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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MARION SKORO,)
) No. CV 06-1319-HU
Plaintiff,)
)
v.) OPINION AND ORDER
)
THE CITY OF PORTLAND, a)
)
municipal corporation)
)
of the State of Oregon,)
)
Defendant.)
_____)

James H. Marvin
Marvin, Chorzempa & Larson
380 S.E. Spokane Street, Suite 300
Portland, Oregon 97202
Attorney for plaintiff

J. Scott Moede
Senior Deputy City Attorney
Office of City Attorney
1221 S.W. Fourth Avenue, Room 430
Portland, Oregon 97204
Attorney for defendant

HUBEL, Magistrate Judge:

This is an action for taking brought by plaintiff Marion Skoro, a property owner, against the City of Portland, Oregon (City).

1 The issue presented by this case is whether the City can
2 require Skoro, as a condition of developing two pieces of property
3 on SE 52nd Avenue, to dedicate portions of the properties to the
4 City for sidewalks. Skoro contends that the City's requirement
5 constitutes a taking for which the City owes him compensation.

6 Skoro seeks summary judgment on the issue of whether there has
7 been a taking, reserving the amount of compensation for
8 determination at trial. The City moves for summary judgment on all
9 claims.

10 **Factual Background**

11 Skoro owns two parcels of real property located in the City.
12 One is situated at the corner of SE 52nd and Cooper and the other
13 is at the corner of SE 52nd and Woodstock. Skoro is in the process
14 of developing the two properties.

15 A. The property on SE 52nd and Cooper

16 Skoro purchased this property in 1967. The site is zoned CN2
17 (Neighborhood Commercial 2). The CN2 zoning straddles SE 52nd and
18 extends for about 450 feet on the west and 550 feet on the east
19 side. Moede Affidavit, Exhibit 13, p. 3. The surrounding area
20 contains a mixture of commercial and residential uses and zoning.
21 Id. The CN2 zone is intended for small commercial sites and areas
22 in or near less dense neighborhoods. The zone is intended primarily
23 for the provision of services to nearby residential users and other
24 small-scale, low-impact uses. Id. The property has a six-foot wide
25 sidewalk.

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1 Skoro's proposed development of the property on 52nd and Cooper
2 involves demolition of the two existing buildings and construction
3 of a new 7,004 square foot building. Skoro has applied for
4 demolition and building permits. The demolition permit was granted
5 by the City and the two buildings on the property have been
6 demolished.

7 Skoro made a land use application to the Bureau of Development
8 Services, which resulted in a decision by the City's Bureau of
9 Development Services Land Use Services Division. The decision,
10 dated November 23, 2005, requires, as a condition of constructing
11 the new building, that Skoro dedicate an additional six feet of
12 easement for a sidewalk, thereby expanding the current sidewalk
13 area from six feet to 12 feet. Defendant's Concise Statement of
14 Material Facts ¶ 10, citing Moede Affidavit, Exhibit 13; Skoro
15 Affidavit ¶ 11.

16 According to Skoro's architect, Bob Schatz, Skoro could put in
17 a 12-foot sidewalk at the 52nd and Cooper location and still be able
18 to build the building he wants, with the same number of parking
19 places and almost exactly the same square footage, although he
20 would have to put the building in a slightly different location.
21 Deposition of Bob Schatz, Moede Affidavit, Exhibit 16 (Schatz dep.)
22 61:25-62:11.

23 Skoro states in an affidavit that his property has the only
24 paved sidewalk on its side of SE 52nd for many blocks, with all
25 other sidewalks being dirt paths, although the street is curbed and
26 guttered. Skoro Affidavit ¶ 5. At the end of the sidewalk on
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1 Skoro's property, one steps into gravel or dirt. Id. Skoro states
2 that across the street, there is only one residence with a paved
3 sidewalk, and it is the only sidewalk for many blocks up and down
4 SE 52nd Avenue on the east side. Id. at ¶ 6.

