

**2004 CONTINUING LEGAL EDUCATION PROGRAM  
OREGON CITY ATTORNEYS ASSOCIATION**

**NOVEMBER 5, 2004**

**River Place Hotel, Portland, Oregon**

**3:00 PM – 4:00 PM SECOND BREAKOUT SESSION:**

**DOLAN FINDINGS REVISITED**

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**I. BACKGROUND.**

A QUICK REVIEW OF THE 7-YEAR PRE- CITY OF SPRINGFIELD/ MCCLURE DOLAN FINDINGS STRUGGLE FROM 1994 TO 2001 (CASES WITH NO FINDINGS, BAD FINDINGS, DIFFERENT FINDINGS) PRACTICAL/ACADEMIC ATTEMPTS TO ADDRESS THE NEED FOR A STANDARDIZED APPROACH TO DOLAN ANALYSIS AND FINDINGS.

(See Attachment No. 1)

**II. THE CITY OF SPRINGFIELD GETS IT RIGHT ON A STREET RIGHT-OF-WAY DEDICATION, A DOLAN FINDINGS WATERSHED IN 2001.**

**A. BACKGROUND.**

On July 20, 2001 the Oregon Court of Appeals decided the case of McClure v. City of Springfield, 175 Or App 425 (2001). This was on a petition for judicial review from the Land Use Board of Appeals (“LUBA”) decision in McClure v. City of Springfield, 39 Or LUBA 329 (2001) (hereafter called “McClure 2”). The City of Springfield (“city”) sought review of LUBA’s decision remanding, for the second time, its approval of a land partition sought by Mr. & Mrs. McClure (“McClure”). City imposed conditions requiring dedications of property for a street right-of-way, a sidewalk, and a "clipped corner" for vision clearance purposes. McClure cross-petitioned asserting that LUBA erred in upholding the proposed street right-of-way exaction. The Court of Appeals affirmed LUBA’s decision in McClure 2. In doing so, it affirmed, for the first time, a local government’s Dolan findings for a street right-of-way dedication.

In McClure v. City of Springfield, 37 Or LUBA 759 (2000) (hereafter called "McClure 1"), LUBA remanded the city's approval of the partition and dedication requirements on the ground that the city failed to adequately justify the required dedications under the test announced in Dolan v. City of Tigard, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (June 24,1994). In particular, LUBA determined in McClure 1 that the city failed to show that its exactions were roughly proportional to the legitimate needs that the city found would be created by the proposed development. After McClure 1 was remanded, the city adopted additional findings justifying its dedication requirements, and McClure again appealed the city's decision to LUBA. After its second review in McClure 2, LUBA once again, remanded the city's decision, determining that the city failed to adequately justify two (sidewalk and "clipped corner" vision clearance) conditions under Dolan but did present findings to justify the street right-of-way dedication under Dolan. The city appealed McClure 2 for review of the denied dedications, while McClure cross-petitioned for review of the upheld right-of-way dedication.

The general issue of the appeal was LUBA's application of the Dolan decision where the U.S. Supreme Court held that an exaction of real property may be sustained only when the exacting government demonstrates (1) that there is an "essential nexus" between the government's demand on the property owner and the harm addressed by the exaction, and (2) that the exaction is "roughly proportional" to the effects of the development.

McClure sought to partition a property in city into three lots. The property was a 25,700-square-foot parcel bordered on the east by 8th Street, a local street with a 45-foot right-of-way, and bordered on the south by a 10-foot right-of-way for M Street, an improved street with an asphalt bicycle and pedestrian path. McClure's proposed land division would create Parcel 1 with frontage on 8th Street, Parcel 2 would have access to 8th Street via a 20-foot panhandle north of Parcel 1 and Parcel 3 would have access to 8th Street, also through a 20-foot panhandle south of Parcel 1.

The proposed partition was approved with conditions. One condition required the McClures to dedicate a 20-foot right-of-way on the south portion of the property to allow for the future development of M Street for both vehicular and bicycle traffic. A second condition required the dedication of the "clipped corner" for visibility.. The third condition required dedication of a five-foot strip for a curbside sidewalk and street lighting.

McClure appealed to the city planning commission, arguing that the conditions were excessive, unconstitutional exactions. The planning commission affirmed the planning director regarding the three conditions. McClure appealed the city's decision to LUBA.

## **B. MCCLURE 1 – LUBA CRITICISMS OF CITY FINDINGS.**

In McClure 1 LUBA made several conclusions about the findings presented to justify the exactions under Dolan. LUBA's criticisms were:

1. The city failed to show that any impact on its transportation facilities justified the condition exacting the 20 feet of additional right-of-way for M Street.
2. The city had failed to identify and quantify the number of bicycle and pedestrian trips generated by the proposed development of the parcels.
3. The city made "no attempt to establish a relationship between the number of nonvehicular trips from the proposed development, whatever that number may be, and its effect on the transportation system.
4. The city did not adequately explain why the increased vehicular, pedestrian, and bicycle traffic that might be expected from the additional lots approved by the partition constituted impacts that were roughly proportional to the required dedications and improvements along M Street and 8th Street.
5. The city failed to justify the M Street right-of-way dedication on the ground that the exaction was necessary to eliminate a safety hazard created by the establishment of a panhandle driveway on Parcel 3.

McClure 1 did hold that the city could consider the benefits that would accrue to the subject property as a result of the exactions. LUBA also held in McClure 1 that the city may be able to adopt findings that justify some or all of the exactions imposed.

## **C. CITY OF SPRINGFIELD RESPONSE - MCCLURE 1 REMAND.**

After the McClure 1 remand, the city adopted supplemental findings to support the required conditions. McClure again appealed to the planning commission. The conditions finally imposed included the right-of-way dedication for a street which said "7. Dedicate 20 feet of right-of-way along the southern property line of the development area for the eventual extension of M Street." The additional conditions were #8 (dedicate for a curbside sidewalk), #9 (dedicate a 'clipped corner' for intersection vision clearance) and #10 (install curbside sidewalk and street lighting to be fulfilled by the recording of an Improvement Agreement for the construction and signing a waiver of remonstrance for the sidewalk improvements).

#### **D. CITY OF SPRINGFIELDS DOLAN FINDINGS – UPHeld BY THE COURT OF APPEALS.**

The planning commission also made findings addressing the deficiencies in Dolan findings LUBA identified in McClure 1. The city's key Dolan findings what were reviewed in McClure 2 and by the Court of Appeals were:

"1. The assumption that the [n]ew development will produce 19 vehicle trips per day is a valid measure of impacts because 19 trips per day is one of the lowest volumes of traffic generated by two permitted uses in the [low density residential (LDR) zone].

2. Conditions of approval #7, #8, #9 and #10 are directly proportional to the impacts of the subject development on the local street system of creating two new parcels as proposed [by petitioners]. This is because the minimum 19 new trips per day the development will generate will comprise 1.86 percent of the 1020 trips that directly and daily impact the sections of local street serving the development area before connecting to a minor arterial street. The 4,371 square feet of right-of-way that is required to be dedicated comprises only 1.59 percent of the 276,700 square feet of planned right-of-way that the proposed development will impact. Since the 1.59 percent right-of-way dedication is a smaller fraction than the [1.86] percent of the vehicle impacts that the new development will produce, the required dedication is roughly proportional to the impacts of the development and is, in fact, less tha[n] what the city could exact if a direct pro rata dedication were required.

3. The required 4,371 square foot right-of-way dedication is roughly proportional to the impacts of creating two new developable lots in the [LDR zone] because the city has determined that in order to provide adequate service to one LDR lot a minimum of 3,206 square feet of right-of-way is necessary. Since two lots are being created, the city could require up to 6,412 square feet. Because 4,371 square feet is less than 6,412 square feet, the required dedication is less than what could be required if an exact pro rata dedication were required.

4. The creation of the panhandle driveway, as proposed by [petitioners], will impact the safety at the intersection of M Street and 8th Street by adding an additional 9 conflict points to the existing 32 conflict points and additional conflict points will occur with the school children using the most direct route to their appropriate public schools. It is difficult to assign a quantifiable value to decreased traffic safety in order to establish proportionality. Therefore, the proper method to mitigate the degraded traffic safety is to restore the level of safety to its state prior to the impact. In order to mitigate the safety impacts specific to this proposed development, [petitioners] shall dedicate sufficient right of way to

facilitate the extension of M Street and thereby reduce the number of conflict points to the number in existence prior to the development. In this case that required dedication is 20 feet along the southern property line.”

#### **E. LUBA’S RESPONSE TO THE DOLAN FINDINGS IN MCCLURE 2.**

McClure again appealed to LUBA (McClure 2), challenging the adequacy of the city's findings in support of the exactions. After much criticism LUBA upheld Condition #7, the 20-foot M Street right-of-way exaction. LUBA determined that the city had demonstrated an "essential nexus" between the exaction and "the city's legitimate governmental interests" in promoting safety and other traffic issues. LUBA criticized the city’s findings saying the city did not establish that the extent of the exaction was roughly proportional to the extent of the impacts created by the development by using quantification of impacts, in and of itself. LUBA further criticized the city's findings to justify the M Street right-of-way exaction based on a city-wide average level of right-of-way required to service a lot in the applicable land use zone. LUBA criticized the facts used to establish that the exaction was roughly proportional to the impacts of the particular development. However, notwithstanding those, LUBA concluded that the city had justified condition #7, the M Street right-of-way exaction. LUBA concluded that, although it was "a very close question, we believe that the identified impacts, safety concerns and benefits justify the M Street exaction."

LUBA rejected Condition #8 finding that the city failed to establish a relationship between the sidewalk dedication and the expected vehicular and nonvehicular impacts of the development. LUBA also rejected Condition #9, the clipped corner vision clearance, concluding that the city failed to make any individualized determination as required by Dolan.

#### **F. THE COURT OF APPEALS REVIEW OF THE CITY’S DOLAN FINDINGS IN MCCLURE 2.**

Before the Court of Appeals on review of McClure 2 the city challenged LUBA's segregation for purposes of analysis of Condition #7 (the M Street right-of-way dedication requirement) from Condition #8 (the 8th Street sidewalk dedication) and Condition #9 (clipped corner vision dedication) requirements. The city asserted that the sidewalk and clipped corner requirements were part of an integrated response to the development's effects.

The Court of Appeals rejected the city's arguments regarding Condition #'s 8 and 9 determining that the city’s Findings on these conditions were incomplete. The details regarding why the conditions were rejected are covered in the Court of Appeals case. They should be reviewed for the findings inadequacies discussed. This paper only discusses the Dolan finding regarding Condition #7 that was approved by the court.

Before the Court of Appeals McClure contended that LUBA erred in affirming the M Street right-of-way street exaction (Condition #7). They argued that LUBA erred in concluding that the city's findings support the determination that the M Street exaction is roughly proportional to the effects of the development. McClure argued that LUBA's determination in McClure 2 that Condition #7 was valid did not meet the two-part test set out in Dolan.

### **G. THE COURT OF APPEALS RATIONALE FOR UPHOLDING THE CITY OF SPRINGFIELD'S DOLAN FINDINGS.**

The Court of Appeals upheld Condition #7 and the city's findings regarding the street right-of-way dedication with more enthusiasm than did LUBA. The Court of Appeals found that the city's findings were adequate saying:

1. The city did address Dolan's "essential nexus" requirement through a "conflict point" [accident potential] study provided by the city's traffic engineer. The study analyzed the conflict points within 30 feet of the M Street intersection that present a safety concern. That analysis is a quantified description of the proposed development's effects in terms of the safety hazards posed by placing a panhandle driveway directly adjacent to a pedestrian and bicycle path and within 30 feet of an intersection, as proposed by the McClure in the partition request.
2. The city Dolan analysis constitutes substantial evidence that the M Street right-of-way exaction is a reasonable solution to the proposed development.
3. The city addressed the "rough proportionality" step of the Dolan test by linking 19 additional vehicle trips to an additional 20 feet of right-of-way. It compared the number of vehicle trips generated with the total daily trips on the two local roads to be used by the new occupants of the proposed lots. The resulting percentage was then compared to another percentage calculation that, in turn, compared the square footage of right-of-way exacted with the total right-of-way area on the two local streets. By comparing the two percentages, the city determined that the percentage of land exacted (1.59 percent) was less than the percentage of trips on the two roads that the development was expected to generate (1.86 percent).
4. The Dolan rough-proportionality test requires a comparison of "different kinds of things." For example, a comparison between a particular number of vehicle trips and an increase in street right-of-way area involves different elements of a traffic scheme. However, whether the comparison is perfect is beside the point. The McClure challenge calls for a highly detailed and precise explanation of each effect produced by a proposed development and an equally detailed and precise correlation

between those effects and the proposed exactions. That call for precision runs afoul of the plurality holding in Dolan that no "precise mathematical calculation" is required to meet its rough proportionality standard. The city's calculations regarding the M Street dedication requirement were sufficient to satisfy that standard.

#### **H. CONCLUSION ON MCCLURE.**

The Court of Appeals held that the city had adequately explained the need for the M Street right-of-way dedication, utilizing a detailed calculation to demonstrate that the exaction required by Condition #7 represented a proportional response to the increase in traffic that the proposed development was expected to generate. This is the first Oregon appeals case where a Dolan finding on a specific "off site" improvement exaction was upheld. Future Dolan findings and cases directed at the findings issue spring from the City of Springfield's successful defense of it's finding.

### **III. DOLAN FINDINGS CASES AND TRENDS SINCE CITY OF SPRINGFIELD/MCCLURE.**

#### **A. CITY OF LAKE OSWEGO/HALLMARK – SUCCESSFUL DOLAN FINDINGS FOR A SIDEWALK.**

##### **1. Background.**

On April 14, 2004 the Oregon Court of Appeals decided the case of Hallmark v. City of Lake Oswego, 193 Or App 24 (2004). The procedural history of this case involved two appeals to LUBA and two appeals to the Court of Appeals. This cases included Hallmark v. City of Lake Oswego, 43 Or LUBA 62 (September 26, 2002) ("Hallmark LUBA 1"); Hallmark v. City of Lake Oswego, 186 Or App 710 (March 13, 2003) ("Hallmark CA 1"); Hallmark v. City of Lake Oswego, 44 Or LUBA 605 (June 4, 2003) ("Hallmark LUBA 2"); and, finally, Hallmark v. City of Lake Oswego, 193 Or App 24 (April 14, 2004) ("Hallmark CA 2"). The cases are all referenced for those who wish to learn more about the detailed issues resulting in such multiple appeals. Suffice it to say that Hallmark LUBA 1 and Hallmark CA 2 are the two cases that deal directly with the Dolan findings issues involved in this paper.

Hallmark CA 2 was the fourth appeal of a City of Lake Oswego ("city") requirement that Hallmark dedicate a 5 foot wide, 160 foot long walkway in front of the main entrance to it's headquarters building. The walkway is not adjacent to any street, but provides a connection across the front of Hallmarks building between two streets, Collins Way on the west and Hallmark Drive on the east.

The Dolan issue arose in the context of city's denial of Hallmark's application to modify a condition of approval, originally issued in 1993, to eliminate any requirement that Hallmark provide a public pedestrian pathway across its property to connect a residential area on one side (the west at Collins Way) of the development to a shopping center on the other side (the east at Hallmark Drive). Hallmark argued that dedication was an unconstitutional taking of property under Dolan v. City of Tigard, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), and Nollan v. California Coastal Comm., 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987). The Court of Appeals in Hallmark CA 2 concluded that the dedication condition comported with the requirements prescribed in Dolan and Nollan and affirmed the city's dedication requirement.

Background facts are that in 1993 city imposed as part of Hallmark's commercial development Condition B(2) that required Hallmark, before the issuance of a city occupancy permit, to "[p]rovide easements for all public walkways/sidewalks ... to the satisfaction of [the] City Engineer." Hallmark never granted an easement for the pathway at issue but it was open to the public from early 1994 to mid-1996 when, due to vandalism, Hallmark constructed a fence at the western edge of the property at its connection to Collins Way. The fence cut off access to Hallmark's property from the west. After the fence was constructed, the city cited Hallmark for failing to comply with the condition requiring a public pathway. As a result, in 1999, Hallmark applied to the city in 1999 to declare the condition not applicable to the pathway or to modify the condition of approval to remove the requirement for an easement. As part of it's application and during the local appeal process Hallmark' claimed that the easement, if required, was not proportional to the burdens occasioned by the development and, therefore, amounted to a taking of its property without just compensation under the Fifth Amendment to the United States Constitution under the theory announced in Dolan.

