BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAN L. CARVER,
*Petitioner,*

vs.

CITY OF SALEM,
*Respondent.*

LUBA No. 2001-140

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Wallace W. Lien PC.

Glenn Klein, Eugene, filed the response brief and argued on behalf of respondent. With him on the brief were Kathryn P. Brotherton and Harrang, Long, Gary, Rudnick PC.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 06/24/2002

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

**NATURE OF THE DECISION**

Petitioner appeals a city decision approving a "Preliminary Declaration of the facility improvements required to obtain an Urban Growth Area (UGA) Development Permit," to allow development of an 8.75-acre parcel zoned Residential Agriculture (RA).

**MOTION TO FILE REPLY BRIEF**

Petitioner requests permission to file a reply brief, pursuant to OAR 661-010-0039.[1] The proposed reply brief contains three parts, and five appendices. The city objects to the proposed reply brief, arguing that it was untimely filed, does not address any "new matters" raise in the response brief, and relies on evidence not in the record. The city specifically objects to parts A and C of the reply brief.

Regarding timeliness, the city argues that the reply brief was filed 28 days after the response brief was filed, and only three days before oral argument, and therefore the reply brief was not filed "as soon as possible after respondent's brief" was filed. OAR 661-010-0039. Untimely filing of a reply brief, while a violation of the Board's rules, will not interfere with our review unless it affects the substantial rights of the parties. OAR 661-010-0005; *Shaffer v. City of Salem*, 29 Or LUBA 592, 593 (1995). The city makes no effort to demonstrate that the timing of the reply brief in this case affects the city's substantial rights.[2]

However, we agree with the city that parts A and C of the proposed reply brief are not warranted under our rules. The statement of facts in the petition for review states that other

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[1] OAR 661-010-0039 provides in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

[2] The city makes a similar argument regarding untimely filing of petitioner's response to one of the city's motions. We reject that argument for the same reason expressed in the text.

UGA permits issued in the area have not included a park land dedication requirement. The response brief notes that that statement is not supported by a record citation and questions its accuracy. Part A of the reply brief argues that the statement is accurate, and cites to copies of two UGA permits attached as appendices B and C, as evidence that the city has engaged in unequal treatment of petitioner. The petition for review contains no assignment of error or argument that the challenged decision should be reversed or remanded based on unequal treatment of petitioner, and it appears that part A of the proposed reply brief is an attempt to develop an additional basis for remand. Petitioner may not assert in a reply brief what is essentially a new assignment of error. *Scott v. City of Portland*, 17 Or LUBA 197, 204 n 6 (1988).

Part C of the proposed reply brief questions the accuracy of a statement in the city's brief that the UGA permit process does not require submission of a subdivision plat or drawing. Neither the statement in the city's brief, nor petitioner's response to that statement, has any discernible relationship to any issue in this case. The city's statement is not a "new matter" within the meaning of OAR 661-010-0039 that warrants a reply brief.

Part B of the reply brief responds to a waiver issue raised in the city's brief. An assertion in the response brief that issues were waived by failure to raise them below is a new matter that warrants a reply brief. *Robinson v. City of Silverton*, 37 Or LUBA 521, 525 (2000). Accordingly, part B of the reply brief is allowed; parts A and C are disallowed.

**MOTIONS TO STRIKE; MOTION TO TAKE EVIDENCE**

In several motions, petitioner and the city move to strike several appendices attached to each other's briefs. The city's response brief moves to strike appendix D to the petition for review. Petitioner's reply brief contains a motion to strike pages 1-3 of an appendix to the city's response brief. The city in turn moves to strike appendices B, C and E attached to the reply brief. Each motion argues that the appended material is not in the record and is not

material of which LUBA can take official notice. We agree that the disputed material must be stricken for those reasons. Only two matters require further discussion.

Appendix D to the petition for review is a copy of a map in the record, which petitioner apparently modified to illustrate one of his arguments over the correct location and extent of the pertinent parks service area. The city objects to the altered map, because it is outside the record and, in the city's view, inaccurate. We agree with the city that Appendix D must be stricken. The Board's ability to examine demonstrative exhibits not in the record is limited. *See* OAR 661-010-0040(5). The practice of attaching maps from the record to the petition for review or response brief, for the convenience of the Board and the parties, is strongly encouraged. We also see no reason why minor additions of color or information to such maps, for example to allow the Board to easily identify the subject property or the pertinent zoning, should be objectionable, if done accurately. However, the alteration here goes beyond those unobjectionable purposes, and the city disputes its accuracy and correctness.

Finally, petitioner argues that the UGA permits in appendices B and C to the reply brief are properly considered part of the record because they were mentioned in testimony below. To the extent that argument constitutes a record objection, the objection is untimely. In any case, testimony referring to documents is not sufficient to place such documents before the local decision maker. *Henderson v. Lane County*, 26 Or LUBA 603 (1993). Alternatively, petitioner argues that LUBA should consider the documents in appendices B, C and E pursuant to OAR 661-010-0045. However, petitioner makes no attempt to demonstrate any basis under OAR 661-010-0045 that would allow us to consider evidence outside of the record.

**FACTS**

The subject property is a vacant tract of land 8.75 acres in size located inside the city's urban growth boundary (UGB) and inside the city limits. The site has been in farm

use, which is an allowed use in the RA zone. The property is bounded on the east by Cordon Road, the city limits and the UGB. To the north and south are vacant and developed residential lands that are outside the city limits but within the UGB. On the west is a newly constructed public school building on the northern portion of an 8.1-acre parcel. A four-acre portion of the school property south of the school building consists of open space that will be developed with ball fields and other recreational amenities.

The subject property lies outside of the city's Urban Services Area (USA). As explained more fully below, the USA is a city-designated portion of the Salem urban area where required facilities, such as water, sewer, storm drainage, transportation and parks, are either in place, funded in the city's capital improvement program or committed to by developers. All development outside the USA requires a UGA permit and compliance with the requirements of Salem Revised Code (SRC) 66.050 through SRC 66.195. In relevant part, those provisions require that an applicant for a UGA permit dedicate to the city land necessary for an "adequate neighborhood park," if such a park is not already available within a one-third mile radius. SRC 66.125.

Petitioner applied for a UGA permit on January 17, 2001, proposing to develop a 51-lot residential subdivision on the subject property. On March 23, 2001, the Development Review Committee (DRC) issued a "Preliminary Declaration." The DRC found that street, water, sanitary sewer or stormwater facilities were already in place or fully committed. However, the DRC found that the subject property was not served by an adequate neighborhood park, which the city's Comprehensive Park System Master Plan (CPSMP) defines as a park five to 10 acres in size. Accordingly, the DRC required that "[t]he applicant shall dedicate to the City of Salem 5.00 acres * * * that is necessary for a neighborhood park and located within the proposed development[.]" Record 81. Alternatively, the DRC required that, contingent on approval of a joint use agreement between the city and the school district, "the applicant shall dedicate to the City of Salem one

acre * * * that, combined with the [four-acre] open space of the Hammond Elementary school site, would provide a neighborhood park of the minimum required size." *Id.* Title to the future neighborhood park "shall be transferred to the City at the time of recording of the final [subdivision] plat." *Id.*

Petitioner appealed the DRC's decision to the city council. City staff presented three alternatives for city council approval: (1) require a dedication of approximately one acre, to combine with the four-acre open space on the school property; (2) require a dedication of approximately a tenth of an acre to provide access to the school grounds; or (3) require no dedication of land. In support of the first alternative, the staff report noted a letter from the school district indicating it would cooperate with the city in the development of park areas on and adjacent to the school grounds. After a hearing, the city council voted to adopt the first alternative. On August 6, 2001, the city council adopted by resolution a decision that requires petitioner to "reserve, for dedication no later than final platting of any subdivision, one acre of property (or approximately that size, depending on the final subdivision layout) located in substantial conformance to the site plan * * *." Record 9.[3] The referenced site plan depicts a strip of land approximately 95 feet wide by 477 feet long, encompassing approximately nine proposed subdivision lots, with the long axis running north-south parallel to the northern portion of the school property. Record 42. The strip of land is within 60 feet of the school classrooms. The strip of land does not adjoin the four acres of open space in the southern portion of the school property.