5 B. The property on SE 52nd and Woodstock

6 Skoro purchased this property in 1978. The property comprises
7 an auto parts store with a large apartment upstairs and a
8 restaurant. Skoro Affidavit ¶ 17. Skoro proposes to remove the
9 existing buildings and construct a two-story building containing
10 offices and shops. Id. Skoro's development of this property is
11 still at the preliminary stage. Skoro's architect, Schatz, has
12 drawn schematics of a 15,000 square foot building. Schatz dep.
13 57:2-61:4. The property at 52nd and Woodstock has not been subject
14 to any formal land use process, but the City's assistant engineer,
15 Kurt Krueger, has notified Schatz that development of the property
16 would be conditioned on dedicating an additional two feet on the
17 52nd Avenue side. See Defendant's Concise Statement of Material
18 Facts ¶ 20; Skoro Affidavit, ¶ 17. The 52nd Avenue side currently
19 has a 10-foot sidewalk. Skoro Affidavit ¶ 17, Amended Affidavit of
20 Kurt Krueger, ¶ 25. The City intends the additional two feet of
21 property dedication to provide space for a six-foot wide
22 "unobstructed pedestrian through zone (sidewalk), a planting strip,
23 which provides a buffer for pedestrians from the roadway, and
24 street trees." Amended Krueger Affidavit ¶ 25.

25 Schatz has testified that Skoro's dedication of an additional
26 two feet on the 52nd Avenue side would not prevent Skoro from
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1 constructing the proposed building, with the same square footage
2 and number of parking places. Schatz dep. 62:12-18.

3 **Standard**

4 In Del Monte Dunes at Monterey v. City of Monterey, 95 F.3d
5 1422, 1428 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999), the Court
6 of Appeals held that an "inverse condemnation" claim, requiring a
7 showing that the governmental action did not substantially advance
8 a legitimate public purpose or denied the landowner economically
9 viable use of the property, was a mixed question of law and fact,
10 "which may be submitted to the jury if they are essentially
11 factual, even if they implicate constitutional rights." 95 F.3d at
12 1428,¹ citing Nollan v. California Coastal Commission, 483 U.S.

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14 ¹ In affirming Del Monte Dunes, the Supreme Court held that
15 "the issue whether a landowner has been deprived of all
16 economically viable use of his property is a predominantly
17 factual question" for the jury, 526 U.S. at 720, but that the
18 issue of whether a land-use decision "substantially advances
19 legitimate public interests within the meaning of our regulatory
20 takings doctrine" was "probably best understood as a mixed
21 question of fact and law." *Id.* at 721. Del Monte Dunes was an
22 inverse condemnation claim, with the court holding that the
23 burden was on the property owner to show that the government's
24 actions 1) did not substantially advance a legitimate purpose or
25 2) denied it economically viable use of its property, citing
26 Nollan, 483 U.S. at 834. The Supreme Court later held, in Lingle
27 v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), that the
28 "substantially advances a public purpose" element was not a valid
method of identifying compensable regulatory takings, because it
was in the nature of a due process test, which had no proper
place in the Supreme Court's takings jurisprudence. 544 U.S. at
540. Accordingly, the Court overruled Agins v. City of Tiburon,
447 U.S. 255 (1980), where the Court had declared that government
regulation of private property "effects a taking if [such
regulation] does not substantially advance legitimate state
interests..." 447 U.S. at 260. The Court emphasized that, even
though Agins had been cited in both Nollan and Dolan v. City of
Tigard, 512 U.S. 374 (1994), the "substantially advances" test

1 825, 834 (1994). The parties agree that the controlling legal
2 authority on the merits of this case is found in the
3 "unconstitutional exactions" cases, Nollan and Dolan.

