

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

3
4 DAN HILL,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

10/30/18 AM 9:17 LUBA

11
12 LUBA No. 2018-001

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal on remand from the Court of Appeals.

18
19 Christopher P. Koback, Portland, represented petitioner.

20
21 Lauren A. King, Deputy City Attorney, Portland, represented respondent.

22
23 BASSHAM, Board Member; RYAN, Board Chair, participated in the
24 decision.

25
26 ZAMUDIO, Board Member, did not participate in the decision.

27
28 REMANDED

10/30/2018

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

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NATURE OF THE DECISION

Petitioner appeals a city hearings officer decision approving his application for a partition creating three parcels.

INTRODUCTION

This matter is on remand from the Court of Appeals. *Hill v. City of Portland*, 293 Or App 283, ___ P3d ___ (2018). We repeat the relevant facts from our underlying decision:

“Petitioner applied to divide a 1.06-acre parcel of residentially-zoned land into three separate parcels. The 1.06-acre parcel presently includes one existing single-family dwelling, which is to be retained. Petitioner’s proposal would allow one single-family dwelling to be constructed on each of the two newly-created parcels.

“Petitioner’s parcel fronts on SE 122nd Drive and SE 124th Avenue. SE 122nd Drive has a 20-foot paved surface within a 40 to 45-foot right-of-way and lacks curbs and sidewalks. SE 124th Avenue is unimproved within a 24-foot right-of-way, which is not needed for access to petitioner’s parcel. No public storm sewer is currently available to the property.

“The city’s Bureau of Development Services (BDS) approved petitioner’s land division application pursuant to a Type IIX land division review. The BDS decision made a series of findings concluding that the dedication of a portion of right-of-way on SE 122nd Drive and SE 124th Avenue, as well as a street and storm sewer waiver of remonstrance were required conditions of approval.

“The BDS decision found that the existing transportation system is capable of safely supporting the proposed development and that no conditions of approval were required to mitigate any traffic

1 impacts associated with the proposed development. Record 198.
2 However, the BDS decision also determined that the existing street
3 widths and improvements on both SE 122nd Drive and SE 124th
4 Avenue do not comply with adopted city street standards. *Id.* at
5 198-203. The decision further determined that the Local
6 Transportation Infrastructure Charge (LTIC) is required, which the
7 applicant could satisfy either by constructing right-of-way
8 improvements or by paying the LTIC fee. *Id.* Petitioner did not
9 indicate whether he planned to pay the LTIC or construct the
10 required right-of-way improvements. Finally, the BDS decision
11 found that stormwater management criteria and standards are
12 satisfied only if the applicant provides signed waivers of
13 remonstrance for improvements and dedicates sufficient property.
14 *Id.*

15 “Petitioner appealed the BDS decision to the city hearings officer,
16 challenging the conditions of approval requiring the two
17 dedications of property and the waiver of remonstrance. Before the
18 hearings officer, and during the open record period following the
19 hearing, the Portland Bureau of Transportation (PBOT) introduced
20 evidence in support of modifying its recommendation to impose
21 right-of-way dedications only on SE 122nd Drive. Accordingly, the
22 BDS and PBOT staff proposed a modified condition to the
23 hearings officer eliminating the requirement for dedication along
24 SE 124th Avenue. Along with the removal of the requirement for
25 right-of-way dedication along SE 124th Avenue, the final
26 recommendation to the hearings officer included the requirement
27 for the waiver of remonstrance for stormwater facility
28 improvements. The hearings officer approved the land division
29 with the city’s recommended conditions, as modified.” *Hill v. City*
30 *of Portland*, __ Or LUBA __ (LUBA No. 2018-001, Apr 26, 2018,
31 slip op at 1-3) (footnotes omitted).

32 On appeal to LUBA, petitioner challenged (1) the condition of approval
33 requiring a right-of-way dedication on SE 122nd Drive, and (2) the condition of
34 approval requiring a waiver of remonstrance for street and stormwater facility
35 improvements.

