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

KEVIN DRESSEL and GILLIAN DRESSEL,
Petitioners,

vs.

CITY OF TIGARD,
Respondent,

and

TIGARD-TUALATIN SCHOOL DISTRICT 23J,
Intervenor-Respondent.

LUBA No. 2019-080

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

Damien R. Hall, Portland, filed a petition for review, a cross response brief and a reply brief, and argued on behalf of petitioners. With him on the brief were Stephen T. Janik and Ball Janik LLP.

No appearance by City of Tigard.

Kelly S. Hossaini, Portland, filed a response brief, a cross petition for review and a cross reply brief, and argued on behalf of intervenor-respondent. With her on the brief was Miller Nash Graham & Dunn LLP.

RUDD, Board Chair; RYAN, Board Member, participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision
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AFFIRMED 03/05/2020

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

Opinion by Rudd.

NATURE OF THE DECISION

The challenged decision is a hearings officer's approval of a partition of a 19.88-acre parcel into 10.38 and 9.5-acre parcels.

FACTS

Intervenor owns an approximately 20-acre parcel (the subject property) zoned medium-density Residential 7 (R-7) with a comprehensive plan designation of Public Institution (PI). The subject property is located within an area known as the River Terrace Plan District (the RTPD). In 2002, the RTPD was brought into the Metro urban growth boundary and in 2011, the city annexed the RTPD. The city intends that the RTPD will provide

> "for a variety of land uses and residential densities consistent with the city's desire to create a community of great neighborhoods that includes housing, neighborhood-scale commercial businesses, schools, parks, and recreational opportunities." Tigard Development Code (TDC) 18.640.010.

Intervenor ultimately hopes to obtain a conditional use permit authorizing development of a school on the western half of the subject property. First, however, intervenor applied to partition the approximately 20-acre parcel into two approximately 10-acre lots. As part of its application, intervenor proposed city imposition of a condition of approval requiring intervenor to execute an agreement (the Equitable Servitude), providing, in part, that city requirements related to street trees would be addressed at the time of physical development of Lots 1 or 2. Record 23-30, 197-203, 267-73, 300-306.

On May 30, 2019, the planning director approved the partition, subject to conditions of approval. On June 13, 2019, petitioners appealed the decision. Petitioners own property to the north of the subject property and argued that the approval decision did not obligate intervenor to make dedications or improvements that petitioners maintained were required by the TDC. On July 15, 2019, the hearings officer held a public hearing at which he accepted testimony and evidence. At the conclusion of the hearing, the hearings officer announced that the written record would remain open for limited purposes until August 5, 2019.[1] Additional material was received during the period the record remained open. On August 26, 2019, the hearings officer issued his decision affirming the planning director's approval of the partition with conditions. This appeal followed.

BACKGROUND

The RTPD regulations are intended to implement the "River Terrace Community Plan, the River Terrace Funding Strategy, and associated infrastructure master plans for water, sewer, stormwater, parks, and transportation" and to ensure that "public facilities are adequate to serve the anticipated levels of development" and that public facilities are available in

[1] The record was left open until July 22, 2019, for anyone to submit testimony and/or evidence. The record was left open until July 29, 2019, for submission of material responsive to new material submitted during the prior week. Intervenor's final argument was due August 5, 2019.

advance of or concurrent with *development*. TDC 18.640.010. TDC 18.30.020.B(50) defines "development" as "(1) A building or mining operation; (2) a material change in the use or appearance of a structure or land; or (3) division of land into two or more parcels, including partitions and subdivisions as provided in Oregon Revised Statutes 92." The hearings officer determined, however, that although certain improvements would be required under the TDC at the time of physical development of Lot 1 or Lot 2, they were not required at the time of the partition. The hearings officer reached this conclusion even though the TDC defines "development" to include the division of land. Because that determination underlies of much of the legal dispute before us, we describe the relevant case law briefly here.