## **2. The City of Lake Oswego's Well Crafted Findings.**

The city crafted the following finding, set forth in Hallmark LUBA 1, to address the requirements of Nollan/Dolan regarding the pathway:

### **"Is there a public need which a condition of approval, or in this instance, a continuation of a condition, is designed to address?"**

1. The public need for pedestrian and bicycle access is evidenced by [the] Transportation Planning Rule[.]
2. The city has recognized the public need for pedestrian and bicycle access by the adoption of LODS 20, and its application to 'all minor and major developments involving the construction of a new structure [.]' LODS 20.010, and specifically LODS 2.020(2) and 2.020(5), as cited by [the design review commission] in its [decision].

**Does the development create or exacerbate the identified public need?**

1. The Council finds ... that the employees and customers who will be working in or conducting business within the development, will contribute to the pedestrian traffic on the City's sidewalk and pathway system. ...
2. Prior to the vacation of a portion of Collins [Way] in 1988, pedestrian and bicycle traffic had occurred from Collins [Way] and Waluga Park (west of the site) to and from ... Hallmark Drive and Mercantile Village (east of the site). There was testimony in the [design review commission] proceedings that the vacation was undertaken to facilitate the development of the platted six lots that constitute the site, as well as, now, a part of vacated Collins [Way]. There is evidence, which the Council finds credible, that the vacation of a portion of Collins [Way] was done with the purpose of encouraging site development upon each of the six lots and the vacated portion of Collins [Way], and that in doing so, it was anticipated and intended that public pedestrian and bicycle traffic would be required within, and across, the development. Discontinuance of public pedestrian and bicycle access through the site would thus be contrary to the purposes of the vacation, and contrary to the preservation of pedestrian or bicycle access across the site.

The platted six lots remained following the vacation of the portion of Collins [Way]. If the six lots had been developed separately, the City would have required some public access connecting through the site from Collins [Way] and Waluga Park to and from Hallmark Drive and Mercantile Village. Each individual lot development would have been required to install public sidewalks along the frontage of the lot.

[Hallmark] chose to acquire all six lots and to develop them as a common site. A developer's decision to acquire multiple sites and commonly develop them should not allow the developer to avoid the obligation that would have been imposed upon the anticipated development of the six separate lots. In other words, the decision to commonly develop multiple lots can be said to itself create or exacerbate the identified public need, whereas if each lot were developed separately, a reasonable exaction for sidewalk purposes would have occurred for each developing lot to meet the public need for through pedestrian and bicycle access. ...

**Is the Condition (or continuation of the Condition) roughly proportional to that portion of the need created or exacerbated by the proposed development?**

1. If the six lots had been developed separately, each of the lots would have been required to install a sidewalk running along its 60-foot frontage, for a total of 360 feet of sidewalk. The walkway required of [Hallmark] is only 160 feet in length.
2. The Council concurs with the [design review commission] findings, [which state:  
'... The nature of the large parcel burdens the public pedestrian and bicycle system by restricting movement and directing traffic over a large area. The Commission therefore concludes that this forces a greater use of the City's sidewalks and pathway system and as capacity diminishes along certain sectors of this pathway system, additional pathways must be added ...

The [design review] commission finds that:

1. The distance of the walkway on the applicant's property is 160 feet.
2. The distance of hard-surfaced pedestrian system maintained from the Hallmark property to Waluga Park is approximately 1,250 feet. (Waluga Park is a 'neighborhood activity center' located within one-half mile of the development ... which current and future customers and employees of the structure would utilize and to which customers and employees of the adjacent Mercantile Village would be expected to utilize public accessways to access the Park.)
3. The distance of the pedestrian and bicycle system maintained from Mercantile Village ... is 300 feet. (Mercantile Village is an adjacent shopping and commercial center, and transit stop location, which residents of the Collins Way area and greater neighborhood area use for their shopping and business service needs.)
4. The number of employees or customers that would potentially utilize the building is in excess of 44 (based on the number of parking spaces), especially when taking into consideration the ability of the owner to change use of the building to another, outright permitted use in the GC Zone.
5. There are 20 residences on Collins Way, for which the occupants would access Waluga Park and [Mercantile Village]. Assuming an average of 2.5 persons per residence, 50 persons that reside on Collins Way may utilize the pedestrian and bicycle system.
6. The amount of lineal footage of walkways require of residential development is a reasonable guideline to estimate the amount of pedestrian and bicycle usage that now exists or can be expected to exist. ...'

[The city council] concludes that 160 feet of sidewalk is roughly proportional to the impacts on the pedestrian and bicycle system create by the development of the six lots as a common campus, and by the potential for more than 44 employees and customers working or doing business at the site and using the pedestrian and bicycle system.”

### **3. The Court of Appeals Review of the City of Lake Oswego’s Nollan/Dolan Findings and Additional Record Materials from the City.**

After the diversion into non-Nollan/Dolan findings issues in Hallmark CA 1 and Hallmark LUBA 2, Hallmark sought judicial review once more in Hallmark CA 2. Hallmark again asserted to the Court of Appeals, along with another issue, that the pathway dedication requirement of Condition B(2) effected an unconstitutional taking of Hallmark's property under the Fifth Amendment.

The Court of Appeals in Hallmark CA 2 addressed the constitutional takings-related issues. Hallmark raised three principal arguments as to why Condition B(2) effected an unconstitutional taking when tested against the demands of Dolan and Nollan. First, Hallmark contended that the city failed to identify any “legitimate governmental interest” that would arguably be advanced by the dedication of the pathway. Second, Hallmark asserted that the city failed to establish the requisite “essential nexus” between the exaction of the pathway across its property and the public interest that that exaction was purportedly designed to promote. Third, Hallmark asserted that the city failed to establish “rough proportionality” between the pathway dedication condition and the reasonably projected impacts of the approved development. The city rejected these arguments, and the Court of Appeals proceeded to do so as well.

The Court found that the city had made several determinations regarding the Nollan/Dolan issues raised by Hallmark. First, on “legitimate governmental interest,” the Court found that the city in it’s findings had emphasized that, through one of its ordinances, it had recognized the public need for pedestrian and bicycle access routes and connectivity.

Second, on “essential nexus,” the Court found the record showed that the public pathway through Hallmark's property advanced the identified need for promoting connectivity for nonvehicular traffic. The city had determined in it’s findings and in additional material in the record, that employees and those conducting business at the developed site would contribute to traffic in the city's transportation system and that the pathway would also serve the need for those persons to have access to shopping and neighborhood activity centers: The record disclosed, in addition to the formal findings, that the city had further found that:

"The Hallmark site has 9,726 square feet of office space and 44 parking spaces. ... Assuming that only one employee or visitor occupies each car, up to 44 people can drive to the site. This does not include the people who walk, ride the bus or bike to the site. These people all contribute to the pedestrian traffic on the City's sidewalk and pathway system as those employees and customers either walk to nearby activity centers (post office, shopping, doctors offices) or leave for lunch breaks (at nearby restaurants or brown bag it in Waluga Park), or arrive or depart from the property for work or business reasons by using the public sidewalk system."

Third, on "rough proportionality," the Court found that the city in it's findings and in additional record materials, had properly rejected Hallmark's argument on how "rough proportionality" should be measured. Hallmark had argued that the impact of development should be measured not by the potential use of the site, but by the number of current employees working at the site, which was 17 rather than 44. The Court determined that the city had correctly observed that numerous uses of Hallmark's facility were permitted outright, including retail, restaurant, business, and medical and professional offices, and that a number of the permitted uses could be expected to generate high pedestrian, bicycle, and transit use. The Court found that the city, in additional record materials beyond the findings, had further properly found that:

"... this large site, in comparison to other properties in the area, lies squarely in the path of the most direct route for pedestrians and bicyclists who wish to move from the retail area to the residential neighborhood and Waluga Park, and vice versa. The nature of the large parcel burdens the public pedestrian and bicycle systems by restricting movement and directing traffic over a large area."

Additionally, the Court found that the city, in assessing the proportionality between the pathway requirement and the impact of Hallmark's development of the site on pedestrian and bicycle traffic, had correctly determined that the Hallmark site encompassed six blocks and that, had the lots been developed separately, the city would have required a public pathway connecting the shopping center on one side to the neighborhood park on the other. The city further determined that the projected 44 users of the Hallmark site could be expected to use the public pathway system to gain access to the shopping center on one side of the site, and the public park on the other side of the site. The Court then cited the further city determination, in the record and in addition to the findings, that:

"Even assuming arguendo that there will never be more than 17 employees in the building (which the [design review] Commission finds to be an unreasonable assumption), as compared to the estimated 50 residents along Collins Way, the imposition of 160 feet of accessway on the parcel,

as contrasted to the 1250 feet of pedestrian facilities that the residents have contributed through dedicated right-of-way is roughly proportional. (To apply a strict mathematical analysis, each of the estimated 50 residents along Collins Way has contributed an average of 25 lineal feet to the pedestrian system; each of the 17 business employees on the Hallmark property has contributed an average of 9.4 lineal feet to the pedestrian system.) In point of fact, even at 17 employees, the employees are contributing less than the residential neighbors to the pedestrian system, not more. The [design review] Commission concludes that the current number of employees (17) is at the low end of the potential number of employees that may occupy the 9,726 square foot building, given the more employee-intensive uses permitted in the GC Zone to which the building could be utilized in the future. Therefore, when one considers the maximum number of employees possible to work on the property, the [design review] Commission concludes that the 160' accessway exaction for the building development clearly survives the rough proportionality requirements of Dolan."

#### **4. LUBA's Review of Nollan/Dolan Findings in Hallmark LUBA 1.**

The Court then recited LUBA's rationale [stated in Hallmark LUBA 1] for rejecting Hallmark's Nollan/Dolan arguments.

With regard to "legitimate governmental interest" and "essential nexus" LUBA said:

"[W]e agree with the city that there is a nexus between the requirement that petitioner grant an easement for access across its property and the city's policy regarding street connectivity . . . . The city determined that access across the subject property satisfied city requirements for connectivity, and presumably the city could have denied the application if that standard was not satisfied. We therefore conclude that there is a nexus between the exaction and the city's legitimate governmental interest in ensuring adequate transportation connectivity."

With regard to "essential nexus" LUBA said:

"With respect to petitioner's argument that the city improperly based its requirement for pedestrian access on speculative future development, we disagree. We have held that a local government may consider those impacts that reasonably flow from the approval granted. McClure v. City of Springfield . . . . The city considered the impact that uses allowed on the property without further approvals would have on the pedestrian transit system and concluded that the building that is on the property could house up to 44 employees, at least some of whom would use the walkway to

access Hallmark Drive or Collins Way. In addition, there are residents of the Waluga neighborhood who could patronize the building, now or in the future, and would access the building by walking or by bicycle. The city properly considered those impacts when it determined the extent of the impacts that justify the exaction.”

With regard to “rough proportionality” LUBA said:

"Finally, we agree with the city that the impact of the development of the subject property on the area's pedestrian and bicycle transportation system has been adequately quantified and establishes that the exaction is roughly proportional to the impact of the development. The findings ... consider the types of uses in the vicinity and conclude that the development would impede access from the west to the subject property, to the transit stop on Hallmark Drive and to Mercantile Village. The findings also explain that persons who work at or patronize petitioner's business or businesses in Mercantile Village would be impeded from accessing Waluga Park, a neighborhood attraction that lies to the west of the subject property. At least some of those persons could utilize the disputed walkway, and have used that walkway when it was open. In addition, the city finds that if the six individual lots were developed separately, the city would expect at least 360 feet of sidewalk to be provided for the public, and that petitioner's decision to combine the lots into one unitary development has impacts on the city's pedestrian system that the easement ameliorates. Given these findings, we conclude that the city has adequately quantified the impact and the exaction, and could conclude, based on that quantification, that the exaction is roughly proportional to the impact of petitioner's development."

## **5. The Court of Appeals Review of Nollan/Dolan Findings in Hallmark CA 2.**

After citing Hallmark LUBA 1 and the specific city findings and related findings in the record, the Court rejected Hallmark’s Nollan/Dolan arguments.

On “legitimate governmental interest” the Court said:

“We begin with Hallmark's argument that the city failed to identify a legitimate governmental interest that would be served by the dedication of the pathway. Specifically, although Hallmark does not dispute the abstract legitimacy of the city's interest in promoting connectivity and safe and convenient pedestrian and bicycle traffic access, Hallmark asserts that the city's reliance on that interest as justifying the pathway requirement cannot be reconciled with the fact that, in 1988, four years before the imposition of Condition B(2), the city had vacated the portion of Collins Way that

had traversed the property in approximately the same location. Like LUBA, we disagree that there is any necessary inconsistency between the city's actions in 1988 and 1992. Indeed, there is no inconsistency at all. First, in partially vacating Collins Way in 1988, the city acted in response to neighborhood residents' concerns about increasing volumes of, inter alia, motor vehicle traffic. Conversely, the pathway was, and is, limited to pedestrians and cyclists. Beyond that, circumstances differed over time. In 1988, the city was not confronted with addressing and mitigating the concrete traffic- and connectivity-related impacts generated by the proposed development; in 1992, it was. In short, vacating Collins Way in 1988 did not preclude the city from credibly identifying a legitimate governmental interest in assuring public access across the property at a later date.”

On “essential nexus” the Court said:

“Hallmark next argues that there was an insufficient "nexus" between the requirement of the dedication of the pathway and the city's asserted interest. ... [see Hallmark CA 2 for a useful discussion of the essential nexus concept that is not directly relevant to the focus on findings in this paper] ... Hallmark asserts that this case is like Nollan, ... that there is, logically and practically, an inadequate relationship between the pathway condition and the interest in promoting connectivity and safe and convenient nonvehicular travel, which the city invokes as justifying that condition. In that regard, Hallmark argues that the city's pathway requirements are meant to implement administrative rules that provide that optimum trip length for cyclists and pedestrians is generally a quarter mile to a half mile, and points out that, even if pedestrians and cyclists were not able to use the 160-foot pathway through its property, they could still circumvent the property in less than half a mile. Thus, Hallmark reasons, because the optimum trip length standard would still be satisfied even without the pathway, the pathway condition cannot promote that interest. With respect, Hallmark's argument misses the point. As the city explains [in the record]:

‘The trip length is the entire trip length, not just the distance to get around the Hallmark parcel. The distance of persons walking from Waluga Park to the commercial area, or vice versa, would be at or near the optimum trip length. Other residents in the surrounding residential area may also use the pathway, and when combining the distance from their residence to the site, it would exceed the optimum trip distance. In other words, because the class of pathway users is not finite, Hallmark cannot say what the length of the trip will be. By eliminating an obstacle, which adds considerable distance, the class of pedestrian users is larger.’ ...

We [the Court] agree. Accordingly, as LUBA determined, the city adequately established an "essential nexus" between the pathway requirement and the legitimate governmental interest of promoting transportation connectivity and alternative modes of nonvehicular travel.”

On “rough proportionality” the Court said:

“Finally, Hallmark contends that, in all events, the city failed to establish "rough proportionality" between the pathway condition and the projected impact of the development. ... In Dolan, the Court, while endorsing the "rough proportionality" formulation, explained: ‘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.’ ... Hallmark asserts that that requirement, as we have interpreted it in J. C. Reeves Corp. v. Clackamas County ... and other cases, was not satisfied here. In particular, Hallmark disparages the city's "rough proportionality"-related findings as "conclusory" and "focused on speculative future uses and future occupants" of the development. Again, we disagree. The city's findings were anything but "conclusory." Rather, those findings were presented in considerable detail, were based on particularized projections, and included attempts to quantify the impact of the development on the city's transportation infrastructure. ... Given that, we understand Hallmark's challenge to be directed less to the specificity of the city's findings than to the premises of those findings. In particular, Hallmark challenges the city's assessment of the impact the development will have on the transportation system based on the projected occupancy of the development, rather than on the actual level of use at the time Hallmark applied for the modification of the condition. Hallmark asserts that the city's findings are inadequate because there is no evidence in the record demonstrating that anyone in the development has ever used the pathway for access to the various community resources on either side of it, or that anyone in the community has actually used the pathway for access to the development itself.

