

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

COMMUNITY PARTICIPATION  
ORGANIZATION 4M and TERESA GIPSON,  
*Petitioners,*

vs.

CITY OF TIGARD,  
*Respondent,*

and

HALL BLVD LAND, LLC,  
and TIM TAYLOR,  
*Intervenors-Respondents.*

LUBA No. 2022-055

FINAL OPINION  
AND ORDER

Appeal from City of Tigard.

Kenneth P. Dobson filed the petition for review and reply brief and argued on behalf of petitioners.

No appearance by City of Tigard.

Wendie L. Kellington filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents. Also on the brief was Kellington Law Group PC.

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

AFFIRMED

02/01/2023

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

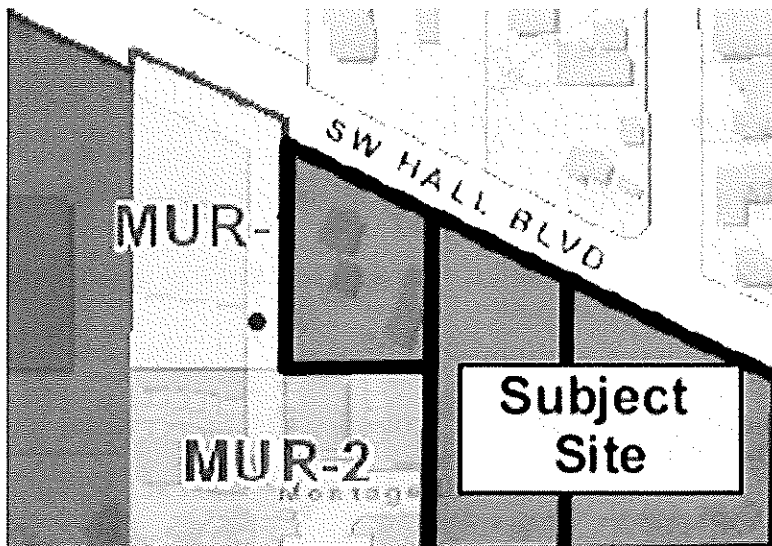
Opinion by Rudd.

## **NATURE OF THE DECISION**

Petitioners appeal the city council's decision annexing three properties and approving a site development application for a four-story assisted living and memory care facility on the annexed property.

## **FACTS**

The subject property is located at 9355 and 9415 SW Hall Blvd. It is bordered by SW Hall Blvd to the north and SW 92nd Avenue to the west. As shown on the map below, SW Montage Lane terminates at the western border of one of the lots.



Record 3.

Intervenors-respondents (intervenors) requested that the city annex the 2.53-acre subject property along with half of the adjoining SW Hall Blvd right of way, for a total of 2.9 acres. After annexation of the 2.9 acres, the property would

1 receive city zoning of Mixed Use Residential-1 (MUR-1). Intervenors also  
2 requested approval of a site design review for a four-story assisted living and  
3 memory care facility and associated parking, landscaping and other site  
4 improvements.

5 Quasi-judicial annexations are processed through a Type III modified  
6 procedure with a recommendation to the city council by the planning commission  
7 and a decision by the city council. Tigard Community Development Code  
8 (TCDC) 18.720.020(A). On January 10, 2022, the planning commission held a  
9 public hearing to consider the applications. The planning commission hearing  
10 was continued to February 28, 2022 and the again to March 14, 2022. On April  
11 4, 2022, the planning commission held a public hearing to deliberate and provide  
12 recommendations to the city council on the applications.

13 On May 10, 2022, the city council held a public hearing to consider the  
14 applications. On May 17, 2022, the city council voted to tentatively approve the  
15 annexation and site plan and directed staff to prepare findings. On May 24, 2022,  
16 the city adopted the ordinance and findings approving the applications. This  
17 appeal followed.