Petitioners argue that (1) the hearings officer misapplied case law concerning the Fifth Amendment of the US Constitution, and the limits it places on local government's ability to condition land use approval, and that (2) the hearings officer erred by failing to impose certain conditions as part of the partition approval.[2] Petitioners rely on *Nollan v. California Coastal Commission*,

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[2] As indicated above, petitioners own property to the north of the subject property. Petitioners speculated that intervenor sought to partition the subject property in advance of seeking a conditional use permit for a school on Lot 1 in order to avoid conditions of approval requiring intervenor to extend infrastructure improvements across Lot 2, where those improvements would be available for petitioners to tie into when petitioners develop their property. Record 82.

483 US 825, 107 SCt 3141 (1987) and *Dolan v. City of Tigard*, 512 US 374, 114 SCt 2309 (1994) in support of their position.

In *Nollan*, the Court held that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit [is not] a taking if the refusal to issue the permit would not constitute a taking." *Nollan,* 483 US at 836. *Nollan* requires an "essential nexus" between a permit condition and the public purpose the condition is intended to further. In *Dolan,* the Court discussed the required relationship between a development and a proposed exaction, concluding:

> "[A] term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but 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." *Dolan*, 512 US at 391 (footnote omitted).

Oregon's Court of Appeals discussed the application of the principles set forth in *Nollan* and *Dolan* in the context of a partition in *Schultz v. City of Grants Pass*, 131 Or App 220, 250, 884 P2d 569 (1994). In *Schultz,* the petitioners challenged the constitutionality of conditions the city applied to its approval of a partition. The city required dedication of a 10-foot wide strip of land for a county right-of-way and a 5-foot wide strip of land for a city right-of-way. City findings in support of the conditions of approval stated that the new right-of-way would directly benefit the partitioned property by enhancing access and concluded that after the partition, the property could have 17 large homesites. The city concluded

the impact of that amount of housing would be substantial, justifying the exactions. The court however, held that the conditions did not survive constitutional scrutiny under *Nollan* or *Dolan*. Given that *Schultz* is on point, we cite it extensively below.

With respect to *Nollan*, the court held:

> "The city does not contest that petitioners' application is very limited. Relying on language from an earlier Supreme Court decision, [*Nollan*, 483 US at 835], it insists that it is appropriate to evaluate the impacts of a proposed development 'alone, or * * * in conjunction with other construction.' That is what the Court said in *Nollan.* However, that language is not relevant to this case, in which there is no reference to actual 'other construction.' There is only the city's *speculation* as to what other construction *could* take place at some time in the future. That is not what the Supreme Court was referring to in *Nollan*." *Id.* at 228.

With respect to *Dolan*, the court held:

> "The only issue in dispute is, indeed, whether there is the 'required degree of connection' between the conditions the city has imposed 'and the projected impact of the proposed development.' [*Dolan*, 512 US at 377]. In this case, however, the city's justification for the conditions is, in the words of the city's own supplemental findings, the impact of '*potential development* of the partitioned tract.' In other words, the city imagined a worst-case scenario—assuming that petitioners would, at some undefined point in the future, attempt to develop their land to its full development potential of as many as 20 subdivided residential lots, further assuming that petitioners would obtain all the necessary permits and approvals—and on the basis of that scenario, it calculated the impacts of the development and tailored conditions to address them.
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> "The problem with that approach is that *Dolan* requires that the exactions imposed be 'related both in nature and extent to the impact

> of *the proposed development.*' [512 US at 391]. (Footnote omitted; emphasis supplied.) The proposed development in this case is the partitioning of a single lot into two lots and nothing more. There is absolutely nothing in the record to connect the dedication of a substantial portion of petitioners' land, for the purpose of widening city streets, with petitioners' limited application." *Id.* at 228.

Similarly, no physical development is proposed as part of intervenor's partition application. The hearings officer cited *Schultz* and its treatment of exactions in the context of a partition in his decision.[3] Record 9 n 4. If the subject property can be physically developed without further land use review, some level of exactions may be appropriate. In the absence of any ability to physically develop the property without further land use review, no exactions pass constitutional scrutiny. With this understanding, we turn first to issues of procedural error.