Hallmark's challenge is based on an artificially and erroneously restrictive view of potential development impacts to be considered in the "rough proportionality" calculus. Under Dolan, the temporal benchmark for determining "rough proportionality," including assessing development-related impacts, is at the time the condition is imposed--or very shortly thereafter. ... Given that, the inquiry is necessarily forward-looking; it properly considers reasonable projected impacts from permitted uses of the development, rather than being limited to impacts from a single permitted use. That is, "rough proportionality" is not restricted to considering the impacts of a single, particular use of the site when the development application, as approved, allows a range of uses reasonably

generating a variety of impacts. The city council report on Hallmark's application for modification cogently explained that principle:

[T]he pedestrian patterns are 'people-dependent' and will naturally change as the specific individuals change. For example, when a new residence is constructed, a sidewalk is required because the occupants statistically will utilize the sidewalk system at some time in the future. Although a homebound first owner of a residence will not use the pedestrian system in the neighborhood, when the residence is sold to a couple with 4 young children, they will extensively utilize the pedestrian system. Exaction of a sidewalk is not something that is temporal--imposed when one person moves in, removed when they move out. It is based on the expectation that over the life of the residence, occupants will statistically utilize the pedestrian system. The same is true with office buildings[.]'

A comparison of two of our cases further illustrates and corroborates that principle. In Schultz v. City of Grants Pass ... the local government required roadway dedications as conditions of approving a partition application. The local government's justification for imposing that exaction was that the property in question might, upon further and future applications, be subdivided and that, in turn, might result in up to 20 homes being built on the site. Thus, the justification for the roadway dedications conditions was that those conditions would mitigate transportation impacts that could be generated if, at some point in the future, these sites were developed in a manner that was not yet permitted. Applying Dolan, we rejected that rationale: [saying] '[T]he 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.' ... Conversely, in J.C. Reeves Corp., we rejected an applicant's argument that a certain condition of development designed to alleviate an access problem to an adjoining lot was unconstitutional under Dolan. In that case, it was the applicant's "proposed use of its property [that caused] the access problem on the adjoining property." ... [in J.C. Reeves Corp.] We stated: 'In Schultz ... , we concluded that it was impermissible under Dolan for the city to impose conditions that were linked to potential intensive future uses of property rather than to the more limited proposed use for which the owner was currently applying. Although part of the hearings officer's rationale for the

condition here was based on the future development of the adjoining property, this case is not analogous to that aspect of Schultz. The present and future effects on access to the neighboring property that were the basis for the condition are the result of this proposed development of petitioner's property. Unlike the situation in Schultz, no further applications or development, with the concomitant opportunity for the county to consider further developmental conditions, need to occur or be presented in order for the proposed development to have the impacts on access that the [condition] is aimed at preventing.' ... . The present case is more analogous to J.C. Reeves Corp. than to Schultz. The city's findings are based on the expected use of the facility that Hallmark applied to build and actually built, taking into account its size, the number of parking spaces it has, and the types of uses to which it may be put without further applications or development. The city's decision was not based on "potential development" of the sort at issue in Schultz. Rather, the city's "rough proportionality" calculus considered impacts from the development as actually approved. Beyond that, we find Hallmark's narrow focus on the extent to which its current employees use the pathway to be misplaced. While the extent to which a condition actually benefits the property being developed is certainly a part of the "rough proportionality" assessment, it is not the only factor. See Dolan, ... (the "rough proportionality" inquiry concerns whether "the required dedication is related both in nature and extent to the impact of the proposed development"); ... Piculell ... v. Clackamas County, ... (conditions may have overlapping effects of serving the needs of the development as well as offsetting impacts that the development will have on the community). Here, the city's findings demonstrate that, without the pathway, the development would impede the flow of pedestrian and bicycle traffic from an adjoining residential area to an adjoining shopping center. The pathway removes that impediment. The need for the pathway is directly related to the development itself, and thus satisfies the "related in nature" aspect of the test. As to the "related in extent" inquiry, the city's findings indicate that the Hallmark development, which covers six lots, potentially contributes to the need for the pedestrian and bicycle transportation system at least as much as its neighbors, but actually has contributed less to the pedestrian and bicycle transportation system than its neighbors. We have considered, and reject, Hallmark's ... "rough proportionality" ... arguments. ... We thus conclude that LUBA correctly determined that the pathway dedication condition did not effect an unconstitutional taking of Hallmark's property."

## **6. Conclusion – Lake Oswego’s Assiduous Approach Pays Off.**

This case illustrates the value in the assiduous development of findings and the record in Dolan matters. Without a doubt the City of Lake Oswego’s detailed review and development of findings resulted in this positive outcome.

**B. OTHER OREGON POST CITY OF SPRINGFIELD/MCCLURE  
NOLLAN/ DOLAN CASES IN BRIEF - “TO DOLAN OR NOT TO  
DOLAN.”**

**1. “To Dolan or Not to Dolan # 1.” – “Not to Dolan.” - Rogers Machinery, Inc. v. Washington County, 181 Or App 369 (2002).**

In a review of a Traffic Impact Fee assessed under a Washington County ordinance the Court of Appeals held that Dolan’s heightened scrutiny test does not extend to the “legislatively imposed and generally applicable TIF fee” imposed in this case. Not to Dolan.

**2. “To Dolan or Not to Dolan # 2.” – “Not to Dolan.” and Food For Thought – Homebuilder’s Association of Metropolitan Portland v. Tualatin Hills Park and Recreation District, 185 Or App 729 (2003).**

In a review of a System Development Charge (SDC) for Parks and Recreation imposed by the Tualatin Hills Park and Recreation District the Court of Appeals again held that Dolan’s heightened scrutiny test does not extend to the SDC’s here because the SDC is quasi-legislative in nature, not an ad hoc exaction. The SDC met the “reasonable relationship” and “rational basis” standards under general takings and due process jurisprudence. The case is very interesting and is notable for some comments regarding the nature of the constitutional tests applicable to due process and takings law. The Court said:

“Plaintiffs’ claims under the Fifth Amendment present a ... complex problem. That is so because United States Supreme Court opinions on the subject of exactions, like so much of that Court’s jurisprudence, rely on “tests: composed of vague, abstract, and elastic phrases such as “rough proportionality, “ “reasonable relationship,” and “rational basis” See, e.g., Dolan ... . More notoriously, because the phrases are so imprecise and subjective, once the Court decides which test to apply, the application to frequently becomes a conclusion instead of a legal analysis. Further, the phrases state standards for judges to apply on a case-by-case basis, after the fact, thereby depriving government actors of useful guidance and citizens of predictability. ... we [the Court of Appeals of Oregon] must follow the path chose by the United States Supreme Court and can only attempt to avoid the pitfalls along the way.”

**3. To Dolan or Not to Dolan # 3 – “to Dolan.” – Dukek v. Umatilla County, 187 Or App 504 (2003) on appeal of Dudek v. Umatilla County, 42 Or LUBA 427 (2002).**

A LUBA opinion determining that a condition requiring an applicant to obtain a 10-foot road right-of-way easement from adjacent property owners in the context of a partition application was subject to review as an exaction under Dolan was affirmed by the Court of Appeals. The finding in the LUBA case and the discussion of a “to Dolan” requirement in the Court of Appeals Case is very interesting in the context of the earlier “Not to Dolan” cases discussed above.

**4. To Dolan or Not to Dolan # 4 – “to Dolan.” - Carver v. City of Salem, 42 Or LUBA 305 (2002).**

While not a findings case, LUBA provides an interesting discussion of the applicability of Dolan to the “reservation for dedication at final platting” of approximately one acre of land in a proposed residential subdivision for park purposes. The city argued that the dedication was either not a Dolan exaction because the property owner had other choices rather than dedication, or that compensation was paid through a system of SDC credits. There is complex discussion and some findings ideas. The outcome, “to Dolan.”

As a quick note, a certain East Multnomah County jurisdiction decided “Not to Dolan” regarding a utility undergrounding requirement. It was told by it’s own Hearings Officer “to Dolan” or lose.

**IV. SOME OTHER NOLLAN/DOLAN FINDINGS.**

A CERTAIN EAST MULTNOMAH COUNTY JURISDICTION PREVAILED, IN PART, BEFORE IT’S OWN HEARINGS OFFICER IN A HOTLY CONTESTED NOLLAN/DOLAN BASED CHALLENGE TO EXACTIONS FOR STREET IMPROVEMENTS AND OTHER INFRASTRUCTURE. TO THE EXTENT “ANY EXAMPLE” HELPS MATERIALS RELATING TO THAT MATTER ARE ATTACHED.

(See Attachment No. 2)

**V. IS DOLAN OVER?**

A very short comment.

**ATTACHMENT NO. 2.**

**SOME OTHER NOLLAN/DOLAN FINDINGS.**

EXCERPTS FROM AN CERTAIN EAST MULTNOMAH COUNTY JURISDICTIONS' NOLLAN/DOLAN CASE.

**1. The Hearings Officer's Decision.**

BEFORE THE LAND USE HEARINGS OFFICER  
OF THE CITY OF GRESHAM, OREGON

Regarding appeals by the applicant, by the Kelly Creek Neighborhood Association and by Jim and Robyn Hainey of an administrative decision conditionally approving a design review application for land at 3604 East Powell Valley Road in the City of Gresham, Oregon	)	<b><u>FINAL ORDER</u></b>
	)	File No.
	)	DR 02-519/AH
	)	(Aspen Highlands)

**A. SUMMARY**

1. By decision dated May 20, 2002, the development planning manager (the "manager") conditionally approved an application by Ossey Development Co. (the "applicant") for design review for a 222-unit apartment complex at 3604 East Powell Valley Road; also known as tax lot 3100, Section 11DD, T1S-R3E and tax lots 8900, 9000 and 9100, Section 14AA, T1S-R3E, WM, Multnomah County, Oregon (the "site"). The manager's decision is incorporated herein by reference.

2. Separate timely appeals of the manager's decision were filed on behalf of the applicant, the Kelly Creek Neighborhood Association and Jim and Robyn Hainey. See page 2 of the Staff Report for a summary of the appeals.

3. Gresham Hearings Officer Larry Epstein (the "hearings officer") conducted a *de novo* public hearing to receive evidence and testimony regarding the appeals. Witnesses appeared on behalf of each appellant and the City of Gresham. City staff recommended the hearings officer deny the appeals and affirm the manager's decision with one modification. See the Staff Report dated June 19, 2002, incorporated herein by reference (the "Staff Report"). At the end of the hearing, the hearings officer closed the public record and took the matter under advisement. In this final order, the hearings officer approves the application under appeal and adopts and incorporates findings, conclusions and conditions consistent with that decision.

**B. HEARING AND RECORD**

1. The hearings officer received testimony at the duly noticed public hearing about this application on June 28, 2002. At the beginning of the hearing, the hearings

officer made the declarations required by ORS 197.763.<sup>1</sup> The hearings officer disclaimed any *ex parte* contacts with interested persons, bias or conflicts of interest. He announced that he visited the site prior to the hearing and invited witnesses to ask about that site visit. The following findings summarize selected testimony at the public hearing.

2. Development Planning Manager Ann Pytynia, city transportation planner Scott Keillor and city traffic engineer Jay McCoy testified for the City. Ms. Pytynia identified the applicable approval standards for the application, summarized the manager's decision and responded to the appeal issues related to issues other than transportation. Mr. Keillor and Mr. McCoy responded to the appeal issues related to transportation.

3. Attorney Bill Kabeiseman, transportation planner Judith Gray and architect Paul Franks testified for the applicant. Mr. Kabeiseman responded to the appeals filed by the other parties to the case. He argued the City failed to show there is an essential nexus between the project and a condition requiring the applicant to extend a sewer line to the property south of the site. Also he argued that the City failed to sustain the burden of proof that the cost of required dedications and improvements for Kane Road is roughly proportionate to the impact of the project on the need for such dedications and improvements. Lastly he proposed a change to condition of approval 17 with which City staff agreed. Ms. Gray offered testimony supporting the arguments by Mr. Kabeiseman. Mr. Franks testified that the proposed buildings comply with certain height and transition regulations and that the applicant considered a variety of access points to the site, and he offered evidence supporting his testimony.

4. Michael Whistler and Jim Wheeler testified on behalf of the Kelly Creek Neighborhood Association. Mr. Whistler argued the Powell Valley Road driveway will be hazardous, and a second driveway onto Kane Road should be provided instead. He referred the hearings officer to the arguments made in the appeal letter (Exhibit C) and later letters from the neighborhood association (Hearing Exhibits 4 through 6). Mr. Wheeler supported the City's analysis of the proportionality of transportation-related exactions. John Williamson testified the Powell Valley Road driveway will be hazardous to school children. Trish Endsley disputed the findings and methodology of the applicant's traffic study. Sandra Stevenson testified about her experience with hazards on Powell Valley Road. Frank Boyle testified with questions and concerns.

5. Jim Hainey testified on behalf of himself and his wife. He argued the manager's decision fails to respond to the issues he and his counsel raised about the impact of the anticipated Kane Road realignment project on the Hainey property.

6. Brad Robison testified with objections to the location of the driveway from the

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<sup>1</sup> Although the hearings officer announced that parties are entitled to request that the hearings officer continue the hearing or hold open the record, he also announced that he could not grant either request, because there is not enough time to do so given the 120-clock. See ORS 227.178(1) and CDC 11.0212(A). Due to the dual-appeal opportunities provided by the City, the hearings officer had fewer than three working days to make this decision. The dual-appeal opportunities imposes time constraints that detract from the ability of the parties to participate meaningfully in the process and from the hearings officer's ability to do good job.

site onto Powell Valley Road, because he alleged the driveway is situated such that headlights from vehicles exiting the site necessarily will shine into his home to the north.

7. At the end of the hearing, the applicant waived its right to offer a closing argument, and the hearings officer closed the record and took the matter under advisement.<sup>2</sup>

### **C. DISCUSSION**

1. CDC 11.0520(A) authorizes the hearings officer to hear appeals of the manager's decisions as a *de novo* matter. The hearings officer is required to conduct an independent review of the record and is not bound by the prior determination of the manager. The hearings officer makes the following findings regarding the issues raised in the appeals. The hearings officer adopts the findings in the manager's decision and the Staff Report and the findings and supporting evidence relied on therein, except to the extent inconsistent with the following findings.

2. The Haineys raised three related issues on appeal. The hearings officer appreciates the Haineys' frustration due to the difficulty of obtaining reliable and complete information about the ultimate alignment of Kane Drive from County and City officials and their disappointment with the likelihood that Kane Drive will be situated much closer to their home than it is now. However the hearing officer concludes that their procedural rights in this process were not prejudiced in a manner that violates the CDC. Moreover the issues they raised are not relevant to applicable approval standards or procedures for this application and/or are not supported by substantial evidence. The hearings officer agrees with and adopts the findings on pp. 18-19 of the Staff Report as his own in response to the Haineys' appeal. In addition, the hearings officer adopts the following findings.

a. The Haineys argue the manager's decision violates CDC 11.0207, because the City did not consider and approve a vacation petition for Kane Drive adjoining the site pursuant to a Type IV process before approving the design review application pursuant to a Type II process. However the hearings officer finds that the City does not have jurisdiction to consider vacation of Kane Drive, because it is a Multnomah County right of way. The Intergovernmental Agreement ("IGA ") between the County and the City does not delegate authority to the City to vacate the right of way as part of the review of a land use application adjoining the right of way. Therefore CDC 11.0207 does not require the City or County to process a petition to vacate the Kane Drive right of way before or concurrent with City review of the design review application. See ORS 227.173(1) and 227.178(5)(a). Condition of approval G will result in coordination between the City and the County regarding the road vacation as it relates to the

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<sup>2</sup> The applicant agreed to toll the running of the 120-day clock for one week to allow the hearings officer more time in which to write the decision. However the City Council already has scheduled a hearing to consider an expected appeal of the hearings officer's decision, and that hearing date cannot be changed and, due to notice requirements, does not allow such a delay in the issuance of the hearings officer's decision.

application in this case.

b. The Haineys argue the manager's decision violates CDC A5.400, because the ultimate location for realignment of Kane Drive has not been determined. However the hearings officer finds that the ultimate location for Kane Drive has been determined by Multnomah County, based on the testimony from Mr. Keillor. Moreover the manager's decision ensures that the proposed development will comply with CDC A5.400. In particular, the development will have frontage on and access to two public streets. The applicant is required to dedicate right of way for the abutting streets consistent with City standards and/or, as authorized by the IGA, consistent with County standards. The proposed development will not cause traffic generation that results in an unacceptable level of service, based on the traffic studies in the record, and will not cause dangerous or hazardous conditions as the development relates to Kane Drive, because the proposed access to Kane Drive will comply with applicable access standards of the City (e.g., standards regarding intersection spacing, sight distance and driveway improvements) and the realigned right of way will comply with applicable standards of the City and/or the County (e.g., with regard to street geometry and ASSHTO standards). Defining ultimate improvement of Kane Drive is consistent with CDC A5.408(A), because physical conditions and jurisdiction over the right of way make immediate construction of the improvements impractical.

c. The Haineys argue the manager's decision violates CDC 9.0703(B)(3), because the applicant's traffic study does not depict the details of the realigned Kane Drive right of way and improvements. However CDC 9.0703 contains submittal requirements. It does not contain an approval standard. Therefore, even if the Haineys are correct, the manager's decision does not violate an applicable approval standard. Moreover the hearings officer finds substantial evidence in the record shows that the circulation plan the applicant submitted complies with CDC 9.0710.