4 Governmental regulation categorically violates the Takings
5 Clause if it results in the physical invasion of property. Garneau,
6 147 F.3d at 807, citing Lucas v. South Carolina Coastal Council,
7 505 U.S. 1003, 1016 (1992). Both Nollan and Dolan "began with the
8 premise that, had the government simply appropriated the easement
9 in question, this would have been a *per se* physical taking."
10 Lingle, 544 U.S. at 547. The question was whether the government
11 could, without paying the compensation that would otherwise be
12 required upon effecting such a taking, demand the easement as a

13
14 played no part in Nollan and Dolan, because the Court did not
15 actually apply the "substantially advances" test. Id. at 546. The
16 rule established in Nollan and Dolan was "entirely distinct" from
17 the "substantially advances" test because Nollan and Dolan
18 involved dedications of property so onerous that, outside the
19 exactions context, they would be deemed *per se* physical takings.
20 Lingle, 544 U.S. at 547. The Court distinguished Nollan and Dolan
21 on the ground that the two cases involved the issue of whether
22 the exactions substantially advanced the same interests that
23 land-use authorities asserted would allow them to deny the permit
24 altogether, not whether the exaction would substantially advance
25 some legitimate state interest. Id. Despite the differences in
26 approach between Del Monte Dunes and Nollan and Dolan, I find no
27 authority from the Court of Appeals or the Supreme Court
28 indicating that the relevant inquiries here are something other
29 than mixed questions of law and fact. Compare Garneau v. City of
Seattle, 147 F.3d 802, 813 (1998) (O'Scannlain, C.J.,
30 dissenting) ("Nollan nexus test and Dolan 'rough proportionality'
31 test require 'a court' to compare the government's demanded
32 exaction with the expected harm of the landlord's proposed
33 development and 'a court' to 'calculate the total amount of the
34 exaction to be levied against the landlord bringing the suit,'"
35 thereby suggesting that both inquiries are questions of law for
36 the court.) Garneau was decided a year before the Supreme Court
37 decided Del Monte Dunes.

1 condition for granting a development permit the government was
2 entitled to deny. Id. Resolution of the question required
3 consideration of whether the exactions substantially advanced the
4 same interests that land-use authorities asserted would allow them
5 to deny the permit altogether. Id.

6 In Nollan, the government conditioned a permit to build a
7 larger residence on beachfront property on the dedication of an
8 easement allowing the public to traverse a strip of property
9 between the owner's seawall and the mean high-tide line. The Court
10 struck down the condition on the ground that there was no rational
11 nexus between the condition and the end advanced as its
12 justification:

13 It is quite impossible to understand how a requirement
14 that people already on the public beaches be able to walk
15 across the Nollans' property reduces any obstacles to
16 viewing the beach created by the new house. It is also
17 impossible to understand how it lowers any "psychological
18 barrier" to using the public beaches, or how it helps to
19 remedy any additional congestion on them caused by
20 construction of the Nollans' new house. We therefore find
21 that the Commission's imposition of the permit condition
22 cannot be treated as an exercise of its land-use power
23 for any of these purposes.

24 483 U.S. at 838-39. As the Court said in the later Dolan case,

25 [T]he Coastal Commission's regulatory authority was set
26 completely adrift from its constitutional moorings when
27 it claimed that a nexus existed between visual access to
28 the ocean and a permit condition requiring lateral public
access along the Nollans' beachfront lot. How enhancing
the public's ability to "traverse to and along the
shorefront" served the same governmental purpose of
"visual access to the ocean" from the roadway was beyond
our ability to countenance.

Dolan, 512 U.S. at 387 (internal citation omitted).

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1 In Dolan, the Court refined Nollan, holding that an
2 adjudicative exaction requiring dedication of private property must
3 also be roughly proportional, both in nature and extent, to the
4 impact of the proposed development. Dolan, 512 U.S. at 391; Lingle,
5 544 U.S. at 547. Although, in Dolan, the government passed the
6 essential nexus test, the Court held that the governmental body
7 must also establish the constitutionality of its conditions by
8 making an "individualized determination" that the required
9 dedication is related both in nature and extent to the impact of
10 the proposed development. Dolan, 512 U.S. at 391. The Court held
11 that the city had not established this second, "rough
12 proportionality" requirement.