1 With respect to the right-of-way dedication, petitioner argued under his
2 first assignment of error that the dedication constituted an unconstitutional
3 exaction of property that is prohibited by the Fifth and Fourteenth Amendments
4 to the U.S. Constitution, because the dedication lacks the essential nexus
5 required by *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141
6 (1987), between the impacts of the proposed development and a legitimate local
7 government regulation that would provide a basis to deny the application if not
8 satisfied.

9 LUBA rejected petitioner's nexus argument and denied the first
10 assignment of error. On appeal, the Court of Appeals agreed with petitioner
11 that the dedication is unconstitutional unless the hearings officer finds that the
12 impacts of the proposed development would substantially impede the
13 governmental interest advanced by the city's right-of-way design standards.
14 239 Or App at 290-91. Because the hearings officer adopted no findings on that
15 point, the court directed LUBA to remand the decision to the hearings officer
16 for reconsideration. *Id.*

17 With respect to the condition requiring a waiver of remonstrance against
18 street or stormwater facility improvements, LUBA held that condition was
19 justified under the test set out in *Clark v. City of Albany*, 31 Or LUBA 375, 380,
20 *aff'd* 144 Or App 192, 924 P2d 877 (1996). In *Clark*, LUBA held that a local
21 government may require a waiver of remonstrance where the local government
22 finds that there is a need for a local improvement district and that petitioner's

1 development will both contribute to the need for the improvements and benefit
2 from them. LUBA concluded that the record included evidence to support
3 findings under the test set out in *Clark*. However, on appeal the court agreed
4 with petitioner that in fact the hearings officer had not adopted the findings
5 required by *Clark*. The court stated:

6 “Although LUBA may be correct that the record would contain
7 substantial evidence to support those findings if the hearings
8 officer had made them, that is not the analysis that the hearings
9 officer undertook, and it is not readily apparent what findings the
10 hearings officer would have made if he had applied the *Clark*
11 analysis. Under those circumstances, we are unable to sustain
12 LUBA’s determination that, under *Clark*, the hearings officer
13 properly upheld the condition requiring petitioner to sign waivers
14 of remonstrance. We note, in addition, that LUBA’s decision on
15 this condition appears to have turned, in part, on its conclusion that
16 the right-of-way dedication satisfied the [*Nollan*] standard, a
17 conclusion we have rejected. We therefore reverse and remand for
18 LUBA to address, in the first instance, the parties’ other arguments
19 concerning the propriety of the condition.” 293 Or App at 292.

20 We now take up the matters on remand from the court.

21 **FIRST ASSIGNMENT OF ERROR**

22 For the reasons stated in the court’s opinion, the decision must be
23 remanded to the hearings officer to reconsider whether there exists a sufficient
24 nexus between the impacts of development and the city’s street design
25 standards necessary to support the condition of approval requiring dedication of
26 property along SE 122nd Drive.

27 The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 As noted, the city also imposed a condition of approval requiring that the
3 applicant “shall complete street and storm sewer waivers of remonstrance (for
4 future street and storm sewer improvements) as required by the City
5 Engineer.”¹ Record 21. With respect to this condition of approval, petitioner
6 advanced four arguments to LUBA.

¹ The city’s response brief describes the effect of a waiver of remonstrance:

“A waiver [of remonstrance] is not an assessment of fees but rather is used to determine the level of support for a potential future local improvement district (LID). The City Council is authorized to create LIDs for the purposes of improving streets. An LID levies and collects assessments from all lots specially benefited by an improvement to defray all or part of the cost.

“The City Council cannot form an LID if three-fifths or more of the owners of property located within a potential district object to its formation. However, a waiver of remonstrance prevents a remonstrance—or protest—of a property owner or her successors-in-interest from impeding the formation of the LID. That is, a property with a waiver will be counted in favor of the LID when Council determines if it has jurisdiction to proceed with the formation. *If and when* an LID is formed to construct improvements, petitioner’s property will participate in the financing of the public infrastructure improvements. Accordingly, rather than imposing a requirement to construct improvements at the time of final plat or at the time of construction, a waiver of remonstrance is an appropriate, and less immediately burdensome alternative.” Response Brief 17 (citations omitted, italics in original).

