



CITY OF
PORTLAND, OREGON

1900 S.W. 4th Avenue, Room 3100
Portland, Oregon 97201
Telephone: (503) 823-7307
FAX: (503) 823-4347
TDD (503) 823-6868

HEARINGS OFFICE

**DECISION OF THE HEARINGS OFFICER
ON APPEAL OF ADMINISTRATIVE DECISION**

I. GENERAL INFORMATION

File No.: LU 06-171821 GW (HO 4070025)

Applicant and Appellant: Shawn Karambelas, SK Northwest
1447 NE Sandy Boulevard
Portland, OR 97232

Representatives: Peter Fry
2153 SW Main Street, #104
Portland OR 97205

Richard Allan, Ball Janik LLC
101 SW Main Street #1100
Portland OR 97204-3219

Property Owners And Appellants: Wayne B Kingsley and Craigievar Invest LLC
110 SE Caruthers Street
Portland, OR 97214

Representative: Steve Morasch
Schwabe Williamson & Wyatt, CP
700 Washington Street, Suite 701
Vancouver WA 98660

Hearings Officer: Gregory J. Frank

BDS Staff Representative: Kate Green

Site Address: 240 WI/ SE CARUTHERS STREET (at the foot of SE Division Place)

Legal Description: TL 300 BLOCK A&G SPLIT MAP 79400-1640, KERNS ADD

Tax Account No.: R448700030

State ID No.: 1S1E10AA 00300

Quarter Section: 3230,3330

Neighborhood: Hosford-Abernethy

Business District: Central Eastside Industrial Council

District Coalition: Southeast Uplift

Zoning: Heavy Industrial (IH)
Greenway River General (g)

Plan District: Central City/Central Eastside

Other Designations: Floodplain, Public Recreation Trail

Land Use Review: Type II, Greenway Review

BDS Administrative Decision: Denial

Public Hearing: The hearing was opened at 9:03 a.m. on June 6, 2007, in the 3rd floor hearing room, 1900 SW 4th Avenue, Portland, OR, and was closed at 11:33 a.m. The record was held open until 4:30 p.m., June 13, 2007, for new evidence; until 4:30 p.m., June 20, 2007, for new written evidence from Applicants/Appellants only; and until 4:30 p.m., June 27, 2007, for Applicants'/Appellants' rebuttal. A written request to have the record reopened was received on June 20, 2007. The Hearings Officer granted a request to reopen the record. The record was held open until 4:30 p.m. on June 27, 2007 for new evidence and until 4:30 p.m. on July 5, 2007 for the Applicants'/Appellants' rebuttal. The record was closed at that time.

Testified at the Hearing:

Kate Green, BDS staff representative

Jamie Jeffrey, Office of Transportation, Bldg. 106, Room 800

Gregg Everhart, Portland Parks and Recreation, 1120 SW 5th Avenue, #1302, Portland, OR 97204

Richard Allan, Ball Janik, 101 SW Main Street, #1100, Portland, OR 97204 -- representing Shawn Karambelas, SK Northwest

Steve Morasch, Schwabe Williamson Wyatt, 1211 SW 5th Avenue, #1700, Portland, OR 97204 -- representing Wayne Kingsley, Craigievar Investment

Michelle Poyourou, PO Box 9072, Portland, OR 97207 -- representing Portland Bicycle Alliance

Ben Schonberger, Winterbrook Planning, 310 SW 4th Avenue, #1100, Portland, OR 97204 -- representing Portland Bicycle Alliance

Bill Kabeiseman, 121 SW Morrison Street, Portland, OR 97204

Christine Cook, 4140 NE 41st Avenue, Portland, OR 97211

Ed Birnbaum, 7836 SE 11th Avenue, Portland, OR 97202

Pete Kasting, City Attorney's Office, City Hall Room 430, 1221 SW 4th Avenue, Portland, OR 97204

Proposal: The Applicant proposes to develop a vacant 1.8 acre riverfront lot with a two-story building, parking and loading areas, and a dock. The dock is to be constructed of encapsulated foam and galvanized steel and aluminum, and is to be attached to 18-inch diameter steel pilings. The bank is also to be planted with native vegetation. Uses of the facility are identified as retail, vehicle repair, warehouse, and office.

No new development is proposed on the adjoining lot to the north, which is in the same ownership.

The project site is located in the Greenway River General overlay zone, where new development and in-water structures are subject to **Greenway Review** (33.440.310).

Relevant Approval Criteria: In order to be approved, this proposal must comply with the approval criteria of Title 33. The relevant criteria are: 33.440.350, Greenway Review.

PRELIMINARY MATTERS

The following references shall be used throughout the remainder of this decision:

Shawn Karambelas	Applicant or Appellant #1
Richard Allen	Attorney for Applicant or Attorney for Appellant #1
Wayne B Kingsley and Craigiever Invest LLC	Appellant #2
Steve Morasch	Attorney for Appellant #2
240 WI/SE Caruthers Street	Subject Property
Decision in case LU 05-178171 GW	<i>SK#1</i>
Appellants #1 and #2 collectively	Appellants

Claim/Issue Preclusion

Appellants argue that the “City is bound by the prior determinations made by the Hearings Officer in LU 05-178171, especially the legal determinations made by the Hearings Officer regarding the facial unconstitutionality of PCC 33.272.020, 33.272.030(D) and 33.440.240(B), and the meaning of the term “top of bank.”” (Exhibit H.10, page 3). The Hearings Officer’s decision in LU 05-178171 was submitted in this case as Exhibit H.8a, and shall hereafter be referred to as “*SK#1*.”

The Hearings Officer acknowledges that the same and/or similar relevant approval criteria and appellant issues were involved in *SK#1*. The Hearings Officer also acknowledges that in the *SK#1* decision, the Hearings Officer did opine on the issues noted by the appellant in the preceding paragraph. However, as will be discussed later in this section of this decision, neither the “facial constitutionality” or “top of bank” opinions express in *SK#1* formed the basis of the ultimate decision. The Hearings Officer’s decision in *SK#1* was denial of the Greenway Review application submitted by Appellants/Applicant because the Applicant failed to provide credible substantial evidence to allow the Hearings Officer to find certain approval criteria were satisfied. (Exhibit H.8a; also see Exhibit H.8, letter from R. Allen, page 2)

The Appellants' arguments related to claim and issue preclusion are most forcefully made in Exhibits H.10 and H.24. All parties who engaged in the claim and issue preclusion discussion seemed, to the Hearings Officer, to agree that a leading case dealing with claim and issue preclusion in the land use arena is *Lawrence v. Clackamas County*, 180 Or App 495, 43 P3d 1192 (2003). (See Exhibit H.10, page 4 and Exhibit H.16, pages 2 and 3) "For issue preclusion to apply, five requirements must be met: (1) The issue in the two proceedings must be identical. (2) The issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding. (3) The party sought to be precluded had a full and fair opportunity to be heard. (4) The party sought to be precluded was a party or was in privity with the party in the prior proceeding. (5) The prior proceeding was the type of proceeding to which a court will give preclusive effect." *Lawrence* at 503 The court, in *Lawrence*, found that because a relevant law had changed requirement (1) was not satisfied and held that the Clackamas County did not err in rejecting petitioner's application as being precluded by an earlier application.

Appellant #2 addressed the five *Lawrence* factors in Exhibit H.10 (pages 4 - 6) and Exhibit H.24 (pages 7-9). The Hearings Officer finds it necessary only to address *Lawrence* factors (2) and (5).

Appellant #2, with regard to *Lawrence* factor (2) stated that "the issue of facial invalidity was actually litigated and essential to a final decision on the merits." (Exhibit H.10, page 5) Appellant #2 expanded on *Lawrence* factor (2) by stating that:

"The Hearings Officer's prior determination of facial invalidity was indeed essential to a final decision on the merits since that determination was needed to guide the Hearings Officer on how to apply the approval criteria, particularly with respect to issues B and F of the Willamette Greenway Design Guidelines. Since the trail issue permeated the entire application, the Hearings Officer could not have properly applied the criteria without first having addressed the facial unconstitutionality of the trial (sic) requirement." (Exhibit H.24, page 9)

Mr. Kastings, a Portland City Attorney, asserted through oral testimony at the public hearing that *Lawrence* factor (2) was not met because the Hearings Officer's constitutional determination in *SK#1* was not essential to the final *SK#1* decision; that the Hearings Officer's constitutional determinations were "not the reason for denial" of the *SK#1* application.

At this point the Hearings Officer finds it necessary to review various sections of *SK#1* to determine if the "constitutional" and "top of bank" issues were essential to the final *SK#1* decision on the merits. The Hearings Officer, in *SK#1*, rendered the following decision:

"The BDS administrative decision rendered on June 6, 2006 is upheld and the application for Greenway Review is denied. The Hearings Officer finds there is no prevailing party as Appellants prevailed on their arguments related to "top of bank" and "Nollan/Dolan" and the City prevailed in its decision to deny the application." (Exhibit H.8a, page 40)

In the Conclusion section of the *SK#1* the Hearings Officer stated:

"The Hearings Officer reviewed the approval criteria set forth in 33.440.350. The Hearings Officer found all approval criteria satisfied excepting for 33.440.350 A. and 33.440.350 F.1. The Hearings Officer found that 33.440.350 A. was not satisfied because Appellant #1 failed to

provide substantial evidence in the record for the Hearings Officer to find that Willamette Greenway Design Guideline Issue B had been satisfied. The Hearings Officer found that 33.440.350.F.1 was not satisfied because Appellant #1 failed to provide substantial evidence in the record to demonstrate that the application proposal would not result in a significant loss of biological productivity in the Willamette River. The Hearings Officer, therefore, upholds the BDS staff decision (June 6, 2006) conclusion to deny the Greenway Review application.” (Exhibit H.8a, page 40)

SK#1 findings for 33.440.350 A (Willamette Greenway Design Guideline B) state, in part, that:

“The Hearings Officer found that Appellant #1 need not dedicate an easement for the Greenway Trail and need not construct the trail; that does not mean, however, that Guideline (2) is not applicable to this application. The Hearings Officer interprets this Guideline as part of 33.440.350 approval criteria and therefore Appellant #1 must provide evidence, in the record, that the proposed project is designed so that there is “adequate screening, from parking, loading, circulation routes, external storage areas, trash dumpsters, exterior vents, mechanical devices, and other similar equipment.”... (Exhibit H.8a, page 25)

“Guideline (1) requires Appellant #1 to provide evidence, in the record, related to integrating public access opportunities to and along the river into the design of the project. The Hearings Officer reiterates a point made previously; just because Appellant #1 is not required to dedicate a Greenway Trail easement and construct trail improvements does not relieve Appellant #1 from addressing, with substantial evidence, all Issue B design guidelines.” (Exhibit H.8a, page 26)

SK#1 findings for 33.440.350 F.1 state, in part, that :

“The Hearings Officer found, earlier in this decision, that the City’s demand for a greenway trail easement dedication and construction of a Greenway Trail on the Subject Property is not constitutionally supported....The Hearings Officer notes that the Appellants have not contested the right of the City to establish a greenway setback line or the complementary prohibition of building with the greenway setback. The Hearings Officer, based upon hearing testimony and written submissions (see for example, Exhibit I.15, page 9) finds that there is sufficient area within the greenway setback to locate, in the future, the greenway trail. The Hearings Officer treats Issue F for what it is – a design standard.” (Exhibit H.8a, page 31)

The Hearings Officer, after considering the decision in *SK#1*, and particularly based upon the above quoted sections of the decision, finds that the Hearings Officer’s opinions stated in *SK#1* related to facial constitutionality, *Nollan/Dolan* tests (as applied constitutional analysis), and “top of bank” were **not** essential to the final *SK#1* decision on the merits. The Hearings Officer finds that *Lawrence* factor (2) is **not** satisfied in this case.