1   **SECOND ASSIGNMENT OF ERROR**

2           TCDC 18.710.080(A)(1)(a) provides that notice will be mailed at least 20  
3   days prior to the hearing on a Type III application.<sup>1</sup> Petitioners' second

---

<sup>1</sup> Petitioners cite TCDC 18.710.070 in error. A Type III procedure is set out in TCDC 18.710.080. TCDC 18.710.080(A)(1) states that

“A notice of hearing must be provided as follows:

“a. At least 20 days before the hearing date, a notice of hearing must be mailed to:

“i. The applicant and all owners or contract purchasers of record of the proposed development site;

“ii. All property owners of record within 500 feet of the proposed development site;

“iii. City's interested parties who have requested to receive notice of all land use notices;

“iv. any city-recognized neighborhood group and community organizations whose boundaries include the proposed development site;

“v. Any affected governmental agency that is entitled to such notice; and

“vi. In actions involving appeals, the appellant and all parties to the appeal.

“b. The Director will prepare an affidavit of mailing such notice that indicates the date that the notice was mailed to the necessary parties. The affidavit will be made part of the record.

“c. At least 14 days prior to the hearing date, a notice of the hearing must be posted on the proposed development site by the

1 assignment of error is that the city erred because it provided only 14 days notice  
2 of the March 14, 2022 continued planning commission hearing.

3 We will reverse or remand a local government decision where the local  
4 government “[f]ailed to follow the procedures applicable to the matter before it  
5 in a manner that prejudiced the substantial rights of the petitioner[.]” ORS  
6 197.835(9)(a)(B). Petitioners argue that their attorney was present and ready to  
7 participate in the February 28, 2022 planning commission hearing. The  
8 February 28, 2022 hearing was, however, terminated by the planning commission  
9 and continued to March 14, 2022 due to technical problems with the city’s virtual  
10 hearing software. Petitioners argue that they were prejudiced by the lack of 20  
11 days prior notice of the March 14, 2022 hearing date because their attorney was  
12 unable to attend the March 14, 2022 hearing.

13 Petitioners do not address whether the 20 days notice required by TCDC  
14 18.710.080(A)(1)(a) applies to hearings continued from the planning  
15 commission’s initial January 10, 2022 hearing. In any event, the final decision  
16 was made by the city council following a *de novo* hearing. We agree with  
17 intervenors that petitioners do not explain how they were prejudiced by the  
18 alleged procedural error at the planning commission stage given that the city  
19 council was the ultimate decision maker. Intervenor-Respondents’ Brief 45. We

---

applicant. An affidavit of posting such notice must be  
prepared by the applicant and submitted as part of the record.”

1 conclude that petitioners have not established any prejudice to their substantial  
2 rights. Accordingly, the second assignment of error provides no basis for remand.

3 The second assignment of error is denied.

#### 4 **FIRST ASSIGNMENT OF ERROR**

5 TCDC 18.910.030(H)(2) provides, as relevant here, that:

6 “All local, neighborhood routes and collector streets which abut a  
7 development shall be extended within the site to provide through  
8 circulation when not precluded by environmental or topographical  
9 constraints, existing development patterns or strict adherence to  
10 other standards in this code. A street connection or extension is  
11 considered precluded when it is not possible to redesign or  
12 reconfigure the street pattern to provide required extensions. Land  
13 is considered topographically constrained if the slope is greater than  
14 15 percent for a distance of 250 feet or more. In the case of  
15 environmental or topographical constraints, the mere presence of a  
16 constraint is not sufficient to show that a street connection is not  
17 possible. The applicant must show why the constraint precludes  
18 some reasonable street connection.”

19 TCDC 18.910.030(L) further provides that “[a] cul-de-sac \* \* \* shall only be  
20 used when environmental or topographical constraints, existing development  
21 patterns, or strict adherence to other standards in this code preclude street  
22 extension and through circulation \* \* \* .” As depicted in the image provided  
23 earlier in this decision, SW Montage Lane terminates at one of the subject  
24 properties. As approved, intervenors’ site development plan extends SW  
25 Montage Lane into a cul-de-sac, rather than providing a connection between SW  
26 Hall Blvd and SW Montage Lane. Petitioners’ first assignment of error is that the

1 city council erred in approving the site design review without requiring a  
2 connector street between SW Hall and SW Montage Lane.