3. The Kelly Creek Neighborhood Association raised six issues on appeal. Despite the sincerity and the legitimate public interest in the issues raised by the neighborhood association and related witnesses, the hearings officer concludes that the manager applied all of the applicable approval standards and that the findings adopted by the manager regarding those standards are supported by substantial evidence. The hearings officer agrees with and adopts the findings at pages 13 through 17 of the Staff Report as his own in response to the neighborhood association's appeal. The evidence to the contrary by the neighborhood association and witnesses in support of the neighborhood association appeal is not substantial or is not as probative as the evidence relied on by the manager and/or is not as persuasive as the evidence relied on by the manager as it relates to applicable approval standards. In addition, the hearings officer adopts the following findings.

a. The neighborhood association argued the manager's decision violates CDC 9.0822(A)(2) and A5.608, because the proposed Powell Valley Road driveway inhibits safe circulation as it relates to the Gordon Russell School, and the manager did not undertake an individualized determination about whether access should be limited to

the Kane Drive frontage.

i. However, based on the alternatives provided by Mr. Franks (Hearing Exhibit 10) and testimony by Mr. Keillor, the hearings officer finds the manager did consider alternative locations for access to the site including locations exclusively on Kane Drive. The manager approved access to the site that is consistent with CDC A5.608, because the second driveway access is provided to Powell Valley Road rather than to Kane Drive.<sup>3</sup> The manager could have prohibited all direct access to Kane Drive, because access to Powell Valley Road is available. See footnote 3 of Table A5.608(B). A second driveway onto Kane Drive would have been consistent with Table A5.608(B), because there would have been more than 100 feet between the driveway and the curb return on Kane Drive south of Powell Valley Road, northbound traffic on Kane Drive would have stacked south of the Powell Valley Road intersection such that a driveway ±215 feet south of the intersection would be obstructed by queued vehicles at peak hours. Such a result would be inconsistent with CDC A5.608(D).

ii. With regard to the issue of safe circulation and the Powell Valley Road driveway, the hearings officer is persuaded by the testimony at pp. 4-5 of Hearing Exhibit 3 that, although the school driveway operates at a level of service "F" during the peak 15 minutes, the peak HOUR level of service at the school driveway is "E", which is acceptable. See CDC A5.402(C). The hearings officer is persuaded that such a level of service is not hazardous, because the source of the congestion at the driveway is the school-related traffic into and out of the driveway rather than traffic on Powell Valley Road. In addition the hearings officer is persuaded that the mitigation measures proposed by the applicant (see p. 5 of Hearing Exhibit 3) will improve the level of service at the school driveway intersection to an LOS "D" for the P.M. peak hour and will maintain or improve the safety of that intersection compared to existing operations. In conclusion, the hearings officer finds the manager's decision complies with CDC 9.0822(A)(2) and A5.608.

iii. The neighborhood association relies on various purpose statements to support their arguments about safety. E.g., see pp. 1, 2 and 4 of the argument attached to Hearing Exhibit 6. The hearings officer finds the purpose statements are not applicable approval standards, and reference to those purposes is not warranted to provide context for resolution of ambiguities in the approval standards that implement those purpose statements.

iv. The neighborhood association notes that the traffic volumes on Powell Valley Road are higher than on Kane Drive; therefore, the former should be treated as the higher classification roadway in fact, and access to Powell Valley Road should be discouraged over access to Kane Drive. However the hearings officer finds that the road classifications are not subject to revision by the hearings officer and cannot be

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<sup>3</sup> CDC A5.608 provides as follows in relevant part:

On arterial and collector streets and above, one driveway per site frontage will be the normal maximum number.

ignored. Whether correct or not, they are what they are. Moreover the hearings officer observes that, due to population growth and roadway improvements, future traffic volume on Kane Drive is expected to be higher than on Powell Valley Road. That may not be consistent with past experience, but things change.

b. The neighborhood association argued the location of the crosswalk to the school violates CDC A5.402, because that location is not safe. However the hearings officer finds that the crosswalk is as safe as it can be given the totality of the circumstances.<sup>4</sup>

i. The proposed crosswalk will be one of three crossings of Powell Valley Road convenient to students of the school. Therefore students are not compelled by the circumstances to use only this crossing. Most students arriving from or going to locations west of Kane Drive are likely to use the signalized crossing at the intersection of Powell Valley Road because it is more direct and convenient. Most students arriving from or going to locations several hundred feet east of the site are likely to use the crosswalk to the east, because it is more direct and convenient. This minimizes the potential number of students using the proposed crossing.

ii. Although the proposed crossing is not situated at a traffic signal, and a mid-block crossing is not as safe as a signalized crossing, it is not unsafe where the evidence shows there is ample time for students to cross the street, and the crosswalk is duly marked. Based on the traffic study, there are ample gaps during peak school arrival and departure hours as well as during peak traffic hours for children to walk from one side of the street to the other within the crosswalk. If built as proposed, the crosswalk will be duly marked and signed. Cars will not be parked along Powell Valley Road, so parked cars will not obstruct views by or of children approaching the crosswalk.

iii. The hearings officer also is persuaded by the applicant's testimony at pp. 5-6 of Hearing Exhibit 3 that the crosswalk location was selected to maximize safety and efficiency, given the nature of the pedestrian population it is intended to serve, and that, with the mitigation the applicant will provide or pay for, it will be as safe as it can be. With the modification to condition 17, which allows for some flexibility with regard to the crosswalk location or alternatives, it better complies with CDC A5.406 than the original condition of approval. The hearings officer is not persuaded that alleged methodological flaws in the gap analysis undercuts its credibility.

c. The neighborhood association argued the project will contribute traffic to the failing intersection of Orient Drive and Kane Drive. The hearings officer disagrees, because that intersection will be improved concurrent with development of the project. The intersection improvement is designed, and funded. See CDC A5.507(C) and the

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<sup>4</sup> Any time children have to cross a busy street, there is a potential risk of harm, even with a signalized crossing. However such risks are inherent in an urban area such as this. The hearings officer finds such a risk does not make crossing unsafe for purposes of CDC A5.402(1), because the conduct of daily life in an urban area requires that people negotiate such risks. Safety must be judged in context.

2002-2006 Multnomah County Transportation Capital Improvement Plan and Program.

d. The neighborhood association argued the City should not issue building permits for the project until public improvements are completed, particularly the realignment and improvement of Kane Drive and the improvement of the intersection of Orient Drive and Kane Drive. They also argued the Kane Drive improvements cannot be undertaken until affected land owners have time to comment on the improvement plans. The hearings officer disagrees.

i. The neighborhood association's claim is inconsistent with CDC A5.007(A). The hearings officer finds that completion of required improvements prior to issuance of building permits is not necessary for the public health, safety and welfare (CDC A5.007(B)), because the traffic generated by residents of the project will not occur until after the project is occupied. Construction traffic for the project will be concurrent with development of the road and intersection improvements, and potential impacts of project-related construction traffic will be mitigated by traffic management measures incorporated into the road and intersection improvement activities. The City should not authorize final inspection and/or occupancy permits until the intersection improvements are completed consistent with CDC A5.007(A) and (D).

ii. As it relates to the Kane Drive frontage improvements, the hearings officer finds that it is consistent with CDC A5.007(C) to stage the improvements, because it is impractical (i.e., less efficient) to build frontage improvements abutting the site when a County road improvement project is planned and scheduled to coincide with development of the site. It is more logical and practical for the improvements along the site frontage to be made concurrent with improvements to the road segment the County plans to improve that includes the site frontage. The City should not authorize final inspection and/or occupancy permits until at least the frontage improvements are completed consistent with CDC A5.007(A) and (D).<sup>5,6</sup>

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<sup>5</sup> The hearings officer disagrees with the applicant's argument at p. 7 of Hearing Exhibit 3 that Kane drive is adequate to accommodate traffic from the project based on the traffic study, because the traffic study does not adequately address the geometric constraints that contribute to the need for the Kane Drive improvements abutting the site.

<sup>6</sup> In relation to this issue, City staff note at p. 16 of the Staff Report that "[i]f the appeal results in fewer funds for the needed Kane Road improvements, then concurrency could become an issue." The City is relying on the applicant paying the full amount required in condition of approval 28 of the manager's decision, (i.e., \$311,000), to enable the County to complete the Kane Drive frontage improvements concurrent with the development of Aspen Highlands. Unless the applicant contributes that amount, the County cannot expedite those improvements as it proposes to do, in part, due to the increased pressure the project puts on the street. However that condition of approval also provides that, in the alternative, the applicant must execute an agreement with the County to make half-street improvements that remedy the geometric deficiencies in Kane Drive abutting the site. Therefore the hearings officer concludes that the concurrency issue (i.e., the adequacy of Kane Drive to accommodate existing traffic, traffic from short-term background growth and traffic from the project in a manner that complies with applicable road design and alignment standards), does not preclude approval of the project provided the applicant complies with either of the alternatives in condition of approval 28 as adopted.

e. The neighborhood association argued the manager failed to correctly apply the height transition standards of CDC 7.0201(K)(2) and 9.0600. The hearings officer disagrees, based on Hearing Exhibit 12 and conditions of approval 1.f and 1.e.

f. The neighborhood association argued the application was incomplete or insufficient to warrant review. The hearings officer finds this is not a relevant issue on appeal. The manager is authorized to decide whether the application is complete. See CDC 11.0212(B). The manager's decision on completeness is not subject to appeal. Once the manager determines the application is complete, or it is deemed complete as a matter of law, the City must process it. The issue on appeal is whether the application contains sufficient substantial evidence to support findings that it complies with the applicable approval criteria.

4. The applicant raises four issues on appeal. The applicant did not aggressively prosecute two of those issues, and the hearings officer summarily rejects them. See findings C.4.a and b below. The hearings officer agrees with the applicant about one of the remaining issues. See finding C.4.c below. The final issue is the most complex and contentious. However the hearings officer concludes the City has sustained its burden of proof that there is an essential nexus between the disputed condition of approval and the impacts of the project. Therefore the hearings officer affirms that condition.

a. In the written appeal (but not at the hearing), the applicant alleged that the City applied approval standards and/or conditions of approval that are not clear and objective. Because the application is for "needed housing" under ORS 197.303(1), such standards and conditions violate ORS 197.307. The hearings officer finds the applicant's argument is not sufficiently specific so that the hearings officer can understand to what it refers. The applicant did not identify the non-objective standards that it alleges were applied to the application nor the conditions of approval that it alleges are not objective. Therefore the hearings officer cannot respond without making assumptions about what the applicant refers to. The hearings officer agrees with and adopts as his own the findings at pp. 12-13 of the Staff Report in response to this allegation.

b. Also in the written appeal (but not at the hearing), the applicant alleged the City applied comprehensive plan policies that are not specifically adopted or identified in the City's development regulations, contrary to ORS 197.195. The hearings officer finds the applicant's argument is not sufficiently specific so that the hearings officer can understand to what it refers. The applicant did not identify the policies that it alleges were applied to the application. Therefore the hearings officer cannot respond without making assumptions about what the applicant refers to. The hearings officer agrees with and adopts as his own the findings at pp. 8-9 of the Staff Report in response to this allegation.

c. The applicant alleges that condition of approval 21, which requires the applicant to extend a sanitary sewer line from the intersection of SE 7th Street and Kane Drive to provide service to the property at 925 Kane Drive, violates the Fifth Amendment to the U.S. Constitution, because there is no rational nexus between that condition and the

impacts of the project. *Nollan v. California Coastal Comm'n*, 438 U.S. 825 (1987). The Staff Report did not address this issue, and City staff did not defend the condition at the hearing. But see pp. 1-2 of Exhibit E and pp. 3-5 of Exhibit F of the manager's decision. This issue is addressed at page 30 of the manager's decision.

i. Section 3.000 of the City of Gresham Public Works Standards requires all developments to extend public sewers to adjoining properties. Based on that standard, the manager required the applicant to extend the sanitary sewer as noted in condition 21. However the manager's decision fails to show how the proposed development contributes to the need for such an extension in any way. On the contrary, the manager's decision notes that sewer service for the subject will be provided from two existing manholes. The applicant does not need to extend the sewer main line in Kane Drive to do so. The applicant simply has to extend a lateral from the existing manholes to provide service to all of the site.

ii. The manager failed to show that requiring the applicant to extend to the sewer line to off-site property in any way is warranted as a result of the project, (e.g., to achieve economies of scale or more efficient development of the sewer system or to avoid repeated excavation of the road). Although the Public Works Standards requires the applicant to extend the main line, that is not sufficient to meet the City's obligation under the Fifth Amendment to show that there is a rational relationship between the project and the condition of approval.

iii. If the applicant was going to have to extend the sewer main line in Kane Road to provide service to the site or to rebuild Kane Drive (instead of simply contributing funds for the County to use to rebuild the abutting portion of that road as part of the County road project), it might be efficient for the applicant to extend the sewer line along the frontage as part of that project, subject to reimbursement by the benefited properties. But that is not the case.<sup>7</sup> Given the failure of the City to meet its burden of proof to show there is a rational relationship between the sewer line extension and the impact of the project, the hearings officer finds the manager erred by imposing condition of approval 21, and the hearings officer deletes that condition.

d. Lastly the applicant alleges that condition of approval 28, which, *inter alia*, requires the applicant to pay Multnomah County \$311,000 to be used for realignment and construction of a portion of Kane Drive, violates the Fifth Amendment to the U.S. Constitution.<sup>8</sup> More specifically the applicant alleged that the City failed to

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<sup>7</sup> The discussion in Exhibit F implies the failure of the applicant to extend the sewer main in Kane Drive will lead to repeated excavations of the roadway. However the hearings officer is not persuaded that implication is logically correct given the circumstances. The applicant will not be excavating Kane Drive between the sewer manholes; the applicant simply will extend laterals into the site from the manholes.