Lawrence factor (5) requires a showing that the “prior proceeding was the type of proceeding to which this court will give preclusive effect.” *Lawrence* @ 504, citing 40 Or LUBA at 520, quoting *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990). The Court of Appeals, in *Lawrence*, stated that “we need not decide the broad question of whether local land use decisions are the type of decisions to which

preclusive effect may be accorded...” *Lawrence* @ 504 However, LUBA, in its *Lawrence* decision did address *Lawrence* factor (5). *Lawrence v. Clackamas County*, 40 Or LUBA 507 (2001) (hereafter referred to as “*LUBA Lawrence*”).

After considering the 5 *Lawrence* factors (citing *Nelson v. Emerald People’s Utility Dist.*, 318 Or @ 104) LUBA stated, in *LUBA Lawrence* that:

“the parties make a number of arguments regarding the first requirement, however, we believe the fifth requirement is dispositive --- whether local land use proceedings are the types of procedures to which preclusive effect will be given. We considered this question in *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990). Contrary to intervenors’ assertion, issue preclusion does not generally apply in local land use hearings. We stated that, in principal, issue preclusion *could* apply to local land use proceedings. After thoroughly considering the issue, however, we reached the conclusion that issue preclusion does not apply to local land use proceedings.” *LUBA Lawrence* @ 519-520.

The Hearings Officer finds the approach taken in *LUBA Lawrence* to be persuasive. Appellant #2 suggests that courts do give preclusive effect to land use decisions and cites as support for this position *Lloyd District Community Association v. City of Portland*, 141 Or App 29, 916 P2d 884 (1996), *State ex rel. Moore v. City of Fairveiw*, 170 Or App 771, 13 P3d 1031 (2000), *review denied*, 331 Or 692 (2001), and *Doney v. Clatsop County*, 142 Or App 497, 921 P2d 1346 (1996).

The Hearings Officer finds no language in any of the cases cited above by Appellant #2 to convince the Hearings Officer that the decision in *LUBA Lawrence* is incorrect. The Hearings Officer notes that each of the cases cited by Appellant #2 involved an approval by a jurisdiction and not a denial as in *SK#1*.

A distinction is appropriate between an approval of a land use approval and a denial of a land use request. A land use *approval*, if not appealed, gives the Applicant the right to proceed with a development under terms of the approval (including any conditions). If the Applicant, affected jurisdiction, or opponents wish disagree with the approval or any condition, then an appeal to LUBA, and subsequently through the court system, may be necessary. In essence, an approval “vests” the Applicant with identifiable rights to develop. On the other hand, a denial of a land use application provides an Applicant with at least two options; the first is to appeal the correctness of the denial decision to a higher decision making authority, such as LUBA, and second the denied Applicant may file another application with the jurisdiction.

Appellant #2 argues that the City of Portland “has previously relied on collateral estoppel at the Court of Appeals level to defeat an Applicant’s appeal of the City’s denial in the *Lloyd District* case. The City cannot have it both ways” (Exhibit H.24) The Hearings Officer finds the Appellant #2’s argument not persuasive and distinguishes the present case from *Lloyd*. In *Lloyd* the City Planning Director initially issued an approval for the operation of a hospital use at a specified location. Subsequently, the *Lloyd* Community Association requested the Planning Director process the hospital request quasi-judicially. The Planning Director denied the Community Association request. The Court of Appeals held that the Planning Director’s determination, which the Hearings Officer characterizes as an approval, was a land use decision and since such decision was not timely appealed to LUBA the Planning Director’s decision

was final. *Lloyd* is distinguishable because the “first” decision (Planning Director’s administrative) was and approval and not a denial as described by Appellant #2

Generally, an Applicant whose land use application is denied may file one or more subsequent applications for “modified, or even the same, development.” *Krischenko v. Canby*, 52 Or LUBA 290 (2006) citing *Lawrence v. Clackamas County*, 180 Or App 495, 43 P3d 1192 (2003) The Applicants, in this case, were denied (*SK#1*) and the present case is a subsequent application. The Hearings Officer reviews subsequent land applications, even if following an earlier denial, *de novo*; afresh, the same as if had not been heard before and as if no decision had been previously rendered. (de novo trial as defined in *Black’s Law Dictionary*) The Hearings Officer is required, under any application to consider the law in effect at the time the application is deemed complete and the Hearings Officer must consider all evidence submitted and all legal arguments proffered during the subsequent hearing process.

The Hearings Officer finds that *Lawrence* factors (2) and (5) are not met and therefore Appellant #2’s argument that issue preclusion applies in this case fails. Further, the Hearings Officer finds that claim preclusion is not applicable, generally, to land use proceedings because “once an Applicant has filed a new application, that application must be decided on its merits, even if the application is similar or identical to a prior application.” *LUBA Lawrence @ 518* citing *Durig v. Washington County* ___ LUBA ___ (*LUBA No. 2000-185, May 1, 2001*), *slip op 6*, aff’d ___ Or App ___ (2001) LUBA went on to say “local land use proceedings do not, and are not intended to, have the preclusive and final effects of judicial and other types of proceedings where claim preclusion is applied. If one proposal for development is denied, land use ordinances anticipate and allow for additional attempts for modified, or even the same development.” *LUBA Lawrence @ 518*. “The city’s zoning code permits Applicants to file successive applications for development. The code reflects the council’s policy choice that an Applicant who has had a development denied should be permitted to try again by filing an application for the same or similar development.” (Exhibit H.16, page 3)

As an aside, the Hearings Officer notes a perspective, which the Hearings Officer is in accord, presented by one of the opponents of the application where he stated that:

“the case law makes it clear that the City’s focus should be on getting the decision correct – not consistent. In *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004) *affirmed without opinion* 197 Or App 124, 107 P3d 83 (2005), LUBA held that nothing prohibits a local government from reinterpreting the meaning of indisputably applicable approval standards. In short, no law prevents the City from properly interpreting an applying the City’s code to this application in the correct manner, regardless of what happened in a previous application...” (Exhibit H.15, page 2)

In summary, the Hearings Officer’s discussions related to the “top of bank” and the “constitutionality” in *SK#1* do not preclude the Hearings Officer to consider such issues and evidence offered relating to those issues anew in this case.

Facial Constitutionality

Appellant #2 raised the issue of facial unconstitutionality of certain identified sections of the Portland Zoning Code in *SK#1* by stating the following: “The City’s code requirements for a trail violates *Dolan* on its face because it purports to require every waterfront Applicant for building or land use permit to provide the trail, regardless of the impact of the proposed development.” (Exhibit I.15, *SK #1*) The Hearings Officer, with little assistance from either the City or Appellants, undertook the facial constitutionality analysis in *SK#1* and concluded code sections 33.272.020, 33.272.030 D., and 33.440.240 B. were overbroad and, therefore were unconstitutional on their face. (Exhibit H.8a, pages 10-12)

Following review of the evidence and argument submitted in this case the Hearings Officer revisits Appellants’ assertion that sections 33.272.020, 33.272.030 D., and 33.440.240 B. are facially unconstitutional. The Hearings Officer was directed at the public hearing, by persons in opposition to the application, to view the challenged code sections in context of zoning code section 33.10.040 and in light of *Lincoln City Chamber of Commerce v. City of Lincoln City*, 164 Or App 272, 991 P2d 1080 (1999). (oral testimony of Ben Schonberger and Christine Cook) The Hearings Officer notes that neither 33.10.040 or the *Lincoln City Chamber of Commerce* case were considered in reaching the *SK#1* facial determination. The Hearings Officer finds that the new evidence and arguments prompt the Hearings Officer to find the challenged sections of the zoning code are not facially unconstitutional; a reversal of the Hearings Officer’s *SK#1* findings.

The challenged sections of the zoning code, in relevant part, stated the following:

“33.272.020: All Applicants for a land use review or for building permits on lands designated with a recreational trail symbol on the zoning map are required to grant an easement for the recreational trail. The easement must be done as part of recording a land use review and finalized prior to obtaining a final certificate of occupancy. The land may be donated to the City instead of granting an easement when standards of Section 33.272.080 are met. Trails shown adjacent to public rights-of-way may be constructed in the public right-of-way, subject to approval from the Office of Transportation.”

“33.272.030 D: Construction of the recreational trail is required on lands designated with a recreational trail symbol on the zoning maps in any of the following situations listed below.
1. When there is new development.”

“33.440.240 B: All sites with a public recreational trail symbol shown on the Official Zoning Maps must comply with the requirements of Chapter 33.272, Public Recreational Trails, provide and install the official Greenway Trail signs as required by the Parks Bureau, and meet the trail design guidelines contained in the Willamette Greenway Plan.”

The Hearings Officer, in *SK#1*, concentrated on the words “all” and “must” which are found within the challenged sections of the Zoning Code. The Hearings Officer found that the above-quoted sections were facially overbroad because they could “potentially impact a substantial number of landowners who have property with the recreational symbol by *requiring* dedication of a trail easement and construction of

trail impacts” without undertaking a *Nollan/Dolan* analysis. The Hearings Officer found that the use by the City of the word “all” precluded any application of *Nollan/Dolan* (Exhibit H.8a, pages10-13)

Two additional sections of the Portland Zoning Code are quoted below:

“33.10.040 A.: In addition to the requirements of the zoning code, all uses and development must comply with all other applicable City, regional, state, and federal regulations.”

“33.700.070: The rules of this section apply to this Title and any conditions of a land use approval granted under this Title.

A. Reading and applying the code. Literal readings of the code language will be used. Regulations are no more or less strict than as stated. Applications of the regulations that are consistent with the rules of this section are nondiscretionary actions of the Director of BDS to implement the code. The action of the Director of BDS is final.

B. Ambiguous or unclear language. Where language is ambiguous or unclear, the Director of BDS may issue a statement of clarification processed through a Type III procedure, or initiate an amendment to Title 33 as stated in Chapter 33.835, Goal, Policy, and Regulation Amendments.

D. Terms.

1. Defining words. Words used in the zoning code have their dictionary meaning unless they are listed in Chapter 33.910. Words listed in the Definitions chapter have the specific meaning stated, unless the context clearly indicates another meaning.”

Opponents (Schonberger and Cook) argue that 33.10.040 A., in essence, overlays the entire Zoning Code resulting in the imposition of the *Nollan/Dolan* analysis upon sections 33.272.020, 33.272.030 D., and 33.440.240 B. Cook argues that the “city can implement non-ordinance methodology, or apply non-ordinance tools of analysis (like those in *PGE v. BOLI*), or consider other aspects of criteria that have been created as common law decisions of the judiciary, the city can, and must also apply the analysis of *Nollan* and *Dolan* in this case.” (Exhibit H.29, page 3) On the other hand, Applicants argue that (1) the Hearings Officer cannot consider the opponents’ and City’s new facial arguments because the Hearings Officer is precluded from such analysis (see Issue and Claims Preclusion Discussion above) (2) the language of the challenged code sections is clear and unambiguous and in light of 33.700.070 A. the Hearings Officer should not (or need not) consider the language of 33.10.040, and (3) the Hearings Officer’s analysis in *SK#1* is correct and should be the holding in this case.

The Hearings Officer agrees that sections 33.272.020, 33.272.030 D., and 33.440.240 B are clear and unambiguous; in particular, the word “all” has a plain, clear and unambiguous meaning. The Hearings Officer, however, finds that in interpreting sections 33.272.020, 33.272.030 D., and 33.440.240 B. the Hearings Officer must consider both the “text” of those sections and the “context” of the sections of the ordinance, related ordinances and applicable court decisions. See *PGE v. Bureau of Labors and Industries*, 317 Or 606, 859 P2d 1142 (1993) and *State ex rel Department of Human Services v. Rardin*, 338 Or 399, 407-08, 110 P3d 580 (2005).