13 In Dolan, the city conditioned a permit to expand a store and
14 parking lot on dedication of part of the property as a greenway
15 that included a bicycle/pedestrian walkway. The property owner
16 argued that the city had identified "no special benefits" conferred
17 on her, or any "special quantifiable burdens" created by her new
18 store, that would justify dedications required from her which were
19 not required from the public at large. Id. at 386.

20 The Court agreed, saying,

21 [W]e have no doubt that the city was correct in finding
22 that the larger retail sales facility proposed by
23 petitioner will increase traffic on the streets of the
24 Central Business District. The city estimates that the
25 proposed development would generate roughly 435
26 additional trips per day. Dedications for streets,
27 sidewalks, and other public ways are generally reasonable
exactions to avoid excessive congestion from a proposed
property use. But on the record before us, the city has
not met its burden of demonstrating that the additional
number of vehicle and bicycle trips generated by
petitioner's development reasonably relate to the city's

1 requirement for a dedication of the pedestrian/bicycle
2 pathway easement.

3 * * *

4 No precise mathematical calculation is required, but the
5 city must make some effort to quantify its findings in
6 support of the dedication for the pedestrian/bicycle
7 pathway beyond the conclusory statement that it could
8 offset some of the traffic demand generated.

9 512 U.S. at 395-96. The court emphasized that if there had been
10 findings that the bicycle pathway system *would* or *was likely* to
11 offset some of the traffic demand, the pathway might pass
12 constitutional muster; but on the facts of Dolan, the finding was
13 merely that the bicycle pathway system *could* offset some of the
14 traffic demand created by petitioner's larger retail facility. Id.

15 Discussion

16 Skoro asks that the court grant him partial summary judgment
17 "on the issue of whether there has been a taking in this matter."
18 Plaintiff's Memorandum, p. 1. Skoro asserts that the "remaining
19 issue concerning the amount of compensation" should proceed to
20 trial. Id. at p. 1-2.

21 The City asserts that there is no genuine issue of material
22 fact and that because it has demonstrated both the essential nexus
23 and the rough proportionality requirements, the exaction is
24 constitutional.

25 As the court noted in Garneau, regulatory exactions cases
26 governed by Nollan and Dolan involve a three-part inquiry. The
27 first question is whether a government imposition of the exaction
28 would constitute a taking. See, e.g., Lingle, 544 U.S. at 546 ("In
[Nollan and Dolan], the Court began with the premise that, had the

1 government simply appropriated the easement in question, this would
2 have been a *per se* physical taking.”[citations omitted]). In Nollan
3 and Dolan, the Supreme Court

4 had no trouble ... finding that government imposition of
5 the exaction would amount to a taking,” because in both
6 cases the government demanded permanent physical
7 occupation of some portion of the applicant’s land.
8 Courts have generally found that where government action
9 leads to the physical invasion of private property, it
10 constitutes a *per se* taking. ... By contrast, in non-
11 categorical takings cases, courts must undertake complex
12 factual assessments of the purposes and economic effects
13 of government actions. Because of the difference in the
14 Court’s approach, much turns on the classification of the
15 government’s action.

16 Garneau, 147 F.3d at 807-08. This case, like Nollan and Dolan,
17 involves a demand by the City that it be granted permanent physical
18 occupation of some portion of Skoro’s land; thus, the first Nollan-
19 Dolan inquiry must be answered affirmatively. Garneau, 147 F.3d at
20 809, citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S.
21 419, 433 (1982); Levald v. City of Palm Desert, 998 F.2d 680, 684
22 (9th Cir. 1993).

