

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

3
4 SOUTHWEST MEDFORD LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF MEDFORD,
10 *Respondent.*

11
12 LUBA No. 2014-006

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Medford.

18
19 Alan D. B. Harper, Ashland, filed the petition for review and argued on
20 behalf of petitioner.

21
22 Lori J. Cooper, Deputy City Attorney, Medford, filed the response brief
23 and argued on behalf of respondent.

24
25 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
26 Member, participated in the decision.

27
28 AFFIRMED 05/19/2014

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city decision that grants in part and denies in part its request to revise a previously approved planned unit development (PUD) residential subdivision.

FACTS

In 2006, the city approved petitioner’s predecessor’s application for a zoning map amendment and a 71-lot, four phase PUD subdivision named Spring Meadows Subdivision (Spring Meadows). Lucky Lane, an existing substandard road, connects Phase 4 of Spring Meadows with Griffin Creek Road to the west of the subdivision. In response to neighborhood concerns about the condition of Lucky Lane, petitioner’s predecessor agreed to improve approximately 600 feet of Lucky Lane from the western boundary of Phase 4 of Spring Meadows to Griffin Creek Road. Record 307. The city’s 2006 decision granting PUD, zone change and land division approval included condition 3, which provided as follows:

“3. Prior to the recordation of Phase 4, the applicant shall design and construct to City standards a 22-foot wide structural section of Lucky Lane from the westerly property boundary to Griffin Creek Road.” Record 290.

Although final plats for Phases 2 and 3 have been recorded, the 2006 tentative plat approvals for Phases 1 and 4 expired in 2011, and a new tentative plat for Phases 1 and 4 was approved in 2011. That 2011 decision retained the 2006 condition requiring improvement of Lucky Lane. Record 119.

1 In 2013, petitioner sought approval for a revision of Phases 4 and 5.¹ As
2 relevant in this appeal, petitioner sought to install a barrier across Lucky Lane
3 to prevent traffic to and from Spring Meadows from Griffin Creek Road and to
4 have the condition requiring improvement of Lucky Lane to Griffin Creek
5 Road removed. The planning commission denied the request.² Petitioner
6 appealed the planning commission’s decision to the city council. The city
7 council affirmed the planning commission’s decision. This appeal followed.

8 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

9 In its first and second assignments of error, petitioner contends that
10 while petitioner’s predecessor agreed to improve Lucky Lane between Spring
11 Meadows Phases 4 and 5 and Griffin Creek Road, that agreed-to improvement
12 was not required for the proposal to comply with any relevant approval
13 criterion. Record 82. Petitioner contends that his request to revise Spring
14 Meadows PUD is governed by Medford Land Development Code (MLDC)
15 10.245, and no criteria in MLDC 10.245 allow the city to insist that a voluntary
16 road improvement that is unrelated to the criteria governing PUD revisions
17 must be constructed. We understand petitioner to argue that the city
18 “[i]mproperly construed the applicable law * * *” in denying its request, and
19 that the findings that the city adopted are inadequate to explain its reasons for
20 denying the request. ORS 197.835(9)(a)(D); *Sunnyside Neighborhood v.*
21 *Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977) (adequate
22 findings supporting a quasi-judicial decision must identify the relevant

¹ At some point, Phase 4 was divided into Phase 4 and Phase 5.

² Other aspects of petitioner’s request were approved and are not at issue in this appeal.

1 approval standards, set out the facts which are believed and relied upon, and
2 explain how those facts lead to the conclusion of compliance with the approval
3 standards).

4 In its brief, the city repeats the position taken in parts of the planning
5 commission's and city council's decision that it would be unfair to allow
6 petitioner to escape responsibility for its promise to improve Lucky Lane, since
7 Spring Meadows is largely developed. Respondent's Brief 3-8; Record 6, 34.
8 The city contends that petitioner should be "estopped" from seeking to escape
9 responsibility for the Lucky Lane improvements. Respondent's Brief 4.

10 We agree with petitioner that because the city has a procedure that
11 expressly authorizes applicants to seek revisions in previously approved PUDs
12 and sets criteria that govern its decision on revision requests, the city's decision
13 on the requested PUD revision must be based on those criteria. Fairness is not
14 a consideration under the city's criteria that govern PUD revisions, and
15 petitioner is not estopped from seeking approval of a revision to the previously
16 approved PUD to remove the condition that requires improvement of Lucky
17 Lane. Moreover, we agree with petitioner that it is entitled to removal of the
18 condition, if the revised Spring Meadows PUD—without the Lucky Lane
19 improvement condition—complies with all relevant approval criteria.