The Hearings Officer agrees that for 33.10.040 to have any meaning it must relate to all other sections of the zoning code. The Hearings Officer finds it appropriate to consider 33.10.040 in the context of 33.272.020, 33.272.030 D., and 33.440.240 B. The Oregon Supreme Court, in *Owens v. Maass*, 323 Or

430, 434-435, 918 P 2d 808 (1996) addressed a state statute which included the term “all.” In *Owens* the court considered other statutory provisions to provide context for the word “all.” The court decided that one of the other sections “limits the otherwise expansive scope of petitions that would be included under the ‘all petitions’ wording...” *Owens* at 437

The Hearings Officer, therefore, finds that for the purposes of interpreting sections 33.272.020, 33.272.030 D., and 33.440.240 B the Hearings Officer must consider 33.10.040 as imposing an “overlay” requirement that the challenged sections must be in legal conformance with United States Supreme Court holdings in *Nollan/Dolan* and the Fifth Amendment of the United States Constitution.

In addition to the findings above related to 33.10.040 the Hearings Officer considered the Oregon Court of Appeals decision in *Lincoln City Chamber of Commerce v. City of Lincoln City*, 164 Or App 272, 991 P2d 1080 (1999). In this case the petitioners argued that a section of the Lincoln City Zoning Code was “facially inconsistent with *Dolan*” and therefore facially unconstitutional. The court responded by stating that “in considering a facial challenge to the constitutionality of legislation, the question to be asked is the challenged law “capable of any constitutionally permissible applications.” *Lincoln City Chamber of Commerce @ 276*, citing *Benson v. City of Portland*, 119 Or App 406, 850 P 2d 416, *rev den* 318 Or 24, 862 P 2d 1304 (1993) The court went on to say that “if it is, then it is susceptible to constitutional challenge only on an ‘as applied’ basis and cannot be declared unconstitutional on its face.” *Lincoln City Chamber of Commerce @ 276*, See also *Jensen v. Whitlow*, 334 Or 412, 51 P 3d 599 (2001) and *Stevens v. City of Cannon Beach*, 317 Or 131, 147, 854 P 2d 449 (1993).

Applicant #1 suggests that “the Hearings Officer determined [in *SK#1*] that the City could not legally impose the trail requirement under any set of facts.” (brackets added by Hearings Officer, underlining part of Applicant #1’s written statement) (Exhibit H.8, page 13) The Hearings Officer disagrees with Applicant #1’s characterization of the Hearings Officer’s facial constitution findings in *SK#1*. The Hearings Officer, in *SK#1* focused on whether or not a decision maker, in the context of 33.272.020, 33.272.030 D., and 33.440.240 B, has any discretion. The Hearings Officer notes again that no consideration was given to 33.10.040 in *SK#1*; the Hearings Officer considers the failure to consider 33.10.040 to have been a mistake in his analysis in the *SK#1* decision.

The Hearings Officer also did not consider, in *SK#1*, whether there were fact situations where 33.272.020, 33.272.030 D., and 33.440.240 B could be constitutionally (per *Nollan/Dolan*) applied and enforced. The Hearings Officer, in this case, finds no difficulty in imagining applications of 33.272.020, 33.272.030 D., and 33.440.240 B that satisfy *Nollan/Dolan*. For example, in this case, as will be seen in during the *Nollan/Dolan* analysis, the Hearings Officer finds that the City presented sufficient evidence to demonstrate satisfaction of *Nollan/Dolan*. However, the Hearings Officer can imagine other circumstances where the nexus and rough proportionality tests of *Nollan/Dolan* are even more clearly satisfied; such as a situation where a development created extensive demand for vehicular, pedestrian and bicycle traffic and the dedication and improvement exactions are slight (small area).

The Hearings Officer finds that the standard set forth in *Lincoln City Chamber of Commerce* and *Jensen* requires the Hearings Officer to find the challenged sections constitutional on their face unless the Hearings Officer finds the challenged sections are incapable of constitutional application in *any*

circumstance. Because the Hearings Officer finds the challenged sections are capable of constitutional application in some circumstances the Hearings Officer finds the challenged sections are not unconstitutional on their face.

Top of Bank

Portland Code section 33.440.210 B.1 states, in part, that “the greenway setback extends from the top of the bank to a point 25’ landward from the top of the bank...” Section 33.910 defines top of the bank as “the first major change in the slope of the incline from the ordinary high water level of a water body. A major change is a change of ten degrees or more. If there is no major change within a distance of 50 feet from the ordinary high water level, then the top of bank will be the elevation 2 feet above the ordinary high water level.” The Applicant and City disagree as to the application of the top of bank definition to the physical condition of the Subject Property.

Applicant provided a report from a professional engineer describing a methodology in arriving at the top of the bank for the Subject Property. (Exhibit A.3) The Hearings Officer found in *Sk#1* that the explanation by the Applicant’s engineer was reasonable. The City, in this case, has asked the Hearings Officer to consider additional argument and discussion relating to the Applicant’s top of bank determination. The Hearings Officer shall consider the evidence, interpretative statements and argument submitted in this case related to locating the top of bank.

The Applicant’s engineer generated a “3 Dimensional Triangular Irregular Network (TIN) model of the site (the individual survey points were connected with lines). Using AutoCad seven cross sections (SL-1 through SLo-7) were created along the bank, and slope changes were identified. If the slope change was more than 10 degrees then distance from OHW was measured. If this distance was more than 50ft, the alternate definition was applied. If it was less than, or equal, then this change of slope was considered the top of bank.” (Exhibit A.3, page 1)

The City, utilizing the Applicant’s site plan (Exhibit C.1) and using its interpretation of the zoning code, arrived at a different top of bank location. The reason this matter is important is that if the City’s top of bank location is used a portion of the Applicant’s building sets within the greenway setback. Siting improvements in the greenway setback requirement is only permitted upon the granting of a Greenway Goal Exception; no such application has been applied for in this case.

The Hearings Officer finds no technical evidence in the record to dispute the data collected by the Applicants’ engineer. The City’s position, it seems to the Hearings Officer, is not disputing the Applicant engineer’s qualifications or data but rather is challenging the Applicant’s interpretation of the Code when applying the data.

As stated above, the Hearings Officer in *SK#1* found in Applicant’s favor because the Applicant’s engineer was qualified and presented a reasonable argument on behalf of his methodology. In this case the Hearings Officer considered the additional information/argument submitted on behalf of the City.

In his report the Applicant’s engineer stated, in regards to the definition of top of bank, that “as the two methods in the zoning code are drastically different, the top of bank at transition points can be a

significant distance apart. See in the plan, the line defining top of bank are disjointed. This line is the basis for the greenway set back, which results in a setback that is also disjointed. The setback should be measured perpendicular to the flow of the river. Where the ‘top of bank’ transitions ‘landward’ no line should be drawn up the slope to connect the points (to of bank logically cannot be perpendicular to contours). If top of bank is not shown in these areas, then a setback cannot be drawn.” The Applicant’s engineer then diagramed the ‘basic setback – Figure 2’ and the ‘City interpretation – Figure 3.’ (Exhibit A.3, page 2)

The City addressed the top of bank issue in its staff presentation at the hearing (Exhibit H.27a, powerpoint presentation) and a memorandum submitted during the open-record period. (Exhibit H.28) In summary, the City asserts that the role of BDS is to administer and apply city codes, including applying the definitions of terms/phrases. BDS stated that the Applicant’s engineer, in using the TIN model failed to take into account the context of the top of bank definition within the Zoning Code. (Exhibit H.28, page1) BDS asserted that the information provided by the Applicant’s engineer indicated that “there is a major change (> 10 degrees) in the bank slope within 50 feet of the OHW line across the site’s entire riverfront.” BDS argued that the greenway setback identified by appellant’s engineer is a “disconnected alignment. BDS finds the greenway setback is a contiguous uniform distance from the identified top of bank locations, which conforms to the general application of setbacks as required throughout the *Zoning Code*.” BDS also argued that “the greenway setback identified by the Appellants is not consistent with the intent of the setback, as noted in the *Willamette Greenway Plan* (p 8), since non river-dependent development would not be kept back from the river’s edge. Further a fragmented setback is contrary to the intent of providing for public access.” (Exhibit H.28, page 1)

33.410.210 B. establishes the importance of the top of bank definition. 33.410.201 B.1 describes the greenway setback as extending from a point 25 feet landward from the top of the bank. BDS argues that the greenway setback is to be a continuous strip of land which performs various functions such as increasing recreational opportunities, providing emergency vehicle access and providing connections to other transportation systems. (see 33.440.010 and Willamette Greenway Plan page 8, paragraph C) BDS argued that these purposes can only be satisfied with a continuous “ribbon” form of a greenway setback and to accomplish that the top of bank must be continuous and not “disjointed” as proffered by the Applicant’s engineer. In support of the continuous ribbon form of greenway setback BDS directed the Hearings Officer to Figure 440-3 (33.440 of the Zoning Code) (see Exhibit 27a, page 9)

The Applicant’s engineer selected 7 points along the frontage of the Subject Property. Why the Applicant’s engineer selected seven points or why they were located in the chosen locations was not explained in his report. (Exhibit A.3) With the data collected from the seven cross sections the Applicant’s engineer then proceeded to make his interpretation (Exhibit A.3, page 2, Figure 2) and attempted to display, in a diagram, what he believed to be the City’s interpretation (Exhibit A.3, page 2, Figure 3). Based upon the BDS hearing presentation (Exhibit H.27a, page 13 and 14, and Exhibit H.28, attached diagram) the City’s interpretation is not the same as represented by the Applicant’s engineer. (Exhibit A.3, page 2)

The Hearings Officer agrees with the Applicant’s engineer that his representation of the City’s interpretation (as shown in Exhibit A.3, page 2, Figure 3) is not logical and does not represent a

reasonable reading of the zoning code. However, the Hearings Officer finds that the Applicant engineer's interpretation (as shown in Exhibit A.3, page 2, Figure 2) is equally illogical and unreasonable when considering the policies and purposes set forth in the zoning code and other relevant documents. The Hearings Officer found a City submission to clearly display the illogical and unreasonable nature of the Applicant engineer's interpretation. (see Exhibit A.27a, page 13) (The disjointed nature of the top of bank line and greenway setback line is also graphically portrayed on Applicant's site plan – Exhibit C.8)

If the purpose of the greenway setback is to accommodate one or more of the stated purposes of 33.440.010 (ie. increasing recreational opportunities, increasing public access, providing emergency vehicle access, providing connections to other transportation systems) the disjointed approach advocated by the Applicant's engineer makes no sense. The problem, from the perspective of the Hearings Officer, is the Applicant engineer's reliance on only a limited number of cross sections. The Hearings Officer finds that the limited number of cross sections created the opportunity for the disjointed conclusion reached by the Applicant's engineer. The Applicant's engineer had topographical data of sufficient detail to determine the top of bank as the City did in its analysis. The City's interpretation results in a ribbon like line which is not disjointed but rather is contiguous and uniform. The City's interpretation results in a top of bank line that creates a greenway setback that is also contiguous and uniform.

As stated earlier in this section the Hearings Officer is not disputing the credibility of the data generated by the Applicant's engineer. What the Hearings Officer finds, however, is that the City's interpretation of the data provided by the Applicant engineer's is more consistent with the policies and purposes of the Greenway Overlay Zones section of the zoning code and the Willamette Greenway Plan.