3 **A. First Subassignment of Error**

4 Petitioners first subassignment of error is that the city council's decision,  
5 that a connecting street is precluded (and a cul-de-sac allowed), does not comply  
6 with the law because intervenors could extend SW Montage Lane east and then  
7 north to connect to SW Hall Boulevard.<sup>2</sup> Petition for Review 9. According to  
8 petitioners, "[b]ecause it is entirely feasible to reconfigure the project to allow  
9 the required connectivity, strict adherence to other standards does not *preclude*  
10 the street extension, which in turn bars the creation of the proposed cul-de-sac."  
11 Petition for Review 10 (emphasis added).

12 Limited land use decisions include local government decisions concerning  
13 land within an urban growth boundary that concerns "[t]he approval or denial of  
14 an application based on discretionary standards intended to regulate the physical  
15 characteristics of a use permitted outright, including but not limited to site review  
16 and design review." ORS 197.015(12)(a)(B). We will reverse or remand a limited  
17 land use where the decision does not comply with applicable provisions of the  
18 land use regulation or the local government's decision is not supported by  
19 substantial evidence in the record. ORS 197.828(2)(a), (b). "The existence of

---

<sup>2</sup> Petitioners acknowledge that existing development would make such a street connection difficult. Petition for Review 9.



1 evidence in the record supporting a different decision shall not be grounds for  
2 reversal or remand if there is evidence in the record to support the final decision.”

3 ORS 197.828(2)(a).

4 TCDC 18.910.030(H)(2) provides that “[a] street connection or extension  
5 is considered precluded when it is not possible to redesign or reconfigure the  
6 street pattern to provide required extensions” and “[i]n the case of environmental  
7 or topographical constraints, the mere presence of a constraint is not sufficient  
8 to show that a street connection is not possible. *The applicant must show why the  
9 constraint precludes some reasonable street connection.*” (Emphases added.)

10 Petitioners focus on the last sentence of TCDC 18.910.030(H)(2) and maintain  
11 that “for the cul-de-sac to be allowed, the applicant bears the burden of proving  
12 that ‘strict adherence to other standards in this code preclude street extension and  
13 through circulation’” and that intervenors did not meet this burden. Petition for  
14 Review 9. We understand petitioners to argue that the the city council decision  
15 that a street connection is precluded is not supported by substantial evidence  
16 because the evidence does not show that constraints prevent construction. An  
17 applicant’s burden to establish why a street connection is not *physically possible*  
18 is limited to preclusion caused by environmental or topographical constraints. The  
19 city council did not rely on an environmental or topographical constraint to  
20 determine that the street connection was precluded. Accordingly, the code  
21 provision that intervenors must show why an environmental or topographical  
22 constraint physically precludes a street connection is not relevant to the city

council's decision. The city was not required to determine that an environmental or topographical constraint physically precluded construction of the street connector or that it was not physically possible to construct the street connector.

The first subassignment of error is denied.

**B. Second Subassignment of Error**

TCDC 18.910.020(A) provides:

“Unless otherwise provided, construction, reconstruction or repair of streets, sidewalks, curbs, and other public improvements shall occur in compliance with the standards of this title. No development may occur and no land use application may be approved unless the public facilities related to development comply with the public facility requirement established in this chapter and adequate public facilities are available. *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.*” (Emphasis added.)

As explained further below, TCDC 18.910.020(A) codifies the proportionality test for the constitutionality of development exactions set out in the takings cases *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), and *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). We sometimes refer to TCDC 18.910.020(A) in this opinion as the “rough proportionality standard.”