This appeal followed.

[3] The city council decision at Record 3-9 incorporates by reference a May 14, 2001 staff report beginning at Record 17, and appendices A, B and D of that report. Record 3. The parties appear to agree that the challenged decision includes various maps and appendices attached to the documents appended to the May 14, 2001 staff report, with the result that the challenged decision consists of the following: Record 3-9, 17-33, 37-42; *see* Petition for Review Appendix A.

**INTRODUCTION**

Petitioner's arguments under the first and second assignments of error challenge the city's actions pursuant to SRC chapter 66, which sets forth the city's urban growth management program. We first describe that regulatory scheme.

As noted, the subject property lies outside of the designated USA. SRC 66.020(w) defines the USA as "that portion of the Salem urban area where required facilities are in place or fully committed," as designated by the city. "Required facilities" are defined as "major and minor facilities for water, sewer, storm drainage, transportation and parks[.]" SRC 66.020(q). "Fully committed" means that all public facilities required to adequately serve an area are either funded in the capital improvement plan, or will be fully constructed or funded pursuant to an improvement agreement. SRC 66.020(i). Within the USA, public facilities will be constructed by the city consistent with the scheduling and funding of such facilities in the capital improvement plan, and development may occur anywhere within the USA if all required facilities are in place. SRC 66.030.[4] However, development outside the USA, or inside the USA if development precedes city construction of required facilities,

[4] SRC 66.030 provides:

> "Following adoption of a capital improvement plan and upon consideration of the extent to which the five required facility types defined in SRC 66.020(o) are in place or fully committed, the council may, by ordinance, designate an Urban Service Area (USA).
>
> "Within the USA, public facilities will be constructed by the city consistent with the scheduling and funding of such facilities in the capital improvement plan. Development may occur anywhere in the USA upon annexation if all required facilities adequate to serve the development are in place or constructed and accepted by the city.
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> "Development proposed outside the USA, or inside the USA if development precedes city construction of required facilities, shall require an Urban Growth Area Development Permit and must conform to the requirements of SRC 66.050 through SRC 66.195."

requires a UGA permit and compliance with the requirements of SRC 66.050 through SRC 66.195.[5] *Id.*

Obtaining a UGA permit requires a multi-step process. First, the applicant submits an application containing the information specified in SRC 66.060 to the planning administrator. The DRC reviews the application and determines, after a public hearing, whether public facilities (streets, sewer, storm drainage, water, and parks) serving the subject property meet the standards at SRC 66.100 to 66.125. With respect to parks, SRC 66.125 provides that:

> "(a) The [DRC] shall require that a UGA Development Permit applicant dedicate that property within the development site that is necessary for an adequate neighborhood park, access to such park, recreation routes, or similar uninterrupted linkages, based upon the Parks Master Plan.
>
> "(b) For purposes of this section, an adequate neighborhood park site is one that meets the Level of Service (LOS) of 2.5 acres per 1000 population, utilizing an average service radius of 1/3 mile."

The DRC then issues a "Preliminary Declaration," which states "the extent and location of all public facilities which the developer must provide as a condition of the [UGA] permit." SRC 66.070(b).[6] The DRC's decision regarding a Preliminary Declaration may be

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[5] It is noteworthy that the requirement to obtain a UGA permit, and potentially provide all missing facilities, appears to apply not only to residential subdivisions but to any development outside the USA, even a single building permit for one of the non-residential uses allowed in the RA zone.

[6] SRC 66.070 provides, in relevant part:

> "(a) The Development Review Committee shall review each application submitted to it and shall, within 60 days of filing of the application, schedule a public meeting to discuss the development requirements which will be imposed. * * *
>
> "(b) Within 20 days following the meeting the Development Review Committee shall issue a Preliminary Declaration stating the extent and location of all public facilities which the developer must provide as conditions of the permit. * * *
>
> "* * * * *
>
> "(d) The Preliminary Declaration shall be valid for a period of two years following the date of the decision of the Development Review Committee under subsection (b) of

appealed to the city council. SRC 66.070(b). A Preliminary Declaration is valid for two years from the DRC decision, with the possibility of two extensions of up to two years each. SRC 66.070(d). Upon issuance of the Preliminary Declaration, the applicant "shall cause" a registered engineer to design the improvements required in the Preliminary Declaration. SRC 66.080(a).[7] Upon approval of the design and execution of an improvement agreement, the director of public works shall issue a UGA Development Permit. *Id.* The UGA permit is valid for two years, with the possibility of two extensions of up to two years each. SRC 66.080(c). To alter the requirements of a Preliminary Declaration or UGA permit, the applicant must file an application to amend that declaration or permit demonstrating, among other things, a significant change in circumstances that have the effect of rendering the originally required public facilities inappropriate or inadequate. SRC 66.200. Only after obtaining the UGA permit may the developer file an application for subdivision or for a building permit. SRC 66.050(a).

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this section. Two extensions of up to two years each may be granted by the director of public works upon good cause shown.

"(e) No application for a tentative subdivision plan approval, planned unit development, manufactured dwelling park, or zone change shall be deemed complete without a copy of the Preliminary Declaration."

[7] SRC 66.080 provides, in relevant part:

"(a) Upon issuance of a Preliminary Declaration the applicant shall cause a competent registered professional engineer to design the improvements required by the Preliminary Declaration. Such plans shall be drawn to the specifications of the director of public works and submitted for his approval in accordance with the provisions and fees stated in Chapters 72, 73 and 77. Upon approval of the applicant's plans and the improvement agreement described in SRC 66.035(b), the director of public works shall issue a UGA Development Permit. Completion of the required improvements according to the approved plans and specifications shall be a condition of the permit.

"* * * * *

"(c) The UGA Development Permit shall be valid for a period of two years following the date of the issuance of the Development Permit by the director of public works. Two extensions of up to two years each may be granted by the director of public works upon good cause shown."