The Hearings Officer finds that a portion of the Applicant's proposed building is within the properly designated greenway setback area and as such the building must either be redesigned to eliminate the setback encroachment or the Applicant must file a Greenway Goal Exemption.

Easement Rights

Because the Hearings Officer has decided that the application has failed to satisfy a number of relevant approval criteria the Hearings Officer does not address the BDS staff contention that that Applicant has not provided sufficient information to demonstrate certain easement rights. (Exhibit H.7, page 2) Further, in the event that the Applicant had satisfied all relevant approval criteria in this case the Hearings Officer could have made the demonstration of easement access rights a condition of approval.

Categorization of Uses

An opponent of the application testified at the public hearing and submitted written evidence into the record. (Exhibit H.22) This opponent disputes the Applicant's characterization of uses. This argument was also made in *SK#1*. In the earlier case the Hearings Officer expended considerable effort and discussion on this opponent's categorization of use argument. The Hearings Officer, in the earlier case, found that the uses proposed by Applicant in the application itself were sufficient to be considered "complete".

In the application for this case (Exhibit A.1, pages 1 and 2) the proposed uses for the Subject Property were listed. The Applicant's attorney, during its final argument submission, stated that "neither BDS nor Mr. Schonberger argues against uses proposed in the application. Mr. Schonberger's attempt to convert a table from a transportation analysis submitted by the *current owner of the subject property*, not the *Applicant*, does not change what the Applicant has proposed... That does not convert 9,,308 square feet of the proposed use into a retail space." (Exhibit H.31, page 1)

The Hearings Officer sees no merit in revisiting the categorization argument raised by the opponent (per Exhibit H.22). The Hearings Officer is required to consider the application as presented by the Applicant and deemed complete by BDS staff. The Hearings Officer will not second guess, in this proceeding, the Applicant's representations of use.

II. ANALYSIS

Site and Vicinity: The project site is a 1.8 acre [79,683square foot (SF)] parcel along the east bank of the Willamette River at the foot of SE Division Place, between the Marquam and Ross Island bridges. Currently, the only vehicular or pedestrian access to the SK Northwest (SK NW) site is via SE Division Place.

The site is presently vacant, except for a gravel surface, some fencing along the east lot line, and a remnant concrete structure in the southwest corner of the lot. There is also a grove of cottonwood trees near the southwest corner of the site. Himalayan blackberries and other non-native vegetation cover the balance of the riverbank. A number of pilings are located across the river frontage and appear to be remnants from a previous development. An in-water lease area is noted in the waterway adjacent to the site.

The site is located in an area with a mix of industrial uses within the Central Eastside Subdistrict of the Central City. Development to the north includes a dock facility, which is currently under the same ownership as the subject site, the primary greenway trail (at the foot of SE Caruthers), and the Oregon Museum of Science and Industry (OMSI) and Portland Opera facilities and parking areas. To the east are single story industrial buildings, rail lines and an interim greenway trail along SE Fourth Avenue, and the elevated SE Grand/McLoughlin Boulevard Viaduct. The lot directly to the south is currently under review for a new multi-story building, dock facilities, and a greenway trail (LU 06-182816 GW). As noted above, the neighboring project also includes improvements on the two abutting lots to the east of this subject site. Development to the south includes Ross Island Sand & Gravel, and the primary Greenway/Springwater Trail (south of SE Ivon/SE Fourth), and Oaks Bottom Wildlife Refuge. The South Waterfront Subdistrict of the Central City is directly to the west across the Willamette River.

Zoning: The project site is in the Heavy Industrial (IH) zone and has a Greenway River General (g) overlay designation.

The **Heavy Industrial (IH)** zone is one of the three zones that implement the Industrial Sanctuary map designation of the Comprehensive Plan. This zone provides areas where all kinds of industries may locate including those not desirable in other zones due to their objectionable impacts or appearance.

The **Greenway River General (g)** zone allows for uses and development which are consistent with the base zoning, which allow for public use and enjoyment of the waterfront, and which enhance the river's natural and scenic qualities.

The *Greenway Plan* calls for a 25-foot **greenway setback** at this site, and allows only river-dependent or river-related development to be located within the greenway setback. Other development may be allowed if approved through a Greenway Goal Exception (Statewide Planning Goal Exception). The terms *river-dependent* and *river-related* are defined in the Portland Zoning Code (33.910) as follows:

River-Dependent. *A use which can be carried out only on, in, or adjacent to a river because it requires access to the river for waterborne transportation or recreation. River-dependent also includes development, which by its nature, can be built only on, in, or over a river. Bridges supported by piers or pillars, as opposed to fill, are river-dependent development.*

River-Related. *A use or development which is not directly dependent upon access to a water body but which provides goods or services that are directly associated with river-dependent land or waterway use or development, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered. Residences (including houseboats), parking areas, spoil and dump sites, roads and highways, restaurants, businesses, factories, and recreational vehicle parks are not generally considered dependent or related to water. Recreational trails and viewpoints adjacent to the river are river-related development. Bridge exit and entrance ramps supported by piers or pillars, as opposed to fill, are river-related development. Removal or remedial actions of hazardous substances conducted under ORS 465.200 through 465.510 and 475.900 are considered river-related development for the duration of the removal or remedial action.*

The greenway setback includes the portion of the site between the top of the riverbank and the area 25 feet landward. The Zoning Code includes several definitions for the top of the riverbank as follows:

Top of Bank. *The first major change in the slope of the incline from the ordinary high water level of a water body. A major change is a change of ten degrees or more. If there is no major change within a distance of 50 feet from the ordinary high water level, then the top of bank will be the elevation 2 feet above the ordinary high water level.*

The Hearings Officer, in the preliminary matters discussed above, concurred with the City's location of the top of bank.

The *Greenway Plan* also shows a **public trail** designation on the subject site. There are several *Zoning Code* standards that call for trail improvements on sites with a public trail designation. These include 33.440.240, Greenway Development Standards/Public Recreation Trails, and 33.272, Public Recreation Trails. These standards work in conjunction with one another and call for the dedication of an easement and construction of the trail when new development occurs on a site with a Greenway Trail designation. The requirement for a trail must be applied consistent with constitutional principles.

Appellants have challenged the constitutionality, on facial grounds, of Zoning Code sections 33.272.020, 33.272.030 D. and 33.400.240 B. The Hearings Officer, as discussed above in the preliminary matters section of this decision, found that sections 33.272.020, 33.272.030 D. and 33.400.240 B are not facially unconstitutional.

Appellants also challenged sections 33.272.020, 33.272.030 D. and 33.400.240 B on as applied basis as being contrary to the United States Supreme Court *Nollan* and *Dolan* cases. The as applied will be discussed later in this decision (see response to Issue F, pages 23-52) under approval criteria 33.440.350 (see findings for Issue F, pages 23-52).

Land Use History: City records indicate that prior land use reviews include the following:

- ZC 5041: Zone Change for multiple parcels: final decision unknown, case year 1967
- LU 05-178171 GW: Greenway Review for new building and dock-Denied

Agency Review: A *Notice of Proposal in Your Neighborhood* was mailed **March 1, 2007**. The following agencies have responded:

- *Urban Forestry and Water Bureau*-No concerns noted (Exhibit E.1)
- *Life Safety Section/BDS*-A separate building permit will be required for the project (Exhibit E.2).
- *Fire Bureau*- Fire department access to this site must be identified. The Fire Code requires access roads within 150 feet of all portions of the exterior wall of the first story of the building, as measured by an approved route around the exterior to the building. If the required access is not available, and the Applicant chooses to appeal a requirement, the appeal must be listed as a condition in the decision. Complete details are provided in Exhibit E.3.
- *Site Development/BDS*-Stormwater disposal must comply with the hierarchy identified in the *Stormwater Management Manual*. A DEQ permit is required for properties greater than one acre in size. Development within the 100-year flood plain is subject to the regulations of Chapter 24.50, Flood Hazards, in particular, the balanced cut and fill requirement. Additional information is provided in Exhibit E.43.
- *Bureau of Environmental Services*-Sanitary sewer service is available in SE Division Place. A 10-foot public sewer easement extends across a 30-inch CMP public storm sewer located at the north end of the site. There is also a 15-foot public sewer easement, 7.5 feet of which is on the Applicant's property in the vacated SE Ivon Street, along the southern property line. All public sewer easements are exclusive and work within the easements is subject to approval by the Director of Environmental Services. The submitted site plan shows "underground storm water treatment" to manage stormwater from the site. This does not meet the requirements of the *Stormwater Management Manual* without further explanation, since vegetated facilities are required to the maximum extent practicable. In addition, the Applicant has not identified the method of stormwater disposal. Because a specific site plan is approved through this Greenway review, the Applicant is advised to identify a method of stormwater management and disposal at this time that meets requirements. Native vegetation should be retained and nuisance vegetation should be controlled. Complete details are provided in Exhibit E.5.
- *Portland Transportation*- SE Division Place is designated as a Traffic Access Street, Transit Access street, City Bikeway, City Walkway, Freight District, Minor Emergency Response street, and local design street in the *Portland Transportation System Plan*. The site also has an Off-Street Path

designation for both Bicycles and Pedestrians. The Applicant will be required to construct frontage improvements on SE Division Place. Improvements will include curb, paving, planter or stormwater swale, sidewalk, streetlights, and street trees as necessary. Additional requirements for system development charges and driveway improvements are also noted. *Portland Transportation* also provided a detailed analysis quantifying the project impacts to the transportation system, and the proportional trail improvements warranted at the site. Additional details are provided in Exhibit E.6.

- *Portland Parks and Recreation*-A trail on this site should match the materials and size of the trail south of OMSI (a 12-foot wide concrete trail on the river side of the site), and will contribute to the long-term vision for the area. Additional details are included in Exhibit E.7.
- *Department of State Lands*-A lease may be required for the proposed dock, and work in the waterway is subject to permit. Contact information is provided in Exhibit E.8.

Neighborhood Review: A total of 18 written responses have been received prior to the issuance of the BDS decision. The letters raise concerns about one or more of the following issues: the greenway trail; wildlife and wildlife habitat; and boating activities. Additionally, a number of persons testified at the public hearing and submitted additional written evidence during the open-record period. The issues raised by the oral and written responses are addressed in the findings below.

ZONING CODE APPROVAL CRITERIA

GREENWAY REVIEW

33.440.300 Purpose

Greenway review ensures that all proposed changes to a site are consistent with the Willamette Greenway Plan, the Willamette Greenway design guidelines and, where applicable, the water quality element of Title 3 of Metro's Urban Growth Management Functional Plan. The purpose of greenway review is to ensure that:

- Development will not have a detrimental impact on the use and functioning of the river and abutting lands;
- Development will conserve, enhance and maintain the scenic qualities and natural habitat of lands along the river;
- Development will conserve the water surface of the river by limiting structures and fills riverward of the greenway setback;
- Practicable alternative development options are considered, including outside the River Water Quality zone setback; and
- Mitigation and enhancement activities are considered for development within the River Water Quality zone.

