

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CLELAN DUDEK and LOIS DUDEK,
5 *Petitioners,*

6
7 vs.

8
9 UMATILLA COUNTY,
10 *Respondent,*

11
12 and

13
14 DANNY R. SMITH,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2002-048

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Umatilla County.

23
24 Douglas E. Hojem, Pendleton, filed the petition for review and argued on behalf of
25 petitioners. With him on the brief was Corey, Byler, Rew, Lorenzen and Hojem.

26
27 No appearance by Umatilla County.

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29 D. Rahn Hostetter, Enterprise, filed the response brief and argued on behalf of
30 intervenor-respondent.

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

34
35 AFFIRMED

08/01/2002

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners challenge a county approval of a partition.

MOTION TO INTERVENE

Danny R. Smith (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

This matter is before us for the second time. In *Dudek v. Umatilla County*, 40 Or LUBA 416 (2001), we remanded the county’s decision approving the partition in order for the county to interpret a provision of its ordinance regarding required road improvements. We begin by reciting the relevant facts from our prior decision:

“* * * [Intervenor] submitted an application to divide the subject 20-acre property into three parcels. As proposed, two five-acre parcels would be created from the western half of the property, and a third 10-acre parcel would be created from the eastern half of the property. The application anticipated the use of Jerico Lane, an existing private road easement, as the access to the property from the west. The Jerico Lane easement is 50 feet wide, with an improved gravel surface that varies in width from 14 to 20 feet. Jerico Lane provides access to several properties before it reaches the subject property, including petitioners’ property. After reaching the subject property, Jerico Lane crosses the subject property along its western boundary and provides access to the property to the north. [Intervenor] also proposed to create a new easement along the southern boundary of the property to provide access to the third parcel.

“Petitioners appeared before the county to oppose the application, and testified that Jerico Lane is not currently built to county standards. Petitioners argued that the application could be approved only if [intervenor] were required to bring the entire 3,500-foot length of Jerico Lane leading to the subject property up to county road standards. Petitioners contended that county standards require that the right-of-way width be expanded to 60 feet, and that the road be improved to county B-1 standards.” *Id.* at 418-19 (footnote omitted).

On remand, we directed the county to interpret a provision of its ordinance to determine whether it requires intervenor to obtain a 60-foot easement and improve the entire

1 3,500-foot length of Jerico Lane to B-1 standards.¹ The county interpreted its ordinance to
2 require intervenor to obtain a 60-foot easement and improve to B-1 standards the entire
3 3,500-foot length of Jerico Lane. The county, however, also found that to impose such a
4 condition of approval on the application would violate the takings clause of the Fifth
5 Amendment of the United States Constitution as interpreted and applied in *Dolan v. City of*
6 *Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). Because compliance with the
7 ordinance would, in the county’s opinion, run afoul of *Dolan*, the county did not require
8 compliance with the provision. As intervenor satisfied the remaining approval criteria, the
9 county approved the partition. This appeal followed.

10 **ASSIGNMENT OF ERROR**

11 Petitioners’ sole assignment of error is that the county misconstrued the applicable
12 law by finding that *Dolan* applies to the exactions required by the ordinance.

13 Umatilla County Development Ordinance (UCDO) 152.684(G) provides:

14 “Dedicated road or public recorded easement shall be provided to each parcel
15 and conform to right-of-way and improvement standards as follows:

16 “* * * * *

17 “(3) If a public road or recorded easement for access purposes in a Type II
18 Land Division will serve four or more lots and will likely serve
19 additional parcels due to development pressures in the area, or likely
20 be an extension of a future road as specified in a future road plan, a
21 minimum of a 60-foot right-of-way shall be required and be improved
22 to a ‘B-1’ standard.”

23 When this case was first before us, it was not clear whether the county interpreted
24 UCDO 152.684(G)(3) to require improvements to the full length of Jerico Lane or merely to
25 require improvements to the portion of Jerico Lane that crosses intervenor’s property. On
26 remand, the county specifically found that UCDO 152.684(G)(3) does require improvements

¹ The county’s B-1 road standard for residential development requires a six-inch crushed rock base, a two-inch crushed rock level course, and a one and one-quarter inch 0-11 oil mat.

1 to the full length of Jerico Lane, but that it would be an unconstitutional exaction to apply the
2 ordinance provision in this case. The county’s findings state, in relevant part:

3 “Jerico Lane off of Subject Property. As that portion of Jerico Lane located
4 from Lake Drive to the southern boundary of the subject property does serve
5 more than 4 lots, under [UCDO] 152.684(G)(3) that right-of-way should be 60
6 feet. The provision, however, cannot be applied to the present application.