NINTH ASSIGNMENT OF ERROR

ORS 197.763(6) provides:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

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[3] A requirement of proportionality is also reflected in TDC 18.910.020.A, which provides: "Applicants may be required to dedicate land and build required public improvements only when the required exaction is directly related to and roughly proportional to the impact of the development."

> "(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.
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> "(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

At the conclusion of the public hearing, the hearings officer announced the timeline for submission of additional material into the record. As explained in the decision:

> "At the close of the July 15, 2019, public hearing the hearings officer held the record open for one week to allow all parties an opportunity to submit new testimony and evidence. The hearings officer held the record open for a second week to allow all parties to respond to the testimony and evidence submitted during the first week. The second week was expressly limited to responses to new evidence submitted during the first week." Record 7.

Petitioners argue that the hearings officer improperly excluded material petitioners submitted during the second week (July 29, 2019 Submittal). Petition for Review 38.

During the first week the record remained open to new material, intervenor and respondent submitted proposed revisions to and a copy of the Equitable Servitude and a copy of the River Terrace Master Plan Addendum. Petition for Review 39. Petitioners maintain that the July 29, 2019 Submittal was directly responsive to material submitted into the record during the prior week and that the hearings officer erred in excluding the July 29, 2019 Submittal from the record. Contrary to petitioners' argument, however, the hearings officer stated at the close of the public hearing that the first week of the open record period was limited to new testimony and evidence and that submittals during that second week were limited to those responsive to the first week submittals.[4] Audio Recording, Hearings Officer Hearing, July 15, 2019, at 58:00.

The hearings officer rejected petitioners' attempt to broadly characterize their submittal in order to qualify the July 29, 2019 Submittal for admission into the record during the second period. Instead the hearings officer determined that the new evidence concerned proposed changes to two sections of the Equitable Servitude, and that the July 29, 2019 Submittal did not limit its discussion to the new evidence. We agree with intervenor that the hearings officer did not commit procedural error in rejecting the July 29, 2019 Submittal. A second copy of the Equitable Servitude is not new information submitted during the open record

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[4] ORS 197.763(6)(c) provides that a party may request "an opportunity to respond to new evidence submitted during the period the record was left open."

period, and did not allow expansion of the scope of material admissible during the second week.[5]

Consistent with ORS 197.763(6)(c), the hearings officer limited the scope of material to be submitted during the second week to material responsive to new evidence admitted into the record during the initial period. The hearings officer excluded petitioners' material because he determined it was not responsive to new evidence but instead supplemented and enhanced petitioners' initial arguments. Record 8.

This assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

Petitioners argue in their tenth assignment of error that the hearings officer failed to address a variety of issues raised by petitioners. Intervenor responds that these issues were either not raised prior to the close of the hearing, or were raised in the July 29, 2019 Submittal that the hearings officer excluded from the record. ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to the Land Use

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[5] Petitioners counter that allowing the July 29, 2019 Submittal would not have prejudiced intervenor because intervenor responded to the submittal. Intervenor's decision to respond to the substance of petitioners' proffered material does not require that we conclude that the hearings officer committed a procedural error in rejecting the July 29, 2019 Submittal. Intervenor objected in detail to the proffered material, but responded to the substance in the event the hearings officer accepted the submittal. Intervenor's substantive response does not resolve the issue in petitioners' favor.

> Board of Appeals shall be raised not later that the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties adequate opportunity to respond to each issue."

As we held in our resolution of the ninth assignment of error, the July 29, 2019 Submittal was properly excluded from the record. Generally, we agree with intervenor that the issues petitioners seek to raise in the tenth assignment of error have been waived. To the extent, however, the tenth assignment of error raises preserved challenges related to the Equitable Servitude, they are repetitive of issues raised in the eighth assignment of error and we address them there.

This assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error argues the hearings officer erred in his treatment of the "essential nexus" test described in *Nollan*. The response brief identifies pages where staff and intervenor discussed cases petitioners raise in their petition, but intervenor maintains that petitioners did not raise below the issue they seek to raise in the petition for review. In their reply brief, petitioners argue that the misapplication of the essential nexus test is preserved in the following locations: Record 101-109, 139-40, 149, 159, 217. Petitioner's Reply 1. We have reviewed the cited pages and find that petitioners did not raise the issue. For example, petitioners argued that:

> "The Decision erred by finding that non-exaction requirements of the [TDC] are subject to the rough proportionality and essential

> nexus tests and declining to apply such standards. Decision, page 4. Those legal standards do not apply where the public improvements are simply those necessary for the applicant's own development." Record 149.

This argument raises no issue of whether there is a nexus between a potential city exaction and intervenor's project. This is a new issue and is therefore waived. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

This assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argued below that five specific code provisions could be applied to the partition application without concerns of an unconstitutional taking because they are not exactions. Record 89. However, the petition for review does not raise any issue with those five standards. Rather, the petition for review asserts that the city failed to require compliance with three different provisions. Intervenor responds, and we agree, that petitioners did not raise the issues raised in the third assignment of error. *Long*, 75 Or LUBA 390. The issues were not preserved and are therefore waived.

This assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Petitioners argue that the hearings officer was required to but failed to apply certain standards related to infrastructure such as sanitary sewers and utilities to the application. Petitioners also argue that the hearings officer failed

to correctly apply street and access standards.[6] Petitioners do not show where these issues were preserved. The issues raised in the fourth and fifth assignments of error are waived.

The fourth and fifth assignments of error are denied.

SIXTH AND EIGHTH ASSIGNMENTS OF ERROR

A. Street Trees Standard

The hearings officer found that:

> "Amendments to the equitable servitude will ensure compliance with the street tree standards when frontage improvements are constructed in the future. The hearings officer finds it is feasible for future development to comply with these standards by planting street trees or paying a fee as allowed by TDC 18.320.040.G."[7] Record 17.

Petitioners challenge the use of the Equitable Servitude to defer a demonstration of compliance with the TDC street tree standards in their sixth and eighth assignments of error. Intervenor responds that petitioners failed to raise the issue raised in the sixth assignment of error and may not raise it for the first time at LUBA. We agree.

Although petitioners made general arguments below that deferral of compliance with development standards was inappropriate, petitioners do not

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[6] The subject property is accessed via a private drive, Taylor Lane, which is not improved to city street or city access standards.

[7] Petitioners do not argue that payment of an in lieu of fee prior to receipt of final plat approval or an occupancy permit is not feasible.

indicate where they preserved the issue that street trees had to be installed as a condition of partition approval. Record 87. The staff decision appealed to the hearings officer did not require installation of street trees prior to subsequent land use applications, and instead relied upon the Equitable Servitude proposed as part of intervenor's application materials to ensure that the standard is met. The Equitable Servitude includes a requirement that street trees be planted or a payment in lieu be made prior to development of Lots 1 or 2. We agree with intervenor that petitioners failed to raise any issue with use of the Equitable Servitude to meet the street trees requirement as set forth in the planning director decision petitioners appealed to the hearings officer. In *Savage v. City of Astoria*, 68 Or LUBA 255 (2013), the staff report provided to the planning commission included draft findings of compliance with the Transportation Planning Rule (TPR). OAR 661-012-000. Those draft findings were not challenged at the local level and were ultimately adopted by the planning commission. We held that "unless petitioner or some other party asserted below that the proposed rezoning does not comply with the TPR, so that the city had 'fair notice' that it needed to address that issue, petitioner's TPR issues were not preserved for review in this appeal." *Id.* at 229 (citations omitted). Similarly, the staff decision petitioners appealed to the hearings officer did not require that street trees be installed as part of the partition approval, but rather relied on the Equitable Servitude. Petitioners failed to preserve their assignment of error related to installation of the street trees and the issue is waived.