33.440.350 Greenway Review Approval Criteria

A. Design Guidelines. The Willamette Greenway Design Guidelines must be met for all greenway reviews.

Findings: The Willamette Greenway Design Guidelines address the quality of the environment along the river and require public and private developments to complement and enhance the riverbank area. The Design Guidelines are grouped in a series of eight Issues:

Issue A. Relationship of Structures to the Greenway Setback Area

Issue B. Public Access

Issue C. Natural Riverbank and Riparian Habitat

Issue D. Riverbank Stabilization Treatments

Issue E. Landscape Treatments

Issue F. Alignment of Greenway Trail

Issue G. Viewpoints

Issue H. View Corridors

A complete description of the Design Guidelines and their applicability is provided in pages 45-81 in the *Willamette Greenway Plan*. Each of the Design Guidelines is addressed below:

Issue A. Relationship of Structures to the Greenway Setback Area: This Issue “applies to all but river-dependent and river-related industrial use applications for Greenway Approval, when the Greenway Trail is shown on the property in the *Willamette Greenway Plan*.” These guidelines call for complementary design and orientation of structures so that the greenway setback area is enhanced:

1. Structure Design
2. Structure Alignment

Response to Issue A: In order to assess if the location and design of the structures compliment the greenway setback it is necessary to first establish the location of the greenway setback itself. As noted in the discussion above, the proposed development plans (Exhibits C.1 and C.2) do not reflect the location of the greenway setback in accordance with the *Zoning Code* definitions, and would place the southwest corner of the building within the required greenway setback. The proposed building does not conform to the *Zoning Code* definition of *river-dependent* or *river-related* development; so all portions of the building must be located landward of the greenway setback. The proposed dock and ramp access, on the other hand, are *river-dependent* development and can be located within and riverward of the greenway setback, if approved through this Greenway Review.

Provided the building is removed from the greenway setback, the balance of the structure appears to be designed with windows and doors oriented toward the greenway setback, and other upland development for parking and exterior work areas are to be screened from the greenway setback. A 5-foot wide walkway is also shown along the north facades, to provide access up to the greenway setback. The building location will also allow views of the river from the SE Division Place right-of-way.

The location of the proposed building within the greenway setback is not consistent with this Guideline. Therefore, the Hearings Officer finds that the proposal **does not** meet this Issue.

Issue B. Public Access: This Issue “applies to all but river-dependent and river-related industrial use applications for Greenway Approval, when the Greenway Trail is shown on the property in the

Willamette Greenway Plan.” These guidelines call for integration of the Greenway Trail into new development, as well as the provision of features such as view points, plazas, or view corridors:

1. Public Access
2. Separation and Screening
3. Signage
4. Access to the Water’s Edge

Response to Issue B: As noted above, the primary greenway trail is identified on the site, in the *Greenway Plan* (the requirements for the trail are addressed in greater detail in Issue F, below). The proposal does not include the trail, so public access to and along the river has not been integrated into the site layout. The Hearings Officer in an earlier discussion (preliminary matters) found that Appellants’ claim that 33.272.020, 33.272.030 D., and 33.440.240 B are constitutional on their face. Further, as will be seen in the findings for Guideline Issue F, the Hearings Officer finds that the exactions sought by the City, including the greenway trail, are constitutional “as applied” in the context of *Nollan* and *Dolan*.

The Hearings Officer finds that the Applicant refused to incorporate a greenway trail segment into its application. Therefore, on the basis of the failure of Applicant to include a greenway trail segment in its application the Hearings Officer finds the proposal **does not** meet this Issue.

Issue C. Natural Riverbank and Riparian Habitat: This Issue “applies to situations where the river bank is in a natural state, or has significant wildlife habitat, as determined by the wildlife habitat inventory.” These guidelines call for the preservation and enhancement of natural banks and areas with riparian habitat:

1. Natural Riverbanks
2. Riparian Habitat

Response to Issue C:

The project area is within Site 19.2A in the *Lower Willamette River Wildlife Habitat Inventory* (LWRWHI). This is a Rank IV (Value 30) Habitat Area, and is noted for medium to high physical and human disturbance. Rank IV sites are noted for having great potential for wildlife enhancement.

With approximately 370 linear feet of river frontage, the site offers opportunities to contribute to the enhancement of the riparian habitat along the shoreline, while also accommodating a dock facility and a public trail. The plans indicate nuisance species, such as Himalayan blackberry, will be removed from the shoreline, and a variety of native species will be installed on the bank. The removal of nuisance species and the installation of new plantings, appropriate to the shoreline environment will contribute to the enhancement of the habitat and scenic values of the riverbank.

BDS expressed concern regarding the Applicant’s plans to remove most, if not all, of the 25 native cottonwood trees along the shore. Applicant submitted information regarding the trees and the reasons for removal. (Exhibit H.8, pages 3 and 4) The Hearings Officer finds that the Applicant’s explanation is reasonable; many of the trees are dead, almost dead, or present “significant blow-down

hazard to people and structures.” (Exhibit H.8, page 4) The Applicant’s proposal to remove most, if not all, of the existing cottonwoods is based on substantial evidence in the record.

The Applicant has also proposed to “enhance the site significantly, with approximately 50 native trees and 1,100 native shrubs. Applicant submitted evidence of the varying heights and habitat values to be gained by the trees and shrubs to be planted.” (Exhibit H.8, page 4)

Issue C. Guideline 2 states, in part, that “other riparian habitat should be conserved and enhanced through riparian landscape treatments to the maximum extent possible. Conservation however does not mean absolute preservation. Some discretion as to what vegetation should remain and what can be removed and replaced should be permitted.” The Hearings Officer finds that the discretion in removal, as referenced in the preceding quote, should take into consideration the health of the vegetation and whether or not the vegetation presents any reasonably expected safety risk to property/persons.

The Hearings Officer finds that the removal of dead trees or trees that present safety risks, as proposed by the Applicant is reasonable under Issue C. The Hearings Officer, having reviewed the landscape planting plan finds the plan to be responsive to Issue C. Therefore, this Issue **is met**.

Issue D. Riverbank Stabilization Treatments: This Issue “applies to all applications for Greenway Approval.” This guideline promotes bank treatments for upland developments that enhance the appearance of the riverbank, promote public access to the river, and incorporate the use of vegetation where possible:

1. Riverbank Enhancement

Response to Issue D: The shoreline treatment currently consists of a steep rip rapped slope with 27 trees, 2 shrub groupings, and non-native blackberry and grass species. Other features include wood pilings in and along the waterway, and a remnant concrete structure in the southwest corner of the site. The proposal calls for the installation of a dock and gangway, and for the removal of 25 native trees and all nuisance vegetation along the riverbank.

The narrative (Exhibit A.1, p 10-11) notes that no significant changes are proposed to the current bank configuration. As outlined in the narrative, the dock, piles, and ramp are to be fabricated off-site and transported to the site for assembly. Pile driving and assembly are to occur from water-based equipment. Erosion controls are to be installed on the bank during the construction of the concrete pad, which is to support the gangway. A plan has also been provided by a licensed professional engineer, which indicates that construction of the dock will not destabilize the bank (Exhibit C.7). The Applicant intends to employ “standard local operating procedures” (SLOPES), in accordance with the requirements of the *US Army Corps of Engineers*, for the in-water structures and construction (Exhibit A.1). These measures will help to minimize impacts to the existing bank stabilization treatment. Conditions, which call for the submittal of plans to comply with City of Portland, Title 10, *Erosion Control* and *Balanced Cut and Fill* regulations, will provide additional bank stability safeguards during for grading and construction activities within the 100-year floodplain.

Additionally, the removal of invasive non-native species will reduce competition for the proposed plantings, and new plantings will help to improve the appearance of the riverbank. BDS staff, once again, used the removal of the cottonwood trees to reach a conclusion that this Issue had not been met. (Exhibit H.8a, page 8) Applicant responded that evidence is in the record “about the excellent soil binding and bank stabilization characteristics of the trees that it proposes to plant. (Applicant citing Exhibit A.1, pages 9-10) The Hearings Officer finds that the Applicant’s proposal addresses riverbank stabilization in is landscape plantings plan. The Hearings Officer finds this Issue **is met**.

Issue E. Landscape Treatments: This issue “applies to all applications for Greenway Approval which are subject to the landscape requirements of the Greenway chapter of Title 33 Planning and Zoning of the Portland Municipal Code.” These guidelines call for landscaping treatments which create a balance between the needs of both human and wildlife populations:

1. Landscape Treatment
2. Grouping of Trees and Shrubs
3. Transition

Response to Issue E:

Guideline (1) is focused upon creating environments that recognize both human and wildlife uses. The Hearings Officer’s review of the Applicant’s landscape plan shows the areas within the parking lot, for example, have more formal groupings of trees/plants and the reiverbank/greenway setback area appears to be planted more informally. The Hearings Officer finds that the most intensive shrub plantings and most trees are located on the riverbank transition area. The Hearings Officer rejects the argument made by BDS staff that removal of the existing cottonwood trees somehow results in this Issue not being met.

There is substantial evidence in the record (Applicant’s planting plan) to demonstrate that this Issue **is met**.

Issue F. Alignment of Greenway Trail: This Issue “applies to all applications for Greenway Approval with Greenway Trail shown on the property in the Willamette Greenway Plan.” These guidelines give direction in the proper alignment of the greenway trail and call for consideration of habitat protection, the physical features of the site and the necessity of maintaining year-round use of the trail:

1. Year-Round Use
2. Habitat Protection
3. Alignment

Response to Issue F:

The primary greenway trail is identified on the Subject Property in the *Willamette Greenway Plan*. The *Transportation System Plan* (TSP) also shows an alignment for an Off-Street Bike and Pedestrian Path across this site. There is no trail currently developed on the Subject Property and no

trail is proposed as part of this application. The Hearings Officer takes note that the Applicant has not agreed to dedication land or construction of improvements for the greenway trail on the Subject Property. The Applicant/Appellants argue that certain provisions of the Zoning Code requiring dedication of land and construction of improvements are facially unconstitutional and in the alternative the requirements of United States Supreme Court cases *Nollan v. Coastal Comm'n*, 483 US 825 (1987) and *Dolan v. City of Tigard*, 512 US 374 (1994) and subsequent Oregon appellate decisions are not met.

The Hearings Officer, in *SK#1* agreed with Appellants and held Zoning Code sections 33.272.020, 33.272.030 D., and 33.400.240 B unconstitutional on their face (overbroad) and further found the City's "rough proportionality" analysis in *SK#1* deficient. The Hearings Officer, in a discussion earlier in this decision, reversed his position regarding facial unconstitutionality. The Hearings Officer, considering all evidence in the present case, undertakes a fresh review of the *Nollan* and *Dolan* tests.

Nollan – Essential Nexus

The Hearings Officer found, in *SK#1*, that the City provided sufficient evidence to support a finding of an "essential nexus" under *Nollan*. (Exhibit H.8a, page 14) However, as with all aspects of this case, the Hearings Officer considers all evidence submitted in the record of this before reaching a finding of whether or not there is an "essential nexus" as required by *Nollan*.

Nollan stands for the proposition that an "essential nexus" must exist between a legitimate governmental purpose and the action required by a governmental. *Nollan @ 837*. The first prong of the *Nollan* test is to determine the governmental purpose(s) and whether or not such purpose(s) is/are "legitimate."