7 “Jerico Lane is a graveled private easement road, with a 50-foot right-of-way,
8 extending approximately 3,500 feet from Lake Drive to the boundary of the
9 applicant’s property. The portion of the lane not on the subject property serves
10 18 properties. The 3 parcels resulting from the partition would add
11 approximately 7 trips per day. The new properties would constitute
12 approximately 15% of the use of the road. Under the ordinance standards, an
13 additional 10 feet of right-of-way would be required to be obtained from the
14 adjacent property owners, and the road would have to be improved to a B-1
15 standard. To impose on the applicant the burden of making off-site
16 improvements by expanding the easement width and road construction
17 standards the entire length of Jerico Lane would not be in [pro]portion to the
18 estimated 15% impact of the development. The county cannot condition the
19 partition and the development on obtaining additional right-of-way and
20 improvements in a greater proportion than the impact of the development. As
21 a result, the standards under [UCDO] 152.684(G)(3) cannot be applied to the
22 portion of Jerico Lane off of the subject property. * * *² Record 8.

23 Although the above-quoted findings do not specifically mention *Dolan*, it is clear that
24 the county applied the rough proportionality test from *Dolan* in deciding not to enforce
25 UCDO 152.684(G)(3). In *McClure v. City of Springfield*, 39 Or LUBA 329, *aff’d* 175 Or
26 App 425, 28 P3d 1222 (2001), *rev den* 334 Or App 327 (2002), we described the decision in
27 *Dolan* as follows:

28 “In *Dolan*, the Court held that a local government seeking to obtain land for
29 public purposes through an exaction must demonstrate that the exaction is in
30 ‘rough proportionality’ to the impacts of the proposed development. 512 US
31 at 391. To do this, the local government must show that the exaction is
32 ‘related both in nature and extent to the impact of the proposed development.’
33 *Id.* According to the Court, the local government’s demonstration of that

² At oral argument, counsel for intervenor suggested that, contrary to petitioners’ assertion, the county did not interpret UCDO 152.684(G)(3) to require improvements to all of Jerico Lane. Although intervenor urged the county to adopt such an interpretation, as the above quoted findings make clear, the county did *not* interpret the ordinance as intervenor suggests.

1 relationship does not require a ‘precise mathematical calculation’ but does
2 require some quantification. *Id.* at 395-96. *Dolan* elaborates on the necessary
3 *degree* of relatedness or nexus between the development’s impacts on the
4 local government’s legitimate governmental interests and the exactions
5 imposed to mitigate those impacts.

6 “In reaching its decision, the Court resolved conflicts between different
7 circuits as to the required degree of connection under the Fifth Amendment
8 between impacts and exactions. It rejected the ‘specifi[c] and uniquely
9 attributable test,’ which requires (1) exacting scrutiny and (2) a nearly exact
10 match between the exaction and the impact. *Id.* at 389-90. The Court also
11 rejected the idea that the exaction could be supported by ‘very generalized
12 statements as to the necessary connection’ between the exaction and the
13 development. *Id.* at 389. The Court indicated that the appropriate standard
14 under the United States Constitution was closer to the intermediate
15 ‘reasonable relationship’ test that had been adopted in many jurisdictions,
16 including Oregon. *Id.* at 391. However, the Court did not adopt the reasonable
17 relationship test as such and instead described the appropriate test as ‘rough
18 proportionality.’ *Id.*” 39 Or LUBA at 338-39.³

19 Petitioners argue that the rough proportionality test of *Dolan* does not apply to the
20 exaction at issue. Petitioners acknowledge that there is no explicit authority under Oregon
21 law for their position and that *Dolan* has been applied to similar exactions in the past.
22 Petitioners assert, however, that the Court of Appeals’ recent decisions in *McClure* and
23 *Rogers Machinery, Inc. v. Washington County*, 181 Or App 369, ___ P3d ___ (2002),
24 demonstrate that the Court of Appeals now believes that *Dolan* does not apply to the type of
25 exactions involved in this case.

26 *Rogers Machinery, Inc.* involved a takings challenge to a traffic impact fee assessed
27 pursuant to a Washington County ordinance. The court determined that the fee was a systems
28 development charge (SDC) and proceeded to analyze whether *Dolan* applies to SDCs. *See*
29 ORS chapter 223 (governing such charges). The Court of Appeals reviewed existing takings

³ In *Dolan*, the Court clarified the second part of a two-step test for determining whether an exaction survives a Fifth Amendment challenge. In *Nollan v. California Coastal Commission*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), the Court established the first step, whether there is an “essential nexus” between the exaction imposed and the problem it is designed to address. The essential nexus test is not at issue in the present case.

