



Work Session #2

WS2

Milwaukie City Council



MINUTES
MILWAUKIE CITY COUNCIL
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WORK SESSION #2
 FEBRUARY 3, 2015
 City Hall Council Chambers

Council President Batey called the work session to order at 9:38 p.m.

Council Present: Councilors Scott Churchill, Mark Gamba, and Karin Power

Staff Present: City Manager Bill Monahan, City Attorney Tim Ramis, City Recorder Pat DuVal, Community Development Director Steve Butler, Planning Director Denny Egner

Discussion of Development Conditions of Approval and Exactions

Mr. Ramis said the fundamental policy question was to what extent do we build cities using funds from property taxes or funds from development? The exaction process created a tension between the two. The law in that area was all about striking a balance and determining the limits on the cities' ability to exact improvements from developers rather than through taxes.

Mr. Ramis provided a brief history of the evolution of building cities and constitutional law. In previous centuries, land was platted, sold, and divided, and with no subdivision ordinances there were no requirements for improvements. That necessitated road building by cities that were organized by essentially large barn raising efforts to build a street paid for by taxes with the understanding that a street grid would eventually be built.

Eventually the proliferation of the automobile and the Great Depression influenced that process which resulted in communities owning vast undeveloped neighborhoods. At that point there was an increased demand for a certain level of amenities that prevailed until the post WWII housing boom. Subsequently there was a much higher public demand for amenities including streets, water, sewer, and parks. That coincided with an effort by Congress to fund these large programs. That started to burn out in the 1970's, and by the 1980's those programs were very weak. Public demand, however, was increasing and putting a lot of pressure on local governments. Property taxes were increased to meet those demands which resulted in property tax limitation measures. This resulted in more dependency on the exaction process as developers came through the system.

At the time the laws said the a city could establish conditions to provide infrastructure as long as the condition was reasonably related to the project. There was a surprisingly small amount of litigation on the subject. As local governments across the country got more aggressive about conditioning projects, resistance mounted. The Supreme Court of the United States (SCOTUS) started taking up these cases including *Nollan* that addressed the nexus of the impact of the project and if the exaction actually mitigated that impact. The next significant case was *Dolan v. The City of Tigard* having to do with proportionality and, assuming the nexus was established, had the government gone too far in imposing the exaction. The *Koontz* case related to the requirements for nexus and proportionality.

The next step was examining in more depth the fee in lieu construction (FILOC) rather than approaching it on a case by case basis. One could evaluate the impact of a single family home and make available to the developer the option of paying that cost rather than building some improvements to avoid the sidewalk to nowhere scenario. It was a tool that might be enhanced in the code in the future.

Councilor Churchill asked how much other communities were relying on FILOC. He understood it was creating the flexibility to do other things.

Mr. Ramis thought it was happening more frequently, and it was a subject on everyone's mind.

Council President Batey understood whether it was FILOC or the developer built a sidewalk, for example, that it was still an exaction. Whether it passed muster under *Koontz* did not matter as the same test applied.

Mr. Ramis thought this was a close examination of how cities applied FILOC.

Councilor Gamba asked if the proportionality issue impacted things like the sewer systems development charges (SDC).

Mr. Ramis replied there was some case law that said the calculation of sewer SDCs was not directly related to proportionality, but if one read State Statute on how SDCs were calculated, it was a proportionality analysis. SDCs were an examination of impacts on a system, and Mr. Ramis felt it was legitimate for the developer to say he had already paid for a portion of that. The Stanley Avenue issue was a negotiated result based on the impact of a single family home.

Mr. Rice added that one of challenges brought to light in the Stanley Avenue case was that the street was classified as a collector. The argument was why a home should be required to do more than a home on a local street. This led to a discussion of how one got the improvements of a collector street such as set back sidewalks on a local street. This resulted in the need to develop a standardized version and how to make the City's expectations clear to a developer.

Councilor Gamba said it seemed to him that FILOC might be the answer.

Mr. Rice said in the case of the Stanley Avenue home, the original house had burned, so the argument was that there was no greater impact. He believed the new house was built on the existing foundation. He was not seeing a lot of potential for making sidewalk connections outside of subdivisions, so staff was looking at alternatives with clear standards.

Council President Batey noted beyond the sidewalk questions were half-street improvements and constructing through streets.

The group talked about some recent development discussions.

