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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

PACWEST II, INC.,
Petitioner,

vs.

CITY OF MADRAS,
Respondent.

LUBA No. 2006-169

FINAL OPINION
AND ORDER

Appeal from City of Madras.

Steven P. Hultberg, Portland, filed the petition for review. With him on the brief were Michael C. Robinson and Perkins Coie, LLP. Roger A. Alfred, Portland, argued on behalf of petitioner.

Robert S. Lovlien, Bend, filed the response brief and argued on behalf of respondent. With him on the brief was Bryant, Lovlien and Jarvis, PC.

HOLSTUN, Board Member; RYAN, Board Member, participated in the decision.

BASSHAM, Board Chair, did not participate in the decision.

REMANDED 01/09/2007

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

NATURE OF THE DECISION

Petitioner appeals a condition of approval requiring off-site street improvements.

FACTS

Petitioner is the applicant below who obtained approval for a 153-lot subdivision on property zoned single family residential (R-1). The property is surrounded by industrial land to the north and east, a municipal golf course to the west, and residential property to the south. The existing residential lots along the southern boundary of the subject property separate the proposed subdivision from NW Birch Lane. Although the proposed subdivision does not have any frontage on NW Birch Lane, residents of the subdivision will have to travel across NW Birch Lane when traveling to the City of Madras and Highway 26 to the east. The planning commission approved the proposed subdivision with conditions of approval. One of the conditions of approval requires petitioner to make off-site improvements to NW Birch Lane. Petitioner appealed that condition of approval to the city council, which affirmed the planning commission’s decision. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The disputed condition of approval, condition 1(c), requires petitioner to make three-quarter street improvements along NW Birch Lane for a distance equivalent to the entire east/west length of the proposed subdivision. The improvements include installing a two-inch asphalt overlay over the existing surface to create a 28-foot wide paved surface, curb and gutter additions, stormwater collection and piping, street lighting, and a sidewalk along the north side of NW Birch Lane. NW Birch Lane is designated as a minor collector on the city’s transportation system plan (TSP), but does not have the full width of right-of-way required for minor collectors. Petitioner prepared a traffic impact analysis (TIA) that demonstrated NW Birch Lane has adequate traffic carrying capacity. In other words, even with the expected 1,530 additional trips per day that the proposed subdivision will add to

1 nearby roads and intersections, those roadways and intersections will continue to operate at
2 acceptable levels of service.¹

3 City of Madras Code (CMC) 8.11(C) expressly allows the city to require widening
4 and improvement of existing inadequate streets that adjoin or are located within proposed
5 subdivisions.² However, the city did not rely on CMC 8.11(C) to impose condition 1(c),
6 because NW Birch Lane is not “adjacent to or within the tract” that is to be subdivided.
7 Instead, the city relied on CMC 3.10(B) which directs that the city may not approve a
8 tentative subdivision plan unless the city finds that:

9 “The subdivision will not create excessive demand on public facilities and
10 services required to serve the development.”

11 A planning department staff report includes the following findings regarding CMC 3.10(B):

12 “Staff finds that the Public Works Director has identified NW Birch Lane as a
13 minor collector per the City’s [Transportation Plan]. Minor collectors require
14 60’ of public right-of-way (ROW) which only 40’ – 50’ of ROW exists along
15 the property adjacent to the subdivision so a variance in street width
16 improvements will have to be granted. Birch Lane will serve as the primary
17 access for this development. The condition of Birch Lane is marginal with
18 cracking visible throughout. The Public Works Department will require ¾
19 street improvements along NW Birch Lane adjacent to the development
20 (western border to eastern border).” Record 110.

¹ Although the parties agree that a TIA showing NW Birch Lane has adequate capacity was prepared, for some reason the TIA was not submitted into the record below. The decision, however, references the TIA and the city does not dispute the conclusions of the TIA which are referenced in the decision.

² CMC 8.11(C) provides:

“Whenever existing streets, adjacent to or within a tract, are of inadequate width to accommodate the increase in traffic expected from the subdivision or by the City’s transportation policies, additional right-of-way shall be provided at the time of the land division by the applicant. During consideration of the tentative plan for the subdivision or partition, the City Public Works Director shall determine whether the improvements to existing streets, adjacent to or within the tract, are required. If so determined, such improvements shall be required as a condition of approval of the tentative plan. Improvements to adjacent streets shall be required where traffic on said streets shall be directly affected by the proposed subdivision.”

1 The planning staff report goes on to explain how the cost of the improvements the city
2 believes are necessary will be shared by the city and the applicant:

3 “* * * [the applicant’s] share of the construction cost shall be at 77.67% and
4 the City with the balance of 22.33%. * * *” Record 120.