As conditioned by the hearings officer, intervenor must provide street trees prior to obtaining an occupancy permit for commercial or institutional development, or prior to final plat approval for residential development or, if the approving authority finds that installing the minimum number of trees is not practicable, pay the fee option as allowed by TDC 18.320.040.G. Record 24. Equitable Servitude Paragraph 5 provides:

> "Grantor, in consideration for and satisfaction of Condition of Approval No. 2, hereby represents, covenants and warrants that, prior to the issuance of a final occupancy permit for any commercial or institutional development on Lot 1 or Lot 2, or prior to final plat approval for any residential development on Lot 1 or Lot 2, streets trees will be planted consistent with TDC 18.320.040 along all street frontages on or abutting the Lot where development is proposed. If the approval authority finds that it is not practicable to provide the minimum number of required street trees, the applicant shall remit payment into the urban forestry fund consistent with TDC 18.320.040.G." Record 24.

Petitioners preserved the argument in their eighth assignment of error that the Equitable Servitude provides "no direction as to what process will be used for City review of street trees standards and no assurance of public involvement (notice or a hearing)." Petition for Review 37. Petitioners argued below that:

> "The equitable servitude * * * contains no guarantee of notice or hearing associated with future City decisions. The applicant could pull permits for any allowed site development in the R-7 district and the deferred development standards would never be applied." Record 87.

The petition for review does not, however, address the hearings officer's findings that: (1) "Future development on the proposed lots will be subject to

additional review, with notice and opportunity for public comment," or (2) "Future development on the proposed lots will be subject to further City review with public notice and opportunity for comment, regardless of the equitable servitude." Record 17-18. Consistent with the findings, intervenor argues that "Under the Code and the equitable servitude, no development is allowed on the property without a future development application, which will require notice and an opportunity for comment." Response Brief 29. Petitioners do not explain why Equitable Servitude Paragraph 5 is insufficient to require public process regarding the street trees standard prior to development. Absent any developed argument from petitioners, petitioners have not demonstrated how the city's deferral of the street trees standards was improper.

This subassignment of error is denied.

B. Exactions

In a portion of their eighth assignment of error, petitioners argue that the Equitable Servitude's deferral of exacting public improvements is inadequate to satisfy the requirement for a future process that includes public notice and an opportunity to participate because performance is based on a future land use application that may in fact never occur. However, this outcome is consistent with the court's decision in *Schultz.* If no physical development ever exists, there is no basis with which to find rough proportionality. This is consistent with the

constitutional restraints on exactions we discussed above, and is not a basis for remand.[8]

Petitioners also argue that the Equitable Servitude is inconsistent with the process established in the code for deferring application of land use regulations.[9] First, petitioners argue that the Equitable Servitude is inconsistent with the TDC process that petitioners argue is set out in TDC 18.640.040.C, which petitioners maintain only allows deferral of application of standards until final plat approval. However, TDC 18.640.040.C contains no such restriction. TDC 18.640.030.C, "Deferral or compliance," provides:

> "1. The applicant may request to defer demonstrating compliance with one or more of the standards in Subsections 18.640.030.B and E as provided for below:

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[8] The hearings officer summarized some of the testimony below in his decision. The decision describes the city planner's assertion that, "The Code and the equitable servitude will ensure that all required exactions and improvements occur when further development is proposed." Record 3. The decision also describes intervenor's argument that, "Any new use of the site will require further City review and approval through at least a Type II process" and that "the equitable servitude reinforces the City's ability to require such exactions and improvements." Record 4.

[9] Petitioners point out that the TDC purpose statement requires public facilities to be available in advance of or concurrent with development. TDC 18.640.010. The purpose statement also provides, however, that "The statements in this section do not constitute distinct approval criteria, but they guide and inform the interpretation and application of the provisions in this chapter." TDC 18.640.010.

"a. Preliminary plat. Deferral of compliance to final plat approval.

"b. Planned development concept plan (without a land division proposal). Deferral of compliance to detailed development plan approval.

"c. All other development applications. A condition of land use approval requiring demonstration of compliance no later than 180 days after approval or prior to submission of applications for building or public facility improvement permits, whichever occurs first."

Petitioners fail to establish that the TDC deferral process in the code is exclusive. Further, petitioners fail to address the hearings officer's findings that the provision is not applicable.[10] Record 13.