The City, in the BDS decision/staff report states that "there is an identified public need for access to and along the Willamette River and for pedestrian and bicycle access routes and connectivity, as outlined in the city's *Comprehensive Plan* and related documents..." (Exhibit H.7, pages 10-11) The BDS decision/staff report referenced the City Zoning Code, Willamette Greenway Plan, Transportation System Plan. (Exhibit H.7, page 10) The BDS decision/staff report stated, in part, that:

"The public trail is a part of a whole, multi-modal transportation system, along with streets, sidewalks, and public transportation. In this situation, the greenway trail serves a unique function that is not duplicated by other parts of the system. It provides a route separate from motorized traffic and it provides access to and along the river's edge. The Greenway/Springwater Trail is also part of a regional trail system, which provides bicycle and pedestrian connections to surrounding neighborhoods and nearby communities as well...An on-site trail will provide direct benefits to the property owner as well. An on-site trail will provide direct bicycle and pedestrian access to the SK NW property. This will provide SK NW employees and customers with a link to other trails, nearby businesses, surrounding neighborhoods, and public transit. The trail will increase safety along SE Fourth and non-motorized vehicle traffic, freight and delivery trucks, and congestion on the SE Fourth and SE Division Place rights-of-way, which will improve access for

emergency vehicles and reduce emergency response times...With respect to ‘essential nexus,’ a public trail through the SK NW property will advance the identified need for promoting public access to and along the Willamette River, connectivity for non-motorized traffic, and it will contribute to the completion of a significant multi-purpose public trail facility.” (Exhibit H.7, pages 10-11)

Appellant #2 disagrees with the BDS characterization of “legitimate” purpose. Appellant #2 says: “We do not dispute that the trail as a whole may serve some transportation purpose. However, this particular trail segment is only needed for recreational purposes since there exists an adequate alternative transportation route that is roughly equivalent in length and been made safe through the MLK Viaduct improvements as was contemplated by the TSP. The improvements to SE Fourth Avenue have been completed, and the previous deficiencies have been corrected. The rail line was relocated to a safer alignment, and this stretch of SE Fourth Avenue has been completely reconstructed. It now has a new concrete surface, with beautiful bike lanes in each direction, and new signage. The previous safety hazards for bicycles and pedestrians no longer exist. The City’s concerns about safety and capacity of SE Fourth Avenue predate these improvements and now lack any factual basis...This particular trail segment does not serve any transportation need that is not served equally as well by the alternative alignment. Thus, the City has failed to show a *Nollan* nexus.” (Exhibit H.10, page 8)

The Hearings Officer disagrees with Appellant #2’s argument that there is no legitimate governmental interest because the sole purpose of the trail is recreational. The Hearings Officer finds the City Zoning Code references, as of one numerous purposes of the trail, the provision of emergency vehicle access and providing connections to other transportation systems. (Exhibit H.7, page 10; reference to 33.272.030 and 33.440.240; see also Exhibit H.27a, pages 19 and 21) The Hearings Officer finds that the trail serves multiple purposes and the uses listed above by BDS staff, including the promotion of public access to/along the Willamette River, contributing to the connectivity of various modes of transportation (non-motorized, transit, vehicles) and movement towards the completion of a multi-purpose public trail facility.

The Hearings Officer finds that even if appellant #2’s attorney was correct and that the trail network has only one purpose, that of recreation, the *Nollan* “legitimate government purpose” requirement would be satisfied. However, the Hearings Officer finds significant evidence in the record to suggest that the greenway trail network provides access for businesses, employees and the recreating public; the trail network serves more than the recreation purpose suggested by Appellant #2’s attorney.

Appellant #2 also asserts that there is no evidentiary support in the record of this case to conclude that safety hazards continue to exist and therefore “safety” is not a legitimate purpose for exacting the greeway trail. (Exhibit H.10, page 8). To the contrary, it is clear to the Hearings Officer from the evidence in the record that development of the SK NW facility, as proposed, will create additional traffic/pedestrian/bicycle conflicts on SE 4th and in particular at the intersection of SE Division Place and SE Fourth Avenue. (See Exhibit H.13, pages 6-15)

The Hearings Officer finds that the City has expressed legitimate governmental interests as required by *Nollan*.

The Hearings Officer, in *SK#1*, summarized the Court's holding in *Nollan* with respect to satisfaction of the "nexus" requirement. The Hearings Officer stated that "the facts of *Nollan* were that the stated governmental purpose (legitimate governmental interest) was to provide for views from the coastal highway of the beach/ocean but the required dedication was a lateral easement across the front of the Nollan's property. The Court in *Nollan* held that there was not a connection or nexus between a view to the west towards the ocean and the demand for dedication of a north/south easement on the beachside of the Nollan's property." (Exhibit H.8a, page 13) In this case the City compared the identified need to be providing public access to/along the Willamette River, contributing to the connectivity of various modes of transportation and the movement towards the completion of a multi-purpose public trail facility and to an exaction of an greenway trail easement and access. The Hearings Officer finds that the stated governmental interests will be fulfilled if the dedication and construction requirements are completed. In this case, the end (dedication and construction of trail/access) justifies the governmental purpose/interest (access, connectivity, and completion of trail system).

The Hearings Officer finds that the "nexus" required under *Nollan* has been met in this case for the above-stated reasons.

Dolan rough proportionality analysis

Traffic Impacts

Fundamental to the Dolan rough proportionality analysis is an estimate of the traffic impacts created by development at the Subject Property. One measure of the traffic impacts is trips generated by the use of the property. In this case Appellants and City agree that the proposed use of the Subject Property is relevant in calculating the daily trip generation to be ascribed to the Subject Property.

Applicant contends that the traffic generated by the proposed facility to be approximately 285 trips per day including an estimated 14 bike/pedestrian trips per day. (Exhibits H.10 and Exhibit 10a, tab C – also, prior Group Mackenzie Letters from the *SK#1* case Exhibits I.36 and I.38b) The City, through Portland Transportation Development Review, estimated total daily trips to be 562 including 28 bike/pedestrian trips. (Exhibits E.6 and H.11; see also an opponent's trip generation comments in Exhibit H.14) This large difference in estimated vehicle trips per day potentially has a significant impact upon the *Dolan* rough proportionality analysis finding set forth below. It is important that the Hearings Officer review vehicle trip generation evidence and arguments carefully.

Both the Applicants and City start their analysis of trip generation by estimating the number of trips per day per 1,000 square feet of building area and then apply that rate to the square footage of the Subject Property. The City and opponent testimony raised concerns regarding the appellant's traffic engineer data collection efforts and methodology for estimating trips for the Subject Property. (see, for example, Exhibits H.23 and H.26)

The Hearings Officer first considered the source of testimony and credibility of those offering the evidence. Applicant's traffic consultant, Mr. Clemow, is an Oregon registered transportation engineer and the Hearings Officer considers the consultant to be qualified as an expert in his field. Ms. Jeffrey, testifying on behalf of the City, is an Oregon registered traffic engineer working for Portland Transportation and is a qualified expert in her field. Mr. Nys, submitting testimony for an opponent of the application, is a traffic engineer working for Greenlight Engineering, a traffic engineering/planning firm located in Oregon. The Hearings Officer considers Mr. Nys as a qualified expert in his field.

Applicant's traffic engineer made a decision to identify the primary "use" category(s) on two sites (SK's Sandy Boulevard store and Gresham Mt. Hood Honda) as a base to calculate vehicle trips per 1000 square feet of area. (Exhibits I.36 and I.38b in *SK#1* and Exhibit H.10a, tab C) Applicant's traffic engineer indicated the SK NW Sandy Boulevard store located at 1447 NE Sandy Boulevard to have 3,400 square feet of building area. Applicant's traffic engineer stated that the "trip generation data for SK Northwest and Mt. Hood Honda on Tuesday, August 8, 2006 and Wednesday, July 26 respectively. Data was obtained at each site for an entire business day." (Exhibit I.36, page 2) The Applicant's traffic engineer went on to say that "it should be noted, the retail/service portion of the businesses generate almost all trips, while the warehousing portion of the businesses generate very few trips." (Exhibit I.36, page 2) The Applicant's traffic engineer estimated (for a 3,000 square foot facility) "92 daily trips of which 5 (5%) would be pedestrian/bicycle trips." (Exhibit I.36, page 2)

In a supplemental submission, Applicant's traffic engineer revised its trip generation conclusion by stating that "the retail and parts department/office/support areas total 6,336 square feet of floor area" for the proposed facility. Therefore, the Applicant's traffic engineer estimate of daily vehicle trips rose to 194. (Exhibit I.38b *SK#1* case) In yet another submission Applicant's traffic engineer stated that "the existing SK Northwest facility located on NE Sandy Boulevard" contained square footage set forth in a table (Exhibit H.10a, tab C, page 1). In summary, the table listed the Sandy Boulevard facility as containing 3,400 square feet of Retail/Parts/Office, 10,000 square feet of Service Vehicle and Repair use, and 10,000 square feet of warehouse storage space. (Exhibit H.10a, tab C, page 1) Applicant's traffic engineer stated that "based on information provided by Shawn Karambelas, president of SK Northwest, proposed facility operations and employee trip making characteristics are anticipated to be similar to the existing facility." (Exhibit H.10a, tab C, page 1) Applicant's traffic engineer also revised vehicle trip generation estimate upwards for the Subject Property to 285 per day.

Opponent traffic engineer Nys and the City (Portland Transportation) traffic engineer challenged the methodology employed by Applicant's traffic engineer in estimating vehicle trips per day. (Exhibit H.23 and Exhibit H.26) Consultant Nys stated, in part: "The Applicant's traffic engineer suggests that there is 23,400 feet at the existing SK Northwest site located on Sandy Boulevard. This square footage, which is purported to include 10,000 square feet of service vehicle and repair and 10,000 square feet of warehouse, was previously not mentioned by the Applicant and does not appear to be onsite at 1447 NE Sandy Boulevard." (Exhibit H.23, page1) Consultant Nys goes on to say that "Applicant's arguments are fatally flawed. First and foremost, the location of the extra square

footage that the Applicant's traffic engineer refers to in his June 5, 2007 [letter] is not explained. It is clear that the site at 1447 NE Sandy Boulevard contains only the 3,400 square feet as previously analyzed. This can be determined both from aerial photo research (Figure 2), the Applicant's traffic engineer's original August 16, 2006 and August 21st, 2006 letters as well as checking assessment data (Figure 1 and attached assessment data). As such, there is no evidence available regarding where the purported extra square feet exists, and how much traffic it might generate... There are no traffic counts to support this conclusion or any details about the new 20,000 square feet." (Exhibit H.23, page 1)

The City, through comments made by Ms. Jeffrey, are supportive of traffic engineer Nys' discussion quoted in part in the preceding paragraph. (Exhibit H.26, page 1 and 2) Ms. Jeffrey expanded on these comments by stating that "upon review of the site at 1447 NE Sandy, it was confirmed through Multnomah County Tax Records that there is only 3400 s.f. of building square footage. Furthermore, the site, which is comprised of two adjacent tax lots (TL 01600 and 01700), is only approximately 8075 square feet in size. This indicates that the additional 20,000 s.f. of Warehouse and Service Vehicle and Repair space is located on a different site. (Group Mackenzie confirmed in an e-mail, dated 6/12/07 that the additional square footage was spread among the three other sites A copy of the e-mail is attached)... The traffic consultant for the Appellants did not provide additional trip data for any other SK Northwest sites." (Exhibit H.26, page 1)

The e-mail, from Appellant #2's attorney to the traffic consultant, referenced by Ms. Jeffrey indicates that "the main building is at 1447 NE Sandy Blvd. This building consists of 3400 square feet of sales/parts/office uses (sales – 2K sq ft/ part – 1K sq ft / admin – 400 sq ft storage 750 sq ft – parking lot). In addition to that building, there are three other buildings in close proximity. There are two storage locations, one at 12th and Sandy (storage yard – 7,000 square feet) and one on Riverview Drive (3,500 square feet). There is also a service building at 1321 NE Davis (10,000 square feet, consisting of about 8,000 square feet of service area with 2,000 square feet of boat storage)."

Traffic engineer Nys further stated that "there is no evidence of how the Applicant's traffic engineer generated their trip estimates. The August 16th, 2006 and August 21st, 2006 letters did not provide any actual traffic counts of which driveways were analyzed and how they were analyzed, leaving no one with the ability to check the Applicant's work. In the immediate vicinity of the site, there is a large amount of on street parking available. It is not clear if the Applicant addressed users of the site that park on the street. It is certainly feasible to consider that vehicles would park on street given the nature of the business and the likelihood that trailers would be utilized by the site's customers. Given the small site, it may be advantageous for users to stay offsite than venture onsite. Additionally, it is unknown how the Applicant addressed the trip counts of the 20,000 square feet of additional space that has now come to light."