Within 30 days of city acceptance of a required facility, the developer must certify the costs of providing the facility to the city. SRC 66.160.[8] A developer who constructs a major facility or an off-site minor facility is eligible for systems development charges (SDCs) credits, which would reduce or eliminate the SDCs that would otherwise be levied against the developer. If the facility cost exceeds the developer's SDC obligation, other reimbursement is possible, subject to budgetary appropriation. SRC 66.195(a).[9]

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[8] SRC 66.160 provides, in relevant part:

> "(a) Where a major facility or minor off-site facility is constructed by a developer as required by this chapter, for which reimbursement or SDC credits may be available, the developer shall, within 30 days of city acceptance of the facility, prepare a sworn statement of all allowable costs incurred in the construction, and submit the same, together with proof of payment thereof, to the director of public works. The director of public works may require the developer to provide additional documentation prior to certification by the city.
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> "(b) 'Allowable costs' include:
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> "(1) The actual price paid * * * for the construction of the facility * * *.
>
> "(2) The cost of labor and materials plus 15 percent thereof for the work performed by the developer directly.
>
> "(3) The actual cost charged by an independent engineer or engineers for the design of the facility * * *.
>
> "(4) The amount of wages or salary paid plus 15 percent thereof, based on actual hours worked by engineers and draftsmen and other technicians who are directly employed by the developer for the design of the facility * * *.
>
> "(5) The actual cost of independent tests performed in aid of design of the facility, or to determine whether the materials and workmanship employed in the construction are within the approved specifications.
>
> "(6) The actual price paid to an independent surveyor * * *.
>
> "(7) The amount of wages or salary paid, plus the cost of materials, plus 15 percent thereof based on the actual hours worked by surveyors and their assistants who are employed by the developer * * *.
>
> "(8) The costs of acquiring real property interests for the facility, escrow fees and fees related to litigation charged by the city attorney and other involved city departments pursuant to SRC 66.090."

[9] SRC 66.195(a) provides, in relevant part:

With that introduction, we turn to petitioner's assignments of error.

**SECOND ASSIGNMENT OF ERROR**

In this assignment of error, petitioner challenges the city's conclusion that there is a need for the one-acre park dedication. Specifically, petitioner argues that (1) under petitioner's view of the service area, the area is already adequately served by parks; and (2) the city's findings addressing certain policies and park site selection criteria in the CPSMP are inadequate.

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> "A developer who provides a major facility on or off-site, or a minor off-site facility, exclusive of temporary sewage lift stations, temporary water pumping stations, temporary storm drainage facilities, and temporary water reservoirs shall be eligible for credits under 41.160, and reimbursements in excess of credits for their allowable costs as provided in this section.
>
> "(1) Where the development permit requires the construction of such facilities and they are specified as eligible facilities in the improvement agreement, the developer shall be eligible for reimbursement from the Extra Capacity Facilities Fund for the allowable cost of such construction, as provided in subparagraph (2) of this section. * * *
>
> "(2) Repayment from SDCs paid within a development, in the form of pass-thru credits as defined in 41.100, is payable to any developer who provides an eligible facility, whether within or without the USA.
>
> "(3) Subject to budgetary appropriation, reimbursement in excess of the credits provided for in paragraph 2 of the subsection is payable to any developer of an eligible facility within the USA and listed in the CIP [capital improvement plan] as a publicly-funded improvement. * * * Reimbursement under this paragraph is limited to 15 years from the time that the facility is accepted by the city.
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> "(4) Development outside of the USA shall install all master plan facilities as required by its Preliminary Declaration at the developer's own expense. Subject to budgetary appropriation, reimbursement in excess of the credits provided for in paragraph 2 of this subsection for such facilities shall not occur until the area is taken into the USA. Reimbursement under this paragraph is limited to 15 years from the time that the facilities are accepted by the city. The amount of reimbursement shall be based on the least public cost for a USA addition calculated as provided in SRC 66.035(c) at the time of the improvement agreement or the certified allowable costs, whichever is less. * * *
>
> "(5) In no event shall a developer be reimbursed in an amount that exceeds the developer's allowable costs plus return on investment or indexing as specified in (3) and (4) above, less any system development charge credits allowed under SRC 41.160, city adopted budget project expenditures, and any connection fees credited as determined by SRC 72.086 and SRC 73.087."

**A. Service Area**

As noted above, SRC 66.125 requires that the applicant for a UGA permit dedicate land necessary for an "adequate neighborhood park," based on the parks master plan. By definition, a neighborhood park is at least five acres in size. SRC 66.125 further provides that an "adequate neighborhood park site" is one that meets a level of service of 2.5 acres per 1,000 population, using an average service radius of one-third mile. The city applied SRC 66.125 in this case by identifying five existing or proposed parks on a map of the relevant area and drawing a circle with a one-third mile radius centered on each park. Record 91. The subject property falls within only one of the identified parks: the four acres of open space on the adjoining school property.

Petitioner argues that the correct service area should be based on a half-mile radius, not a one-third mile radius. According to petitioner, Table I-1 of the CPSMP indicates that the service area for a neighborhood park is "1/4 to 1/2 mile." Petition for Review App C-10. If a half-mile service radius is used, petitioner argues, the subject property is served by at least three existing or proposed parks. Therefore, petitioner argues, the city erred in using a one-third mile radius and in concluding that the subject property is not served by an adequate neighborhood park.

The city responds that SRC 66.125(b) specifies "an average service radius of 1/3 mile," and argues that the city did not err in applying a service area based on that radius. We agree. Although the relationship between the CPSMP and SRC 66.125 is not clear to us, petitioner offers no reason why the city is obligated to apply a service area based on the "1/4 to 1/2 mile" radius described in the CPSMP, instead of the one-third mile radius prescribed in SRC 66.125(b).

**B. Parks Master Plan Siting Criteria**

Policy 1.7 of the CPSMP sets forth eight "site selection criteria," to evaluate and select new park sites.[10] The city's decision incorporates staff findings that address the Policy 1.7 site selection criteria and conclude generally that use of the one-acre portion of the subject property in conjunction with the four acres of open space on the school property is consistent with Policy 1.7.[11] In response to petitioner's arguments that the proposed

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[10] CPSMP Policy 1.7 provides

> "Site selection criteria shall be used to evaluate and select new park and recreation sites. These criteria should address the following issues:
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> "[1] central location;
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> "[2] neighborhood access;
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> "[3] location of complementary public facilities (e.g. schools);
>
> "[4] population distribution within the service area;
>
> "[5] available sites;
>
> "[6] land acquisition costs;
>
> "[7] location of other park and recreation facilities in adjoining service areas; and
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> "[8] unique features and/or natural assets." Petition for Review App C-9.

[11] In relevant part, the city's finding state:

> "1. Central Location: Using the subject parcel as the radius point for the 1/3 mile neighborhood park service radius; the area is bounded to the east by Cordon Road, a designated parkway classification with high volume to capacity traffic counts and Kale Road, a minor arterial, several hundred feet to the north. Both these streets present significant pedestrian access barriers to this site and consequently mean that the areas immediately adjacent to Cordon Rd. would not be suited for an ideal neighborhood park location.
>
> "* * * * *
>
> "5. Available sites: There are vacant undeveloped and/or underdeveloped sites that would offer alternate locations, especially north of Kale Road, for a neighborhood park. However, an alternate site would leave the subject property underserved with only the school property providing open space amenities. This, soon to be developed, school district property, as now configured, will not provide the same unrestricted access that a City owned park facility could afford. The CPSMP has

dedication is not supported by all of the Policy 1.7 criteria, the city's decision adopted the following finding:

> "The applicant does not believe that all of the criteria necessary for imposing a park land dedication have been met. Applicant misunderstands the basis for park land reservation decisions. The criteria, which appear in [Policy 1.7], are matters to be addressed, rather than criteria that must be met. As the CPSMP policy 1.7 provides, site selection criteria shall be used to evaluate and select new park and recreation sites, and [those] criteria should address eight issues. Both staff and the applicant have analyzed and discussed the eight issues and we have in turn used the criteria and addressed the issues in the evaluation and selection of the subject park site. In so doing, we have identified property to be dedicated for a park 'based' upon the master plan. SRC 66.125. That is all that is required under SRC chapter 66." Record 7-8.