5 The planning commission adopted the above findings from the staff report as its
6 findings. Petitioner appealed the planning commission’s decision to the city council. In that
7 appeal, petitioner challenged the planning commission’s CMC 3.10(B) findings:

8 “a. The Planning Commission erred * * * because there is no substantial
9 evidence demonstrating that the subdivision will create ‘excessive
10 demand on public facilities and services.’ Pre-existing deficiencies
11 (even if a worn surface qualifies as a pre-existing deficiency) in Birch
12 Lane are not created by the development and there is no evidence that
13 the pre-existing deficiency represents any ‘excessive demand’
14 attributable to the development.

15 “b. The applicable standards found in the City’s Transportation System
16 Plan (‘TSP’) relate to the operation of intersections, not the quality of
17 wearing surface of City streets. If the wearing surface is cracked, it is
18 unrelated to the subdivision and is related to an insufficient base and
19 heavy truck traffic as acknowledged in the TSP at page 13. In other
20 words, the excessive demand is from pre-existing traffic, not the traffic
21 from the development.” Record 88.

22 In response to petitioner’s appeal, the city council adopted the following findings:

23 “After hearing all of the testimony and considering the entire record, the City
24 Council found that condition 1(c) was an appropriate Condition of Approval
25 based on the traffic impacts generated by the 153-lot subdivision on NW
26 Birch Lane.

27 “The City Council found that they felt that there was a ‘rational nexus’
28 because the development will need to utilize NW Birch Lane as its only route
29 into and out of the subdivision. Without NW Birch Lane, the developer
30 would have to build a road to get into and out of the subdivision.

31 “The Council further found that an additional 1,530 vehicle trips per day * * *
32 *will create an impact* when the subdivision is built out.

33 “The City Council found that the proposed proportional share of the
34 improvements to NW Birch Lane with the developer paying approximately
35 78% and the City of Madras paying approximately 22% is proportionate to the

1 impact [o]f the additional 1,530 vehicle trips per day onto NW Birch Lane.”
2 Record 9 (emphasis added).

3 Petitioner argues that CMC 3.10(B) does not authorize the city to require exactions
4 such as off-site street improvements, and even if it did, there is not substantial evidence in
5 the record to demonstrate that the proposed development will “create excessive demand on
6 public facilities and services.”

7 Petitioner is correct that CMC 3.10(B) does not expressly authorize the city to impose
8 a condition of approval that requires a subdivision applicant to pay for or construct off-site
9 street improvements. However, CMC 3.10(B) does expressly require that the city deny
10 tentative subdivision approval if the proposed subdivision will “create excessive demand on
11 public facilities and services required to serve the development.” Presumably that
12 requirement to deny tentative subdivision plan applications in “excessive demand” situations
13 along with CMC 3.09(c), which authorizes the city to “approve, modify, or disapprove the
14 tentative plan,” would allow the city to impose an appropriate condition of approval to avoid
15 the “excessive demand” on facilities that would otherwise require that the city deny the
16 tentative subdivision plan. *See* ORS 197.522 (limiting a local government’s authority to
17 deny subdivisions that do not comply with approval standards where the approval standards
18 could be met through imposition of reasonable conditions of approval).³

19 We reject petitioner’s contention that the city could not, in an appropriate
20 circumstance, impose a condition of approval that requires construction of or payment for off
21 site improvements where the city’s only other alternative under CMC 3.10(B) would be to

³ ORS 197.522 provides:

“A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval.”

1 deny the tentative subdivision plan. However, in order to impose such a condition of
2 approval, the city must adopt adequate findings to establish that without the condition the
3 proposed subdivision would “create excessive demand on public facilities and services
4 required to serve the development.” In addition, those findings would of course have to be
5 supported by substantial evidence. Moreover, even if the evidentiary record supports such
6 findings, any exaction imposed by the city must be supported by findings that explain how
7 the exaction is “roughly proportional” to the expected impacts of the proposed subdivision.
8 *Dolan v. City of Tigard*, 512 US 374, 391, 114 S Ct 2309, 129 LEd 2d 304 (1994); *Art*
9 *Piculell Group v. Clackamas County*, 142 Or App 327, 330, 922 P2d 1227 (1996)

10 In this case we need not consider whether condition 1(c) imposes costs that are
11 disproportional to the expected impacts of the subdivision and thereby runs afoul of the Fifth
12 Amendment of the U.S. Constitution or Article 1, section 18 of the Oregon Constitution. The
13 first inquiry that must be satisfied before the city could either deny the disputed tentative
14 subdivision plan under CMC 3.10(B) or impose an appropriate exaction to avoid such a
15 denial is whether the disputed subdivision would “create excessive demand on public
16 facilities and services required to serve the development.” We know that petitioner equates
17 “demand” for transportation facilities with “capacity.” We also know that as far as capacity
18 is concerned, condition 1(c) is not necessary, because NW Birch Lane has adequate capacity
19 to serve the disputed subdivision. If petitioner’s interpretation of CMC 3.10(B) is the only
20 correct interpretation, then the predicate finding that is necessary to impose an exaction
21 under CMC 3.10(B) cannot be adopted. While petitioner’s interpretation and application of
22 CMC 3.10(B) might not be the only way CMC 3.10(B) can be interpreted and applied, it is
23 certainly a reasonable interpretation and application of that criterion.