The Hearings Officer included the quotes and comments above for the purpose of considering credibility of the "experts" offering testimony related to the vehicle trip estimates. The Hearings Officer notes that in making the *SK#1* decision a level of frustration was expressed with the Applicant's and City's evidence pertaining to vehicle trip generation. (Exhibit H.8a, page 17) At that time the Applicant estimated 92 trips and the City 300-400. The Hearings Officer finds that

new evidence presented in this case helps, at least to some extent, clarify the methodology used by the Applicant and City in arriving at their vehicle trip estimates.

The Hearings Officer finds the estimates of vehicle trips made by Applicant's traffic engineer to lack credibility. The bases for this finding include (1) the changes in vehicle trip estimates in successive written submissions by the Applicant's traffic engineer, (2) the lack of a thorough discussion of the methodology used by Applicant's traffic engineer in conducting traffic counts, (3) the failure of the traffic engineer to identify multiple operation locations associated with the SK Sandy Blvd (existing SK facility) operation, and (4) the failure to describe traffic counting efforts (if any) at the satellite locations (not 1447 NE Sandy). Also, the Hearings Officer notes for the record that appellant #2's attorney is qualified to argue, from a legal perspective, evidence related to vehicle trip estimates, but the Hearings Officer does not consider (based on evidence in the record) appellant #2's attorney to be qualified as a traffic expert.

The Hearings Officer finds that a vehicle trip estimate of approximately 31 per day per 1,000 square feet is reasonable. The City, despite reservations expressed on the Applicant consultant's methodology (Exhibit H.26, pages 1-3), did accept the approximately 31 vehicle trips per day per 1,000 square feet estimate. (Exhibit H.26, page 3) (see also Exhibit H.23, page 4, traffic engineer Nys agreement to use Applicant's trip generation information) The Hearings Officer, therefore, finds that 30.67 vehicle trips per day for the proposed building, is reasonable and shall be utilized for the remainder of this decision.

The next step is to determine what number (of square feet) is to be multiplied by the vehicle trip rate. Again, the Hearings Officer finds the size of the improvements at the Subject Property have changed over the course of time starting with the *SK#1* case and extending to this case. The appellant's consultant started by hypothesizing a size of the proposed building (to apply to the vehicle trip rate) of 3,000 square feet (Exhibit I.36, page 2). Next, the Applicant traffic consultant used 6,336 square feet (Exhibit I.38b, page 2). Most recently the Applicant traffic consultant used 9,308 square feet (Exhibit H.10a, Tab C, page 1). This last estimate of square footage, according to Applicant #2's attorney, is because of an expansion of "the parts department by about 2,964 feet." (Exhibit H.10, page 9)

The City stated that the "Applicant only applied the trip rate to the Parts Dept Office and Support (6,335 s.f.). However, the consultant's transportation memo did not include the new Retail Sales Showroom (2,973 s.f.) and the Service and Vehicle Repair space (9,004 s.f.). All of the Retail and Service related uses total 18,312 square feet. The Applicant's consultant should have applied the trip generation rate to the total Retail and Service use square footage on the proposed SK Northwest site in order to meet accepted practices for trip generation calculations." (Exhibit H.11, page 5) The Hearings Officer finds the Applicants' traffic engineer has offered inconsistent/variant estimates of the appropriate square footage to be multiplied by the trip rate per 1,000 square feet (then divided by 1,000 = estimated vehicle trips).

The Hearings Officer finds it important that until receipt of the email from Applicant #2's attorney to the Applicant's traffic consultant the fact that there are multiple SK Northwest locations (two storage locations, on at 12th/Sandy and one on Riverview Drive) and a service building (1321 NE

Davis) was not identified by Applicant or Applicant's consultant. (Exhibit H.26a) The Hearings Officer finds it important that Appellants' traffic consultant did not submit trip generation evidence into the record related to the satellite (non 1447 NE Sandy Blvd.) facility locations.

The Hearings Officer finds that there is no convincing evidence in the record to support Applicant's position of the Applicant's utilization of 9,308 square feet. The Hearings Officer finds that the City (Portland Transportation) estimate of 18,312 square feet is reasonable. The Hearings Officer finds the Appellants' argument that no trips (or, even a few trips) would be generated by all other uses, particularly the service and vehicle repair uses, has no evidentiary support. The Hearings Officer finds appellant #2's argument that the initial rate was calculated by only using the 3,400 square feet at 1447 NE Sandy (SK Northwest) is unconvincing in the context of the City and traffic engineer Nys' comments that there is no traffic study information in the record related to the other uses located in satellite locations.

It should be noted that traffic engineer Nys, utilizing the 30.67 vehicle trip rate, concluded that all of the square footage in the proposed buildings at the Subject Property be included in calculating the estimated vehicle trips per day; Nys estimated a total of 675 trips per day. The Hearings Officer, in what he considers a conservative approach, finds that the Subject Property will generate 562 vehicle trips per day (total). The 562 number, as estimated by Portland Transportation (Exhibit E.6), will be used throughout the balance of the *Dolan* discussion.

The Appellants and City next disagreed as to how many of the vehicle trips generated by the proposed uses at the Subject Property would be pedestrian and/or bicycles.

Applicant's traffic consultant consistently reported that "approximately 5% of the daily trips" represented a reasonable allocation to bicycle and/or pedestrians. (Exhibits I.36, I.38b, and Exhibit H.10a, Tab C) The Applicant's consultant, based on increasing vehicle trip count estimates, estimated initially 5, then 10, and finally 14 bike/pedestrian trips for the proposed development at the Subject Property. (Exhibits I.36, I.38b, and Exhibit H.10a, Tab C) Applicant's traffic consultant justified the 5% bike/pedestrian allocation, apparently, on the combined traffic generation observations of the SK Sandy Blvd site and the Mt. Hood Honda site over a two day period. Applicant's consultant did not discuss, in any of his reports, the bicycle or pedestrian amenities of the two study sites and did not discuss any comparison of the two study sites (from a bicycle/pedestrian perspective) to the Subject Property.

The City, through Portland Transportation, utilized the Appellants' bike/pedestrian allocation of 5% of total vehicle trips. (Exhibit E.6, page 2, Exhibit H.26, page 2) Appellant #2's attorney did not challenge the City's use of the 5% allocation but did contend that references to higher percentage pedestrian/bicycle rates were not reliable. (Exhibit H.10, page 10)

Opponents to the application suggest that the allocation of bike/pedestrian trips to total trips should be higher than 5%. (Exhibit H.12 and Exhibit H.13, pages 2-6) Opponent Bicycle Transportation Alliance stated that "a variety of sources show that bicycle trips in the central and inner eastside make up between 5% and 12% of all trips." (Exhibit H.12, page 1) Traffic engineer Nys submitted

additional evidence that the 5% estimate of bike/pedestrian trips (of total vehicle trips) is too low. Traffic engineer Nys cited a Portland Development Commission study indicating 19% of employees in the Central Eastside Industrial District commute by bicycle and foot.(Exhibit H.12, page 2) Traffic engineer Nys also cited a City Auditor's report (2005) indicating 12.1% of survey respondents indicated they use a bicycle for commuting. (Exhibit H.12, page 3) Traffic engineer Nys' opinion was that "it appears more reasonable to apply a rate of 10% or greater than to apply a rate of 5% when analyzing the mode split for bicycles and pedestrians in this particular area" in large part due to the Subject Property being located in close proximity to multiple modes of transportation such as transit, the Springwater trail corridor and in the future light rail line and streetcar line (Exhibit H.12, page 6)

Applicant's traffic engineer provided no evidence in the record to challenge the 5% bicycle mode split agreed to by Portland Transportation or the 10% (or higher) mode split proposed by opponents (via Exhibits H.12 and H.13). As indicated above, the Hearings Officer considers appellant #2's attorney qualified to present argument related to traffic matters but does not consider appellant #2's attorney to be (based on the evidence in the record) a qualified traffic expert/engineer. (See Exhibit H.23, page 5 for related argument by opponent) Appellant #2's attorney disputes the City and opponents assertions that approximately 19% of employees in the area commute by bike or walk. (Exhibit H.10, page 10) The attorney argues that the source of the 19% estimate (Central Eastside Urban Renewal Baseline Report dated December 30, 2002) should not be relied upon for two reasons: (1) "this statistic says nothing about the percent of a particular businesses employees that will use transit", and (2) "the "CEU study is a draft report and cannot be relied upon." (Exhibit H.23, page 10)

The Hearings Officer finds both arguments without merit. The attorney misses the point in his first argument because the analysis in this case is not restricted to considering the employees of the Applicant on any given day; the analysis is forward looking and statistics relating to the local area are relevant. Second, the attorneys' argument that the CEU study is in draft form goes only to the weight given by the Hearings Officer in reaching a decision and is not a threshold "admission" or "not admission" issue. The Hearings Officer notes that the Appellants had ample opportunity to provide the Hearings Officer additional evidence (during the open record period) from appellant's traffic engineer containing original study data, secondary sources referencing bicycle/ped mode splits and information why the City's and opponents comments were in error.

The Hearings Officer, for the purposes of the *Dolan* analysis finds that a 5% bicycle/pedestrian mode split is reasonable considering the evidence in the record. However, the Hearings Officer notes that the evidence provided by opponents (Exhibits H.12 and H.13) does suggest that the 5% is a conservatively low estimate.

Overview and SDC Discussion

The United States Supreme Court, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), assuming the *Nollan* nexus test is met, imposed an additional evidentiary hurdle for governmental entities. The Court, in *Dolan*, requires governmental entities to show that action required of an Applicant (such as

dedication and/or construction requirements) must be “roughly proportional” to the impact of the proposed development. *Dolan @* 388-391

Applicant #1’s attorney summarized the basic legal underpinnings to the *Dolan* rough proportionality test by saying:

“The Court in *Dolan* stated that ‘no precise mathematical calculation is required,’ but the City must make an ‘individualized determination’ and ‘some effort to quantify its findings supporting the dedication...beyond [a] conclusory statement.’ *Dolan*, 512 U.S. at 395-96. This requires that a city must ‘articulate and substantiate the requisite facts and legal conclusion’ that support the exaction. *Art Piculell v. Clackamas County*, 922 P 2d 1227, 1231 (Or. App. 1996). Furthermore, a city’s findings must demonstrate the ‘relationship between a developmental condition and the impacts of development’ with ‘considerable particularity.’ *J.C. Reeves Corp. v. Clackamas County*, 887 P2d 360, 362 (Or App 1994) A city cannot justify an exaction on the basis of offsetting impacts that are not derived from a proposed development.” (Exhibit H.8, page 12)

The Hearings Officer agrees with the above summary presented by appellant #1’s attorney. Appellant #1’s attorney goes on to state that the “City’s rationale fails to take into consideration the Applicant’s obligation to pay Transportation SDCs, which are intended to offset transportation impacts of new development by funding priority capital improvements identified in the City’s Transportation Capital Improvement Plan.” (Exhibit H.8, page 16) Appellant #1’s attorney quotes a portion of the purpose section of 17.15.010 A and concludes that “the purpose of the SDC is to expand transportation system capacity to meet the demands generated by new development.” (Exhibit H.8, page 16, see also Exhibit H.10, page 12 – Appellant #2’s attorney statement regarding SDC’s)

The Hearings Officer’s understanding of the Appellants’ SDC argument is this: SDC fees paid by a development, although legislatively enacted and therefore themselves not subject to a *Nollan/Dolan* analysis, should be included in the “rough proportionality” balancing equation. The City, citing *Rogers Machinery, Inc. v. Washington County*, 181 Or App 369, 45 P3d 966 (2002), argues that SDC’s are “not subject to Dolan’s rough proportionality analysis.” (Exhibit H.27, page 2)

Further, Appellant #2’s attorney says that the “Applicant, through the payment of SDC’s, will be providing funding for the capital improvement projects that the City itself has identified as the highest priorities for expansion of transportation system capacity.” (Exhibit H.8, page 17) Appellant #2’s attorney then admits that the “Greenway Trail was not identified by the City as part of the Transportation Capital Improvement Plan.” (Exhibit H.8, page 17; see also Exhibit H.10b, Tab 2 and the following documents in Tab 2)

The Hearings Officer agrees with the City that the legislative enactment and imposition of SDC assessments are not generally subject to *Nollan/Dolan* analysis based upon the Oregon Court of Appeals decision in *Rogers Machinery. Id.* at 397. However, to the best of the Hearings Officer’s review of the record no cases were cited to support or refute the Appellants’ proposition that SDC’s should be considered in the “rough proportionality” balancing equation. As such, the Hearings

Officer considers the Appellants' SDC argument in light of the evidence in this case and logic which may fairly be inferred from case law.