23 The court must then consider the second and third inquiries,
24 which “seek to determine whether the government may shield itself
25 from a takings claim through the use of its police powers.”
26 Garneau, 147 F.3d at 810. In this case, the City has made an
27 “adjudicative decision to condition [an] application for a building
28 permit on an individual parcel;” consequently, the burden is on the
29 government to establish both an “essential nexus”² between the

30 ² As explained in the preceding footnote, in Lingle, the
31 Court characterized “essential nexus” as a requirement that the
32 governmental entity prove the exaction substantially advanced the
33 same interests that land-use authorities asserted would allow

1 exaction and the burdens imposed by the development, and “rough
2 proportionality” between the condition imposed and the social harm
3 caused by the proposed development. Dolan, 512 U.S. at 391 n. 8.

4 A. The Record on Summary Judgment

5 The City has proffered the affidavit of Kurt Krueger,
6 containing the supporting analysis for the City’s sidewalk
7 dedication requirements for SE 52nd and Cooper and SE 52nd and
8 Woodstock. Krueger’s analysis is offered as evidence that the
9 sidewalk dedications in this case--a six-foot strip at 52nd and
10 Cooper and a two-foot strip at 52nd and Woodstock--satisfy the
11 requirements of a “rational nexus” and “rough proportionality”
12 between the exaction and the impact of the proposed development.
13 See Dolan, 512 U.S. at 391; Lingle, 544 U.S. at 546-47.

14 Skoro has proffered the affidavit of Bruce Schafer, a traffic
15 engineer, to counter the Krueger affidavit.

16 1. Krueger Affidavit

17 Krueger is employed by the City’s Bureau of Transportation
18 Engineering and Development as a Development Review Manager, and
19 evaluated land use issues involving Skoro’s two properties.

20 With respect to the SE 52nd and Cooper site, Krueger opines
21 that although Skoro’s building permit application for 7,045 square
22 feet of retail use is the “highest and best use” for the site’s CN2
23 zoning, the Institute of Transportation Engineers (ITE) Trip
24 Generation Manual predicts that Skoro’s proposed development will
25 generate 260 new trips on the site’s transportation system. Amended

26 _____
27 them to deny the permit altogether.

1 Affidavit of Kurt Krueger, ¶ 10. Krueger states that the "addition
2 of the site trips" to SE 52nd Avenue will "directly conflict" with
3 pedestrians, bicyclists and vehicles that enter SE 52nd Avenue
4 through the corridor or that are on SE 52nd Avenue at this location.
5 Id. at ¶ 9.

6 Krueger states that the additional six feet of property
7 dedication sought by the City from Skoro "will provide space for a
8 6-foot wide unobstructed pedestrian through zone (sidewalk), a
9 planting strip, which provides a buffer for pedestrians from the
10 roadway, and street trees." Id. at ¶ 14. The sidewalk improvement
11 envisioned by the City on Skoro's property includes removal of the
12 six-foot wide curb-tight sidewalk, its relocation and re-
13 construction as a new six-foot-wide sidewalk, and installation of
14 a four and a half foot wide furnishings zone with street trees. Id.
15 at ¶ 16. These improvements are consistent with the "Portland
16 Pedestrian Design Guide" (Pedestrian Guide), an element of the
17 Pedestrian Master Plan for the City, developed by the City in June
18 1998. Krueger Affidavit, Exhibit 12. The purpose of the Pedestrian
19 Guide is

20 to integrate the wide range of design criteria and
21 practices into a coherent set of new standards and
22 guidelines that, over time, will promote an environment
conducive to walking.

23 Id. at p. 2.

24 According to Krueger, the dedication of an additional six feet
25 at the SE 52nd and Cooper site for sidewalk and sidewalk
26 improvements along SE 52nd will provide the following benefits:

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- 1 1. Increased pedestrian/bicycle and vehicle access to the
2 property.
- 3 2. Direct access for emergency vehicles, thereby reducing
4 emergency response times.
- 5 3. Provision of an area for efficiently locating utilities
6 in the public right-of-way.
- 7 4. Provision of adequate area to reduce congestion from
8 future pedestrian traffic.
- 9 5. Enhancement of the value of the property with increased
10 sidewalk that "allows for outdoor seating, advertising,
11 street trees, etc. to be located along the building in
12 the right-of-way."