The city council concluded that intervenors' project did not require a street connection between SW Hall Blvd and SW Montage Lane, and that a SW Montage Lane cul-de-sac was acceptable, because strict adherence to the street connectivity standard was precluded by strict adherence to other code

standards—namely TCDC 18.910.020(A). The city council concluded that the through street connection is not required when

“other standards in [the TCDC] preclude street extension and circulation.’ This is the situation presented here. TCDC 18.910.030(H)(2) says a street connection ‘is considered precluded’ when it is ‘not possible to redesign or reconfigure the street pattern to provide the required extensions.’ *It is not possible for the city to redesign or reconfigure the street pattern to provide a street cutting through the applicant’s site without violating the city code and the United States and Oregon Constitutions.* As noted above, TCDC 18.910.020(A) makes clear that *the city may not require the applicant to dedicate land or construct a cut-through street through the property*, stating: ‘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.*’” Record 69 (first and second emphases added, third emphasis in original).

Petitioners’ second subassignment of error is that the city council decision does not comply with the law because the decision determines that a street connection was precluded due to the absence of rough proportionality between requiring the street connection and *the impacts of intervenors’ project*. Petitioners argue, in part, that it is impossible to determine if there is not rough proportionality because intervenors did not submit evidence of alternative design options. Petition for Review 10. Thus, the issue presented is a mixed challenge, that the decision does not comply with applicable law and that it is not supported by substantial evidence.

The city council found that the rough proportionality standard precluded the street connection. We agree with intervenors that the city council properly

1 applied TCDC 18.910.020(A) and considered intervenors' project as opposed to  
2 an alternative design. Intervenors-Respondents' Brief 24, 28.

3 As explained above, TCDC 18.910.020(A) codifies the proportionality test  
4 for the constitutionality of development exactions. Because those standards  
5 appear to be identical, and the city applied them together, we also analyze them  
6 without distinction in this decision.

7 The Court of Appeals explained in *Hill v. City of Portland*:

8 "Under *Nollan* and *Dolan*, the Fifth and Fourteenth Amendments  
9 permit the government to exact a dedication of private property as a  
10 condition of approval of a land use permit if the government  
11 demonstrates (1) a nexus between a governmental interest that  
12 would furnish a valid ground for the denial of the permit and the  
13 exaction of property, and (2) that the nature and extent of the  
14 exaction are roughly proportional to the effect of the proposed  
15 development. *Brown v. City of Medford*, 251 Or App 42, 47, 283  
16 P3d 367 (2012).

17 "\* \* \* \* \*

18 "As noted, the first element of the *Nollan/Dolan* framework—the  
19 'nexus' element—requires the city to demonstrate '(1) what  
20 interests would allow the city to deny plaintiff's partition, and (2)  
21 how the exaction would serve those interests.' *Brown*, 251 Or App  
22 at 56, 283 P3d 367. In this context, as we understand *Nollan*, a  
23 governmental interest is one that would permit the denial of a permit  
24 when it is a legitimate one—such as managing traffic congestion—  
25 and the project's impacts standing alone, or in combination with the  
26 impacts of other construction, 'would substantially impede' that  
27 legitimate interest. *Nollan*, 483 US at 835-36, 107 S Ct 3141  
28 (assuming without deciding that the government had identified  
29 legitimate governmental interests that would allow it 'to deny the  
30 Nollans their permit outright if their new house (alone, or by reason  
31 of the cumulative impact produced in conjunction with other

1 construction) would substantially impede these purposes’). That  
2 means, necessarily, that, to determine whether a government has  
3 established an interest that would permit the denial of a permit, the  
4 government must demonstrate how the *proposed project’s impacts*,  
5 either alone or in combination with other construction, are ones that  
6 ‘substantially impede’ the interest identified by the government.  
7 Said another way, the city cannot evade *Nollan*’s requirement that it  
8 *demonstrate that the impacts of a particular proposal* ‘substantially  
9 impede’ a legitimate governmental interest so as to permit the denial  
10 of a permit outright, simply by defining approval criteria that do not  
11 take into account a proposal’s impacts. *See Koontz [v. St. Johns*  
12 *River Water Mgmt. Dist., 570 US 595, 606-07, 133 S Ct 2586, 186*  
13 *L Ed 2d 697 (2013)]* (rejecting notion that a government can evade  
14 the requirements of *Nollan* and *Dolan* through artful phrasing).