20 The dispositive MLDC approval criteria are set out at MLDC
21 10.245(A)(3), 10.235(D)(7) and 10.270(4). MLDC 10.245 governs PUD
22 revisions. The criteria governing such revisions are set out at MLDC
23 10.245(A)(3), which provides:

24 "Burden of Proof; Criteria for Revisions: The burden of proof and
25 supporting findings of fact and conclusions of law for the criteria
26 in Subsections 10.235(D) or 10.240(G), as applicable, shall be
27 strictly limited to the specific nature and magnitude of the

1 proposed revision. However, it is further provided that the design
2 and development aspects of the whole PUD may be relied upon in
3 reaching findings of fact and conclusions of law for the criterion at
4 Subsection 10.235(D)(5). It is further provided that before the
5 Planning Commission can approve a PUD Plan revision, it must
6 determine that the proposed revision is compatible with existing
7 developed portions of the whole PUD.”

8 MLDC 10.235(D) sets out the approval criteria for preliminary PUD plan
9 approval and MLDC 10.240(G) sets out the approval criteria for final PUD
10 plan approval. MLDC 10.235(D)(7) provides, in part, as follows:

11 “If approval of the PUD application includes the division of land
12 or the approval of other concurrent development permits
13 applications * * *, approval of the PUD shall also be subject to
14 compliance with the substantive approval criteria in Article II for
15 each of the additional development applications.

16 As we noted earlier, the 2006 application included a request for land division
17 approval. Among the standards that govern land division approval is MLDC
18 10.270(4). MLDC 10.270(4) requires as follows:

19 “If [a proposed land division] includes the creation of streets or
20 alleys, that such streets or alleys are laid out to be consistent with
21 existing and planned streets and alleys and with the plats of land
22 divisions already approved for adjoining property unless the
23 approving authority determines it is in the public interest to
24 modify the street pattern[.]”

25 To summarize, MLDC 10.245(A)(3) requires that a request to revise a
26 preliminary PUD plan must demonstrate that the PUD plan, with the proposed
27 revision, complies with the MLDC 10.235(D) standards that govern initial
28 PUD plan approval. One of those MLDC 10.235(D) standards, MLDC
29 10.235(D)(7), requires that PUD plans that are combined with land division
30 applications must comply with the MLDC Article II standards that govern land
31 divisions. One of those MLDC Article II standards is MLDC 10.270(4), which

1 requires that where a land division will create new streets, those streets will “be
2 laid out to be consistent with existing and planned streets.”

3 In denying petitioner’s request to remove the condition requiring
4 improvement of Lucky Lane, the planning commission adopted the following
5 findings:

6 “The applicant is requesting to stub Lucky Lane at the project
7 boundary and install a barrier in order to prevent traffic onto the
8 unimproved portion of Lucky Lane. The Public Works Report is
9 not in support of the eliminated connectivity. In addition, the
10 Planning Commission can find *the application does not meet the*
11 *Land Division Criteria listed in Medford Land Development Code*
12 *Section 10.270(4) without the connection to the existing street.”*
13 Record 34 (emphasis added).

14 The city council adopted the planning commission’s findings:

15 “The Planning Commission found that the applicant’s request to
16 stub Lucky Lane at the project boundary and install a barrier in
17 order to prevent traffic onto the unimproved portion of Lucky
18 Lane would not provide the necessary connection for street
19 circulation. In addition, the Planning Commission found *the*
20 *application did not meet the Land Division Criteria listed in*
21 *Medford Land Development Code Section 10.270(4) without the*
22 *connection to the existing street.”* Record 5 (emphasis added).

23 Although both the planning commission and city council findings cite
24 MLDC 10.270(4) as a basis for denial of the requested revision, petitioner
25 argues:

26 “The City failed to adopt Findings that the condition requiring the
27 off-site improvement of Lucky Lane is necessary to meet any of
28 the approval standards.” Petition for Review 7.

29 “The City’s conclusion that, ‘...it would be unfair and disruptive
30 to allow a subsequent purchaser of a development to challenge a
31 stipulation or condition...’ misses the critical element that this is a
32 new application, with a new scope of impacts to be considered.