Councilor Gamba asked if the City could say it was only doing FILOCs.

Mr. Ramis said it might be possible if Milwaukie could standardize it enough. It would probably help in many cases.

Council President Batey thought there might be educational value in having sidewalks to nowhere.

Councilor Churchill said if one went down the route of FILOC with a pot of money at the end of the trail, and he suggested extending the sunset but asked if there were a limit.

Mr. Ramis replied a capital improvement plan (CIP) can go out a long way, and visions and costs can go up. Logically, it made sense to envision the end picture of the City and determine how much more infrastructure was needed in order to forecast how much could come from SDCs and what the remainder was. The impact of a single family home on the infrastructure could be calculated with the balance being the responsibility of the taxpayer. It would be good for everyone to know the numbers.

Council President Batey asked Mr. Ramis if he thought there would be litigation that the fees be spent within a certain distance from the property.

Mr. Ramis responded he thought there would be conflicts and potentially litigation.

Mr. Rice thought the neighborhood strategy was working without a lot of negativity surrounding the use of FILOC. At this time those who had paid those fees do not get notice of the use of those funds on specific projects. Right now there was language regarding communicating and coordinating without a lot of definition. He thought it would be best to cleanup that language and add some clarity.

Council President Batey understood some years ago the City accepted remonstrance waivers.

Mr. Ramis said those were predominantly used in the 1970's, but there still needed to be some type of proportionality test. These were typically local improvement districts (LID) where everyone in the district paid for the improvements. Those with which he was familiar went with the property for an unlimited period of time.

Council President Batey said one of the people who had signed the non-remonstrance agreement lived on River Road which was a likely place for sidewalks especially once the connection was built to Kronberg Park. If the City found funding, then this person would likely be part of the LID.

Mr. Ramis said he would have to look at the language in the waiver. The only limit was that the cost and apportionment of the project costs be identified at the time it was built.

Mr. Monahan commented that it was important to be consistent in accepting non-remonstrance agreements. It was a political decision on whether to form the LID.

Board, Commission and Committee Interviews

Council President Batey understood from Mr. Nieman that there was not a plethora of applicants at this time. She urged people to apply.

Councilor Power and **Councilor Gamba** said they would be happy to help with the interviews if the City Council wanted to interview everyone. Councilor Power thought it might be a good idea to touch base with other board members to find out how the incumbents were doing.

It was the consensus of Council to interview all those seeking appointment and reappointment, to divide the interview responsibilities among the four Council members and to give the incumbents a shorter interview.

The group discussed reducing the number of members on the artMOB, and **Mr. Monahan** said doing so would require a code amendment. **Mr. Nieman** added that the artMOB supported reducing the number of members. The Committee recently lost its chair, and some members have not attended for years. It was agreed the artMOB would take a formal vote on the record on the membership matter.

Mr. Nieman said this staff would distribute the interviews as evenly as possible among the Council members and noted there was about a month to make City Council appointments.

Council President Batey adjourned the work session at 10:30 p.m.

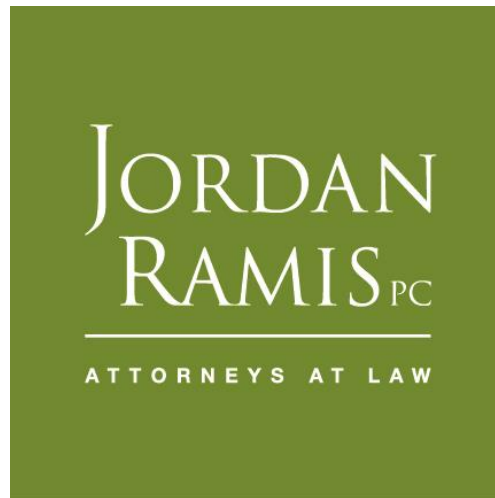
Respectfully submitted,



Pat DuVal, Recorder

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Development under Koontz



The proportionality of "fees in lieu"

By Tim Ramis

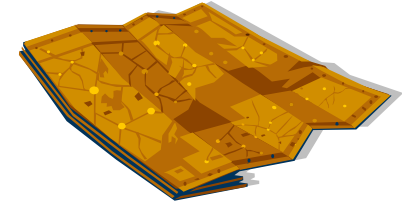
February 3, 2015

Presented by:

Tim Ramis

Today's Road Map

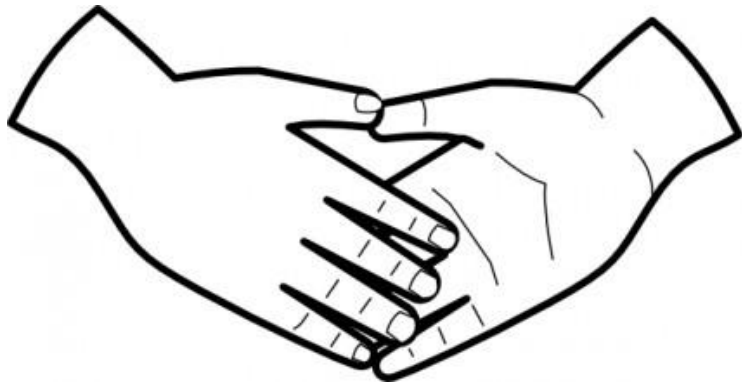
- Basic Premise—code requirements
- Nexus (Nollan)
- Proportionality (Dolan)
- Fees in lieu (Koontz)
- What has not changed
- Case study—Stanley Ave. residence



What is the basic premise of a takings question?

- The code requires or authorizes the city to require that the applicant dedicate land to the public, construct a public improvement and/or pay a fee in lieu.
 - Examples:
 - Dedicating property for right-of-way
 - Construction of public improvements such as traffic signals or sidewalks
 - Paying a fee that is proportional to the cost of the land or improvement.
- The land use approval contains such a condition.

The “essential nexus”



- Nollan: There must be an “essential nexus” between the legitimate public interest and the permit condition required by the city.

The required “rough proportionality”



- Dolan: Required exactions of property must be “roughly proportional” to the impacts of the proposed development
 - Individualized determination: City must examine the development, the impacts, and the conditions proposed to offset the impacts. Often expressed in findings.
 - No precise mathematical calculation is required.
 - Dedication must be related in nature and extent to the impact of development.

How does Koontz fit in?

1. Do the rules for exacting property also apply to a condition requiring payment of a fee in lieu or to construct an off-site improvement ?
2. Paying a fee or constructing an improvement, instead of surrendering a property interest, is “functionally equivalent” to other types of land use exactions.
3. Courts will evaluate public improvement conditions and fees “in lieu” of development under the Nollan and Dollan requirements for nexus and proportionality

What remains the same?

- Koontz is a logical extension of the “proportionality” rule of Dolan.
- City code requires rough proportionality analysis for some development applications. MMC 19.705.
- City permits fees-in-lieu of improvements in narrow circumstances. *See*, MMC 19.706.

Case Study: Stanley Ave. property

Property:

- New single-family house proposed—replace casualty loss
- Stanley Avenue is planned to become a collector street
- Stanley Ave. currently exists but below collector standards.
- House would be 1 of 28 on the street.

Types of impacts:

- Adds stormwater to public system
- Development produces auto and pedestrian traffic
- Erosion control permit required for construction phase

Potential mitigation measures:

Milwaukee code required developer to construct or fund the following features, imposed by conditions of approval:

1. Storm water improvements for collector.
2. 18-foot paved $\frac{1}{2}$ street, curb & gutter, 5' landscape strip, 6' sidewalk setback.
3. ADA-compliant driveway approach.
4. Vehicle turnaround on site, to prevent cars backing out onto collector street.

Application of Dolan and Koonz

Dolan (proportionality):

- Single family home has insufficient auto and pedestrian impact to justify constructing ½ of collector street.
- Impacts probably justify improvements to smaller, neighborhood street standards
- Impacts of house justify mitigating stormwater impacts on public system.
- Turnaround required as matter of safety, not as an exaction for the public benefit.

Koontz (how to get there with a fee):

- City did not wish developer to build local street features which would have to be removed if and when Stanley became a collector.
- BUT, City would not require developer to expand size of street to collector standard
- Parties agreed on a fee that reflected local street improvement.
- Impacts of house justify mitigating stormwater impacts on public system.
- Turnaround required as matter of safety, not as an exaction for the public benefit.