<sup>8</sup> Condition 28 reads as follows:

Provide a cash-in-lieu of construction payment of \$311,000 to Multnomah County for the SE Kane Drive/SE 257th Avenue improvements, or provide an agreement with the County to proceed with half-street improvements under conditions that remove the SE Kane Drive geometric

sustain its burden of proof that condition of approval 28 imposes an obligation on the applicant is roughly proportionate in nature and extent to the impact of the project on the need for that realignment and improvement.<sup>9</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1993). In support of its arguments, the applicant relies on the written appeal and Hearing Exhibits 3, 9 and 13. The hearings officer disagrees with the applicant on this issue.

i. The manager's decision addresses this issue at pp. 26-29. Also see Exhibits E1, E2 and F of the Staff Report and Hearing Exhibits 7 and 8. Also see the May 6, 2002 and May 17, 2002 memoranda from Jay McCoy to Scot Keillor. The hearings officer agrees with and adopts those findings, exhibits and memoranda as his own except to the extent inconsistent with the following findings.

ii. Traffic from the site will use Kane Drive for access. Based on Figure 9 of the applicant's traffic study, 10% of the trips to/from the site will travel on Kane Drive southbound (including trips to Palmquist Road westbound) and 25% of the trips to/from the site will travel on Kane Drive northbound. A number of the northbound trips from the Kane Drive driveway will travel east and west on Powell Valley Road. Assuming the Kane Drive driveway carries 359 average daily trips, it is 18 times more traffic from the site than now generated by the two single family homes on the site with access to Kane Drive. Therefore there is a nexus between Kane Drive and the proposed development, and a sizable proportion of the site-related trips will travel on Kane Drive.

iii. Although the applicant's traffic study concludes that Kane Drive can accommodate traffic from the site without exceeding the acceptable level of service standard at affected intersections, that traffic study does not address the substandard geometry (i.e., vertical and horizontal curves) in Kane Drive abutting the site. Rather, the traffic study assumes those deficiencies will be remedied by the County road project to realign and widen the roadway. The traffic study also assumes there are two left hand turn lanes northbound at the intersection of Kane Drive and Powell Valley Road, resulting in an acceptable level of service, whereas only one turn lane exists now. Therefore the traffic study, on which the applicant steadfastly relies to support its arguments, assumes facts not in existence. If Kane Drive is not realigned and rebuilt to comply with road geometry standards, the intersection of the driveway with Kane Drive would be hazardous. If the intersection of Kane Drive and Powell Valley Road is not improved, delays at the intersection would increase by 38 to 41 seconds, a reduction of 9% over existing intersection performance, and would cause excessive queues. Therefore the applicant places too much reliance on the conclusions of the traffic study to show the proposed development will not have any adverse impact on the existing roadway conditions.

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deficiencies and incorporate those portions of the County CIP project necessary to remedy the vertical curve in SB Kane Drive.

<sup>9</sup> In oral testimony, the applicant's counsel conceded that the City sustained its burden of proof that there is an essential nexus between the project and the realignment and improvement of Kane Drive.

iv. To make the Kane Drive intersection function safely, the geometry of the roadway adjoining the site must be remedied. The manager's decision allows the applicant to do so as an alternative to making the contribution in lieu of improvements. Although less efficient to do so piecemeal, the applicant can do so to comply with condition of approval 28. If the applicant removed the substandard geometry of the roadway and made related improvements within the right of way, (e.g., to replace the utilities in the right of way, install a sidewalk abutting the site frontage, and provide appropriate transitions to the existing roadway section), it would cost roughly \$282,724. Administrative costs of the City associated with the applicant's construction would increase the total cost of the road project to \$311,000, including reasonable contingencies. This is the amount the manager's decision requires the applicant to pay in lieu of realigning and improving the roadway. Therefore it is roughly (i.e., exactly) proportionate to the cost of the roadway improvements necessary to bring Kane Drive into conformance with roadway geometry standards abutting the site.

v. The manager also computed the proportionate impact of traffic from the proposed development on Powell Valley Road and Kane Drive and found it to be roughly 7% to 9% of existing traffic volume. The costs imposed on the applicant to improve Kane Drive and Powell Valley Road are proportionate to this impact (roughly 7% to 12%).

vi. The applicant argued the City is requiring it to improve Kane Road to a five-lane section. That is incorrect. Based on the cost estimate attached to Mr. McCoy's May 17 memorandum, the City is requiring the applicant to pay for a 14-foot wide section of roadway on Kane Road abutting the site. This is roughly one-and-one-half lanes and is proportionate to increase volume of traffic on Kane Drive resulting from completion of the project in 2003.

vii. The applicant argued the City is requiring the applicant to build the roadway to accommodate traffic in the year 2020, by which time background traffic growth will warrant a five-lane section for Kane Drive. That is incorrect. The City is requiring the applicant to remedy existing substandard roadway conditions and to accommodate traffic from the project when complete (i.e., in 2003).

#### **D. CONCLUSIONS**

Based on the findings adopted or incorporated herein, the hearings officer concludes as follows:

1. The applicant sustained the burden of proof that the proposed development does or can comply with the applicable approval standards of the City of Gresham Community Development Code and should be approved, subject to the conditions of approval in the manager's decision, as amended to be consistent with the discussion herein.

2. Appellants Kelly Creek Neighborhood Association and Jim and Robyn Hainey

failed to rebut the substantial evidence in the record in support of the manager's decision with evidence that was substantial and of equal or greater probative value and more persuasive than the evidence in support the manager's decision.

3. The City of Gresham failed to sustain the burden of proof that there is a rational relationship between condition of approval 21 of the manager's decision and the impact of the proposed development.

4. The City of Gresham sustained the burden of proof that condition of approval 28 has an essential nexus to the proposed development and is roughly proportionate in nature and extent to the impact of the proposed development on the need for the realignment and improvement (or payments in lieu thereof) of Kane Drive abutting the site and extending a reasonable distance south of the site.

5. Based on the agreement of the applicant and the City, the hearings officer should amend condition of approval 17 as proposed by the applicant is Hearing Exhibit 11.

#### **E. ORDER**

Based on the findings and conclusions adopted or incorporated herein, the hearings officer hereby denies the appeals by Kelly Creek Neighborhood Association and Jim and Robyn Hainey. The hearings officer also denies, in part, and grants, in part, the appeal by the applicant. The hearings officer also affirms the manager's decision and approves DR02-519/AH (Aspen Highlands) subject to the conditions of approval of the manager's decision with the following amendments:

1. Condition of approval 21 is hereby deleted.
2. Condition of approval 17 is hereby amended to read as follows:

17. Improve the site's E. Powell Valley Road frontage per approval of Multnomah County and City Development Engineering. Provide funds to the City in an amount to allow construction of a ladder-style crosswalk with pedestrian island in the design and construction of these required E. Powell Valley Road improvements, or, alternatively, the funds will be used by the City to construct other pedestrian safety improvements on E. Powell Valley Road in the vicinity of the development.

DATED this 2<sup>nd</sup> day of July, 2002

/s/ Larry Epstein  
Larry Epstein, Esq., AICP  
City of Gresham Land Use Hearings Officer

## 2. First Segment of Dolan Findings on Transportation.



### MEMORANDUM

#### COMMUNITY & ECONOMIC DEVELOPMENT DEPARTMENT

Comprehensive Planning • Transportation Planning • Community Revitalization

Date: May 14, 2002

To: Gary Miniszewski, AICP, Sr. City Planner

From: Scott Keillor, AICP, Sr. Transportation Planner

Re: **DR-02-519 Aspen Highlands: 222 Apartments - Dolan Findings and Recommended Approval Conditions**

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#### I. Dolan Findings

##### A. Overview

Transportation Planning, Development Engineering and Transportation Engineering have worked with the applicant and Multnomah County to require certain street improvements to support the development of 222 apartments on the southeast corner of Kane and Powell Valley Roads. The conditions relative to public roadway development essentially require half street improvements to the property frontage on both streets, and a pedestrian crosswalk with pedestrian refuge island on Powell Valley Rd.

This memo gives project background, demonstrates the improvements under condition are reasonably related to the impacts of the project (nexus), and shows rough proportionality between the exaction and the project impacts to the transportation system. This relationship is established because street improvements are needed to support an increase in auto and non-automobile trips on the transportation system. The development includes 222 apartments with driveway access points to Kane Drive and Powell Valley Rd.

The following analysis shows rough proportionality between the impact of the project and the cost for required improvements. In summary, the required improvements are related to the auto and non-auto trips generated by the development of

the site for residential purposes. The cost of required improvements are “roughly proportional” to the trip impacts of the development and therefore are acceptable under the Dolan test.

## **B. Background**

The Aspen Highlands site is located in southeast Gresham, on the corner of SE Kane Drive (257<sup>th</sup>) and Powell Valley Rd. The Gordon Russell Middle School is located north of the site, across Powell Valley Rd, and existing neighborhoods are located east, south and west (across Kane) from the site. The intersection of Kane (County arterial) and Powell (County collector) prohibits the extension of a public street to serve the site due to intersection proximity, and the fact that there are no adjacent available local street connections. The site plan proposes access points to Kane and Powell Valley that maximize the distance to this major intersection. The application includes an original traffic study dated January 15, 2002 and an addendum dated March 14, 2002.

Developer-required roadway improvements are limited to the site frontage, and include a pedestrian crosswalk and refuge island in Powell Valley. Off site improvements to Kane Drive are proposed as part of an adopted County CIP project that will 1) remedy the “F” LOS at Kane and Orient (2003), and 2) remedy the vertical curve condition in Kane adjacent to the subject site. In addition, the County has committed to lobby the state for a reduction in the posted speed on Kane from 35 to 30 MPH so that the horizontal curves will meet standard roadway geometry. For details, please refer to the memorandum from Jay McCoy, City Traffic Engineer, dated May 6, 2002.

Physical street system development is reasonably related to the impacts of the project. The applicant’s traffic impacts include 1,435 ADT, 115 AM peak hour trips and 140 PM peak hour trips. The trip impacts are evaluated relative to the corridors they impact. For purposes of the following analysis, the Kane Drive corridor is defined from Orient to Powell Valley, and the Powell Valley corridor is defined from US 26 to Barnes Rd.

## **C. Findings**

### **1) Nexus/Public Problem**

Identification of the public problem the condition is designed to address.

The conditions include a requirement to construct half street frontage improvements for Kane Drive and Powell Valley Rd, and provide a crosswalk in Powell Valley aligned with the site driveway. The conditions, coupled with a committed County CIP project, are designed to correct substandard roadway geometry on Kane Drive, provide adequate capacity along both roadway segments, and to facilitate safe pedestrian crossing of Powell Valley Rd.

### **2) Nexus/Development will Exacerbate Problem**

Show that the proposed development will create or exacerbate the identified public problem.

Applicant requests a development permit to construct 222 apartments on the southeast corner of Kane and Powell Valley. The project is projected to generate 1,435 ADT or 140 PM peak hour trips, with 25% of trips assigned to Kane Drive and 75% assigned to

Powell Valley Rd. The traffic study (figures 5 and 11, and addendum, page 1) indicates a peak hour increase of 7% on Kane Drive and 9% on Powell Valley, or an average combined increase of 8% over base year peak hour traffic.

**3). Nexus/Rough Proportionality**

Show that the condition solves or alleviates the identified public problem.

The additional trips will contribute to traffic along Kane and Powell Valley and will exacerbate the identified safety problem. When the trips are added, there will be an 8% increase in PM peak hour traffic. With the conditions and committed County CIP project on Kane, the geometric or “nominal safety problems” on Kane will be resolved.

**4). Rough Proportionality – Impacts in Peak Hour Trips Proportional to Improvement and Right-of-Way Costs.**

Show the proposed solution (condition) is roughly proportional to that part of the problem created or exacerbated by the proposed development.

The site will use Kane and Powell Valley for access and will generate 8% of the combined PM peak hour trips (derived from traffic study figures 5 and 11, and addendum, page 1). The proportional cost per trip is tabled below.

<b>Table 1 trips/costs</b>	<b>Total Costs</b>	<b>Project Costs</b>	<b>% Project</b>
<b><u>Kane Dr</u></b> County Minor Arterial (CIP build out = 5 lanes)  Aspen Highland PH trips = 35 or 7% of total	1,680' from Orient to Powell Valley @ \$1,012 lf = \$1.7M, plus 134,400 sf ROW @ \$10/sf = \$1.344M  \$3.044M	850' frontage @ \$366 lf = \$311,000, plus ROW dedication (less vacation area) = 4,800 sf @ \$10/sf = \$48,000  \$359,000	Project's impacts/costs for Kane Drive:   7% of PH trips and 12% total street costs
<b><u>Powell Valley Rd</u></b> County Major Collector (3 lanes)  Aspen Highlands PH trips = 105 or 9% of total	3,200' from US 26 to Barnes Rd @ \$608 = \$1.946M, plus 224,000 sf ROW @ \$10/sf = \$2.24M  \$4.186M	750' frontage @ \$330 lf = \$248,000, plus ROW dedication = 3,710 sf @ \$10/sf = \$37,100, plus \$5,000 crosswalk \$290,100	Project's impacts/costs for Powell Valley Rd:   9% of PH trips and 7% total street costs
<b><u>Combined Total</u></b> Aspen Highlands PH trips = 140 or 8% of total	Construct = \$3.65M ROW = \$3.58M  <b>\$7.23M</b>	Construct = \$564,000 ROW = \$85,100  <b>\$649,100</b>	<b>Project's impact/costs:</b>  <b>8% increase PH trips</b> <b>9% of street costs</b>

Finding

As shown in table 1, the project will generate 8% of the total peak hour trips on Kane Drive and Powell Valley Road and will pay 9% of the improved cost (including right-of-way). Based on street system impacts generated by the proposed 222-unit Aspen

Highlands apartment project, the above analysis shows the project will contribute a roughly proportional amount to improve the supporting street system. In addition to the applicant's frontage improvements, the County will improve Kane Drive to a 5-lane section from Orient to Powell Valley Road under a CIP project scheduled for completion in 2003/04.

**Conclusion: The proposed Aspen Highlands apartment project is supported by City and County Transportation Planning and Engineering staff based on the above findings of fact and with the following conditions.**

## **II. Recommended Conditions**

1. Dedicate 5' to the site's Powell Valley Rd frontage and provide an additional 5' easement to Multnomah County, per Development Engineering comments.
2. Improve the site's Powell Valley Rd frontage per approval of Multnomah County and City Development Engineering. Include a ladder style crosswalk with pedestrian island in Powell design and construction.
3. Provide a cash in lieu of construction payment of \$311,000 to Multnomah County for the Kane Rd improvements, or provide an agreement with the County to proceed with half street improvements under conditions that remove the Kane Rd. geometric deficiencies and incorporate those portions of the County CIP project necessary to remedy the vertical curve in Kane Drive.

Thanks for the opportunity to provide comment. Please feel free to call me at x2777 (503-618-2777) should you have any questions.

### **3. Second Segment (Supplemental) of Dolan Findings on Transportation.**



## **MEMORANDUM**

### **COMMUNITY & ECONOMIC DEVELOPMENT DEPARTMENT**

**Comprehensive Planning • Transportation Planning • Community Revitalization**

Date: May 14, 2002

To: Gary Miniszewski, AICP, Sr. City Planner

From: Scott Keillor, AICP, Sr. Transportation Planner

## **I. Dolan Findings**

### **A. Overview**

Transportation Planning, Development Engineering and Transportation Engineering have worked with the applicant and Multnomah County to require certain street improvements to support the development of 222 apartments on the southeast corner of Kane and Powell Valley Roads. The conditions relative to public roadway development essentially require half street improvements to the property frontage on both streets, and a pedestrian crosswalk with pedestrian refuge island on Powell Valley Rd.

This memo gives project background, demonstrates the improvements under condition are reasonably related to the impacts of the project (nexus), and shows rough proportionality between the exaction and the project impacts to the transportation system. This relationship is established because street improvements are needed to support an increase in auto and non-automobile trips on the transportation system. The development includes 222 apartments with driveway access points to Kane Drive and Powell Valley Rd.

The following analysis shows rough proportionality between the impact of the project and the cost for required improvements. In summary, the required improvements are related to the auto and non-auto trips generated by the development of the site for residential purposes. The cost of required improvements are “roughly proportional” to the trip impacts of the development and therefore are acceptable under the Dolan test.

### **B. Background**

The Aspen Highlands site is located in southeast Gresham, on the corner of SE Kane Drive (257<sup>th</sup>) and Powell Valley Rd. The Gordon Russell Middle School is located north of the site, across Powell Valley Rd, and existing neighborhoods are located east, south and west (across Kane) from the site. The intersection of Kane (County arterial) and Powell (County collector) prohibits the extension of a public street to serve the site due to intersection proximity, and the fact that there are no adjacent available local street connections. The site plan proposes access points to Kane and Powell Valley that maximize the distance to this major intersection. The application includes an original traffic study dated January 15, 2002 and an addendum dated March 14, 2002.

Developer-required roadway improvements are limited to the site frontage, and include a pedestrian crosswalk and refuge island in Powell Valley. Off site improvements to Kane Drive are proposed as part of an adopted County CIP project that will 1) remedy the “F” LOS at Kane and Orient (2003), and 2) remedy the vertical curve condition in Kane adjacent to the subject site. In addition, the County has committed to lobby the state for a reduction in the posted speed on Kane from 35 to 30 MPH so that the horizontal curves

will meet standard roadway geometry. For details, please refer to the memorandum from Jay McCoy, City Traffic Engineer, dated May 6, 2002.