1 * * * The approval standards specifically require the analysis of all
2 the preliminary PUD standards of MLDC 10.235(D), as it relates
3 to the nature and magnitude of the revisions proposed. MLDC
4 [1]0.235(A)(3) * * *. The city failed to demonstrate that the
5 condition is related to any approval standards.” Petition for
6 Review 11.

7 Because the challenged decision denies petitioner’s request to revise its
8 prior PUD approval, the challenged decision need only be supported by a
9 single sustainable basis for denial. *McCoy v. Marion County*, 16 Or LUBA
10 284, 286 (1987); *Weyerhauser v. Lane County*, 7 Or LUBA 42, 46 (1982).
11 Petitioner’s petition for review takes the city to task for some of its reasoning
12 that may very well be faulty and inadequate as a basis for denial. Petitioner
13 also cites places in the record where the city suggests that it could not have
14 unilaterally imposed the Lucky Lane improvement condition on petitioner’s
15 predecessor in 2006, although the reasoning supporting that suggestion is not
16 clear to us. In any event, the above findings clearly take the position that
17 revising the Spring Meadows PUD plan to omit the Lucky Lane improvement
18 condition would cause Spring Meadows PUD to violate MLDC 10.270(4).
19 Petitioner neither acknowledges nor assigns error to those findings. Because
20 the city’s decision to deny the requested PUD revision is supported by one
21 unchallenged basis for denial under MLDC 10.245(A)(3), 10.235(D)(7), and
22 10.270(4), petitioner’s first and second assignments of error—which only
23 challenge other bases for denial—provide no basis for reversal or remand. *Tri-*
24 *River Investment Co. v. Clatsop County*, 37 Or LUBA 195, 210 (1999); *Port*
25 *Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 75-76, *aff’d* 161 Or App
26 199, 984 P2d 958 (1999); *Garre v. Clackamas County*, 18 Or LUBA 877, 881,
27 *aff’d* 102 Or App 123, 792 P2d 117 (1990).

28 The first and second assignments of error are denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 The city council’s findings include the following:

3 “[T]he previous owner of the development stipulated to improving
4 the existing portion of Lucky Lane as part of the 2006 application
5 for a zone change, PUD, and land division. * * *” Record 6.

6 Petitioner assigns error to the above findings. Petitioner contends that
7 2006 application was actually three consolidated applications (PUD, land
8 division, rezoning) and that the Lucky Lane condition was only a condition of
9 the land division approval.

10 We are not sure what to make of that argument.³ Petitioner concedes the
11 Lucky Lane condition was a condition of the 2006 land division approval. As
12 we have already explained in our discussion of the first two assignments of
13 error, the applicable criteria for PUD plan revision require that PUD plan
14 approvals that are combined with land division approval must comply with the
15 land division approval criteria, and revisions of PUD plans must maintain
16 compliance with land division approval criteria. In fact, we have concluded
17 under the first and second assignments of error that in an unchallenged finding
18 the city found that the revised PUD, which included approval of a land
19 division, would violate one of the applicable land division criteria if the Lucky
20 Lane improvement condition is removed and a barrier is installed to block
21 Spring Meadows traffic from using Lucky Lane. The city appears to be
22 incorrect, if it meant to suggest that the Lucky Lane condition was also a
23 condition of the 2006 rezoning and PUD approvals (rather than solely a

³ The argument could be a substantial evidence argument, or perhaps an improper construction of applicable law argument. ORS 197.835(9)(a)(C) or (D).

1 condition of land division approval).⁴ However, given that it is undisputed that
2 the Lucky Lane condition was a condition of land division approval, the
3 suggestion that petitioner sees in the finding would be, at most, harmless error.

4 Petitioner next argues the 2006 tentative land division approvals expired,
5 and suggests that the Lucky Lane improvement condition expired with the
6 2006 tentative land division approval decisions. However, the unchallenged
7 2011 decision that extended tentative land division approval for Phases 4 and 5
8 carried the Lucky Lane improvement condition forward.

9 The third assignment of error is denied.

10 **FOURTH ASSIGNMENT OF ERROR**

11 Citing *Koontz v. St. Johns River Water Management District*, ___ US
12 ___, 133 S Ct 2586, 186 L Ed 2d 697 (2013), petitioner contends the condition
13 of land division approval that petitioner must construct off-site improvements
14 is subject to the rough proportionality analysis required by *Dolan v. City of*
15 *Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). Petitioner
16 contends the city erred in failing to conduct the required rough proportionality
17 analysis for the Lucky Lane condition of development approval in considering
18 its request for revisions to Spring Meadows. We understand petitioner to argue
19 that the city “[m]ade an unconstitutional decision[.]” in denying its request to
20 remove the condition requiring petitioner’s predecessor to construct off-site
21 improvements, without conducting the rough proportionality analysis that is
22 required under *Dolan* and the Fifth Amendment to the United States
23 Constitution. ORS 197.835(9)(a)(E).

