

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

3
4 SOUTHWEST HILLS RESIDENTIAL
5 LEAGUE and JOHN KOSYDAR,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF PORTLAND,
11 *Respondent,*

12
13 and

14
15 GUENTHER, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2020-017

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Portland.

24
25 Daniel Kearns, Portland, filed the petition for review and argued on behalf
26 of petitioners. With him on the brief was Reeve Kearns, PC.

27
28 Michael J. Jeter, Assistant Deputy City Attorney, Portland, filed a response
29 brief and argued on behalf of respondent.

30
31 Christopher P. Koback, Portland, filed a response brief and argued on
32 behalf of intervenor-respondent. With him on the brief was Hathaway Larson
33 LLP.

34
35 RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board
36 Member, participated in the decision.

37
38 AFFIRMED

12/08/2020

1
2 You are entitled to judicial review of this Order. Judicial review is
3 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision approving a land division,
4 environmental review, and a planned unit development application to develop 20
5 townhomes on a 4.76-acre property.

6 **FACTS**

7 Intervenor-respondent Guenther, LLC (intervenor) owns a 4.76 acre
8 property located north of S.W. Broadway Drive (S.W. Broadway) and west and
9 south of the terminus of S.W. Tangent Street. The subject property is zoned
10 Residential 10,000 (R10), with an Environmental Conservation overlay for
11 wildlife habitat, forested wetland resources, perennial and seasonal creeks,
12 among other resources. Intervenor proposed to partition the property to create (1)
13 a 58,092 square foot parcel on which intervenor proposed to develop 20
14 townhome units with garages, a shared access driveway from S.W. Tangent
15 Street, 25 surface parking spaces, and shared outdoor common space; (2) a
16 second 142,000 square foot environmental resource parcel; and (3) a third parcel
17 totaling 6,875 square feet for a pedestrian path connecting S.W. Tangent Street
18 to S.W. Broadway, to be dedicated to the city.

19 S.W. Broadway in the area of the subject property is a two-lane street with
20 no sidewalks and no bike lanes. The subject property currently has no improved
21 access to S.W. Broadway, and the only vehicular access to the proposed
22 development is from extended S.W. Tangent Street. The property is steeply

1 sloped along its approximately 740 feet of frontage along S.W. Broadway,
2 containing slopes averaging over 35 percent. A wetland is located immediately
3 above S.W. Broadway.

4 The hearings officer held a hearing on the applications and issued a
5 decision approving the applications with conditions. Opponents appealed the
6 hearings officer's decision to the city council, which held a hearing on the appeal
7 and issued a decision approving the applications with slightly modified
8 conditions. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioner's single assignment of error includes four subassignments of
11 error. We first set out and describe the relevant Portland City Code (PCC)
12 provisions at issue in this appeal, and then describe the city council's decision,
13 before we address the subassignments of error.

14 **A. PCC Provisions**

15 PCC 33.654 and PCC Title 17 include design standards for streets that
16 require an application for development approval to construct a six-foot paved
17 bike lane and a six-foot paved sidewalk adjacent to public streets such as S.W.
18 Broadway. PCC 33.654.120. The street standards also require a dedication of
19 property to the city to accommodate the improvements. Due to the property's
20 steep slopes fronting S.W. Broadway, and the resulting high cost to construct the
21 improvements, intervenor sought and received an Alternative Design Review
22 approval from the Portland Bureau of Transportation (PBOT) waiving the

1 requirement to construct the standard improvements and to allow intervenor to
2 construct an alternative to the street improvements, while requiring intervenor to
3 dedicate right of way on the north side of S.W Broadway and record a waiver of
4 remonstrance against the formation of a future local improvement district. We
5 discuss the alternative below.