Petitioner argues, first, that there is a conflict in the city's findings, because the above-quoted finding regards the site selection criteria as "matters to be addressed" rather than mandatory applied criteria, while the staff findings addressing those criteria consider them to be approval standards that must each be satisfied in order to select a site.

We note that petitioner does not challenge the interpretation of Policy 1.7 contained in the above-quoted findings, to the effect that the eight site selection "criteria" are matters to consider rather than distinct approval standards. In any case, we disagree that the incorporated findings conflict with that interpretation. Nothing about the findings

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designated a future neighborhood park site, in the vicinity of the proposed Hammond Elementary School, adjacent and west of the subject site.

"6. Land acquisition costs: the subject property is unimproved with the exception of a residence and outbuildings at the northeast corner of the property. The property is prime, flat, developable land whose highest and best use most likely would be single family residential use. It, therefore, would have a corresponding value that is somewhat commensurate with open space cost as opposed to commercial retail zoning which would have a considerable higher per acre value.

"7. Location of other park and recreation facilities in adjoining service areas: As was noted there are no existing, City owned, park facilities that service this proposed development. The CPSMP indicates a future neighborhood park adjacent to and west of the subject property. The 1/2 mile service radius from Stephens-Yoshikai School/Park provides some overlap within the service radius generated from the subject property. Adjoining neighborhood park service radii, which have no impact on the subject property, are from the undeveloped Parkdale Park site on Hayesville Road (owned by the county) and the undeveloped Kale Road/Raccoon Avenue site which is pending City acquisition." Record 30-31.

incorporated into the city's decision suggests that all of the Policy 1.7 site selection criteria must be satisfied in order to select a particular site.

Petitioner next challenges the adequacy of the findings addressing criteria 1, 5, 6 and 7. *See* n 11. With respect to the finding addressing criterion 1, petitioner repeats his argument, rejected above, that the city erred in relying on a service area based on the one-third mile radius specified in SRC 66.125(b). With respect to the finding addressing criteria 5 and 7, petitioner argues that there is no explanation why the city believes alternative park locations would leave the "subject property underserved," given that there are three parks within one-half mile of the subject property and four acres of open space on the adjoining school property. However, it is clear from the city's findings that it views the relevant code provisions to require that the subject property be served by a park of at least five acres within one-third mile and, absent such facilities, the subject property is underserved. The city's conclusion on that point needs no additional explanation.

With respect to the finding addressing criterion 6, land acquisition costs, petitioner argues that the finding "compares subdivision land to commercial retail zoned land, when that comparison has no relevance to this case." Petition for Review 19. However, the challenged finding concludes that the subject property's value is *not* comparable to that of land zoned for commercial retail uses, and is more comparable to the value of land zoned for open space, *i.e.*, land acquisition costs will be relatively low. *See* n 11. Petitioner does not explain why that finding is inadequate.

Finally, the second assignment of error argues against the propriety of siting a portion of a public park at the proposed location, immediately adjacent to the existing school building. Petitioner points out that the school district expressed concern at the proximity of the proposed one-acre park addition to its classrooms, and indicated its preference that any park addition be adjacent to the four-acre open space south of the school building. Petitioner challenges findings that the school district is "not opposed" to the proposed location, and that

the location would "increase connections" between the neighborhood and the school park, and provide "better access and visibility for safety." Record 37-38. Petitioner notes that the school has constructed a chain-link fence separating its property from petitioner's, and cites to evidence that the school is interested in retaining a fence in that area even if the one-acre portion is dedicated as a park.

It is not clear what park siting criteria, if any, these issues implicate. In any case, petitioner has not demonstrated any inadequacy in the city's findings. That the school district prefers a different location for the proposed park dedication does not mean the district is opposed to the proposed location. The presence of a chain-link fence, assuming it remains after the proposed dedication, is not necessarily incompatible with increased connections, access and visibility. Petitioner apparently believes that the proposed park addition is poorly located, and that a superior choice would be to expand the school district's four-acre open space by including an acre of land from adjoining residential lands to the east, when and if the owners of those properties seek development or the city can afford to condemn the property. Petitioner may well be correct on that point, but he offers no explanation why the city's preference for his property is a basis for reversal or remand of the challenged decision.

The second assignment of error is denied.

**FIRST ASSIGNMENT OF ERROR**

Petitioner argues that the city's decision violates the Fifth Amendment to the United States Constitution and Article I, section 18, of the Oregon Constitution, by requiring dedication of petitioner's land without providing just compensation.[12]

[12] The Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation." Article I, section 18, of the Oregon Constitution provides, in relevant part, that: "Private property shall not be taken for public use * * * without just compensation."

**A. Article I, Section 18 Takings Clause**

As a preliminary matter, the city notes that the arguments under the first assignment of error are based entirely on Fifth Amendment jurisprudence, and do not include any discussion of Article I, section 18, of the Oregon Constitution, or explain why the challenged decision violates that provision. The city argues that any state constitutional argument is undeveloped and, therefore, should be rejected.

The "basic thrust" of Article I, section 18 is generally the same as the takings provision of the Fifth Amendment to the United States Constitution. *Ferguson v. City of Mill City*, 120 Or App 210, 213, 852 P2d 205 (1993) (citing *Suess Builders v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982). While the criteria for an unconstitutional taking are "not necessarily identical" under both state and federal constitutions, "at least where there has been a permanent physical occupation by the state or local government, the rule always has been the same: Government action that effects a permanent physical occupation of private property is a taking." *Ferguson*, 120 Or App at 213-14 (applying federal takings jurisprudence to hold that an ordinance requiring property owners to grant an uncompensated easement for installation of city sewer lines and tanks is a taking under Article I, section 18). However, most of petitioner's arguments under the first assignment of error turn on *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 120 L Ed 2d 304 (1994), a case decided under the federal takings provision, as applied to an exaction of property as a condition of development approval. No Oregon court to our knowledge has held that the state takings provision imposes the identical requirements as those articulated by the United States Supreme Court in *Dolan*. To the contrary, the cases suggest that *Dolan* imposes more and different requirements than Article I, section 18. *Compare Dolan v. City of Tigard*, 113 Or App 162, 167, 832 P2d 853 (1992), *aff'd* 317 Or 110, 854 P2d 437 (1993), *rev'd* 512 US 374 (reasonable relationship standard is the proper test under the Fifth Amendment as well as under Article I, section 18) with *Art Piculell Group v. Clackamas County*, 142 Or App 327,

330-32, 922 P2d 1227 (1996) (while the "rough proportionality" standard articulated in the U.S. Supreme Court's *Dolan* opinion does not "differ sharply" from the state "reasonable relationship" standard, *Dolan* shifts the burden to local governments and imposes a more specific findings requirement). The first assignment of error proceeds on the apparent assumption that the state takings provision imposes at least the same requirements with respect to exactions of property as the federal takings provision. That assumption is questionable. In the absence of particular arguments based on Article I, section 18, we therefore decline to further consider petitioner's claims based on that provision.

**B. Fifth Amendment Takings Clause**

As discussed below, the city's decision concludes that the park dedication requirement imposed in the present case is either not subject to the federal Takings Clause at all or satisfies all constitutional requirements because reimbursement under SRC chapter 66 constitutes "just compensation." Petitioner challenges both conclusions.