15 “Here, in determining that the city had demonstrated interests that  
16 would permit it to deny petitioner’s permit, the hearings officer did  
17 not examine *how the impacts of petitioner’s proposal* substantially  
18 impede the governmental interest or interests embodied in the city’s  
19 right-of-way design standards. Instead, the hearings officer  
20 determined that the city had made the showing required by *Nollan*  
21 simply by demonstrating that its approval criteria allow it to deny a  
22 permit on the ground that an existing right-of-way does not meet  
23 design standards, without any consideration of whether and *how*  
24 *petitioner’s proposal* will impede the particular governmental  
25 interest or interests advanced by those design standards. But, as  
26 explained, that assessment is required under *Nollan* in order to  
27 determine whether a government has demonstrated a valid basis for  
28 denying *a requested permit* for purposes of determining whether an  
29 exaction of property is constitutional.” 293 Or App 283, 284-291,  
30 428 P3d 986 (2018) (emphases added).

31 As explained in *Hill*, the constitutional rough proportionality analysis requires  
32 consideration of “the project’s impacts,” that is, “petitioner’s proposal” and  
33 whether there is a valid basis for denying “a requested permit,” considerations  
34 which relate to the project proposed by an applicant. *Id.*

1       We agree with intervenors that the rough proportionality standard is  
2 properly applied to intervenors' project. The city council found that:

3       "Here the requirement of rough proportionality foreclose the city  
4 from requiring the full street improvement that the code  
5 contemplates. TCDC 18.910.020(A). Therefore, a cul-de-sac is  
6 required in its place. As required by City Code, all cul-de-sacs must  
7 terminate with a turnaround. [Intervenors] have provided the  
8 required cul-de-sac for the public terminus of SW Montage Lane  
9 with the required minimum widths for street characteristics in  
10 accordance with [TCDC] 18.190.1." Record 67.

11   The city council concluded:

12       "As discussed above in the findings for TCDC 18.910.030[(A)], the  
13 City Council finds and acknowledges that a full, public street  
14 extension would not be roughly proportional to the development's  
15 impacts. Where a full street connection is precluded as it is here, the  
16 TCDC 18.910.030[(L)] requires a cul-de-sac." Record 73.

17   In evaluating whether the street connection requirement met the rough  
18 proportionality standard, the city council is required to consider intervenors'  
19 project as proposed. The city council's decision that a full street connection is  
20 precluded because it is not roughly proportional to intervenors' development's  
21 impacts did not fail to comply with the law by not considering alternative designs.

22       The second subassignment of error is denied.

23       **C.   Third Subassignment of Error**

24       Petitioners' third subassignment of error is that the city council's decision  
25 does not comply with the law because the rough proportionality standard does

1 not *preclude* the through street connection, where the city may designate the  
2 street “private.”

3 As intervenors point out, the city council found that designating the street  
4 private would not change the requirement of proportionality where the city  
5 requires that the public be allowed to use the street. Record 69. Intervenors argue  
6 that Petitioners’ arguments do not provide a basis for reversal or remand because  
7 they fail to address responsive findings adopted by the city council that  
8 specifically responded to petitioners’ arguments made below and concluded that  
9 designating the street “private” as opposed to “public” would not resolve the  
10 rough proportionality standard because the public could still use the street.