13 Id. at ¶ 20.

14 With respect to the site at SE 52nd and Woodstock, Krueger
15 states that Skoro's proposed development is the highest and best
16 use for the site zoning. Krueger ¶ 21. The ITE Trip Generation
17 Manual predicts that Skoro's proposed development would add 69 new
18 site trips to the transportation system. Id. The existing sidewalk
19 of the SE 52nd and Woodstock site is 10 feet wide. Krueger states
20 that the additional two feet of property dedication sought by the
21 City from Skoro "will provide space for a 6-foot wide unobstructed
22 pedestrian through zone (sidewalk), a planting strip, which
23 provides a buffer for pedestrians from the roadway, and street
24 trees." Id. at ¶ 25. Krueger cited the same benefits from the
25 additional two feet of property dedication at SE 52nd and Woodstock
26 that would accrue from the additional six feet of sidewalk
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1 dedication at SE 52nd and Cooper. Id. at ¶ 30.

2 Krueger has provided calculations described as a
3 "proportionality analysis," in which he calculates the "percentage
4 of impacts" from the proposed development; the "percentage of
5 exaction area" based on the total site area; the percentage of the
6 exaction area to the total corridor area; and the site improvement
7 cost as a percentage of a total corridor improvement cost. His
8 conclusion is that the dedication and construction of sidewalk
9 improvements is "roughly proportional" to the expected impacts to
10 the pedestrian corridor.

11 2. Schaefer Affidavit

12 Schaefer is a licensed traffic engineer, now working as a
13 consulting engineer. Schafer states that he has made site visits to
14 both locations involved in this case. Based on these preliminary
15 views, he has "serious questions as to the basis and the magnitude
16 of the sidewalk improvements demanded by the City of Portland."
17 Affidavit of Bruce Schafer ¶ 3.

18 Schafer says the development proposed by Skoro of the SE 52nd
19 and Cooper property "squarely meets" the Brentwood-Darlington
20 Neighborhood Plan, see Affidavit of Scott Moede, Exhibit 17, while
21 there is no neighborhood plan that covers the SE 52nd and Woodstock
22 property. Id. at ¶¶ 5, 10.

23 Schafer states that 12-foot sidewalks are not required, or
24 even recommended, by the Neighborhood Association, id. at ¶ 6, and
25 that in his opinion, Skoro's proposed development of his properties
26 satisfies the Neighborhood Association's stated goals of

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1 maintaining and improving the predominantly residential character
2 of the neighborhood; attracting new businesses in the commercial
3 zones; and revitalizing the 52nd Avenue commercial areas through
4 rehabilitation and upgrading. Id.

5 Schafer says he has observed that "only a few" of the
6 properties adjacent to the SE 52nd and Cooper property have any
7 sidewalks at all. Id. at ¶ 7.

8 In Schafer's opinion, the existing six foot sidewalk at the SE
9 52nd and Cooper property is "sufficient to handle present and long-
10 term future pedestrian traffic," and "[t]here is no basis or
11 purpose for any increased width to Skoro's sidewalk." Id. at ¶ 8.

12 Schaefer also notes an "inconsistent application" of the
13 Pedestrian Guide by the City just north of Skoro's property, across
14 Cooper Street on the west side of 52nd. At that location, there is
15 a sidewalk with a utility pole that has a surface width of two feet
16 nine inches, due to the pole's presence. According to Schaefer, the
17 sidewalk "does not comply with ADA minimum requirements of 36
18 inches travel surface." Id. at ¶ 9.