1 jurisprudence and identified two issues it believes affect whether *Dolan* is applicable to
2 particular exactions: whether the exaction involves a dedication of private property to public
3 use, *i.e.*, whether it is “possessory”; and whether the exaction is imposed legislatively or
4 through an ad hoc adjudicative process. 181 Or App at 387-88. The court stated:

5 “* * * The two questions that consequently have generated considerable
6 litigation for lower courts are: (1) Does heightened scrutiny apply to non-
7 possessory exactions * * * ? (2) Does that scrutiny apply to exactions imposed
8 through generally applicable legislation rather than individual adjudicative
9 decisions?” *Id.*

10 Notwithstanding petitioners’ arguments, *Rogers Machinery, Inc.* is not on point. As
11 we have already explained, that case concerned SDCs, an exaction that the court
12 characterized as “non-possessory,” rather than an exaction that required dedication of land.
13 That case simply holds that *Dolan’s* rough proportionality requirement does not apply to
14 “monetary exactions” that are applied broadly under a legislatively adopted “scheme that
15 leaves no meaningful discretion either in the imposition or in the calculation of the fee.” 181
16 Or App at 400.

17 We do not agree with petitioners that the condition in this case, which requires
18 intervenor to widen existing easements across private property and improve the existing
19 roadway to full county road standards, is accurately characterized as a nonpossessory
20 exaction. The requirement to secure an easement for the benefit of the motoring public is not
21 materially different than the required dedication of land for greenway expansion and flood
22 protection in *Dolan*. The Court of Appeals has also held that off-site improvements may be
23 subject to the *Dolan* rough proportionality requirement. *See Clark v. City of Albany*, 137 Or
24 App 293, 300, 904 P2d 185 (1995) (“[t]he fact that the developer retains title in, or never
25 acquires title to, the property that he is required to improve and make available to the public,
26 does not make the requirement any less a burden on his use and interest than corresponding
27 requirements that happen also to entail memorialization in the deed records”). If the holding
28 in *Rogers Machinery, Inc.* is to be extended to cover a possessory interest such as the

1 required easement expansion and required off-site improvements, we believe the Court of
2 Appeals is the appropriate body to adopt that extension.

3 We also have some question whether the Court of Appeals would agree that UCDO
4 152.684(G)(3) constitutes a legislatively adopted scheme that avoids the kind of ad hoc
5 decision making that would otherwise trigger application of the *Dolan* rough proportionality
6 requirement.⁴ Although those provisions appear to leave no meaningful discretion to county
7 decision makers, there is no apparent explanation for the very different way in which the
8 county has applied those provisions. The record before us suggests that the county applies
9 those provisions in an ad hoc manner.⁵

10 The assignment of error is denied.

11 **CONCLUSION**

12 Today we decide that the “rough proportionality” test established by *Dolan* applies to
13 the exactions at issue in this appeal. We do not, however, consider whether the exactions at
14 issue would violate the rough proportionality test of *Dolan*, as the county found. Petitioners
15 challenge only the county’s decision to apply the *Dolan* rough proportionality test; they do
16 not assign error to the county’s finding that the exactions fail that rough proportionality test.⁶
17 We also do not decide whether it is proper for the county to decline to apply UCDO

⁴ Petitioners neither explain nor do we understand how the same exaction for the same development that would be unconstitutional for failing the essential nexus or rough proportionality test as an ad hoc condition of approval would, *legislature ex machina*, become constitutional merely because it was legislatively imposed. Legislatively dictated exactions may indeed be *more likely* to survive constitutional scrutiny for the reasons expressed in *Rogers Machinery, Inc.*, however, it hardly guarantees such a result in all instances.

⁵ According to intervenor, several land divisions on Jerico Lane have been approved without a requirement that the entire length of the road be improved to the B-1 standard, even though it appears that the standard did apply. *See* Record 78, 124, 126.

⁶ Counsel for petitioners suggested at oral argument that the proper disposition of the case, should LUBA conclude that *Dolan* applies, would be a remand for the county to justify its decision. That argument was not made in the petition for review, however, and we may not consider it. OAR 661-010-0040(1) (the Board shall not consider issues raised for the first time at oral argument). While the county’s findings regarding rough proportionality are meager, in the absence of an assignment of error challenging the adequacy of those findings, we do not consider whether they are adequate.

1 152.684(G)(3) because the county believes the exactions that provision would require in this
2 case are unconstitutional.⁷ We decide merely that the county did not err by applying *Dolan*
3 to the disputed exactions.

4 The county's decision is affirmed.

⁷ Petitioners did not argue that the only proper response in such a situation is to deny the application because an approval criterion cannot be met without imposing the exactions.