11 In *Southwest Hills Residential League v. City of Portland* we explained:

12 “[T]he city council’s actual basis for its decision to approve the  
13 application in spite of its conclusion that S.W. Broadway remained  
14 unsafe for pedestrian and bike travel after the development, and thus  
15 in spite of PCC 33.800.050(A)’s requirement that applications that  
16 fail to meet all applicable approval criteria ‘will be denied,’ was its  
17 conclusion that it could not, consistent with the Fifth Amendment,  
18 deny the applications. Petitioners’ oblique reference to that  
19 conclusion and to *Dolan* does not develop any meaningful argument  
20 that challenges it. We will not develop a petitioner’s argument for  
21 it. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA  
22 218, 220 (1982). Absent a challenge to the city’s primary conclusion  
23 that it could not, consistent with the Fifth Amendment, deny the  
24 applications, petitioners’ arguments in their assignment of error  
25 provide no basis for reversal or remand. *Waste Not of Yamhill*  
26 *County v. Yamhill County*, 65 Or LUBA 142, 148-49 (2012) (citing  
27 *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA  
28 139, 170-71 (1998), *aff’d*, 158 Or App 1, 970 P2d 685[, *rev den*, 328  
29 Or 594, 987 P2d 541] (1999)). Petitioners’ assignment of error is

1 denied.” \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2020-017, Dec 8, 2020)  
2 (slip op at 12).

3 Similarly, in *Wal-Mart Stores, Inc. v. City of Gresham* we concluded

4 “We agree with Wal-Mart that in this circumstance the  
5 neighborhoods must do more than cite to the evidence the hearings  
6 officer found to be unreliable; the neighborhoods must challenge  
7 that finding and explain why the hearings officer erred in concluding  
8 that the cited evidence is unreliable. Absent a challenge to that  
9 effect, the cited evidence does little to assist the neighborhoods in  
10 challenging the hearings officer’s ultimate evidentiary choice with  
11 respect to the calibration issue.” 54 Or LUBA 16, 37-38 (2003).

12 Similarly, petitioners must do more than repeat their argument that  
13 designating the street private resolves the rough proportionality issue. Petitioners  
14 were required to address the city council’s findings that designating the street  
15 “private” as opposed to “public” would not resolve the rough proportionality  
16 issue. The city council found:

17 “Some commentators argued that the City \* \* \* should simply require  
18 a public street connection, but call it a ‘private street’ to avoid  
19 constitutional requirements that apply to exactions of private  
20 property for public use. However, these commentators ask the city  
21 to do what it may not. If the city imposes a requirement for the  
22 construction of a street that the public can use to cut through from  
23 Montage Lane to Hall Boulevard, that is an exaction subject to the  
24 constitutional rules of *Dolan v. City of Tigard*,[ 512 US 374].”  
25 Record 69.

26 Petitioners do not address the city council’s finding and do not provide a basis  
27 for reversal or remand.

28 In *Dudek v. Umatilla County*, 187 Or App 504, 69 P3d 751 (2003) the court  
29 concluded that the county’s decision was based on *Dolan*. Similar to petitioners’



1 argument, Dudek argued that a rough proportionality showing was not required  
2 because the relevant code section did not require dedication of property, but  
3 rather acquisition of an access easement for use by the public. The court  
4 concluded that the fact that the easement would remain in private ownership was  
5 not determinative, holding:

6 “The purpose of the exaction is to provide access to the parcels  
7 served by the easement. The ordinance does not address a strictly  
8 private easement, and only an easement permitting public use is  
9 recognized under the ordinance. While the easement technically  
10 may not be held by the county, it serves the county’s property access  
11 and travel purposes. As such, the fact that a required ‘public’  
12 easement remains in private hands does not insulate the county’s  
13 requirement for the easements from the Takings Clause of the Fifth  
14 Amendment to the United States Constitution or Article I, section  
15 18, of the Oregon Constitution. *See Barkley et ux. v. Gibbs*, 180 Or  
16 647, 650-56, 178 P2d 918 (1947) (discussing exercise of eminent  
17 domain and public and private easements under Article I, section 18,  
18 of the Oregon Constitution); *Towns v. Klamath County*, 33 Or 225,  
19 232-33, 53 P 604 (1898) (same); *Chapman v. Perron*, 69 Or App  
20 445, 447-49, 685 P2d 492 (1984) (same).” *Id.* at 514.