**1. Dedication of Property**

Petitioner argued to the city, and now to us, that the one-acre park dedication requirement is an exaction of land subject to the requirements of *Dolan* and *Nollan v. California Coastal Commission*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987). As discussed below, in *Nollan*, the U.S. Supreme Court held that there must be an "essential nexus," *i.e.*, some logical connection, between the government's exaction of property and the harm addressed by the exaction. 483 US at 837. In *Dolan*, the Court clarified that the federal takings provision requires that the local government demonstrate that the exaction is "roughly proportional" to the effects of the proposed development. While that demonstration does not require a "precise mathematical calculation," the Court held, there must be an "individualized determination" and "some effort to quantify" the local government's finding of rough proportionality between the exaction and the effects of development. 512 US at 391.

According to petitioner, there is no essential nexus between the challenged one-acre dedication requirement and any harm addressed by that exaction, because the subject property is in fact adequately served by neighborhood parks in the area, if "area" is properly understood. We addressed and rejected the premise to that argument in discussing the second assignment of error, above. Petitioner offers no other reason to conclude that the challenged decision is infirm under *Nollan*'s essential nexus requirement.

Petitioner's more forceful argument is under *Dolan*. Because the city failed to recognize the one-acre park dedication as an exaction subject to *Dolan*, petitioner argues, it failed to conduct an "individualized determination" that the exaction is roughly proportional to the effects of the proposed development. Petitioner contends that, given the city parks standard of 2.5 acres of park per 1,000 persons, the additional population generated by the proposed subdivision would, at most, allow an exaction of less than one-half acre, not the one acre demanded by the city.

The city's decision rejects petitioner's premise that the one-acre park dedication requirement is an "exaction" subject to analysis under *Dolan* and the federal Takings Clause:

> "The applicant * * * asserts that the city's specification of park land to be dedicated violates the * * * federal constitutional requirement that there be a 'rough proportionality' between the projected impact of the development and an exaction (that which a local government can demand from a developer in exchange for a land use approval). Applicant notes that based upon the park standard of 2.5 acres per 1000 residents, less than one-half acre could be required without compensation. In applicant's view, however, exacting the balance of the one-acre dedication fails the *Dolan* test because the requirement is not roughly proportional to the park needs of the residents of the proposed development.
>
> "Applicant mistakes the nature of the preliminary declaration and how it operates in the context of SRC Chapter 66, the city's acknowledged growth management program.
>
> "SRC Chapter 66 was enacted to implement the growth management policies of the comprehensive plan. These policies provide that development that creates a demand for new or expanded facilities and services should [bear the cost of such facilities and services], consistent with plans for the orderly arrangement of public facilities and the financial capability and responsibility

of the city and developers to finance growth. The urban growth management program is based upon concepts of in-fill and economic extension of public facilities, and applies to those undeveloped properties beyond that part of the urban area which is already developed for urban uses. These 'Urban Service Areas' or 'USAs' are areas slated for development, where required public facilities are either in place, funded in the capital improvement plan or committed to by developers. City financing of public infrastructure in USAs is primarily through [SDCs]. SDCs are assessed on new development and earmarked for growth-related capital improvements. The estimated cost and timing for such improvements are specified in the capital improvement plan. * * * Until facilities are made available, no subdivisions or development permits may be granted. This doesn't mean that persons cannot develop in or beyond the USA in advance of city provision of necessary facilities. If a developer does not want to wait for the city to provide public facilities, the developer may get permission to construct them. * * * The urban growth area permit process involves a request by the applicant for a 'preliminary declaration'—a specification by the city of the public facilities necessary to serve the proposed development. If the applicant still wants to develop, he or she may provide or construct the specified facilities, and upon city acceptance of these facilities, a subdivision can be approved and development may occur.

"The applicant in this case presumes that he is applying for a development permit and that provision of the one-acre park is an exaction. If the application was for a subdivision or a building permit, the applicant would be correct in applying the *Dolan* case. However the preliminary declaration is not a development permit, and specification of park land does not involve an exaction. The US Supreme Court has stated clearly that the *Dolan* rough proportionality test is not applicable to regulatory takings other than exactions. *City of Monterey v. Del Monte Dunes at Monterey, Ltd. et al.*, ___ US ___, 143 L Ed 2d 882, 119 S Ct 1624 (1999). Here, there is no exaction—the city is not imposing a condition on development permit approval. Instead, it is providing a developer-requested declaration of facilities that must be in place before development permit applications may be made. The presence of adequate facilities is, like annexation to the city, a necessary precondition to the right to apply for development permits. In applying for a UGA permit, the developer is exercising a choice. He or she is choosing not to wait for the city to provide public facilities and is engaging the city to allow the developer to provide them in advance under the SRC Chapter 66 'rules of the game.' In this sense, the person who wants to jump the gun 'buys in' to the process that is built into SRC Chapter 66. The applicant has made this choice. Therefore, the city is not, a la *Dolan*, imposing an exaction on him. Instead he is imposing the requirements on himself. Consequently, he cannot be heard to complain that the process is too costly or involves requirements that are not proportional to the impacts of proposed development. * * *" Record 3-5.

According to the city, a requirement that a landowner deed land to the government as a condition of development approval is an "exaction" subject to *Dolan* and the federal Takings Clause only if the government action in some manner *compels* the landowner to do so. If the landowner has a choice, for example, to wait until the city provides the missing public facilities, then it cannot be said that the government has compelled the landowner to waive his or her Fifth Amendment right to compensation. The city distinguishes *Dolan* on the grounds that, in that case, the landowner in *Dolan* could not develop at all without the required dedications. Here, the city argues, the city is willing to bear the burden of providing the required facilities, if petitioner will simply be patient. However, if petitioner wishes to develop in advance of city-provided facilities, the city argues, the city may require petitioner to provide all missing facilities, and that requirement, no matter how disproportionate to the impacts of proposed development, is not subject to analysis under *Dolan* and the Fifth Amendment.

The city's argument rests on the apparent premise that any dedication of property that is accurately characterized as "voluntary" does not implicate the Takings Clause. The city contends that petitioner, if he waits, can achieve his development objectives without providing *any* dedication of land for parks. Therefore, we understand the city to argue, petitioner's choice to develop prior to city provision of parks is a meaningful, voluntary waiver of his rights under the Takings Clause.[13]

A variation of the city's argument can be built on the premises that (1) parks are among the public facilities that the city can reasonably require be in place prior to development and (2) the city can deny a permit for development because such facilities are

[13] Although the city's decision and brief do not use the term "waiver," that seems the most apt description of the city's view of petitioner's ability to invoke the Takings Clause. In a different portion of the challenged decision, the city states that petitioner is "deemed to have accepted" certain eventualities in obtaining compensation for the one-acre park dedication, "just as he has accepted the burden of providing public facilities listed in the preliminary declaration." Record 7 n 1.

absent or inadequate. Because the city can deny a development permit where public facilities are inadequate, why cannot the city offer the applicant the *option* of providing those facilities, even if the cost of such facilities would be disproportionate to the impacts of development? If it is constitutionally permissible to *deny* development because of inadequate public facilities, we understand the city to argue, it is also constitutional to allow, as one *alternative* to denial, the option of providing the missing facilities, even if such provision would be disproportionate to the impacts of the proposed development. Indeed, here the landowner has two options: either to proceed with development and provide the required facilities, or to postpone development, in the hopes that someone else (the city or another developer) will someday provide the missing facilities.[14] Because the landowner has those options, the city argues, the choice to proceed with development and provide the required facilities is not compelled by the city, but a voluntary choice on the part of the landowner, and thus not subject to *Dolan* or the Takings Clause.