⁴ It may also be that petitioner misreads the finding, and that the quoted finding simply reflects that a single order approved the PUD, rezoning and land division. Record 270.

1 In *West Linn Corporate Park v. City of West Linn*, 349 Or 58, 240 P3d
2 29 (2010), the Oregon Supreme Court found that a property owner does not
3 allege a valid claim for just compensation under the Fifth Amendment to the
4 U.S. Constitution or Article I, section 18 of the Oregon Constitution by
5 alleging that a permit condition of approval requires off-site improvements that
6 are not roughly proportional. 349 Or 86 and 94. However, in *Koontz*, a water
7 management district attempted to require a permit applicant to “make
8 improvements to District-owned land several miles away” as a permit condition
9 of approval. 133 S Ct at 2593, 186 L Ed 2d at 706. The U.S. Supreme Court
10 characterized that requirement as a demand for “money” and held that such a
11 requirement is subject to the *Dolan* rough proportionality test under the Fifth
12 Amendment. 133 S Ct at 2603, 186 L Ed 2d at 717. Neither party in this
13 appeal discusses either *West Linn Corporate Park* or *Koontz*. Therefore, for
14 purposes of this opinion, we assume without deciding that the Lucky Lane
15 condition requires a *Dolan* rough proportionality analysis under the Supreme
16 Court’s holding in *Koontz*.

17 Petitioner contends “[t]he Planning Commission decision did not address
18 this point in any significant way.” Petition for Review 15. Petitioner is
19 correct. But the *city council* did address the issue:

20 “As part of the 2011 land division approval * * * the Public Works
21 Department did submit a Dolan analysis into the record * * *.
22 This analysis was also contained in the Public Works staff report
23 for the applications for the 2013 revision at issue in this appeal
24 * * *. The analysis found that there was a rough proportionality
25 between the exactions and the impacts caused by the development.

26 “The applicant argued that the 2013 PUD and land division
27 revisions caused new impacts which were not analyzed in the 2006
28 and 2011 land use approvals. The City Council finds that the

1 revisions did not substantially change the impacts which were
2 raised at the 2006 and 2011 land use hearings, therefore the Dolan
3 analysis that was done as part of the 2011 land use approvals and
4 carried forward in the analysis for the 2013 revisions was
5 sufficient.” Record 5-6.

6 Petitioner first suggests the 2011 Public Works *Dolan* analysis is
7 inadequate. Petitioner supports that suggestion with two arguments. First,
8 petitioner points out that the 2013 staff report that sets out the 2011 analysis
9 states that the 2011 analysis was to be further modified, but it never was.
10 Record 84. Second, petitioner contends “the City failed to actually evaluate the
11 nature and magnitude of the Revised PUD scope of impacts as required by
12 Code and required for such a takings under the US Constitution.” Petition for
13 Review 16.

14 Petitioner’s point that the anticipated further modification of the *Dolan*
15 analysis was never forthcoming does not mean the 2011 analysis is inadequate
16 without the anticipated modification. Petitioner’s second point is simply a
17 general criticism of a lack of specificity in the analysis. The city’s *Dolan*
18 analysis is three single-spaced pages long. Record 83-85. That analysis begins
19 with a discussion of the constitutional limits on exactions, pointing out first
20 that a nexus to a legitimate government purpose is required. The analysis then
21 acknowledges there must be rough proportionality between required
22 dedications and street improvement and explains why the required roadway
23 dedications and street improvements are roughly proportional to the “impacts
24 reasonably anticipated to be imposed by this development.” Record 84. Given
25 the level of detail provided in the Public Works analysis, petitioner’s general
26 and undeveloped criticism of that analysis is insufficient to provide a basis for

1 remand.⁵ *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220
2 (1982).

⁵ The Public Works rough proportionality analysis is set out below:

“2. Rough proportionality between the dedications and improvements, and the impacts of development.”

“No mathematical formula is required to support the rough proportionality analysis. Further, benefits to the development from the dedication and improvements when determining ‘rough proportionality’, have been considered, including but not limited to: increased property values, intensification of use, and connections to municipal services and the transportation network.