21 Petitioners do not address the city council’s finding that they “ask the city  
22 to do what it may not.” Record 69. Petitioners do not provide a basis for reversal  
23 or remand.

24 The third subassignment of error is denied.

25 **D. Fourth Subassignment of Error**

26 Petitioners’ fourth subassignment of error is that the city council decision  
27 does not comply with the law because the street connection must be required even  
28 if not roughly proportional to the development’s impacts. Petitioners maintain

1 that the city was required to apply the street connectivity standard even if the city  
2 could not require intervenors to dedicate land for the street connection without  
3 compensating intervenors for the exaction. Instead, petitioners argue, the city  
4 must pay just compensation for the street connection.<sup>3</sup>

5 Intervenor respond, and we agree that a local government can decide to  
6 not apply a standard that offends the rough proportionality standard. In *Columbia*  
7 *Riverkeeper v. Clatsop County*, we explained that where a local code provision  
8 appeared to limit the county’s ability to require a development applicant to  
9 improve public facilities to comply with county road standards, the county could  
10 apply the provision to determine whether a variance to the road standards was  
11 warranted. 58 Or LUBA 235, 242 (2009). We also assumed that the provision  
12 allowed the county to reduce the level of road improvements otherwise required,  
13 rather than granting a variance under the standard. *Id.* at 243. Here, we conclude  
14 that the TCDC allows the city to reduce the level of road improvements otherwise  
15 required.

16 As the court explained in *Koontz*, *Nollan* and *Dolan* involve an application  
17 of the unconstitutional conditions doctrine “that protects the Fifth Amendment  
18 right to just compensation for property the government takes when owners apply  
19 for land use permits.” 570 US at 604. “Under *Nollan* and *Dolan*, the government

---

<sup>3</sup> Petitioners maintain that “if the requirement for public dedication is not roughly proportional to the impact of the development, the local government would be required to pay the landowner just compensation for the required public dedication.” Petition for Review 12.

1 may choose *whether* and how a permit application is required to mitigate the  
2 impacts of a proposed development[.]” *Id.* at 606 (emphasis added). The city  
3 council may choose whether the application is required to mitigate impacts and  
4 may choose not to apply a standard when doing so is not roughly proportional to  
5 the impacts of a development. The city council may choose not to require the  
6 dedication, it may choose not to purchase or acquire the property, and it may  
7 choose not to apply the regulation.

8 The fourth subassignment of error is denied.

9 **E. Fifth Subassignment of Error**

10 Petitioners’ fifth subassignment of error is that the city council’s decision  
11 that requiring a dedication of property for a street connection would not be  
12 proportional to the impact of the development on the street system is not  
13 supported by substantial evidence. Petitioners contend that “[intervenors] failed  
14 to offer any real evidence such as alternative design options, cost estimates, or  
15 other information demonstrating the costs of coming into compliance with the  
16 street connectivity requirements. Without this basic information, it is impossible  
17 to determine whether the required dedication is ‘roughly proportional’ to the  
18 impacts of the development.” Petition for Review 10.

19 We agree with intervenors that there is substantial evidence in the record  
20 to support the city council’s decision that requiring the dedication of the street  
21 connection would violate the rough proportionality requirement. Intervenors’  
22 testimony includes:

1 “The traffic impacts that flow from the proposal are minimal, as one  
2 might expect from a residential use where most of the residents are  
3 unable to drive. [Intervenors’] TIA shows that the weekday AM  
4 peak hour will produce only 37 vehicle trips and the PM peak hour  
5 51. Approximately 95% of the site trips will utilize SW Hall Blvd  
6 by driveway, with the remaining 5% using a driveway to SW  
7 Montage Lane. See, Kittelson & Associates, TIA, January 4, 2021,  
8 p. 14. And while the TIA shows that mitigation measures will be  
9 necessary to satisfy ODOT access standards from SW Hall Blvd.,  
10 the posited through-street is neither intended to nor will address the  
11 ODOT site access issue. Kittelson & Associates, TIA, January 4,  
12 2021, p. 20-28. \* \* \*