The city cites no authority for its position and, as far as the parties have made known to us or we can discover, no court has directly addressed whether and to what extent the government can condition permit approval on dedication of land, but nevertheless fail to make the finding of rough proportionality required by *Dolan*, by relying on the allegedly "voluntary" nature of a landowner's exercise of options under a land use permitting process.

However, *Nollan* and *Dolan* provide at least an indirect answer to that question. In *Nollan*, the Court reversed a decision that conditioned approval of a residential building

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[14] The parties dispute whether petitioner could avoid the one-acre park dedication requirement by postponing further proceedings under SRC chapter 66 until the city or another party provides a park in the area. Petitioner argues that the challenged decision imposes the park dedication requirement, without any qualification for subsequent events. The city appears to view the park dedication requirement as binding on petitioner only if its predicate facts remain unchanged, *i.e.*, area park facilities remain inadequate at the time petitioner seeks issuance of the UGA permit or subdivision approval. Although we need not and do not resolve the parties' dispute, we note that petitioner's view seems more consistent with the pertinent city code provisions cited to us. If so, petitioner's only apparent options to avoid the park dedication requirement would be to either apply to amend the Preliminary Declaration under SRC 66.200 or to allow the Preliminary Declaration to lapse after two years, and apply anew once the city or another developer had provided an adequate park for the area.

permit on providing a public easement along the adjoining beach. The claimed justifications for the easement were to protect the public's ability to see the beach from the street, to reduce psychological barriers to using the beach, and to prevent congestion on the beach. The Court assumed that such purposes were legitimate public purposes, "in which case, the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes[.]" 483 US at 835 (footnote omitted). The Court agreed with the statement that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Id.* at 836. Thus, the Court commented,

> "the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power, rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." 483 US at 836-87.

The Court suggested that a "requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere" might be sufficiently related to the cited policy purposes to pass constitutional muster. However, the Court found it

> "impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barriers' to using the public beaches, or how helps to remedy any additional congestion on them." *Id.* at 838.

In short, the exaction lacked an "essential nexus" to the harm or impacts caused by the proposed development. Because the circumstances in *Nollan* did not establish any nexus at

all, the Court did not address how close a relationship or "fit" between the exaction and the public policy or harm to be mitigated is required.

*Dolan* takes up the question left unanswered in *Nollan*. In *Dolan*, the city's plans and code required, as a condition of site review for development within or adjacent to a 100-year floodplain, a dedication of land within the floodplain for a greenway, including portions at a suitable elevation for construction of a pedestrian/bicycle path in accordance with the adopted pedestrian/bicycle plan. The petitioner applied for site review approval to expand an existing commercial use on a 1.67-acre parcel, portions of which included a floodplain. The city conditioned approval on dedication of the portion of the petitioner's property within the floodplain, plus an additional 15-foot wide strip of land adjacent to the floodplain for a pedestrian/bicycle path, for a total of approximately 10 percent of the petitioner's property.

The Court began its analysis by noting that had the city simply required the petitioner to dedicate the land for public use, rather than conditioning permit approval on such a dedication, there is no question a taking would have occurred that would require just compensation. 512 US at 384; *see also Nollan*, 483 US at 831. While government has authority to require dedication of land as a condition of permit approval, the Court stated, such authority is circumscribed by the Fifth Amendment. According to the Court, the doctrinal underpinning for circumscribing that authority is the doctrine of "unconstitutional conditions," the concept that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." 512 US at 385. To avoid transgressing the constitution, the Court held, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. The Court went on to conclude that the city's findings in that case failed to make the required demonstration.

Turning to the present case, it is clear that if the city had simply required petitioner to dedicate land for a public park, rather than require that dedication as a condition of discretionary development approval, it would constitute a taking for which just compensation is required. Therefore, the city's attempt to avoid that result must fit within some cognizable exception or limit to the Takings Clause. *Nollan* and *Dolan* articulate and circumscribe one such exception, one that strikes a balance between government's police powers and the requirement for just compensation under the Takings Clause. We understand the city here to argue for another or different type of exception or limit to the Takings Clause. As we understand the city's view, the Takings Clause is not implicated where it can be said that the landowner voluntarily waived any takings claim, either because (1) the landowner chose to ignore a potential path to development that would require no dedication of property, or (2) the dedication requirement is simply one alternative to denial, among others, that the landowner is free to accept or reject.

For purposes of discussion we accept the city's basic premise that a landowner's voluntary actions can, at least in some circumstances, waive or obviate any takings issue. *See Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F2d 696, 698-99 (1991) (off-site exactions assumed to lack essential nexus to impact of development under *Nollan* cannot be collaterally challenged after the landowner entered voluntarily into a settlement agreement to provide the facilities).[15] Certainly, if the city had two available development tracks, one

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[15] *Leroy Land Dev.* may also be understood as a case about estoppel. *See L.A. Development v. City of Sherwood*, 159 Or App 125, 977 P2d 392 (1999) (developer who accepts benefits of development permit but fails to pursue legal challenge of allegedly unconstitutional condition is estopped from claiming a taking under the takings clause). The holding in *L.A. Development* was legislatively overruled by 1999 Oregon Laws, chapter 1014, section 5, codified at ORS 197.796. ORS 197.796 provides, in relevant part:

> "(1) An applicant for a land use decision * * * may accept a condition of approval imposed under ORS 215.416 or 227.175 and file a challenge to the condition under this section. Acceptance by an applicant for a land use decision * * * of a condition of approval imposed under ORS 215.416 or 227.175 does not constitute a waiver of the right to challenge the condition of approval. Acceptance of a condition may include but is not limited to paying a fee, performing an act or providing satisfactory evidence of arrangements to pay the fee or to ensure compliance with the condition.

that required exactions subject to *Dolan* and one that required an exaction that exceeded what would be allowed under *Dolan*, petitioner's choice to proceed under the latter track might well be construed as a voluntary waiver of any takings claim under *Dolan*. Similarly, a regulatory process that permits a decision that denies development approval, based on a lack of essential public facilities, but allows that decision to change to an approval if the applicant offers an express, voluntary waiver of his rights under the Takings Clause and agrees to provide the missing facilities, might well pass constitutional muster, even if the cost of those facilities would be disproportionate to development impacts.

However, we see no shortcut to either complying with *Dolan* or obtaining petitioner's unambiguous waiver of his rights under the Takings Clause. As we understand the city's

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> "(2) Any action for damages under this section shall be filed in the circuit court of the county in which the application was submitted within 180 days of the date of the decision.
>
> "(3) (a) A challenge filed pursuant to this section may not be dismissed on the basis that the applicant did not request a variance to the condition of approval or any other available form of reconsideration of the challenged condition. However, an applicant shall comply with ORS 197.763(1) prior to appealing to [LUBA] or bringing an action for damages in circuit court and must exhaust all local appeals provided in the local comprehensive plan and land use regulations before proceeding under this section.
>
> "(b) In addition to the requirements of ORS 197.763(5), at the commencement of the initial public hearing, a statement shall be made to the applicant that the failure of the applicant to raise constitutional or other issues relating to proposed conditions of approval with sufficient specificity to allow the local government or its designee to respond to the issue precludes an action for damages in circuit court.
>
> "(c) An applicant is not required to raise an issue under this subsection unless the condition of approval is stated with sufficient specificity to enable the applicant to respond to the condition prior to the close of the final local hearing.
>
> "(4) In any challenge to a condition of approval that is subject to the Takings Clause of the Fifth Amendment to the United States Constitution, the local government shall have the burden of demonstrating compliance with the constitutional requirements for imposing the condition."