1 First, petitioner argued that the hearings officer erred in concluding that
2 certain Portland City Code (PCC) provisions, discussed below, apply to the
3 proposed development. Second, petitioner argued that even if those PCC
4 provisions apply, none of the cited PCC provisions authorize the city to require
5 a waiver of remonstrance as a condition of approval. Third, petitioner argued
6 that the city's determination that petitioner is not currently required to make
7 public street improvements to SE 122nd Drive to comply with PCC Title 33
8 standards means that the city lacks the factual and legal predicate to require that
9 petitioner waive his right to remonstrate against future formation of an LID to
10 improve SE 122nd Drive to meet street and stormwater facility design standards.
11 Finally, petitioner argued that the condition requiring a waiver of remonstrance
12 is tantamount to an exaction of property, and therefore the hearings officer was
13 required to, but did not, adopt findings demonstrating that the condition is
14 consistent with constitutional requirements.

15 As noted, LUBA denied the second assignment of error, concluding in
16 part that the condition of approval requiring a waiver of remonstrance is not
17 subject to analysis under the federal Takings Clause. *Hill*, __ Or LUBA at __,
18 (slip op at 29-30). That conclusion was not challenged on appeal to the Court
19 of Appeals. LUBA also rejected petitioner's sub-constitutional arguments,
20 agreeing with the city that under the applicable PCC provisions the city may
21 require a waiver of remonstrance, as long as the record supports findings under

1 *Clark* that there is a need for an LID and that petitioner’s development will both
2 contribute to the need for the improvements and benefit from them. *Id.*

3 However, as noted, the hearings officer had adopted no findings under
4 *Clark*, and for that reason the Court of Appeals found that LUBA erred in citing
5 *Clark* as a basis for rejecting petitioner’s arguments. 293 Or App at 292-93. In
6 addition, the court noted that part of LUBA’s reasoning relied on LUBA’s
7 earlier conclusion that the hearings officer had correctly applied *Nollan* with
8 respect to the right-of-way dedication of property along SE 122nd Drive. *Id.*
9 Because the court overturned that conclusion and remanded the decision for the
10 hearings officer to reconsider that point, we understand the court to direct
11 LUBA to reconsider petitioner’s challenges to the waiver of remonstrance
12 condition free of the assumption that the right-of-way dedication passes
13 constitutional muster.

14 Finally, the court directed LUBA to “address, in the first instance, the
15 parties’ other arguments concerning the propriety of the condition.” 293 Or
16 App at 292. We understand this as a directive to reconsider petitioner’s first,
17 second and third arguments, described above. We now proceed as directed to
18 reconsider those arguments.

19 **A. Applicable PCC Provisions**

20 The hearings officer’s explanation for his conclusion that applicable PCC
21 provisions authorize the city to require a waiver of remonstrance is hard to
22 follow. That conclusion rests primarily on PCC 17.88.020, discussed below,

1 which is part of the PCC that governs improvements to public rights-of-way.²
2 PCC Title 17 (Public Improvements) is not part of the city’s land use code,
3 which is located at PCC Title 33 (Planning and Zoning).

4 PCC 17.88.020 provides that if a street adjoining property without direct
5 access to the street does not have standard full-width improvements, the owner
6 must, as a condition of permit or partition approval, either provide the
7 improvements or pay into an improvement fund. Petitioner argued to the
8 hearings officer that PCC 17.88.020 was not applicable to his proposed

² PCC 17.88.020, in relevant part, provides:

“All building permits and planning actions are subject to the following:

“A. No single family, multiple dwelling, industrial or commercial building shall be constructed, or altered so as to increase its number of occupants, or make significant alterations to a building without resulting in increased occupancy, on property that does not have direct access by frontage or recorded easement with not less than 10 feet width of right-of-way to a street used for vehicular traffic.