19 Schafer says that in reviewing Krueger's affidavit,

20 I note that he suggests the corridor area cross-section
21 shows a 12 foot wide sidewalk on each side of the street.
22 I find this is not apparent anyplace near the SE 52nd and
23 Cooper property...

24 Id. at ¶ 10.

25 Schafer states that based upon the National Highway Capacity
26 Manual, Special Report, Transportation Research Board 209, of the
27 National Research Council, which is referenced in the Pedestrian
28 Guide, "the anticipated residential volume and density should be a

1 "Level A" or a "Level B" at SE 52nd and Cooper, and a "Level B" or
2 a "Level C" at SE 52nd and Woodstock, which "means that via the
3 national standard, a six foot sidewalk at SE 52nd and Cooper is
4 sufficient to carry existing and future pedestrian traffic volume."
5 Id. at ¶ 14. Schafer says this "also means ... that a ten foot wide
6 sidewalk [i.e., the ten foot wide sidewalk that now exists] at SE
7 52nd and Woodstock is sufficient to carry existing and future
8 pedestrian traffic volume." Id. at ¶ 14. Schafer opines that there
9 is no "reason or necessity for a requirement to increase the
10 sidewalk size on the SE 52nd Avenue side of Mr. Skoro's property
11 from 10 foot to 12 foot [sic]." Id. at ¶ 12.

12 3. Jeffrey Affidavit

13 In its reply materials, the City has proffered the affidavit
14 of Jeanne-Marie Jeffrey, a traffic engineer for the City. She takes
15 issue with Schafer's statement that the National Highway Capacity
16 Manual suggests that no more than a six foot sidewalk is necessary
17 at the SE 52nd and Cooper location, because

18 Mr. Schafer's Affidavit ignores the fact that the City of
19 Portland's Pedestrian Design Guide also suggests a 6-
20 foot-wide "through pedestrian zone" with an additional
21 six feet, accounting for the curb zone, furnishing zone
22 and frontage zone. ... Mr. Schafer's Affidavit makes no
23 provision for curb zone, furnishing zone and frontage
24 zone for the sidewalk corridor proposed by plaintiff. Mr.
25 Schafer did not acknowledge appropriate provisions for
common street furniture and utilities including
streetlights, power poles, street trees, fire hydrants,
mailboxes, newspaper racks, and street signs.
Specifically, in retail environments, such as that
proposed by the plaintiff, sidewalk cafes and other
advertising elements would potentially compete for this
space as well.

26 Jeffrey Affidavit ¶ 5.

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1 B. Essential nexus

2 The City argues that proof of an essential nexus is contained
3 in 1) the Pedestrian Guide, recommending 12-foot wide pedestrian
4 corridors for walkways adjacent to Neighborhood Collector Streets,
5 as SE 52nd is; 2) the Brentwood-Darlington Neighborhood Plan,
6 adopted by the City Council in 1992, which recognizes SE 52nd Avenue
7 as one of three area streets with commercial areas and contains
8 eight policies intended to strengthen, expand and develop those
9 commercial areas; and 3) a March 14, 2006 letter from Krueger to
10 Skoro's attorney, Krueger Affidavit Exhibit 5, stating that the
11 proposed development at SE 52nd and Cooper increases the building
12 footage by approximately 2,239 square feet, with a projected
13 increase in vehicle trips of approximately 25 vehicles per day.

14 I conclude that the record reveals genuine issues of material
15 fact on the issue of whether the six-foot sidewalk dedication at SE
16 52nd and Cooper has an essential nexus to the impact of the proposed
17 development. A trial on the taking and, if one is found, the
18 damages issue, remain for the SE 52nd and Cooper property.

19 With respect to the two-foot sidewalk dedication at SE 52nd and
20 Woodstock, I conclude that no reasonable jury could find a
21 reasonable nexus between the exaction and the impact of the
22 proposed development, so that Skoro is entitled to summary judgment
23 on the taking issue. A trial on damages only for the SE 52nd and
24 Woodstock property remains.