6 PCC 33.641.020 is an approval criterion for the land division application,
7 and provides:

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

15 PCC 33.641.030 allows an applicant to satisfy PCC 33.641.020 through
16 mitigation measures:

17 “The applicant may meet the criterion in Section 33.641.020, above,
18 by including mitigation measures as part of the land division
19 proposal. Mitigation measures must be acceptable to the City
20 Engineer and may include providing transportation demand
21 management measures, an access management plan, constructing
22 streets, alleys, or bicycle, pedestrian, or transit facilities on or off the
23 site or other capital improvement projects such as traffic calming
24 devices.”

25 Finally, PCC 33.800.050(A) provides:

26 “The approval criteria that are listed with a specific review reflect
27 the findings that must be made to approve a request. The criteria set
28 the bounds for the issues that must be addressed by the applicant and

1 which may be raised by the City or affected parties. A proposal that
2 complies with all of the criteria will be approved. A proposal that
3 can comply with the criteria with mitigation measures or limitations
4 will be approved with conditions. A proposal that cannot comply
5 with the criteria outright or cannot comply with mitigation measures
6 will be denied.”

7 **B. The City Council’s Decision**

8 As noted, S.W. Broadway along the subject property, and well beyond the
9 area of the subject property for more than a mile (from S.W. Vista to S.W. Ninth
10 Avenue), does not include sidewalks or bike lanes. The city council found that
11 PCC 33.641.020 was met “with the exception of the safety for all modes factor
12 regarding SW Broadway Drive” and that “SW Broadway Drive is not currently
13 safe for * * * pedestrians and bicyclists” extending beyond the subject property’s
14 frontage, the length between S.W. Vista and S.W. Ninth Avenue. Record 42, 48.

15 The city council explained its understanding of the requirements of the
16 Takings Clause of the U.S. Constitution and its limits on the city’s ability to deny
17 the applications if intervenor did not agree to construct the improved bike lane
18 and the sidewalk along the north side of S.W Broadway:

19 “PBOT, Applicant’s attorney and traffic consultant, and opponents
20 (particularly opponents’ attorney) offered legal analyses and
21 opinions regarding what improvements to the Subject Property’s
22 frontage on SW Broadway Drive the City could require from
23 Applicant within the limits of the U.S. Constitution. When a
24 government, such as the City of Portland, conditions the approval of
25 a land use permit on an exaction, the property owner’s Fifth
26 Amendment right to just compensation is implicated. The Takings
27 Clause of the Fifth Amendment to the U.S. Constitution prohibits
28 the taking of private property for public use without just
29 compensation. One purpose of the Takings Clause is to bar

1 governments ‘from forcing some people alone to bear public
2 burdens which, in all fairness and justice, should be borne by the
3 public as a whole.’ *Dolan v. City of Tigard*, 512 U.S. 374, 384
4 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49
5 (1960)). On the other hand, the Supreme Court has also recognized
6 that governments have legitimate interests in using dedications of
7 property to offset land uses that ‘threaten to impose costs on the
8 public.’ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595,
9 604–05 (2013).

10 “To reconcile these two realities, the Supreme Court employs a two-
11 part analysis originally announced in *Nollan v. California Coastal*
12 *Comm’n*, 483 US 825 (1987) and *Dolan v. City of Tigard*, 512 US
13 374 (1994). The legal tests established by these cases are often
14 referred to as the Nollan/Dolan ‘essential nexus’ and ‘rough
15 proportionality’ tests. At step one, the analysis begins by
16 determining whether there is an ‘essential nexus’ between the
17 exaction and the asserted legitimate government interest. The
18 exaction must ‘substantially advance the same legitimate
19 government interest that the land use authorities asserted would
20 allow them to deny the permit altogether.’ *Nollan*, 483 U.S. at 837.
21 At step two, the government must determine whether there is rough
22 proportionality ‘between the government’s demand and the effects
23 of the proposed land use.’ *Koontz*, 570 U.S. at 599. The rough
24 proportionality analysis involves an ‘individualized determination
25 that the required dedication is related both in nature and extent to
26 the impact of the proposed development.’ *Dolan*, 512 U.S. at 392.
27 While no ‘precise mathematical calculation is required,’ the
28 government ‘must make some effort to quantify its findings’ that the
29 dedication will offset the development’s impacts. *Dolan*, 512 U.S.
30 at 395–96.