Result:



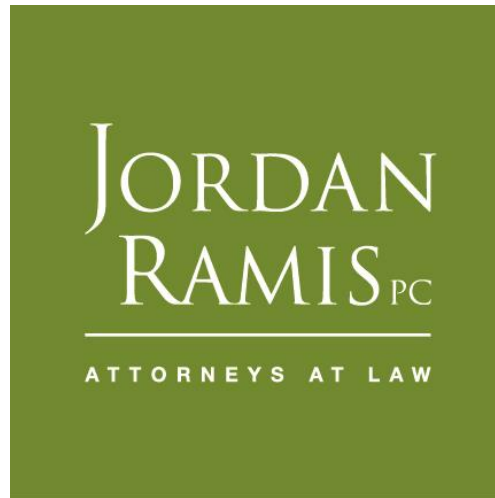
- No objections to city erosion control measures, inspections, etc.
- Storm water sufficiently controlled on site (e.g. drywells).
- \$2,500.00 fee to recognize impacts of single-family home on existing street.
- Cars can turn around on paved area; area in blue could also be used.

Future implementations . . .

Code & Constitution

- Development must pass through two legal “filters”:
 - a. City’s regulations
 - b. State and Federal takings clauses of constitution
- Conditions required by city codes, may not be “disproportional” to impacts of development
- Requiring construction or public improvements or payment of fees “in lieu” of are “functionally equivalent” to other types of exactions, and must be “proportional” to impacts.
- City has burden of satisfying “proportionality” standard, so city must conduct analysis and make findings to support its conditions.

Questions?



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MILWAUKIE CITY COUNCIL
WORK SESSION #2

City Hall Conference Room
10722 SE Main Street
www.milwaukieoregon.gov

REVISED AGENDA
FEBRUARY 3, 2015

**Immediately following adjournment of the Regular Session,
the City Council will convene in Work Session**

	Page #
1. Discussion of Development Conditions of Approval and Exactions Staff: City Attorney Tim Ramis	1
2. Marijuana Grow Sites Staff: Planning Director Denny Egner	2
3. Adjourn Work Session	

Meeting Information

The time listed for each item is approximate; the actual time each item is considered may change due to the length of time devoted to the previous item. The Council may vote in Work Session on non-legislative issues.

Public Notice

Executive Sessions: The Milwaukie City Council may meet in Executive Session immediately following adjournment pursuant to ORS 192.660(2). All Executive Session discussions are confidential and those present may disclose nothing; representatives of the news media may attend as provided by ORS 192.660(3) but must not disclose any information discussed. Executive Sessions may not be held for the purpose of taking final actions or making final decisions and they are closed to the public.

The Council requests that mobile devices be set on silent or turned off during the meeting.

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WS2 1.
2/3/15

To: Council President and City Council
From: Bill Monahan, City Manager
Subject: Discussion of Development Conditions of Approval and Exactions
Date: January 27, 2015

ACTION REQUESTED

Hold a discussion with the City Attorney concerning the opportunities and issues related to imposing conditions of approval and exactions on development projects within the city.

HISTORY OF PRIOR ACTIONS AND DISCUSSIONS

None in the recent past.

BACKGROUND

The Engineering and Planning staffs routinely hold discussions with potential applicants for land use approvals or building permits where discussion centers on what conditions of approval will be required in order to obtain permits or approvals. During the past twenty plus years, the courts have gradually increased the limitations placed on local governments in imposing conditions. In addition, developer willingness to make contributions to public improvements has changed.

Following the recent economic downturn, staff has observed that there is even more developer scrutiny of potential conditions of development suggested by staff. In particular, proposals to require installation of public improvements such as street extensions have been questioned.

Staff has asked the City Attorney to provide City Council with a briefing on the limits that apply today. The briefing will allow Council to update its knowledge of the issue and become better aware of what staff can and cannot expect of developers.

CONCURRENCE

None.

FISCAL IMPACTS

None at this time.

WORK LOAD IMPACTS

None.

ALTERNATIVES

This is an information only item.

ATTACHMENTS

None.



MILWAUKIE CITY COUNCIL
STAFF REPORT REMOVED

[WS2 2.]
[2/3/15]

To: Mayor and City Council
Through: Bill Monahan, City Manager

Subject: **Marijuana Grow Sites**

From: Dennis Egner, Planning Director

Date: January 29, 2015 for February 3, 2015 Work Session

NOTICE:

The Staff Report and related attachments referenced above have been moved to the Work Session Packet. [2/2/2015]