24 While it might be reasonable to infer that the city does not interpret CMC 3.10(B) in
25 exactly the same way that petitioner does, it is hard to understand how the city could simply
26 ignore petitioner’s offered interpretation and application of CMC 3.10(B) and fail to make

1 more of an attempt to explain how it interprets and applies the CMC 3.10(B) “excess
2 demand” criterion. The city never directly tries to explain what it believes “excess demand”
3 means. The city never even finds that the proposed subdivision will “create excessive
4 demand” on NW Birch Lane; it finds instead that the subdivision “will create an impact.”
5 Record 9. We do not agree that “an impact” is the same thing as “excess demand.”

6 While the city’s findings concerning CMC 3.10(B) are inadequate, we reject
7 petitioner’s apparent contention that, as a matter of law, the condition of the surface of NW
8 Birch Lane could never be a factor in applying the CMC 3.10(B) “excess demand” criterion.
9 But we agree with petitioner that the city has not adequately explained why the surface of the
10 NW Birch Lane is such that even though that roadway has sufficient capacity to serve the
11 proposed subdivision, the proposed subdivision will nevertheless result in “excess demand”
12 on NW Birch Lane.⁴ If that in fact is the city’s position.

13 The first and second assignments of error are sustained.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioner argues that the required exactions violate the “Takings Clause” of the State
16 and Federal Constitutions. Because the city’s only basis for requiring the exactions is a
17 purported violation of CMC 3.10(B) and we have already found that the city’s decision does
18 not demonstrate a violation of CMC 3.10(B), the city has not demonstrated that it has a valid
19 basis for requiring the exactions.

20 Although we need not and do not consider whether the exaction imposed by condition
21 1(c)—if it could be justified under CMC 3.10(B)—is roughly proportional to the expected

⁴ The city points out that the NW Birch Lane right of way is in places narrower than the 60 feet required under the TSP and that a variance is needed. It is not clear to us what role the substandard width right of way played in the city’s decision. If it played a role, it is not clear to us how condition 1(c) addresses the right of way width concern. Assuming approving the disputed subdivision without condition 1(c) would result in “excess demand” on NW Birch Lane, we also have some difficulty seeing how improving a section of NW Birch Lane in the manner required by condition 1(c) and leaving the remainder of NW Birch Lane in its existing condition is going to avoid excess demand. If the city again imposes condition 1(c), it should address both of these issues.

1 impacts of the proposed subdivision, we note that the challenged decision makes no attempt
2 to explain why the city believes condition 1(c) is roughly proportional. Therefore, if we
3 were to reach the issue, the city's decision would have to be remanded to provide that
4 explanation. If, on remand, the city is able to explain why condition 1(c) is justified under
5 CMC 3.10(B) it must also explain why the exaction imposed by that condition is roughly
6 proportional to the expected impacts from the proposed subdivision.

7 Finally, we also note that to the extent the city intended to rely on the testimony of
8 the planning director to establish that the 78 percent/22 percent sharing of costs imposed by
9 condition 1(c) satisfies the *Dolan* rough proportionality requirement, we are not sure we
10 understand the planning director's rationale. To the extent we understand the planning
11 director's explanation, we question the adequacy of that explanation. The planning director
12 apparently counted lots and parcels that were approved along NW Birch Lane and two other
13 roads over some unspecified period of time, where no exactions were imposed to require
14 improvements to NW Birch Lane. The planning director apparently compared that lot and
15 parcel total with the 153 lots in the proposed subdivision to arrive at the 78 percent/22
16 percent split. That explanation is short on details and appears to ignore the traffic impact on
17 NW Birch Lane that is unrelated to the disputed subdivision or the other subdivisions or
18 partitions. A more complete and detailed explanation for why the city believes the exaction
19 imposed by condition 1(c) satisfies the *Dolan* rough proportionality requirement will be
20 required if the city expects the condition to be upheld in the event of a another appeal to
21 LUBA.

22 We do not reach the third assignment of error.

23 The city's decision is remanded.