Physical street system development is reasonably related to the impacts of the project. The applicant's traffic impacts include 1,435 ADT, 115 AM peak hour trips and 140 PM peak hour trips. The trip impacts are evaluated relative to the corridors they impact. For purposes of the following analysis, the Kane Drive corridor is defined from Orient to Powell Valley, and the Powell Valley corridor is defined from US 26 to Barnes Rd.

## **C. Findings**

### **1) Nexus/Public Problem**

Identification of the public problem the condition is designed to address.

The conditions include a requirement to construct half street frontage improvements for Kane Drive and Powell Valley Rd, and provide a crosswalk in Powell Valley aligned with the site driveway. The conditions, coupled with a committed County CIP project, are designed to correct substandard roadway geometry on Kane Drive, provide adequate capacity along both roadway segments, and to facilitate safe pedestrian crossing of Powell Valley Rd.

### **2) Nexus/Development will Exacerbate Problem**

Show that the proposed development will create or exacerbate the identified public problem.

Applicant requests a development permit to construct 222 apartments on the southeast corner of Kane and Powell Valley. The project is projected to generate 1,435 ADT or 140 PM peak hour trips, with 25% of trips assigned to Kane Drive and 75% assigned to Powell Valley Rd. The traffic study (figures 5 and 11, and addendum, page 1) indicates a peak hour increase of 7% on Kane Drive and 9% on Powell Valley, or an average combined increase of 8% over base year peak hour traffic.

### **3). Nexus/Rough Proportionality**

Show that the condition solves or alleviates the identified public problem.

The additional trips will contribute to traffic along Kane and Powell Valley and will exacerbate the identified safety problem. When the trips are added, there will be an 8% increase in PM peak hour traffic. With the conditions and committed County CIP project on Kane, the geometric or "nominal safety problems" on Kane will be resolved.

### **4). Rough Proportionality – Impacts in Peak Hour Trips Proportional to Improvement and Right-of-Way Costs.**

Show the proposed solution (condition) is roughly proportional to that part of the problem created or exacerbated by the proposed development.

The site will use Kane and Powell Valley for access and will generate 8% of the combined PM peak hour trips (derived from traffic study figures 5 and 11, and addendum, page 1). The proportional cost per trip is tabled below.

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<b><u>Combined Total</u></b> Aspen Highlands PH trips = 140 or 8% of total	Construct = \$3.65M ROW = \$3.58M  <b>\$7.23M</b>	Construct = \$564,000 ROW = \$85,100  <b>\$649,100</b>	<b>Project's impact/costs:</b>  <b>8% increase PH trips 9% of street costs</b>

### Finding

As shown in table 1, the project will generate 8% of the total peak hour trips on Kane Drive and Powell Valley Road and will pay 9% of the improved cost (including right-of-way). Based on street system impacts generated by the proposed 222-unit Aspen Highlands apartment project, the above analysis shows the project will contribute a roughly proportional amount to improve the supporting street system. In addition to the applicant's frontage improvements, the County will improve Kane Drive to a 5-lane section from Orient to Powell Valley Road under a CIP project scheduled for completion in 2003/04.

**Conclusion: The proposed Aspen Highlands apartment project is supported by City and County Transportation Planning and Engineering staff based on the above findings of fact and with the following conditions.**

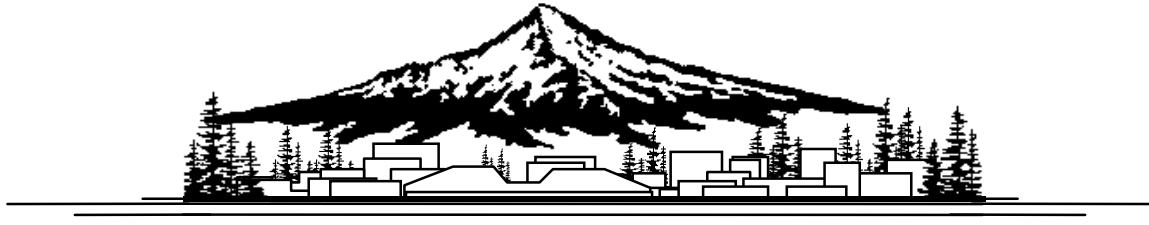
### **II. Recommended Conditions**

4. Dedicate 5' to the site's Powell Valley Rd frontage and provide an additional 5' easement to Multnomah County, per Development Engineering comments.
5. Improve the site's Powell Valley Rd frontage per approval of Multnomah County and City Development Engineering. Include a ladder style crosswalk with pedestrian island in Powell design and construction.
6. Provide a cash in lieu of construction payment of \$311,000 to Multnomah County for the Kane Rd improvements, or provide an agreement with the County to proceed with half street improvements under conditions that remove the Kane Rd.

geometric deficiencies and incorporate those portions of the County CIP project necessary to remedy the vertical curve in Kane Drive.

Thanks for the opportunity to provide comment. Please feel free to call me at x2777 (503-618-2777) should you have any questions.

**4. The Appeal Staff Report on Dolan Issues.**



*Community and Economic Development Department  
City of Gresham*

**STAFF REPORT**

**APPEAL OF STAFF'S DECISION  
OF A TYPE II REVIEW FOR A 222-UNIT APARTMENT  
COMPLEX (Aspen Highlands)**

TO: Larry Epstein, Esq., City Hearings Officer

FROM: Gary Miniszewski, AICP, Senior City Planner

FILE NUMBER: DR 02-519/AH

APPELLANTS:

- A. Edward Sullivan, Esq., representative for Ossey Development Corporation
- B. Michael Whisler, representative for Kelly Creek Neighborhood Association
- C. Michael Neff, Esq., representative for Jim and Robyn Hailey

APPLICANT: Glad I LLC/ Ossey Development Corporation

LEGAL DESCRIPTION: Tax Lots 8900, 9000, & 9100 of Tax Map 1S 3E 14AA and Tax Lot 3100 of Tax Map 1S 3E 11DD

LOCATION: 3604 E Powell Blvd. (SE corner of Kane Drive & E. Powell Blvd.)

REPORT DATE: June 19, 2002

HEARING DATE: June 28, 2002

PROPOSAL: Appeal A: Appeal of certain conditions of the approval of a Type II Administrative decision for a 222-unit apartment project. The specific conditions under appeal are conditions 9,16-21, and 28 requiring dedication of lands and/or street improvements; and application of discretion regarding on-site and off-site public improvements.

Appeal B: Appeal of a Type II Administrative decision of approval and certain conditions of approval for the 222-unit apartment complex, specifically pertaining to driveway access and crosswalk locations on E. Powell, building height, lack of or inadequate intersection and public improvements on Kane Drive and E. Powell, and lack of detailed information for site and street improvements, trees, and traffic study data by which to make an adequate decision.

Appeal C: Appeal of a Type II Administrative decision for the a 222-unit apartment complex, specifically noting the appellant's claims regarding need for right-of-way vacation by Multnomah County to be processed prior to site design review approval, traffic issues, and insufficient traffic study data, and proposed realignment of SE Kane Drive.

RECOMMENDATION: **Denial of all three appeals; uphold staff's decision for approval of the application with the original 28 conditions with the modification of applying one additional condition of approval.**

EXHIBITS:

- A Vicinity Map
- B Applicant's Appeal
- C Neighborhood Association Appeal
- D Hailey Appeal
- E1 Transportation Planning Dolan Findings and associated Attachments
- E2 Transportation and Land Planning Non-Dolan Attachments

F Development Engineering Dolan Findings  
G May 20, 2002 Staff Report

## I. EXECUTIVE SUMMARY AND BACKGROUND

Application DR 02-519 was submitted on January 23, 2002, requesting Site Design Review for a proposal to construct 222 apartment units on a 9.69 acre lot at the corner of Kane Drive and Powell Valley Boulevard, also known as Powell Valley Road. This application was reviewed following Type II review procedures. This process is more fully discussed in Exhibit G, Staff Report (5/20/2002).

The application was deemed complete March 20, 2002. A decision was issued on May 20, 2002 to approve the application with conditions. The appeal period expired on June 3, 2002. Three appeals were received in a timely manner before close of business on June 3, 2002. The 120<sup>th</sup> day is July 18, 2002. The applicant has not agreed to waive the 120-day processing time limit. Therefore, these appeals are being processed concurrently and have been scheduled as soon as is feasible to still meet public notification requirements. The appeals are scheduled for a public hearing on Friday, June 28, 2002.

## II. FINDINGS

### A. Applicable Community Development Procedures:

1. *Appeal Notice and Procedures* (Section 11.0510) states that appeals of decisions must be filed within 12 days of notice of decision.

**Findings: Satisfied.** Staff issued the decision on the subject application May 20, 2002 and all three appeals were filed in a timely manner prior to the June 3<sup>rd</sup> deadline.

Section 11.0510 also provides specific requirements for the content of appeals. This section states that a notice of appeal shall contain:

*(a) An identification of the decision sought to be reviewed, including the date of the decision.*

*(b) A statement of the interest of the person seeking review and that they were a party to the initial proceedings.*

*(c) A detailed statement of the specific grounds relied upon for review.*

**Findings: Satisfied.** Regarding (a): All three letters of appeal (Exhibits B, C & D) identify the development and the decision made. Therefore, subsection (a) is satisfied.

**Findings: Satisfied.** Regarding (b): The appeal by the applicant (Exhibit B) clearly states the appellant's standing. The standing of the Neighborhood and Mr. Hainey (Exhibit C & D) has been stated in their appeal letters. Therefore, subsection (b) is satisfied.

**Findings: Satisfied.** Regarding (c): The appeal letters from the applicant, the neighborhood association and Mr. Hainey give sufficient detail regarding the specific grounds of the three appeals. Staff in subsequent findings and/or reference to original findings will address these.

2. *Appeal of a Type II Decision-Scope of Review* (Section 11.0520(A)). The Hearings Officer is the review body for the appeals of Type II decisions (11.0203(D)). The scope of review for an appeal of a Type II decision shall be a de novo hearing, with the ability to submit new evidence and testimony relative to the issues raised in the appeals (11.0520(A)).

**Findings: Satisfied.** This appeal proceeding permits the right of new evidence and testimony pertaining to issues raised in the appeal letters.

3. *Review Body Decision* (Section 11.0521). The review body (Hearings Officer) may affirm, reverse, modify in whole or in part, or remand a determination or requirement of the decision that is under review. The review body shall render its decision no later than 45 days after the filing for request of review.

**Findings: Satisfied.** These appeals were filed on May 31 and June 3 2002. The hearing is scheduled for June 28, 2002, 25 days after the latest appeal submittal. This is well within the 45-day time limitation.

4. *Appeal of Review Body Decision* (11.1203(F)). The decision of the hearings officer on any appeal may be further appealed to the City Council by a party to the hearing in accordance with Section 11.0500 and shall be a review of the record supplemented by oral arguments relevant to the record presented by the parties.

**Findings: To be Determined.** A person or persons who have “standing” to participate in any of the subject appeals before the hearings officer may file a subsequent appeal of the hearing officer’s decision to the City Council.

#### B. Applicable Community Development Procedures and Standards

For this application (Type II Site Design Review) for Multifamily Dwellings located in the MDR-24 District applicable Gresham Community Development Code procedures, criteria and standards are listed below:

11.0101	Development Permit Required
11.0203	Type II Procedure
11.0211 – 11.0214	Development Permit Application & Decision
11.0311 – 11.0314	Public Notice Requirements
3.0000	Definitions
4.0113	Moderate Density Residential-MDR-24
4.0120	District – Land Uses
4.0130	District – Standards
7.0001 – 7.0003	Site Design Review Purpose and Authority
7.0101	Site Design Review Submittal Requirements
7.0201	Site Design Review Standards and Criteria
9.0100	Buffering and Screening
9.0200	Clear Vision Areas
9.0300	Easements
9.0400	Fencing
9.0500	Grading and Drainage & Storm water Quality Control
9.0600	Height Transition
9.0701 – 9.0710	Neighborhood Circulation
9.0800	Parking Requirements and Design Standards
9.0900	Projections
9.1020 – 9.1021	Street Trees
Appendix 5.000	Public Facilities – General Provisions
Appendix 5.100	Sanitary Sewer Facilities
Appendix 5.200	Surface Water Management Systems
Appendix 5.220	Storm water Quality Control Requirements
Appendix 5.300	Water Facilities
Appendix 5.400	Streets
Appendix 5.500	Roadway System Description/Function
Appendix 5.600	Street Design Standards
Appendix 5.700	Functional Classification Designation
Appendix 6.000	Signs

Findings to address the above sections have been provided in Exhibit G (Attached May 20, 2002 Staff Report).

### C. Appeal Issues

The applicant, Glad I LLC/ Ossey Development Corp, submitted the appeal of City Staff's decision for the subject proposal May 31, 2002. Both the Kelly Creek Neighborhood Association and Hainey appeals of the staff decision (respectively represented by Michael Whisler and Michael Neff) were submitted June 3, 2002. The three appeal statements identify multiple issues as grounds for the three appeals. These will be identified and addressed as follows:

**A. Applicant's Grounds For Appeal (Exhibit B)**

**Applicant Appeal Issues.**

Regarding compliance with Code Sections 70001 (A) (Site Design Review General Provisions), 11.0200 and 11.0500 (Development Procedures) the applicant's appeal states:

**Applicant Issue 1.** *Conditions 9,16 to 21 and 28, which require the dedication of lands or street improvements, have not been justified by a rough proportionality analysis, as required by Dolan v City of Tigard, 512 U.S. 374 (1994). Because the decision under review is a limited land use decision, comprehensive plan provisions cannot be used in such justification unless specifically incorporated into City development standards. ORS 197.195(1). The Manager misapplied Article VI Public Facilities and Street Standards AF.400 at 25-30 of the report used to justify the said conditions. The applicant also raises this issue under ORS 197.796, Article I, Section 18 of the Oregon Constitution and the Fifth and Fourteenth Amendments to the federal constitution."*

**Response: Disagree.**

Conditions 9,16 to 21 and 28 have been justified by a rough proportionality analysis.

An original Dolan Analysis dated May 14, 2002 was attached to the type II decision under appeal. A supplemental Dolan Analysis further justifying proposed street frontage improvements is attached as Exhibit E1. A supplemental Dolan Analysis further justifying all other public improvements is attached as Exhibit F. The analysis for street improvements indicates that the proposed 222-apartment development will generate 1,435 ADT. This represents an increase of 8% for traffic on Powell Valley Road and Kane Drive. The developer is required to contribute 9% of the roadway rights-of-way and frontage improvements, which is roughly proportional to the 8% trip impact caused by the project.

The analysis indicates that the development will increase both vehicular and non-motorized trips, because the apartment site is located south of the Gordon Russell Middle School, proximate neighborhoods and commercial sites located within one-quarter mile south and east of the site. The site has frontage on Kane, a County Minor Arterial Roadway that does not currently meet County Roadway improvement standards. In addition, there are geometric deficiencies in the existing roadway as built along the subject frontage. See Jay McCoy and Dan Brown memo, Exhibit F of the original staff report (Exhibit G) that are proposed to be remedied through a County Capital Improvement Project (CIP) during year 2003 (see attached CIP

excerpt for project detail). The project also fronts on Powell Valley Road, a County Major Collector that does not currently meet standards and will require improvements to accommodate traffic generated by the project. The conditions imposed relative to transportation improvements require dedications to meet standard roadway widths (adding 15' to Kane and 5' to the Powell Valley ROW), addition paved width to accommodate travel lanes (23' on Kane and 14' on Powell Valley), standard sidewalks, street trees, and lighting for both frontages.

City and County staff have worked extensively to coordinate the CIP improvements to meet the developer's timeline for project implementation. The Draft 2002-2006 County CIP updates the 1998-2002 CIP in part to move funding forward and construct the Kane frontage during year 2003. The attached Draft 2002-2006 CIP list indicates funding for the 257<sup>th</sup> Kane Rd project from Division to 800' south of Powell Valley at \$1.1M, of which \$770,000 is County funding. The County has relied on the developer's proportional share contribution in order to move the project to a top-ranking year 2003 project.