Petitioners also argue that the decision includes conclusory statements that the Equitable Servitude can only be rescinded through a public process. The findings are consistent with Equitable Servitude Paragraph 11 which provides:

"Grantor may request approval from Grantee for modification, release, or termination of this Equitable Servitude. Grantor acknowledges that approval of any such request will require a land use application to amend MLP 2018-00004 and be subject to the then applicable provisions of state law, the Tigard Comprehensive Plan, and Community Development Code. If such request is granted, in whole or in part, the parties shall execute and record a release or modification of this Equitable Servitude in the Washington County

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[10] The hearings officer held: "The deferral standards of TDC 18.640.030.C and D are inapplicable. As discussed above, no infrastructure improvements are needed to serve the development proposed in this case. Therefore, there is nothing to defer." Record 13.

real property records." Record 25.

Any modification, release or termination of the Equitable Servitude requires an application to amend the partition approval. Public notice and an opportunity to comment would therefore be provided.

These assignments of error are denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioners identify alleged inconsistencies in the record and argue that such inconsistencies "may undermine the findings sufficiently to render them inadequate to support a determination of compliance." Petition for Review 33. Generally, findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards." *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Intervenor argues that petitioners do not explain why the cited inconsistencies so undermine the findings as to make them inadequate. *McAlister v. Jackson County*, 47 Or LUBA 125 (2004) (hearings officer's finding that a homesite within 300 feet of an existing driveway or road would have only minimum impact on winter deer and elk habitat followed by finding that homesite would have a more than minimum impact even if cited within 300 feet of an existing driveway or road lacked an adequate explanation). We agree with intervenor that petitioners have not established either inconsistencies in the findings or the relevance of inconsistencies.

The hearings officer referenced the Equitable Servitude as providing additional assurances that TDC provisions will be met:

> "The hearings officer finds that the equitable servitude does not deny opportunities for public participation. With one exception, the equitable servitude is not necessary to ensure compliance with the applicable approval criteria. The equitable servitude is necessary to ensure the installation of street trees or payment of the required fee. All other applicable standards are either met or inapplicable, due to the limited impacts of the proposed development. Future development on the proposed lots will be subject to further City review with public notice and opportunity for comment, regardless of the equitable servitude. The equitable servitude merely provides additional assurance that such review will occur." Record 18.

Petitioners contend that the hearings officer's finding that the Equitable Servitude was not necessary to establish criteria, other than the street trees standard were met, is inconsistent with the hearings officer's reliance on the Equitable Servitude to find satisfaction of the residential density standard at TDC 18.110.040 and Table 18.110.3.[11] (Record 10), infrastructure extension standards at TDC 18.640.030.E (Record 12-13) and access standards at TDC 18.920.030.B (Record 16). We disagree with petitioners. There is no inconsistency. The hearings officer determined that the Equitable Servitude provides additional assurance but was not necessary to meet standards other than those related to street trees.

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[11] TDC 18.110.040 provides: "The maximum density limits and minimum density requirements are shown for each residential zone in Table 18.110.3."

Petitioners also contend that the hearings officer made inconsistent findings when he concluded that he could not require dedication of rights-of-way or easements as a condition of approval but could have required dedication of sewer easements shown on intervenor's plans.[12] Record 16. Petitioners do not explain why the city could not accept voluntary dedication of easements if offered by intervenor (on its plans), and the findings are not inconsistent. Intervenor argues that the easements depicted on the plan were conceptual only and that intervenor was clear it did not intend to dedicate the easements shown. Intervenor also argues that the hearings officer's finding concerning the easements was inconsistent with other statements in the decision. The hearings officer did not purport to require dedication of sewer easements or conclude that the easements could be required if not volunteered.