The parties do not address ORS 197.796, and we do not have occasion to speculate on what significance, if any, it has to the issues in this case.

position, it views petitioner's application under SRC chapter 66 to constitute a waiver of petitioner's rights under the Takings Clause, either by operation of law, or as evidence of petitioner's voluntary choice to waive his rights, notwithstanding petitioner's vehement and continuous protestations to the contrary. For the following reasons we do not agree that the city can deem petitioner to have waived his constitutional rights by operation of law, or that the record establishes that petitioner voluntarily waived his rights.

As noted, the city argues that, if petitioner would simply be patient, the city will provide for adequate neighborhood parks in the area, and thus petitioner's choice to apply for permission to develop prior to the city's provision of facilities is accurately characterized as voluntary waiver of any rights under the Takings Clause. That argument might have more force if the record provided a basis to conclude that petitioner's patience would be rewarded after some reasonable, or even reasonably definite, period of time. However, nothing in the record speaks to that point, and the city indicated at oral argument that it has no schedule, timetable, or other plans to bring petitioner's property within the USA or, specifically, to provide for adequate neighborhood parks within one-third mile of petitioner's property. The possibility that the city might someday provide for a park in the area (although it apparently has no current plans or funds to do so) is not a sufficient basis to imply that petitioner voluntarily waived his rights under *Dolan* and the Takings Clause in applying to the city for a UGA permit.

For similar reasons, we reject the city's attempt to distinguish *Dolan* from the present case. It is true that, in *Dolan*, the city's plan and code required specific greenway and pathway dedications as a condition of any site design review in or adjacent to a floodplain, which essentially preordained that any redevelopment of the petitioner's property would be subject to those exactions. Unlike the present case, the petitioner in *Dolan* did not have even a theoretical "option" of waiting some period of time for the city or others to provide the required dedications. However, that distinction makes little difference. As explained above,

the "option" provided petitioner in the present case of waiting until the city provides the required facilities is so indefinite and speculative that it is not a basis to conclude that petitioner's choice to apply for a UGA permit constitutes a voluntary waiver of his rights under the Takings Clause. While the compulsion facing the petitioner in *Dolan* may have differed in degree from that facing petitioner in this case, we do not see that it differs in kind.

Similarly, we do not believe the city's undisputed power to deny an application for a UGA permit allows the city to impose an exaction and proceed as if petitioner had voluntarily waived any objection to that exaction, merely because acceptance of that exaction is one alternative to denial. In most if not all discretionary land use permit applications, denial is one option that is potentially available to the city. As noted earlier, ORS 197.796 specifically allows a permit applicant to accept permit approval and thereafter challenge a condition of approval. *See* n 15.

Finally, we understand the city to emphasize that the basis for denial under SRC chapter 66 would be the absence of adequate public facilities deemed necessary for development—here, parks—rather than more normative values such as protecting views of public beaches, providing greenways, or encouraging bicycle and pedestrian use. The essential nature of the required public facilities, we understand the city to argue, should allow the city to condition development on provision of such facilities, without regard to *Dolan* and the Takings Clause.[16] Certainly the rationale for denying an application for development is greater, perhaps even mandatory, where essential public facilities to support

[16] At oral argument, the city analogized an application for development outside the USA to an application to annex property within the city limits, where similar issues regarding provision of public facilities are often present. The city argued that it should have wide discretion to deny such annexation requests, where required public facilities are not available, or condition them on dedication of land or other exactions necessary to provide required facilities. We agree that annexation requests are an analogous context to the present case. However, the city offers no reason why dedications imposed as a condition of approving an annexation request would not be subject to *Dolan*'s rough proportionality requirement. *See Dept. of Transportation v. Altimus*, 137 Or App 606, 905 P2d 258 (1995) (remanding condemnation award so that the circuit court could apply *Dolan* to determine what dedication of land the city might require if, hypothetically, it annexed the subject property and zoned it for more intensive use).

the proposed development are not available. However, the importance of the public purpose underlying the prohibition that gives rise to the required exaction does not justify an exaction that is unrelated to the prohibition. *Nollan*, 483 US at 837 n 5. Similarly, the relative importance of the public purpose does not justify an exaction that is disproportionate to the impacts of development.

In sum, we disagree with the city that it can avoid the requirements of *Dolan* and the Takings Clause by characterizing petitioner's application for development under SRC chapter 66 as a voluntary waiver of his constitutional rights.

**2. Just Compensation**

As an alternative to its conclusion that the takings clause does not apply to the challenged one-acre park dedication, the city found that, if the Takings Clause applies, it is satisfied, because petitioner will be paid compensation for the dedication of land in several ways, and there is no reason to suppose that that compensation will be legally inadequate:

> "Assuming the applicant could articulate an applicable takings theory, he has nevertheless failed to demonstrate that the park land dedication is not compensated. Applicant presumes that park land that may be dedicated through this process is not adequately paid for by the public. SRC 41.160, SRC 66.195, and the parks SDC methodology provide that when a UGA permit applicant provides an eligible facility such as a park, the applicant is reimbursed (in cash) from SDCs he may have paid ('true credits') and SDCs paid within the development ('pass-through credits'). Money from true and pass-through credits are owing up to the entire value of the entire park, not just that portion that exceeds the minimum standard facility size needed by the development, based upon the above-mentioned 2.5 acres per 1000 population. In addition, the parks SDC methodology provides that the value of that portion of park land that exceeds the minimum standard facility size needed by the development is transferable to other developers or another parcel of land upon council approval. These 'excess credits' have monetary value substantially equal to the value of the land itself. Finally, SRC 66.195(4) provides that reimbursement exceeding pass-through and excess transfer credits is also available subject to budgeting and inclusion of the site in a USA. These provisions provide the basis for public payment for park land dedications. Nothing in the record before us demonstrates that the compensation this developer would receive through them is in any way legally inadequate." Record 6-7 (footnote omitted).

Petitioner disputes that he is legally entitled to receive any reimbursement for the required park dedication under SRC chapter 66. Alternatively, petitioner argues that, if he is entitled to reimbursement of SDC credits paid or owed, or other reimbursement, such compensation does not constitute the "just compensation" required by the Takings Clause.

**(a) Entitlement to Reimbursement**

According to petitioner, SRC 66.195 and 41.160 provide reimbursement only for construction of "major facilities" or "off-site minor facilities." *See* n 9. SRC 66.020(k) defines a "major facility" to include "a park facility shown in the Parks Master Plan." A "minor facility" is "a public facility other than a major facility." SRC 66.020(m). Because the challenged park dedication is not a "park facility shown in the Parks Master Plan" and it is not an *off-site* minor facility, petitioner argues, it is not among the facilities for which petitioner can receive compensation pursuant to SRC 66.195 and 41.160.