The County's present CIP project includes the needed vertical realignment of Kane, which is not charged to the developer on a proportional share basis, nor is any portion of the administrative costs for the work included in the frontage improvement cash-in-lieu payment. Meetings to detail project roadway needs and public/private coordination include: a meeting with City staff and Developer on Thursday, April 25<sup>th</sup>, 2002, a meeting between City and County staff and the Developer on Thursday, May 2, 2002, a meeting between County staff and the Developer on Thursday, May 30, 2002, and multiple coordination session between all three participating entities interested in moving the Kane improvements forward. Note also that the Draft CIP includes year 2003 completion of Kane Rd, from Orient Drive to 11<sup>th</sup> (Orient/Palmquist #62), that will remedy an existing LOS "F" at Kane and Orient. Clearly, the City and County have coordinated efforts and have worked closely with the developer to ensure timely and adequate public improvements required for project approval.

b. Because the decision under review is a limited land use decision, comprehensive plan provision cannot be used in such justification unless specifically incorporated into City development standards.

c. Manager misapplied Article VI Public Facilities and Street Standards AF.400 (Appellant may mean A5.400 on pages 25-30 of the original staff report)

d. Raises issue under Oregon Constitution and Federal Constitution

**Response: Disagree.**

The City Transportation Planning Staff and the Development Planning Staff reviewed the proposed project based on Gresham Community Development Code citations addressed in the following discussion and in the May 20, 2002 staff report/decision. The Gresham Community Development Code is part of the Gresham Community Development Plan, which has been found in compliance with Oregon State Land Use Goals and Guidelines. The Community Development Code is identified as Volume 3 of the Gresham Community Development plan. Volume 1 of the Gresham Community Development Plan is the Findings Document and Volume 2 is the Policy Document.

Gresham Community Development Code (Volume 3 of the Community Development Plan) entails specific zoning requirements and development review criteria and standards that identify where and how development can be reviewed and established in the City. The criteria and standards found in the Community Development Code have been written to implement Volume II plan policies and therefore the criteria and standards are more detailed in nature. The review criteria and standards found in the Development Code (Volume 3) are development requirements that are narrow in scope, clear and objective, as opposed to the land use and land development policies that are general in nature for land use, development and conservation found in Volume 2 of the Gresham Community Development Plan. Because the above requirements, criteria and standards are specific, clear and objective, they provide planning staff clear guidance, with little need for the use of discretion in reviewing development projects for Community Development Code compliance.

The City has been granted the authority to conduct land use reviews and approvals including roadway improvements under a City/County Intergovernmental Agreement (Exhibit E-2). County roadway improvement standards in Exhibit E-2 are similar to those governing City arterial and collector streets. Transportation-related improvements necessary to support the project are required under the following City of Gresham Community Development Plan, Volume 3, Code sections:

Section 7.0201 (G)(3) Design Review, Multi-Family, Vehicular Circulation  
Based on the anticipated vehicular and pedestrian traffic generated and the policies of the Community Development Plan, adequate right-of-way and improvements to abutting streets shall be provided by the applicant and shall meet the street standards of the City. This may include, but is not limited to, improvements to the right-of-way, such as the installation of lighting, signalization, turn lanes, paving, curbs, sidewalks, bikeways, and other facilities needed because of anticipated vehicular and pedestrian traffic generation.

Found Applicable. The implementing ordinance is Volume 3 of the Gresham Community Development Plan. This is the Code portion of the Plan used to evaluate development proposals. Street frontage improvements are required proportional to the impact of the project due to increased vehicular and non-motorized traffic generation.

A5.401 General Provisions

No development permit shall be issued unless the development has frontage or approved access to a public street. Abutting streets shall be dedicated and improved to the “City of Gresham Public Works Standards.” No development will be permitted where it will cause traffic generation and an unacceptable Level of Service beyond the street’s current carrying capacity including pavement width and signalization. No development permit will be granted where such development will create dangerous or hazardous traffic conditions.

Found Applicable. Proportional street frontage improvements required.

A5.402 (D) For Residential Subdivisions, and for Attached Dwellings on a Single Lot (cross-referenced by 7.0201(G)(1))

\*\*\*The maximum perimeter of the blocks formed by local and collector streets shall not exceed 1900 feet when measured along the nearside right-of-way line.\*\*\*

Found not applicable due to arterial frontage forming one leg of the block. If found applicable, the standard would have required a local street through the site, rather than private driveway access.

A5.410 (A) Sidewalks

Public sidewalks are required on the public street frontage of all new residential construction, and all commercial and industrial construction that requires a development permit\*\*\*

Found Applicable. Sidewalks required.

A5.410(C)(4)(c) Sidewalks

The Manager may allow modifications to standard sidewalk design and location for the following reasons.\*\*\* The Manager may waive or defer construction of standard sidewalks in the following cases:\*\*\* Other physical circumstances that prevent construction without harming the public’s interest, as determined by the Manager.

Found Applicable. Due to the County’s CIP plan to realign the vertical curve, immediate sidewalk construction would be mis-aligned with planned street grade. Cash-in-lieu of construction is required to protect the public’s interest insofar as reconstruction would waste both private and public funds.

A5.503 and A5.703 Minor Arterial

Found Applicable. Kane Drive is a City Minor Arterial that requires an 80' ROW, consistent with County standards.

A5.504 and A5.704 Collectors

Found Applicable. Powell Valley is a City Collector that requires a 60' ROW. Powell Valley is a County Major Collector.

A5.506(A)(3) and A4.708 Transit Route

Found Applicable. Powell Valley is a Transit Route, a designation for streets with current but infrequent transit service. Transit Routes are subject to future designation as Transit Streets as refinement of transit service levels are identified through the local and regional transportation system planning process. No approval conditions result from this designation.

A5.506 (B) Private Driveway Accesses

A private driveway access serves a number of dwelling units\*\*\*or apartments in those areas where a continuation of a public street system is not needed.

Found Applicable. As determined under Section A5.402(D) above, and given that the Dolan Analysis will not support a new local street through the site, private driveway access is approved.

A5.507 Traffic Analysis

\*\*\* A traffic analysis will generally be required for a development 1) when it will generate 1,000 vehicle trips per weekday or more, or 2) when a development's location, proposed site plan, traffic characteristics could affect traffic safety, access management, street capacity, or known traffic problems or deficiencies in a development's study area.\*\*\*

Found Applicable. A Traffic Study and Addendum was required.

A5.601 Right-of-Way and Pavement Width

Table A5.601A indicates the following in relevant part:

Minor Arterial: 60' to 90' ROW, 44' to 72' of pavement.  
Collector: 60' ROW, 40' to 44' of pavement.

Found Applicable. The County classification and standard for ROW and pavement width are similar. The City/County IGA gives the land use approval authority to the City and indicates that the City and County shall strive for common standards. City/County coordination is occurring as part of the City's development of a new Transportation System Plan.

A5.608 Design Speed

Minor Arterial 35-40 MPH

Collector 25-30 MPH

Found Applicable. County standards are comparable.

A5.604 Horizontal/Vertical Curves and Grades

(A) Horizontal Curves – Horizontal curve radius (on centerline) for each street classification shall be designed according to the roadway design speed.

The radius shall not be less than the following:

Minor Arterial 415'-600'

Collector 165'-275'

(B) Vertical Curves – Vertical curve length shall be based on the design criteria that include: (1) design speed, (2) crest vertical curve, and (3) sag vertical curve. Stopping sight distance for crest and sag vertical curves shall be based on sight distance and headline distance, respectively.

Arterial 0.060 ft/ft (06%)

Collector 0.080ft/ft (08%)

Found Applicable. The conditions address the deficiencies in Kane Road vertical and horizontal curves.

A5.608 Driveways

Access to private property shall be permitted with the use of driveway curb cuts. The access points with the street shall be the minimum necessary to provide access while not inhibiting the safe circulation and carrying capacity of the street.

On arterial and collector streets and above, one driveway per site frontage will be the normal maximum number. Double frontage and corner lots on these streets may be limited to access from a single street, usually the lower classification street.\*\*\*

Table A5.608(A) Driveway Approach Widths (Min/Max)  
Minor Arterial - (12' min / 24' max)  
Collector - (12' min / 24' max)

Table A5.608(B) Driveway Locations (Minimum Distance to Curb Return)  
Minor Arterial 100'  
Collector 100'\*

\*Subsection (F) indicates that multi-family projects must meet the same access requirements as commercial driveways if the multi-family site generates more than 100 ADT.

Found Applicable. Site plan meets the above standards.

**Applicant Issue 2.** *“Those same conditions are made applicable in the Manager’s Report to on and off site transportation improvements and involve the application of discretion. The application at issue involves “needed housing” under ORS 197.303 (1). ORS 197.307 (3)(b) requires in such circumstances that a city shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance or aesthetics to an application for development, as defined in ORS 215.402 or 227.160, for residential development. The standards or condition may not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone.*

*Moreover, ORS 197.307 (6) provides: Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay”.*

**Response:** *Disagree*

The subject proposal review has been completed and a report was issued addressing compliance with the Gresham Community Development Code in a timely manner. Where the project proposal was out of compliance with the clear and objective Development Code criteria and standards, specific conditions were provided to the applicant facilitating project compliance. The City Development Planning, Transportation Planning and Development Engineering staff found the application for the subject proposal complete March 15, 2002 and a staff report approving the proposal, with conditions, was issued May 20, 2002. Considering the complexities associated with this proposal, staff considers this review period reasonable and not causing unreasonable application processing delay or costs for the applicant.

Regarding the possibility of density reduction, the applicant applied for 222 units and 222 units were approved. That translates to 22.91 units per acre which is close to the MDR-24 District's maximum allowed density of 24.2 units per acre. City Staff has not indicated to the applicant at any time during the pre-application or application review process that the proposed density should be reduced. Also, the dedication of land for private right-of-way does not reduce the allowed density because the maximum density is based on gross site acreage and not net site acreage.

Staff is not aware of any standards or special conditions regulating, in whole or in part, appearance or aesthetics applied to this application that might have the affect of reducing project density. There is one standard regarding height transition under site design review (7.0201 (K) (2) addressed on page 15 of the original staff report that could be perceived to possibly have an affect on project densities. However, this standard addresses compatibility with abutting Low Density Residential (LDR) housing and was not originated to regulate appearance or aesthetics of the buildings. In any case, the applicant had and has adequate site design flexibility regarding building height variability (maximum height can be 40 to 45 feet outside of 50' height transition area abutting LDR) and building location options to meet the above standard while retaining the proposed density.

#### **Staff Conclusions to Applicant's Appeal**

The two major issues of the Applicant's appeal have been considered and adequately addressed by Planning Staff. Based on the above findings, staff concludes that no changes are warranted in either staff's decision to approve the project or the associated conditions of approval.

#### **B. Kelly Creek Neighborhood Association's (KCNA) Grounds for Appeal (Exhibit C)**

##### **KCNA Issue 1.**

The KCNA contends the City Staff improperly evaluated and applied Development Code Sections 9.0822 (A) (2) (Curb Cuts/Access Points) and A5.608 Driveways. The proposed location of the E Powell Valley Blvd driveway from the subject site inhibits safe circulation of traffic on E Powell Valley Blvd. This is the case because E Powell Valley Blvd already has high traffic volumes in addition to the location of the Gordon Russell School Driveway. *"The driveway already has an operating rating of F as stated in page 33 of Aspen Highlands traffic impact analysis. Adding the apartments driveway to Powell just makes the concern for pedestrian safety worse and safety should be the number one concern"*.

Section A5.608 states that double frontage and corner lots on arterial and collector streets may be limited to access from a single street, usually the lower classification street. This standard was misapplied and evaluated. This standard states “usually” the lower classification street should have the access. *“The intent of using the word “usually” is that sites be evaluated individually- this was not done”*.

**Response: *Disagree*, qualified by further analysis/potential mitigation by the developer.**

Section 9.0822(A)(2) requires the minimum number of curb cuts be allowed consistent with Section A5.608 Driveways, while not inhibiting safe circulation of the site. The site plan and traffic analysis support one driveway per frontage, with adequate findings. As noted, the Gordon Russell Middle School driveway is forecast to operate a LOS F with this development. The traffic study shows that the driveway operates at LOS E in the AM peak under 2001 existing and 2003 background conditions. The driveway operates at LOS C under 2001 existing and 2003 PM peak hour background conditions. The development results in an LOS F for the school driveway. Under Section A5.402(C), LOS D is required and an LOS E may be acceptable for local street (or driveway) movements, as long as these movements do not create hazardous traffic conditions. **The applicant should address the LOS F forecast for the middle school driveway.** The staff has otherwise properly applied the code sections relative to Driveways. Staff disagrees that Section A5.608 language relating to locating a drive on a lower classification street is applicable in this case. This is because that language is for cases where a corner lot is limited to a *single access*, which is not possible with a multi-family project of this scale given traffic study findings and Fire Department access needs.

**KCNA Issue 2.**

The KCNA contends that Staff improperly evaluated and applied Code Section A5.402 regarding the approval of a new crosswalk location on Powell Valley Blvd. They contend that proposed location for the crosswalk is the most dangerous known location.

**Response: *Disagree***

The applicant’s traffic study indicates that there is congestion at the middle school access during peak school operations. They assert that this is an existing condition for which the applicant is not responsible (at page 32). They indicate that adequate gaps exist for pedestrian crossings of Powell Valley during peak arrival and departure time. Staff accepts that pedestrians do and will continue to cross the street in unmarked cross walks. With the degraded LOS proposed at the middle school from E to F in the AM peak, it is

reasonable to assume that potential for pedestrian conflicts will increase with the development, and like the driveway operations, the pedestrian crossing issue should be mitigated. The existing crosswalks at Kane and Powell Valley Rd (over 500' west) and mid-block nearly 700' east require out of direction travel to an extent that pedestrians will cross Powell Valley on the site frontage. The condition to require a mid-block crosswalk with a pedestrian refuge in Powell at the site's access to Powell is a reasonable mitigation measure to focus mid-block crossing at the access drive and to provide safe refuge where a two-stage crossing becomes necessary. See memo of May 17 from Jay McCoy, Exhibit E of original staff report (Exhibit G.).

**KCNA Issue 3.**

The KCNA contends that Staff improperly evaluated and applied Code Section A5.400 Streets A5.401 & A5 402 (C ). They contend that the proposed project will be adding additional trips to the Kane/Orient intersection that is rated service level F and is known to be an unacceptable safety problem. The KCNA states “ *it cannot be dismissed with the statement that it will be fixed in the future. You cannot allow any more trips to be added to the failed intersection*”.

**Response: Disagree**

The Applicant's traffic analysis relies on a County CIP to remedy the LOS F at the Kane/Orient intersection. As shown in Exhibit E-2, the Kane Road CIP is scheduled for construction in 2003. Extensive coordination of public and private roadway improvement needs and timing has caused the County to move the entire Kane improvement from Orient to Powell Valley up to year 2003 to ensure concurrency.

**KCNA Issue 4.**

The KCNA contends that Staff did not apply Code Section A5.007 (Commercial, Mixed Use, Industrial, Moderate and Density Residential and Community Service Building Permits Development). This Code section requires that public improvements must be completed before occupancy of the apartment project is permitted. The KCNA states that building permits cannot be issued prior to public improvements are completed. They also state where the existing Kane drive centerline is and recommend where it should be located. They also state “ *notification with significant comment time allowed for all effected landowners on Kane before Kane Rd improvements are finalized*”.

**Response: Disagree.**

The applicant's ability to provide adequate transportation improvements is achieved through conditions to provide cash in lieu for the Kane Drive improvements. This allows the County to combine the funds and build the improvements in 2003. If the appeal results in fewer funds for the needed Kane Road improvements, then concurrency could become an issue.

The above statement that building permits cannot be issued prior to public improvements are completed is not correct. The second paragraph of Development Code Section A5.007 states "Completion of the required public improvements may be required prior to issuance of building permits where the Manager determines that it is necessary for the public health, safety and welfare." Presently, the Planning Manager does not consider to be a public health, safety and welfare problem at the site warranting that there be completion of public facility improvements prior to the "issuance of building permits". However, based on the subject proposal's traffic impacts on both of the frontage streets, occupancy permits will not be issued until public facility improvements are completed. This requirement is made of all new development.