25 Krueger states that the impact of the proposed developments by
26 Skoro is the addition of site trips to SE 52nd, adversely affecting
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1 pedestrians, bicyclists and vehicles using SE 52nd. But as Krueger
2 explains in his affidavit, the City's requirement that Skoro
3 dedicate an additional six feet of his property at SE 52nd and
4 Cooper will force the re-location of the sidewalk, without changing
5 its six-foot width; the additional six feet required by the City
6 is, according to Krueger, to be used for a furnishings zone (a
7 planting strip and street trees) and a frontage zone with a width
8 of one foot six inches. See Krueger Affidavit, Exhibit 12, pp. 15-
9 17 and 22. On the record before the court, there are genuine
10 issues of material fact on whether the exaction at issue here,
11 requiring Skoro to move the sidewalk from its present location
12 without increasing its width, and dedicating an additional six feet
13 to a furnishings zone four feet six inches wide (for a planting
14 strip and street trees) and a frontage zone with a width of one
15 foot six inches, substantially advances the same interests that
16 would allow the City to deny the permit altogether, i.e., the
17 impact of increased site trips on pedestrians, bicyclists, and
18 vehicles. Nor can the court determine whether the exaction would
19 affect emergency vehicle access, utility location, or increased
20 sidewalk area for outdoor seating or advertising. Because of these
21 fact issues, I conclude that neither Skoro, nor the City is
22 entitled to summary judgment in its favor with respect to any issue
23 for the property at SE 52nd and Cooper. See, e.g., State of
24 California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003) (genuine
25 issue of material fact arises if evidence is such that a reasonable
26 jury could return a verdict for the nonmoving party).

27

1 As for the property at SE 52nd and Woodstock, no reasonable
2 jury could find that the exaction required of Skoro by the City has
3 an essential nexus with the impact of Skoro's proposed development.
4 The City's permit condition is that Skoro dedicate an additional
5 two feet of the property so that the existing 10-foot-wide sidewalk
6 can be replaced by a a six-foot-wide sidewalk relocated so as to
7 provide a furnishings zone four feet six inches wide and a frontage
8 zone one foot six inches wide. The City attempts to justify this
9 exaction on the ground that Skoro's proposed development will
10 increase the number of site visits, creating an impact on
11 pedestrian, bicycle and vehicle traffic. *Reducing* the width of the
12 sidewalk from 10 feet to six feet, thereby subtracting four feet of
13 existing sidewalk, will in no way alleviate the pressure of
14 increased site visits. Nor does adding four feet six inches for a
15 planting strip and street trees, at the expense of four feet of
16 existing sidewalk, have any reasonable nexus with the benefits
17 enumerated by Krueger in his affidavit: increased pedestrian,
18 bicycle and vehicle access; greater access for emergency vehicles;
19 additional space for utilities, or providing more sidewalk for
20 outdoor seating and advertising. I conclude that Skoro is entitled
21 to summary judgment on the takings issue with respect to the SE 52nd
22 and Woodstock property.

23 C. Rough proportionality

24 My determination that fact issues preclude a determination
25 that either side has prevailed on the "essential nexus" part of the
26 Nollan-Dolan test for the SE 52nd and Cooper property, and that the

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1 City has failed as a matter of law to demonstrate an "essential
2 nexus" for the SE 52nd and Woodstock property, make it unnecessary
3 for me to reach the issue of "rough proportionality" for either
4 property on these cross motions for summary judgment.

5 **Conclusion**

6 The City's motion for summary judgment (doc. # 34) is DENIED.
7 Skoro's motion for summary judgment (doc. # 30) is GRANTED with
8 respect to the SE 52nd and Woodstock property and DENIED with
9 respect to the SE 52nd and Cooper property.

10 IT IS SO ORDERED.

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12 Dated this 21st day of February, 2008.

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14
15 /s/ Dennis James Hubel

16 Dennis James Hubel
17 United States Magistrate Judge
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