“B. If a street adjacent to a property described in Subsection A. above does not have a standard full-width improvement, including sidewalks, the owner, as a condition of obtaining a building permit, conditional use, zone change, land partition or adjustment, shall provide for such an improvement or a portion thereof as designated by the Director of the Bureau of Transportation [PBOT] in accordance with provisions elsewhere in this Title. The payment of a [LTIC] will satisfy the requirements of this Subsection.”

1 partition. The hearings officer disagreed, for two reasons.³ The first reason is
2 PCC 33.10.030.B.2, which provides in relevant part:

3 **“Clarification for rights-of-way. * * * Land within public rights-**
4 **of-way is regulated by Title 17, Public Improvements, and not by**
5 **Title 33, except in the following situations where both Titles apply:**

6 “ * * *

7 “2. The act of creating or *dedicating* public rights-of-way
8 *through a land division[.]*” (Boldface in original; italics
9 added.)

10 We understand the hearings officer to reason that because petitioner is required
11 to dedicate right-of-way along SE 122nd Drive, the present application involves
12 the act of “dedicating public rights-of-way through a land division[.]”
13 Therefore, the hearings officer concluded, pursuant to PCC 33.10.020.B.2 the

³ The hearings officer stated:

“City Code Title 17 and Title 33 both govern public right of way issues. See [PCC] 33.10.030.B.2 (‘Land within public rights-of-way is regulated by Title 17, Public Improvements, and not by Title 33, *except in the following situations where both Titles apply: * * * 2. The act of creating or dedicating public rights-of-way through a land division * * **’). The Appellant argues that PCC 17.88 is not applicable. [PCC] 33.10.03.B.2, however, clearly shows its applicability. In addition, as noted by BDS Staff, [PCC] 33.800.070 ‘allows for conditions to be included to *ensure enforcement of other city titles.*’ BDS has chosen to condition that approval on the waiver of remonstrances. Thus, a condition requiring compliance with the requirements of Title 17 can be appropriate and provides the nexus for a condition related to PCC 17.88.” Record 17 (emphases added by hearings officer).

1 requirements of both Title 17 and Title 33 apply to the proposed partition,
2 which means that PCC 17.88.020 potentially applies.⁴

3 Petitioner argues that the hearings officer misconstrued PCC
4 33.10.030.B.2, which in petitioner's view is concerned only with dedications of
5 public rights-of-way that pass *through* land being divided. Because petitioner's
6 application did not propose any public right-of-way that passes *through* the
7 subject property from one side to another, and the dedication imposed affects
8 only an existing, adjacent street, petitioner argues that PCC 33.10.030.B.2 does
9 not provide a basis to conclude that Title 17 in general, or PCC 17.88.020 in
10 particular, applies to the proposed development.

11 The hearings officer apparently understood the word "through" in the
12 phrase "dedicating public rights-of-way through a land division" to mean
13 something like "by means of" a land division. That causative sense of the word
14 "through" is indeed one of several dictionary meanings of the word. *Webster's*

⁴ We are not sure we quite understand the hearings officer's reasoning on this point. PCC 33.10.020.B.2 simply says that improvement of public rights of way are governed by Title 17 and not by Title 33, except in those listed circumstances where both apply. In other words, PCC 33.10.020.B.2 may limit the operation of Title 33 provisions, but does not limit or expand the operation of any Title 17 provisions, which apply or not according to their terms. Arguably, PCC 17.88.020 applies or not to a given situation by its terms, regardless of whether some Title 33 provision triggers its application.

1 *Third New Int'l Dictionary* 2384 (unabridged ed 2002) (Definition **2 a** (1)).⁵ In
2 contrast, petitioner apparently understands “through” in the sense of something
3 passing from one side of an object or space to the other side, which is also one
4 of the dictionary meanings of that term. *Id.* (Definition **1 a** (1)).⁶

5 The hearings officer’s understanding of “through” appears to be more
6 consistent with the text, context and apparent purpose of PCC 33.10.030.B.2,
7 because it is not clear why the city would want to apply the Title 17 and Title
8 33 standards together only in the limited circumstances when a public right-of-
9 way is proposed to pass through property from one side to the other. It is more
10 likely that the city intended that Title 17 and Title 33 be applied together when
11 a land use application concerns the creation or dedication of public rights-of-
12 way, even if the dedication at issue expands an existing adjoining right-of-way.
13 Accordingly, we disagree with petitioner that the hearings officer misconstrued
14 PCC 33.10.030.B.2.