The city's decision determines that petitioner is or will be entitled to reimbursement under SRC 66.195 and 41.160. There seems no dispute that the challenged park dedication is not a "park facility shown in the Parks Master Plan." Although the city does not explain the basis for its conclusion that petitioner is entitled to reimbursement, the only other conceivable explanation is that the city believes the disputed park is an "off-site minor facility."[17] Petitioner makes no attempt to demonstrate that that view of SRC 66.195 and 41.160, which appears to be implicit in the city's findings and adequate for review, would be reversible under ORS 197.829(1). It is not obvious to us why an acre of land on the edge of a parcel that, under the city's decision, will be divided from the parcel and added to an

[17] The version of SRC 66.160 applicable here does not expressly reference park dedications as an "allowable cost" subject to reimbursement. However, sometime in 2001, apparently after petitioner filed the application at issue in this case, the city amended SRC 66.160 to provide that "allowable costs" includes "[t]he fair market value of real property within the development that is reserved for dedication to the city for public park use." SRC 66.160(9) (2001). The same legislation amended SRC 66.010 to define "fair market value" as "the appraised value, as of the date of the UGA Preliminary Declaration, of a parcel of land reserved for dedication to the city for public park use. The value appraisal shall be procured by the city at the developer's expense, and will be an allowable cost for reimbursement to the developer." SRC 66.020(h) (2001).

adjoining parcel for use as a public park, cannot be plausibly described as a facility that is "off-site" from development of the parent parcel. Petitioner has not demonstrated error in the city's conclusion that he will be entitled to reimbursement under SRC 66.195 and 41.160.

**(b) Adequacy of Compensation**

According to petitioner, the term "just compensation" as used in the Takings Clause has a precise legal meaning:

> "* * * Just compensation is full remuneration for loss or damage sustained by an owner of condemned property. It is the fair market value of the condemned property or the fair market value of that of which the condemnee has been deprived by reason of the acquisition of the condemnee's property. In the case of a partial taking of property, the measure of damages is the fair market value of the property acquired plus any depreciation in the fair market value of the remaining property caused by the taking. Fair market value is defined as the amount of money the property would bring if it were offered for sale by one who desired, but was not obliged, to sell and was purchased by one who was willing, but not obliged, to buy. Just compensation requires that valuation of property be based on its highest and best use." *Dept. of Trans. v. Lundberg*, 312 Or 568, 574, 825 P2d 641, *cert den* 506 US 975, 113 S Ct 467, 121 L Ed 2d 374 (1992) (citations and footnotes omitted).

Petitioner contends that any reimbursement received under SRC 66.195 and 41.160 will not constitute "just compensation," because it will have only a coincidental relationship, if any, to the property's fair market value, and will not reflect severance damages to the remainder of petitioner's property.

In support of the latter argument, petitioner notes that the required dedication will eliminate nine of the 51 lots shown on the site plan he submitted to the city and that is attached to the city's decision, at Record 42. Petitioner argues that due to street connectivity requirements he must provide the same streets to serve 42 lots as he would to serve 51 lots, with the result that the cost of providing internal streets must be amortized over fewer lots. According to petitioner, this consequence effectively reduces the fair market value of the remainder by approximately 18 percent.

The city responds that petitioner has failed to demonstrate that reimbursement under SRC 66.195 and 41.160 will not be adequate, or that he would be entitled to any severance damages to the remainder of the property.[18] According to the city, the final layout of the subdivision has not yet been determined, and it is not clear that, as petitioner argues, he will lose the ability to develop the remainder with 51 lots, or otherwise suffer any severance damages.

We agree with petitioner that, to the extent the city relies on a process for compensating petitioner for the park dedication as a way of avoiding the requirements of *Dolan*, the city's process must ensure that petitioner will receive "just compensation."[19] That would necessarily include the fair market value of the land taken, plus severance damages to the remainder, if any. SRC chapter 66 does not so provide. For those reasons, and others not discussed by the parties, it seems highly questionable that the reimbursement scheme in SRC chapter 66 could possibly constitute "just compensation," as that term is used in the Fifth Amendment.[20]

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[18] The city also argues that petitioner waived the issue of severance damages by failing to raise that issue before the city, as required by ORS 197.763(1) and 197.835(3). However, petitioner provides a transcript of proceedings before the city council in which that precise issue was raised. We agree with petitioner that the issue was not waived.

[19] Although we can discover no cases on the point, it seems self-evident that if the city provides "just compensation" for taking land as a condition of development approval, it need not also justify the extent of that taking under *Dolan*.

[20] To offer "just compensation," it would seem that SRC chapter 66 would have to offer the same or better protection to petitioner's Fifth Amendment right to compensation as would be the case if the city sought to condemn the property outright. The procedures and standards for such condemnations are set out at ORS chapter 35, and elsewhere. *See* ORS 226.210(4) (authorizing cities to condemn land for parks). The administrative process in SRC 66.195 bears no relationship, superficial or substantive, to the statutory scheme. The most striking difference is that, under SRC 66.195, petitioner may in fact receive no compensation at all, much less just compensation. The city's decision requires petitioner to deed his property to the city no later than final subdivision plat approval. It is possible that petitioner could deed his property, but then, due to economic downturn or other events, not be able to sell any subdivision lots and thus never generate or receive "pass-through" SDC credits from development of those lots. Reimbursement in excess of SDC credits is available only "subject to budgetary appropriation," and in any case is limited to 15 years from the time the facility is accepted by the city. SRC 66.195(3). In other words, even if SRC chapter 66 expressly provided for reimbursing petitioner with SDC credits for the fair market value of his property and any severance damages to

### C. Conclusion

The city's effort to ensure that the provision of public facilities keeps pace with growth in the city is both prudent and laudable. Nonetheless, the city may not pursue that objective by requiring that petitioner transfer title to his property to the city without complying with the Takings Clause. For the foregoing reasons, remand is necessary to allow the city to address its obligations under the Takings Clause.

In remanding the city's decision, we emphasize that we do not reach the question of whether the one-acre park dedication requirement violates *Dolan*'s rough proportionality requirement. We only decide that the city cannot impose the challenged dedication without addressing that question. We also emphasize that nothing in this opinion should be read to suggest that, in the event the city ultimately concludes that all or some of the one-acre park dedication cannot be justified under *Dolan*, the city must necessarily approve the application without the required dedication. The city's options under that circumstance would presumably include denial of petitioner's application. While a denial under SRC chapter 66 might be subject to legal challenge, no such challenge is presented in this appeal.

The first assignment of error is sustained, in part.

## THIRD ASSIGNMENT OF ERROR

Petitioner contends that the city improperly delegated the decision regarding the disputed park dedication to the park district.

As noted, the city's decision requires petitioner to reserve for dedication one acre of his property, "contingent on approval of a joint use agreement for this site between the City of Salem and the Salem-Keizer School District." Record 8-9. Petitioner argues that if the city and school district fail to enter into a joint use agreement, the condition will fail and the disputed dedication will be vacated. Such a condition, petitioner argues, impermissibly shifts

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the remainder, it is highly doubtful that the city could rely on SRC 66.195 to either avoid *Dolan* or satisfy the Takings Clause.

decision-making from the city to the school district. Petitioner cites *Harcourt v. Marion County*, 33 Or LUBA 400, 406 (1997), for the broad proposition that the city cannot condition permit approval on the applicant's obtaining approval of a state agency or other local government.

*Harcourt* involved subdivision approval in a limited groundwater area under criteria requiring a finding that water is available to serve the subdivision. The county failed to make such a finding, instead simply requiring the applicant to obtain a "satisfactory review" by the state water agency. We held that the county was required under its regulations to affirmatively find that water is available to serve the proposed subdivision, and that the county cannot delegate the responsibility for such a finding to the state water agency. 33 Or LUBA at 406.

The city argues, and we agree, that *Harcourt* is inapposite. Here, the city made an affirmative finding that SRC 66.125 requires petitioner to dedicate park land, and imposed a condition to that effect. While that condition is contingent on subsequent events, it is not the case that the city delegated responsibility for finding compliance with its regulations to the school district.

The third assignment of error is denied.

The city's decision is remanded.