“As set forth below, the dedications and improvements recommended herein can be found to be roughly proportional to the impacts reasonably anticipated to be imposed by this development.

“The analysis below is from the Public Works Report for the Spring Meadows revision under LDS 11-090. It is planned to be modified for this report and will be forth coming.

“Public Residential Streets: The right-of-way dedication and street improvements for the streets within this proposed subdivision will provide access for the new lots that are being created and connections to existing streets, which are stubbed to the boundary of this subdivision. These connections will also help reduce emergency vehicle response times to those lots when required. Spring Meadows, Phases 1 through 5 will create 63 Lots. The ITE Trip Generation manual applies a generalized trip generation rate of 9.57 trips per SFR. The 63 new lots will generate 603 average daily trips. The average square footage of street dedication per trip generated is **281.2 square feet per trip**. A similar development to the north, Elk Creek Estates, Phases 1, 2 & 3, is also in SFR-6 zoning, contains wetlands, and was also required to dedicate and construct a higher order street. This 94 Lot development is anticipated to generate 600 average daily trips.

The area of dedication per trip generated for this development is **264.3 square feet per trip**. Therefore the dedication being requested for this development is roughly proportional to its impacts as compared to previous, similar development.

“The improvements being conditioned were also considered, especially in light of the existing stipulation from the Planning Commission Hearing to construct the offsite portion of Lucky Lane. The onsite, square foot, area of street improvements being conditioned in Spring Meadows is 68,327 square feet, which equates to **159 square feet of improvements per trip**. This is roughly proportional with the developer funded improvements required in Elk Creek Estates, which were 132,118 square feet, which equates to **147 square feet of improvements per trip**. If the offsite portion of Lucky Lane is added to Spring Meadows, the ratio of improvements to trips increases to **191 square feet of improvements per trip**.

- “a. Right-of-way dedication and street improvements will ensure that new development and density intensification provides the current level of urban services for all modes of travels. Each Lot in this development will have frontage and access to a public street with sufficient space for vehicle travel, parking, bicycles, and sidewalks for pedestrians.
- “b. Dedication will provide access and transportation connections at urban level of service standards for this development. The connection of the public residential streets will enhance the connectivity in this neighborhood, which will encourage other modes of travel including walking and cycling. When miles traveled are reduced to reach destinations, walking and cycling are then encouraged.
- “c. The circulation and connectivity proposed will decrease emergency response times by reducing the miles traveled as indicated above.

“ * * * * *

1 Petitioner’s final argument is that the city council’s finding that the 2011
2 *Dolan* analysis is adequate to address the *Dolan* rough proportionality
3 requirement and that the revisions to Spring Meadows that were subsequently
4 proposed by petitioner in 2013 do not affect the 2011 analysis exceeds the city
5 council’s scope of review under MLDC 10.053. That is so, according to
6 petitioner, because “[t]he City Council’s scope of review during an appeal
7 states that it is expressly prohibited from re-examining issues of fact.” Petition
8 for Review 17.⁶ We understand petitioner to allege that the city council either
9 exceeded its jurisdiction or failed to follow applicable procedures in a manner
10 that prejudiced petitioner’s substantial rights. ORS 197.835(9)(a)(A) or (B).

11 The city’s brief does not respond to petitioner’s MLDC 10.053 scope of
12 review argument. However, petitioner identifies no facts found by the planning
13 commission that were reexamined by the city council. As far as we can tell, the

“e. The additional traffic of all modes of travel generated by this proposed development supports the dedication and improvements for all modes of travel and utilities. As indication above the area required to be dedicated for this development is necessary and roughly proportional to that required in previous adjacent developments to provide a transportation system that meets the needs for urban levels of service.” Record 84-85 (underlining and bold type in original).

⁶ MLDC 10.053 provides in part:

“Upon review, the City Council shall not re-examine issues of fact and shall limit its review to determining whether there is substantial evidence to support the findings of the tribunal which heard the matter, or to determining if errors in law were committed by such tribunal. * * * Review shall be based on the record of the initial proceedings. * * *”

1 city council limited its review to the evidentiary record compiled by the
2 planning commission and its findings concerning the Public Works *Dolan*
3 analysis were adopted under the city council's authority to determine whether
4 the planning commission committed "errors in law." Petitioner has not
5 demonstrated that the city council exceeded its scope of review under MLDC
6 10.053.

7 The fourth assignment of error is denied.

8 The city's decision is affirmed.