#### **KCNA Issue 5.**

KCNA contends the City Development Planning Staff did not apply the MDR-24 District height transition standard 7.0201 (K)(2) referred to by Code Section 4.0100 (more specifically Code Section 4.0130 (G)) in the review of the subject proposal. Code Section 7.0201 (K)(2) is identified as "Transition and Compatibility Between Attached Dwellings and LDR/TLDR Development".

**Response: *Disagree.*** As seen on pages 15 and 19 of the May 20, 2002 staff report (Exhibit G), staff applied Code Section 7.0201 (K)(2), as well as Code Section 9.0600 (Height Transition) to the review of the subject apartment proposal. In regards to both of the above referenced height transition standards, staff found non-compliance issues and addressed those by requiring conditions of approval 1.f. and 1.e. at the end of the original staff report (Exhibit G).

#### **KCNA Issue 6.**

The KCNA letter of appeal indicates that information submitted by the applicant on landscaping, lighting, building height, fencing, alternative buffer, tree removal and street improvements was not adequate for their review of the proposal. They also state data in the traffic study, issues analysis, and the final analysis results were "*incomplete and unprofessional*". Lastly, the applicant offers remedies to many of the above stated grounds for their appeal as noted in Exhibit C.

**Response: *Disagree.***

A tree removal permit was not applied for and therefore information to address compliance with the tree removal standards was not needed at the time of application. The applicant will be applying for a tree removal permit prior to any grading or construction where the regulated trees are located as required by condition 4 of the original staff report.

Regarding lighting information, the applicant provides information on the location of light poles at the site (as seen on sheet DR-6 of original staff report Exhibit B) and explains how lighting will be provided in the narrative (original staff report Exhibit C page 14). Regarding landscaping, the applicant provided adequate information for compliance review as seen on the landscape plans DR L-1.0, DR L-1.1, DR L-1.2, DR L 1.3 of Exhibit B attached to the original staff report. The applicant addresses the proposal for alternative buffers through the landscape plans identified above in addition to their narrative found on page 11 of the original staff report (Exhibit G). Building height is shown on building elevations (sheets DR 9, DR 12, DR L-1.1 of Exhibit B). The applicant indicates through DR L-1.1 that solid wood fencing would be provided along where the site abuts LDR housing. Staff found the above information adequate for the code compliance review. However, a completeness determination in no way means that the application is in compliance with all applicable Development Code requirements.

The traffic study and addendum supplied by the applicant was completed by a professional traffic-engineering firm and stamped by a registered traffic engineer. The study was reviewed by professional traffic engineers at both the City and County and found complete.

**Staff Conclusions to Neighborhood's Appeal**

The six issues of the Neighborhood's appeal have been considered and adequately addressed. No changes in staff's overall decision to approve project are warranted with the exception of the following added condition: The applicant shall address compliance with Code Section A5.402(C) to ensure that the forecast LOS F at the middle school driveway be mitigated to LOS D, or mitigated to LOS E with adequate findings.

### **C. Hainey Grounds for Appeal (Exhibit D)**

#### **Hainey Issue 1.**

The subject site design review is a Type II procedure and a street right-of-way vacation procedure (a Type IV procedure in City of Gresham) will be necessary through Multnomah County. Section 11.0207 of the City of Gresham Development Code specifically requires Type IV application be processed prior to Type II applications. Based on the above, the Multnomah County vacation procedure should be processed prior to the Type II site design review. The proposal to the County by the applicant to vacate public road right-of-way has not been approved, and as such, the subject Type II application for approval of a site design review cannot be approved until the right-of-way vacation is approved.

#### **Response: Disagree**

Code Section 11.0207 (B) states: “ An application that involves two or more procedures may be processed collectively under the highest numbered procedure required for any part of the application or processed individually under each of the procedures identified by the code. The applicant may determine whether the application shall be processed collectively or individually. If the application is processed under the individual procedure option, the highest numbered type procedure must be processed prior to subsequent lower numbered procedure”.

The above rule for how different types of procedures should be processed applies only when multiple applications for approval of actions under the regulatory jurisdiction of the City of Gresham. The applicant has applied to Multnomah County for the right-of-way vacation approval and the applicant has applied to the City of Gresham for approval of a site design review. As such, this rule is not applicable to this design review application because this application does not involve multiple types of procedures regulated by the Gresham Community Development Code. Moreover, Multnomah County does not assign a procedure type number to their county property vacation process as seen in Exhibit E-2 and identified as “Vacation of County Property”. As such, no determination of a higher order procedure can be made if the above Gresham rule were applied to the County vacation process and the City site design review.

City Planning staff has recognized that there is a timing issue related to the development of the apartments and the street vacation. The Kane Drive vacation proposal by the applicant will need to be approved by the county governing body and title legally transferred prior to the issuance of building permits for buildings to be constructed on the vacated right-of-way area. This has been addressed by condition 8 of original staff report (Exhibit G).

### **Hainey Issue 2.**

Code Section A5.400 of the Gresham Development Code has been incorrectly applied by staff. Table 1 on page 29 of the May 20<sup>th</sup> Staff Report a number of incorrect assumptions which have resulted in the application of conditions which are not adequate to address traffic issue on SE Kane Drive. Also, if additional right-of-way needs to be acquired in order to relocate and reorient SE Kane Drive, the new location of Kane Drive should have been identified prior to approval of the Aspen Highlands project. The realigned Kane Drive could be considerably closer to the Hainey house than SE Kane Drive will be to any of the proposed Aspen Highland apartment buildings.

### **Response: Disagree**

The conditions of approval require a cash-in-lieu of construction payment to a County CIP project designed to remedy a vertical alignment deficiency in Kane Rd. The horizontal alignment is set on the centerline of the existing roadway. The County's CIP will involve a number of steps, including property appraisal and acquisition that are not a part of the proposed development. Acquisition of property on the west side of Kane Drive would occur in the future under the County's CIP with or without the proposed development.

### **Hainey Issue 3.**

The traffic impact study submitted by the applicant is not sufficient to satisfy Code Section 9.0700. The study is not detailed enough to allow adequate review by City staff regarding the realignment of Kane Drive. The study does not depict the new Kane Drive alignment, right-of-way width, centerline radius, and grade of the relocated street alignment as required by Code Section 9.0703 (B)(3).

### **Response: Disagree**

Section 9.0700 Circulation Plans outlines how local circulation will occur and how future streets should be conceptually aligned to serve properties within the vicinity (600' of the site). The Kane Drive CIP and improvements on the subject frontage are not future street improvements and are not related to Section 9.0700 requirements.

### **Staff Conclusions to Hainey Appeal**

The three issues of the Hainey appeal have been considered and adequately addressed by City Development Planning Staff. Based on the above findings, staff concludes that no changes are warranted in either staff's decision to approve the project or the associated conditions of approval.

#### **D. Other Information**

Prior to the times the appeals were filed, the applicant, neighborhood association representatives, Mr. and Mrs. Hainey's attorney, County and City planning staff have had meetings and phone correspondences to discuss relevant facts, potential issues and possible resolutions. Since the appeals were submitted County and City staff have continued dialogue with all parties as much as possible, considering staff time constraints, to help clarify facts and issues. Because of these ongoing discussions, it is possible that testimony will be provided to the Hearings Officer at the public hearing on June 28, 2002 that could affect facts, comments and recommendations within this report.

### **III. CONCLUSIONS**

At this time, based on City staff's analysis of the appeal documents and the issues therein, and staff's review of findings to support the actions as taken by the May 20, 2002 Staff Report, no changes to staff's overall decision appear necessary with exception that an additional condition of approval appears warranted regarding middle school driveway intersection with E Powell Valley Blvd.

### **IV. RECOMMENDATION**

**City staff recommends that the Hearings Officer deny the three appeals and uphold staff's decision on application DR 02-519, based on the appeal analysis within this report, the exhibits to this report, and the findings and conclusions of the initial decision (May 20, 2002) attached as Exhibit G.**

**Further, as a matter of supplementing conditions of approval to comply with Code Section A5.402 (C), the following condition is recommended to be added to the original 28 conditions.**

Condition # 29. The applicant shall address compliance with Code Section A5.402(C) to ensure that the forecast LOS F at the middle school driveway be mitigated to LOS D, or mitigated to LOS E with adequate findings.

*End of Staff Report*

#### **5. Excerpt From the Original Staff Decision on Transportation.**

1. Streets A5.400

The proposed development site has frontage to the north along E Powell Boulevard, which is a Multnomah County-maintained roadway classified as a Major Collector. A 5 ft right-of-way (R-O-W) dedication along the E Powell Boulevard frontage to Multnomah County is required. The standard R-O-W for a Major Collector facility is 70 feet. The applicant must dedicate 5 feet in order to achieve a proportional share of this standard. This R-O-W will be used to improve the roadway to serve growing travel demand, which in part will be generated by this development.

A 5-foot slope/utility/drainage/sidewalk/landscaping/traffic control device easement along the site's E Powell Boulevard frontage to Multnomah County is required. A 5-foot easement dedication allows the County to provide the services necessary to maintain the function of the roadway while reducing R-O-W dedication requirements for property owners.

Half-street improvements along the E Powell Boulevard frontage are required. Improvements shall include grade/rock/pave to commercial depth (6 inches of asphalt over 15 inches of aggregate base) between existing pavement and the new curb, located 25 feet from centerline. Further, construct bicycle lanes, furnish street trees, and provide street lighting facilities as required. Applicant shall construct a signal interconnect and loop conduit as required. Moreover, construct Multnomah County standard concrete curb and 6-foot wide concrete sidewalk and construct storm drainage facilities as necessary.

R-O-W improvements are required to mitigate the impacts of the travel demand created by the proposed development. Drainage improvements are required in order to mitigate the impacts of the proposed development's impervious surface as well as from the roadway that serves it.

The proposed development site has frontage to the east along SE 257<sup>th</sup> Avenue, also known as SE Kane Drive, which is a Multnomah County-maintained roadway classified as a Minor Arterial. Dedicate R-O-W along the site's SE 257<sup>th</sup> Avenue frontage to Multnomah County as necessary to achieve 40 feet of R-O-W from centerline as constructed. The planned R-O-W for this portion of this Minor Arterial facility is 80 feet. The applicant is required to dedicate R-O-W in order to achieve a proportional share of this standard. This R-O-W will be used to improve the roadway to serve growing travel demand, which in part will be generated by this proposed action.

The applicant is required to dedicate a 5-foot slope/utility/drainage/sidewalk/ landscaping/traffic control device easement along the site's SE 257<sup>th</sup> Avenue (SE Kane Drive) frontage to

Multnomah County. A 5-foot easement dedication allows the County to provide the services necessary to maintain the function of the roadway while reducing R-O-W dedication requirements for property owners.

The applicant must provide payment in lieu of five lane half-street improvements along the site's SE 257<sup>th</sup> Avenue (SE Kane Drive) frontage to Multnomah County in the amount of \$311,000.00. These funds will be used to grade/rock/pave to commercial depth between existing pavement and new curb; construct bicycle lanes as required; furnish street trees and street lighting facilities, as required; provide a signal interconnect and loop conduit as required; build Multnomah County standard concrete curb, 6 feet wide concrete sidewalk and storm drainage facilities as necessary.

SE 257<sup>th</sup> Avenue (SE Kane Drive) is a Minor Arterial with a planned cross-section of five lanes. Payment in lieu of construction is required in order to construct the required improvements as a part of a larger County project planned for SE 257<sup>th</sup> Avenue (SE Kane Drive).

Transportation Planning, Development Engineering, and Transportation Engineering have worked with the applicant and Multnomah County to require the above-required street improvements to support the development of 222 apartments on the southeast corner of SE Kane Drive and E Powell Boulevard. The conditions relative to public roadway development essentially require half-street improvements to the property frontage on both streets, and a pedestrian crosswalk with pedestrian refuge island on E Powell Boulevard.

The finding below demonstrates that the improvements under condition are reasonably related to the impacts of the project (nexus), and shows rough proportionality between the exaction and the project impacts to the transportation system. This relationship is established because street improvements are needed to support an increase in auto and non-automobile trips on the transportation system. The development includes 222 apartments with driveway access points to SE Kane Drive and E Powell Boulevard.

The following analysis shows rough proportionality between the impact of the project and the cost for required improvements. In summary, the required improvements are related to the auto and non-auto trips generated by the development of the site for residential purposes. The cost of required improvements are "roughly proportional" to the trip impacts of the development and therefore are acceptable under the Dolan test.

Developer-required roadway improvements are limited to the site frontage, and include a pedestrian crosswalk and refuge island in E Powell Boulevard. Off-site improvements to SE Kane Drive are proposed as part

of an adopted County CIP project that will 1) remedy the “F” LOS at Kane and Orient (2003), and 2) remedy the vertical curve condition in Kane adjacent to the subject site. In addition, the County has committed to lobby the state for a reduction in the posted speed on Kane from 35 to 30 mph so that the horizontal curves will meet standard roadway geometry. For details, please refer to the memorandum from Jay McCoy, City Traffic Engineer, dated May 6, 2002.

Physical street system development is reasonably related to the impacts of the project. The applicant’s traffic impacts include 1,435 ADT, 115 AM peak hour trips, and 140 PM peak hour trips. The trip impacts are evaluated relative to the corridors they impact. For purposes of the following analysis, the SE Kane Drive corridor is defined from SE Orient Drive to E Powell Boulevard, and the E Powell Boulevard corridor is defined from US Highway 26 to Barnes Road.

- a. Nexus/Public Problem: Identification of the public problem the condition is designed to address.

The conditions include a requirement to construct half street frontage improvements for SE Kane Drive and E Powell Boulevard, and provide a crosswalk in E Powell Boulevard aligned with the site driveway. The conditions, coupled with a committed County CIP project, are designed to correct substandard roadway geometry on SE Kane Drive, provide adequate capacity along both roadway segments, and to facilitate safe pedestrian crossing of E Powell Boulevard.

- b. Nexus/Development Will Exacerbate Problem: Show that the proposed development will create or exacerbate the identified public problem.

Applicant requests a development permit to construct 222 apartments on the southeast corner of SE Kane Drive and E Powell Boulevard. The project is projected to generate 1,435 ADT or 140 PM peak hour trips, with 25% of trips assigned to SE Kane Drive and 75% assigned to E Powell Boulevard. The traffic study (figures 5 and 11, and addendum, page 1) indicates a peak hour increase of 7% on SE Kane Drive and 9% on Powell Valley, or an average combined increase of 8% over base year peak hour traffic.

- c. Nexus/Rough Proportionality: Show that the condition solves or alleviates the identified public problem.

The additional trips will contribute to traffic along SE Kane and E Powell Boulevard and will exacerbate the identified safety problem. When the trips are added, there will be an 8% increase in PM peak

hour traffic. With the conditions and committed County CIP project on SE Kane Drive, the geometric or “nominal safety problems” on SE Kane Drive will be resolved.

- d. Rough Proportionality – Impacts in Peak Hour Trips Proportional to Improvement and Right-of-Way Costs: Show the proposed solution (condition) is roughly proportional to that part of the problem created or exacerbated by the proposed development.

The site will use SE Kane Drive and E Powell Boulevard for access and will generate 8% of the combined PM peak hour trips (derived from traffic study figures 5 and 11, and addendum, page 1). The proportional cost per trip is tabled below.

**Table 1 (Omitted from this excerpt as is present in item # 3)**

As shown in Table 1, the project will generate 8% of the total peak hour trips on SE Kane Drive and E Powell Boulevard and will pay 9% of the improved cost (including right-of-way). Based on street system impacts generated by the proposed 222-unit Aspen Highlands apartment project, the above analysis shows the project will contribute a roughly proportional amount to improve the supporting street system. In addition to the applicant’s frontage improvements, the County will improve SE Kane Drive to a 5-lane section from SE Orient Drive to E Powell Boulevard under a CIP project scheduled for completion in 2003/04.

Conclusion: The proposed Aspen Highlands apartment project is supported by City and County Transportation Planning and Engineering staff based on the above findings of fact and with **conditions of approval** found at the end of this staff report.

**Findings:** This Design Review is generally consistent with section A5.400 of the *Community Development Code* and the *Public Works Standards*. The recommended conditions will ensure that the *Community Development Code* and the *Public Works Standards* are met.