⁵ The PCC does not define the term “through.” PCC 33.910.010 provides that words used in the zoning code have their normal dictionary meaning unless defined in that chapter.

⁶ The hearings officer and petitioner also disagree about the meaning of “land division.” Consistent with their respective views on the meaning of “through,” petitioner apparently understands “land division” to mean something like “land that is proposed for division,” whereas the hearings officer appears to understand that term to mean something like “the act of dividing land.”

1 However, as noted, PCC 33.10.030.B.2 is concerned in relevant part only
2 in circumstances where a public right-of-way is dedicated, and the Court of
3 Appeals directed us to consider petitioner’s challenges to the waiver of
4 remonstrance free of the assumption that a dedication of land along SE 122nd
5 Drive can be constitutionally exacted from petitioner. Accordingly, we
6 consider the hearings officer’s second reason for concluding that a waiver of
7 remonstrance may be imposed to address the requirements of PCC 17.88.020,
8 which as far as we can tell is not necessarily predicated on a dedication of land.

9 The hearings officer alternatively found that the condition requiring a
10 waiver of remonstrance is authorized by PCC 33.800.070, which authorizes the
11 city to impose conditions to “ensure enforcement of other city titles.”⁷ Record
12 17. We understand the hearings officer to conclude that even if PCC 17.88.020
13 does not directly apply to the subject development either on its own terms or
14 pursuant to PCC 33.10.030.B.2, the city nonetheless has authority under PCC
15 33.800.070 to impose conditions, including a condition requiring a waiver of
16 remonstrance, to ensure the enforcement of PCC 17.88.020.

⁷ PCC 33.800.070 is entitled “Conditions of Approval,” and provides:

“The City may attach conditions to the approval of all discretionary reviews. However, conditions may be applied only to ensure that the proposal will conform to the applicable approval criteria for the review or to ensure the enforcement of other City regulations.”

1 Petitioner challenges that conclusion, arguing that the city cannot impose
2 a condition to enforce PCC 17.88.020 based on the obligation to construct
3 public street improvements under that code provision, because the city had
4 elsewhere concluded, in addressing PCC 33.641.020, that no public street
5 improvements were necessary in order to render SE 122nd Drive capable of
6 safely supporting the proposed development.⁸ However, that the city
7 determined that no public street improvements are necessary to render SE 122nd
8 Drive “capable of safely supporting the proposed development” as required by
9 PCC 33.641.020(A) has no obvious bearing on whether the city can impose a
10 condition of approval to ensure enforcement of PCC 17.88.020. PCC
11 33.641.020 and PCC 17.88.020 serve different purposes and impose different
12 obligations. It may be the case that no public street improvements are
13 necessary to make SE 122nd Drive capable of safely supporting the proposed
14 development, while nonetheless public street improvements are required under
15 the terms of PCC 17.88.020 for reasons that are not limited to safety. Petitioner

⁸ The version of PCC 33.641.020(A) in effect at the time of the hearings officer’s decision provided the following approval criterion:

“The transportation system must be capable of *safely* supporting the proposed development in addition to the existing uses in the area. Evaluation factors include: street capacity and level-of-service; vehicle access and loading; on-street parking impacts; the availability of transit service and facilities and connections to transit; impacts on the immediate and adjacent neighborhoods; and safety for all modes.” (Emphasis added).

1 has not established that the city's determination not to require public street
2 improvements under PCC 33.641.020 necessarily means that the city cannot
3 impose a condition requiring a waiver of remonstrance to formation of an LID
4 that would pay for future public street improvements in order to address the
5 requirements of PCC 17.88.020.