31 “In summary, a governmental entity, such as the City of Portland,
32 may require something to be done by a developer as a condition of
33 approval, if there is a ‘nexus’ (connection) between a legitimate
34 governmental interest that would furnish a valid ground for the
35 denial of the applicant’s request (the ‘Nollan’ part) and that the
36 nature and extent of the exaction is roughly proportional to the effect
37 of the proposed development (the ‘Dolan’ part).” Record 43.

1 The city council found that the proposed development would have “negligible
2 impacts” on SW Broadway Drive.¹ Record 48. Due to the property’s steep slopes
3 and the existence of a wetland on the subject property near SW Broadway, the
4 city council concluded that the cost of developing the north side of S.W.
5 Broadway to the city standards in PCC 33.654.120, which would include
6 sidewalks and bike lanes along the subject property’s S.W. Broadway frontage,
7 would not be roughly proportional, under the test articulated in *Dolan*, with the
8 limited impacts from the proposed development on SW Broadway:

9 “In sum, City Council finds that requiring applicants to provide
10 opponents’ proposed frontage improvements is not roughly
11 proportional with the proposed development’s impacts. * * *
12 Accordingly, City Council interprets PCC 33.641.020 and
13 33.641.030 in a manner consistent with the Fifth Amendment of the
14 U.S. Constitution. To apply PCC 33.641.020 and 33.641.030, City
15 Council finds that it cannot require mitigation that is not roughly
16 proportional in nature and extent to the proposed development’s
17 impacts. Therefore, City Council interprets PCC 33.641.020 and
18 33.641.030 such that City Council cannot, consistent with the Fifth
19 Amendment of the U.S. Constitution, condition approval of the
20 Applicant’s proposed development on the frontage improvements to
21 SW Broadway Drive that the opponents propose.”² Record 45.

¹ The city council found that the proposed development would generate no more than 8 pedestrian trips a day on S.W. Broadway, and would generate no bike trips. Record 44.

² The half-street improvements required by PCC 33.654.120 would require “significant demolition, excavation and construction on the hillside abutting [SW Broadway], including but not limited to erection of a large retaining wall,” and would cost approximately \$1.3 million. Record 45.

1 The city then concluded that mitigation measures proposed by intervenor that
2 included improving the existing shoulder on the south side of S.W. Broadway
3 Drive for 740 feet parallel to the subject property's frontage on the north side of
4 S.W. Broadway, and improving the existing shoulder on the north side of S.W.
5 Broadway for 125 feet to the east of the subject property (off-site) are "the best
6 option to provide some increased measure of pedestrian safety while complying
7 with the Fifth Amendment to the U.S. Constitution."³ Record 48.

8 **C. Subassignments of Error**

9 Petitioners' main premise in its assignment of error is that PCC
10 33.800.050(A) required the city council to deny the application when it

³ The city council found:

"City Council finds that it must evaluate SW Broadway Drive against the factors in PCC 33.641.020 and that SW Broadway Drive is not currently safe for all modes of transportation, specifically pedestrians and bicyclists. City Counsel finds that in light of the evidence of the negligible impacts that the proposal will produce on the relevant segment of SW Broadway Drive, and the unique topographic constraints, the cost of constructing additional pedestrian improvements on the north side of SW Broadway adjacent to the site would not be roughly proportional with the proposed development's impacts. City Council understands that pedestrian improvements on the south side of SW Broadway may not be the preferred improvements and may not fully address opponents' safety concerns. However, the City Council finds that the south side improvements are the best option to provide some increased measure of pedestrian safety while complying with the Fifth Amendment to the U.S. Constitution." Record 48.