Petitioners argue that the hearings officer found that the deferral standards of *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992) do not apply and that street trees requirements were being deferred. The hearings officer found that *Rhyne* deferral standards do not apply generally, that compliance with the street

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[12] The hearings officer found: "The applicants plans show easements for sewers. Therefore, the City could require that the applicant provide those easements without violating the restrictions of *Nollan, Dolan, and Schulz. See Clark v. City of Albany*, 29 Or UBA 325 (1995). However, the City is not required to require such easements and chose not to in this case. The City can require such easements as a condition of future development on the lots created by this partition." Record 16.

trees requirement was being deferred, but that compliance with the street trees standards was feasible. Record 17. There is no inconsistency. The hearings officer found that the Equitable Servitude ensured that the street trees would be provided, or the requisite payment made and that it was feasible to meet the street trees criteria. *Id.*

Petitioners also assert that the hearings officer's finding–that future development will be subject to further review with public opportunity for comment, independent of the Equitable Servitude–is inconsistent with his finding that single-family homes with in-home day care are allowed by right. Record 10. However, the hearings officer accepted the findings of the planning director except to the extent the findings were inconsistent with his decision. Record 8. The planning director's decision stated that the minimum lot size in the R-7 zone is 5,000 square feet and future development would have to meet the minimum residential lot standards at that time. Record 230. The hearings officer conditioned the approval on recordation of the Equitable Servitude prior to the final plat, and the Equitable Servitude provides that "any residential development of the Property will require additional land use approval with notice and opportunity for public comments *and will meet or exceed a minimum density of 5,000 square foot lot size per acre*." Record 23 (emphasis added). The Equitable Servitude is consistent with the TDC. Petitioners have failed to demonstrate how the statement that one new home site could be created requires reversal or

remand, given that TDC 18.110.040 and Table 18.110.3 provide that the minimum residential density is 5,000 square foot lot size per acre.

This assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue in part that the hearings officer failed to consider the potential benefits of exactions to the subject property when applying the *Dolan* rough proportionality standard. Petitioners also argue that the hearings officer's findings related to rough proportionality are inadequate and unsupported by substantial evidence. The petition for review cites Record 89 as preserving the assignment of error. Petition for Review 17. The reply brief cites Record 36 and 90. Reply 2.

Petitioners argued in their July 15, 2019 submittal that "[t]he Decision assumes that there is no development impact associated with the partition. There are a number of uses that are allowed outright in the R-7 zone" and that "[t]he Decision asserts that any subsequent development would require either a CU or zone change without citing any supporting authority, and in direct contradiction to the R-7 zoning." Record 90. In its August 1, 2019 submittal, intervenor stated "On page 9 of the Dressel Hearing Memo, the Dressels argue that the public infrastructure exactions the Dressels seek to impose upon the partition application are actually benefits to the District's property that should be weighted in the rough proportionality analysis." Record 36. These issues have been preserved.

The hearings officer concluded that a benefit:

> "'offset' is not a relevant consideration where, as here, [no] public facilities are needed to serve the proposed development. The extension of roads, utilities, and other public services within this site will not 'benefit' lots created by this development, because no structures or other improvements are proposed that could connect to such improvements. Even if there is some benefit to the lots, there is no evidence that the benefit is sufficient to meet the rough proportionality standard. The City has the burden of proof on this issue." Record 9.

We agree with petitioners that development allowed outright *may* be considered in evaluating rough proportionality, even though physical development is not part of this application. *McClure v. City of Springfield*, 175 Or App 425, 26 P3d 1222 (2001), *rev den*, 334 Or 327 (2002) (in evaluating an exaction, city considered vehicle trips anticipated based on development of three newly partitioned lots). The hearings officer found that one single-family dwelling with associated day care *may* be a use allowed outright and concluded, without further analysis, that the cost of improvements is not roughly proportional to the impact of a single-family dwelling with a family day care, on city roads, sewers or other services. Record 9. However, petitioners do not point to anything in the TDC or elsewhere that requires the hearings officer to impose exactions at the partition stage, or at any other stage of development in order to ensure that necessary facilities are in place at the appropriate time. Because the hearings officer was not required to impose exactions at the partition stage, petitioners' argument does not provide a basis for remand.

This assignment of error is denied.[13]

The decision is affirmed.

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[13] OAR 661-010-0030(7) provides:

> "A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such."

Pursuant to OAR 661-010-0030(7), intervenor filed a cross petition for review. Because we affirm the decision, we need not address intervenor's two contingent cross-assignments of error.