6 We turn then to petitioner's specific arguments regarding PCC 17.88.020.
7 The only argument petitioner directs specifically at the requirements of PCC
8 17.88.020(B) is that that code provision authorizes the city to do only two
9 things: (1) require the applicant to provide for public street improvements or
10 that portion of the improvements as designated by the Director of the Portland
11 Bureau of Transportation; or (2), alternatively, allow the applicant to pay into
12 the LTIC. According to petitioner, nothing in the text of PCC 17.88.020
13 authorizes the city to instead impose a condition requiring the applicant to
14 waive his right to remonstrate against formation of an LID.

15 However, as we understand it, the authority to impose a condition
16 requiring a waiver of remonstrance to ensure enforcement of PCC 17.88.020 is
17 based on PCC 33.800.070. City staff determined, and the hearings officer
18 agreed, that compliance with PCC 17.88.020 could be assured by requiring
19 petitioner (and his successors-in-interest) to waive the right to remonstrate
20 against future formation of an LID, instead of requiring petitioner to
21 immediately meet the requirements of PCC 17.88.020 by either (1) constructing
22 full or partial street improvements or (2) paying into the LTIC. We understand

1 petitioner to argue, nonetheless, that at most PCC 33.800.070 would only
2 authorize the city to impose conditions to ensure that one of the two alternatives
3 specified in PCC 17.88.020 are met, *i.e.*, that petitioner either (1) construct full
4 or partial street improvements or (2) pay into the LTIC. We understand
5 petitioner to argue that PCC 33.800.070 does not authorize the county to
6 effectively create a *third* means to ensure that PCC 17.88.020 is satisfied, via
7 the imposition of a condition of approval requiring a waiver of remonstrance to
8 future formation of an LID.

9 PCC 33.800.700 limits the types of conditions that the city may impose
10 to conditions that either (1) ensure that the proposal will conform to the
11 applicable approval criteria for the review or (2) ensure the enforcement of
12 other city regulations. *See* n 7. Petitioner argues essentially that a condition of
13 approval is limited to the first function: ensuring that the proposal will conform
14 to applicable approval criteria, in this case, conformance with one of the two
15 options identified in PCC 17.88.020. But PCC 33.800.700 is not so limited, and
16 also authorizes the city to impose conditions that “ensure the enforcement of
17 other City regulations,” which must encompass something more or different
18 than merely ensuring conformance to approval criteria. Petitioner has not
19 demonstrated that a condition of approval requiring a waiver of remonstrance to
20 formation of an LID exceeds the authority granted in PCC 33.800.700, or is an
21 impermissible means of ensuring compliance with PCC 17.88.020(B).

1 In sum, we have reconsidered petitioner's first, second and third
2 arguments challenging the condition of approval requiring a waiver of
3 remonstrance, and those arguments do not provide a basis for reversal or
4 remand. Nonetheless, we conclude that it is appropriate to sustain the second
5 assignment of error in part. For one thing, as the arguments in this appeal have
6 evolved it is apparent that remand is necessary for the hearings officer to adopt
7 findings under *Clark* to support a condition requiring a waiver of remonstrance.
8 Further, as explained, the court directed us to resolve the second assignment of
9 error free of the assumption that the condition of approval requiring a
10 dedication of land for SE 122nd Drive passes constitutional muster. The
11 hearings officer's first finding supporting the waiver of remonstrance, based on
12 33.10.030.B.2, is expressly predicated on the dedication. The second finding
13 supporting the waiver of remonstrance, based on PCC 17.88.020 and PCC
14 33.800.700, does not necessarily depend, as far as we can tell, on dedication of
15 land along SE 122nd Drive.⁹ However, we are not entirely sure about that, and it
16 may be the case that if on remand the hearings officer determines that no
17 dedication can be justified that the hearings officer would also not require a
18 waiver of remonstrance to formation of an LID, even if the hearings officer
19 could choose to adopt findings under *Clark*.

⁹ Presumably, if the city ever forms an LID to improve SE 122nd Drive, and no dedication has been made from the subject property, the city would have to acquire or condemn the land needed for full street improvements.

- 1 The second assignment of error is sustained, in part.
- 2 The city's decision is remanded.