13 “Here, as the diagram above shows, *the costs to the project from a*  
14 *city demand for a cut through-street are devastating and end the*  
15 *project. Not only would there be the cost to pay for a fully developed*  
16 *road that is not necessary for and would provide no benefit to the*  
17 *proposed use and for which the proposal would provide minimal*  
18 *traffic volume on, the impact is that the use itself cannot be*  
19 *established.” Supp Record 11 (emphasis added).*

20 This is evidence upon which a reasonable person would rely, that is, substantial  
21 evidence. *Rouse v. Tillamook County*, 34 Or LUBA 530, 534 (1998). Petitioners’  
22 assignment of error fails to acknowledge the evidence described above.  
23 Intervenors’ evidence is that their use will generate very few trips and therefore  
24 cannot justify the cost of building a fully improved road. The sketch in the record  
25 shows a street connection would bisect the property and take a substantial amount  
26 of property out of residential use. Supp Record 6-7

27 The fifth subassignment of error is denied.

1           **E.     Sixth Subassignment of Error**

2           Lastly, petitioners' sixth subassignment of error is that ORS 197.307(4)  
3   bars the city council's reliance on TCDC 18.910.020(A) because the phrase  
4   "rough proportionality" is not clear and objective. As noted above, we assume  
5   TCDC 18.910.020(A) codifies the proportionality test for the constitutionality of  
6   development exactions, and because the standard and the test appear to be  
7   identical, and the city applied them together, we also analyze them without  
8   distinction in this decision.

9           ORS 197.307(4) provides:

10          "Except as provided in subsection (6) of this section, a local  
11          government may adopt and apply only clear and objective standards,  
12          conditions and procedures regulating the development of housing,  
13          including needed housing. The standards, conditions and  
14          procedures:

15          "(a) May include, but are not limited to, one or more provisions  
16          regulating the density or height of a development.

17          "(b) May not have the effect, either in themselves or cumulatively,  
18          of discouraging needed housing through unreasonable cost or  
19          delay."

20   Petitioners argue that TCDC 18.910.020(A) is not clear and objective and  
21   therefore may not be applied to intervenors' application for housing, to avoid the  
22   requirement to provide a street connection. As noted, TCDC 18.910.020(A)  
23   allows the city to modify or waive otherwise required public facility  
24   improvements if requiring the improvements would violate the Fifth  
25   Amendment.

1 The city council found:

2 “Some commentators argued that the City must ignore the Supreme  
3 Court’s *Dolan* holding because it is not ‘clear and objective’ \* \* \*.  
4 However, these commentators ask the city to do what it may not. If  
5 the city imposes a requirement for the construction of a street that  
6 the public can use to cut through from Montage Lane to Hall  
7 Boulevard, that is an exaction subject to the constitutional rules of  
8 *Dolan v. City of Tigard*[, 512 US 374].” Record 69.

9 The city council concluded that to require a street connection would be  
10 inconsistent with the Oregon Constitution and the United States Constitution. The  
11 Supremacy Clause of Article Six of the United States Constitution states that  
12 federal law always takes precedence over conflicting state law. We agree with  
13 intervenors that when a local government concludes that the application of the  
14 street connection standard may result in a constitutional violation, then the local  
15 government can (and must) act constitutionally, whether by applying the rough  
16 proportionality standard or by directly applying *Dolan*, because of the Supremacy  
17 Clause of Article Six of the United States Constitution. Accordingly, we reject  
18 petitioners’ argument that ORS 197.307(4) prohibits the city from applying  
19 TCDC 18.910.020(A).

20 The sixth subassignment of error is denied.

21 The first assignment of error is denied.

22 The city’s decision is affirmed.