1 concluded that PCC 33.641.020 was not met due to the continuing unsafe
2 condition of S.W. Broadway for pedestrians and bicyclists. In their four
3 subassignments of error, petitioners argue that the city council improperly
4 construed PCC 33.641.020 when it approved the applications after concluding
5 that SW Broadway Drive is not capable of safely supporting the pedestrian and
6 bicycle trips from the proposed development, that the decision is not supported
7 by substantial evidence in the whole record, and that the city's findings are
8 inadequate to explain why it approved the applications when an applicable
9 approval criterion was not met.

10 As noted, the city council concluded that the proposed development would
11 add negligible pedestrian, and no bike, trips to SW Broadway adjacent to the
12 subject property, and that SW Broadway in its existing condition was unsafe for
13 those mode of travel. The city council concluded that the city could not,
14 consistent with constitutional protections afforded intervenor under the Fifth
15 Amendment, require intervenor to construct the half-street improvements
16 required by PCC 33.654.120. Petitioners do not challenge the city council's
17 conclusion that the cost of constructing the half street improvements required by
18 PCC 33.654.120 was not roughly proportional to the impact of the proposed
19 development on the transportation system. Petition for Review 19 ("assuming,
20 without deciding, that the city was correct about *Dolan* proportionality").
21 However, petitioners argue, *Dolan* does not require, and nothing in PCC
22 33.800.050(A) allows, the city to approve an application that fails to satisfy an

1 applicable approval criterion, and accordingly, the only course of action available
2 to the city council was to deny the applications. Petition for Review 17.

3 The city and intervenor (respondents) respond that petitioners'
4 assignments of error fail to challenge or assign error to the city's findings that
5 conclude that the city is prohibited, under *Dolan* and *Koontz v. St. Johns River*
6 *Water Mgmt Dist.*, 570 US 595, 606, 133 S Ct 2586, 2595 (2013), from denying
7 an application based on an applicant's refusal to accept a condition that required
8 an exaction that was not roughly proportional to the impacts of the proposed
9 development. We quoted those findings above. As such, respondents argue,
10 petitioners have failed to state a basis for reversal or remand of the decision.

11 We agree. In *DLCD v. Josephine County*, 18 Or LUBA 798 (1990), DLCD
12 assigned error to the county's failure to take Goal 3 and 4 exceptions in rezoning
13 land from forest to residential, but failed to assign error to the county's
14 determination that the pertinent goals were inapplicable because the property was
15 not agricultural land or forest land within the meaning of Goals 3 and 4. We
16 affirmed the decision because, where property is not agricultural or forest land,
17 the county may rezone the property without taking a Goal 3 or 4 exception;
18 therefore, DLCD's assignment of error directed at failure to take a goals
19 exception provided no basis to reverse or remand. *Id.* at 802-03. Thus, in that
20 case, the county's actual basis for its decision, which DLCD failed to assign as
21 error, obviated the assignment of error DLCD did make.

1 Similarly, here, the city council’s actual basis for its decision to approve
2 the application in spite of its conclusion that S.W. Broadway remained unsafe for
3 pedestrian and bike travel after the development, and thus in spite of PCC
4 33.800.050(A)’s requirement that applications that fail to meet all applicable
5 approval criteria “will be denied,” was its conclusion that it could not, consistent
6 with the Fifth Amendment, deny the applications. Petitioners’ oblique reference
7 to that conclusion and to *Dolan* does not develop any meaningful argument that
8 challenges it. We will not develop a petitioner’s argument for it. *Deschutes*
9 *Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982). Absent a
10 challenge to the city’s primary conclusion that it could not, consistent with the
11 Fifth Amendment, deny the applications, petitioners’ arguments in their
12 assignment of error provide no basis for reversal or remand. *Waste Not of Yamhill*
13 *County v. Yamhill County*, 65 Or LUBA 142, 148-49 (2012) (citing *Rogue Valley*
14 *Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 170-71 (1998), *aff’d*,
15 158 Or App 1, 970 P2d 685 (1999)).

16 Petitioners’ assignment of error is denied.

17 The city’s decision is affirmed.