The Hearings Officer starts with a review of 17.15.010 (Scope and Purposes – Transportation System Development Charges). Code section 17.15.010 A. states, in its entirety, the following:

“New development within the City of Portland contributes to the need for capacity increases for roads, multi-modal transportation and related transportation improvements, to enable new development to take advantage of transit systems and, therefore, new development should contribute to the funding for such capacity increasing improvements. This SDC will fund a portion of the needed capacity increases for arterial, boulevard and collector roads, multi-modal transportation improvements and associated bus pull-outs, transit shelters, sidewalks, bicycle and pedestrian facilities, street lighting and stormwater drainage control facilities, and other public facilities specified in the City of Portland Transportation Capital Improvement Plan.”

17.15.010 C. states, in part:

“This SDC is separate from other fees provided by law or imposed as a condition of development. It is a fee for service because it contemplates a development's receipt of transportation services based upon the nature of that development.”

17.15.010 E. states, in part:

“The funding provided by this Chapter constitutes a mandatory collection method based upon the guidelines set forth in ORS 223.297 through 223.314 and HB 3480 (1996 Special Session) to assure the construction of capacity increasing improvements to arterial, boulevard and collector roads as well as to bicycle, pedestrian and transit facilities as contemplated in the City Comprehensive Plan, City of Portland Transportation Capital Improvement Program and the list of projects, referred to as the SDC CIP, to be funded with money collected under this Chapter and incorporated as Table 301 in the attached Transportation System Development Charges Rate Study, (dated June 11, 1997). The SDC CIP is not to be confused with the City of Portland Capital Improvement Program.”

17.15.010 F. states, in its entirety:

“This Chapter is intended only to be a financing mechanism for the capacity increases needed for major City traffic and collector streets, multi-modal improvements associated with new development and capacity increasing transportation improvements and does not represent a means to fund maintenance of existing roads or elimination of existing deficiencies.”

The Hearings Officer, upon review of 17.15.010, believes that the underlying intent of the City Council was to have new development provide a portion of the funding required to address additions to the City's transportation capacity. The Hearings Officer, believes that City Council took notice that new development creates additional demands upon the City's transportation infrastructure and in most cases creates impacts on the transportation system beyond the immediate locale of the development. The Hearings Officer believes that City Council, by the language used in 17.15.010 (ie. references to capacity increases for arterials and “major” City traffic streets) attempted to spread the increases in “essential capacity” of the transportation system based upon anticipated demand created

by new development. For that reason, it seems to the Hearings Officer, that the SDC chapter incorporated a “list” of projects which the City Council considered to be most likely to be impacted by growth and new development throughout the entire city.

The Hearings Officer believes that the intent of the SDC ordinance is not generally to fund street improvements in the neighborhood of an infill subdivision such as street widening, street improvements and sidewalk improvements. Those “local” improvements are typically, in the opinion of the Hearings Officer, outside the scope of SDC funding; not on the list.

The Hearings Officer considers the Appellants’ naïve if what they are saying is that the traffic generated by the SK NW development has no impacts on the City of Portland transportation system beyond its immediate vicinity. The Appellants must anticipate customers patronizing a business located on the Subject Property will utilize roads, trails, transit at locations beyond the immediate vicinity of the Subject Property. The Appellants must be aware that deliveries of watercraft inventory for sale, parts, and vehicles to be stored, will arrive from outside the immediate neighborhood. It seems to the Hearings Officer that it is the “extended” impacts caused by increased capacity in those locations included on the “list” are being funded by SDC’s.

The Hearings Officer finds that the legislatively enacted SDC’s assessed to new development do fund capacity increases expected to flow from new development. However, the Hearings Officer finds that SDC’s are not intended to fund transportation impacts in the immediate vicinity of new development (unless such impacts have widespread import and are on the SDC “list”). In support of this position the Hearings Officer notes that there are ways to reduce SDC costs or, in some instances, receive credits for improvements made by a developer (see Exhibit H.10b, Tab 2, Questions and Answers – Are there ways to reduce the SDC? and Are SDC credits available and how are they determined?)

Most important to the Hearings Officer, despite the findings above, is the identification and description by Portland Transportation of the impacts created by the proposed SK NW development. The City, in summary, indicated that “SK NW employees and customers will increase the demand on the existing transportation facilities, increase congestion on the narrow SE Fourth corridor, and increase conflicts between vehicles, cyclists, and pedestrians using the existing facility.” (Exhibit H.27a, page 22, see also Portland Transportation summary in Exhibit H.26, page 4, and Portland Transportation discussion in Exhibit E.6, pages 2-3) The Hearings Officer finds these impacts (which are included in the *Dolan* rough proportionality analysis) to be very localized in nature and the funds generated by any SDC assessment would not be allocated to reduce/eliminate these stated impacts. The Hearings Officer finds the SDC funds are used to pay for transportation impacts created by the Applicant’s new development that are more general and broad based than the limited impact area discussed below.

The Hearings Officer finds that the localized exactions subject to this case (greenway trail area, access to the greenway trail, Division Place improvements) are not on the SDC list. The Hearings Officer finds that had the exactions in this case had been on the SDC list and the Appellants made the dedications/improvements then a SDC credit may have been available. The Hearings Officer

finds that the SDC itself is not subject to *Dolan* analysis based upon the *Rogers* decision and the imposition of an SDC assessment is not to be considered in the *Dolan* “rough proportionality” balancing test.

Rough Proportionality Review

In *SK#1* the Hearings Officer found that the City failed to carry its burden of demonstrating “rough proportionality.” (Exhibit H.8a, pages 14-20) The Hearings Officer stated, in *SK#1*, that “the fatal flaw in the BDS rough proportionality approach was its reliance upon a comparison of the estimated cost of Appellant #1 to construct the trail improvements and Appellant #1’s estimated total project costs.” (Exhibit H.8a, page 20)

The City did not rely upon the “cost of trail improvements” to “cost of total project costs” comparison in the present case. Rather, in this case, the City provided new approaches to the “rough proportionality” requirement. (Exhibit H.7, pages 11-14, Exhibit H.26, pages 3-4, Exhibit H.27, pages 2-3, and Exhibit H.27a, pages 22-29) E

The Appellants challenge the BDS staff “rough proportionality” analysis. Rather than attempt to summarize or paraphrase the BDS staff comments the Hearings Officer provides the following excerpts from the BDS staff decision (Exhibit H.7, pages 12-14) for the reader’s review:

****Start of BDS/PDOT quoted material****

“Impacts and Proportionality: In order to determine the amount of impact that the SK NW development will have on the transportation system, the impact area will be defined and the percentage of impact from the SK NW site will be calculated, as noted in the *Portland Transportation* response (Exhibit E.5). The improvements warranted to minimize or eliminate these impacts will then be identified, and a comparison of these factors will be made to determine whether the trail improvements are proportional to the impacts created by the development.

Proof One

Vehicle/Interim Trail Impact Area – The impact area is determined by identifying the route of travel and portions of the street and trail system that employees and customers will use to get to and from the SK NW site. For purposes of this analysis, the vehicle/interim trail impact area is defined by the area in which all SK NW vehicles will distribute on the street system that affect the interim trail alignment. This area, outlined on the map below, can be defined as the portion of the trail from SE Caruthers at SE Water Avenue, to SE Caruthers at SE Fourth Avenue, to the developed Greenway Trail just south of SE Ivon Street. Beyond that area, vehicles are expected to distribute onto streets that travel away from the alignment.

Impact on the SE Fourth/Interim Trail alignment – The addition of the SK NW trips to SE Fourth Avenue will impact the safety of pedestrians and bicyclists in two ways. First, the increased number of vehicle trips crossing SE Fourth Avenue at the intersection of SE Division

Place will directly conflict with pedestrians and bicyclists using the interim trail alignment. Next, every vehicle from the SK NW site that drives northbound on SE Fourth Avenue from Division Place to Caruthers Street will directly conflict with pedestrians and bicyclists using the shared travel lane. *Portland Transportation* notes that it is difficult to quantify the decrease in pedestrian and bicycle safety. However, a ratio of the SK NW site's impact on the SE Fourth/Interim Trail alignment can be calculated.

In order to assess the impact of the proposed SK NW development on the SE Fourth Avenue trail alignment, two calculations are used. The first ratio compares the number of trips (vehicle, bicycle, and pedestrian) from the SK NW development to those already occurring in an "impact area" to determine to what extent the project will impact the existing transportation system:

Portland Transportation has noted that vehicle counts show the average daily volume in the impact area is between approximately 1000-2100 vehicles per day. *Portland Transportation* has also determined, based on Trail use data from *Portland Parks and Recreation*, that a total of 1860 pedestrian/bike trips are possible for a typical day. The current number of trips in the impact area can be calculated by adding the 2100 vehicle trips (the high-end value of the vehicle volume range) to the 1860 pedestrian/bike trips, for a total of 3,960 trips.

Total SK NW trips = 562 trips = 0.14 or 14% impact on the interim trail alignment

Total trips in impact area 3960 trips

The following ratio compares the number of vehicle trips from the SK NW development to those already occurring at the intersection of SE Division Place and SE Fourth Avenue/interim trail.

Portland Transportation notes that the expected number of daily vehicle trips that will be generated by the SK NW development is 534 (562 total trips minus 28 pedestrian/bike trips), and there are current 408 daily vehicle trips on SE Division Place. Based on these counts, and as shown in the equation below, the SK NW development is expected to increase the number of vehicle trips on SE Division Place by 131 percent.

SK NW vehicle trips = 534 trips = 1.31 or 131% impact on SE Division Place/SE Fourth intersection

Division Place vehicle trips 408 trips

These ratios indicate that the traffic generated at the SK NW site will result in a 14 percent increase in the total number of trips in the impact area, and the SK NW development will increase the traffic and conflicts at the SE Division Place and SE Fourth Avenue intersection by 131 percent. These vehicle trips directly impact the crossing of the interim trail alignment on SE Fourth at SE Division Place on a daily basis. An off-street path on the SK NW site would minimize or eliminate these additional conflicts, and contribute to the completion of a separated bike and pedestrian trail.

Next, the size of the exaction is calculated to determine the amount of site area required for a 25-foot wide trail easement on the SK NW site. This ratio compares the amount of site area required for an off-street trail to the total development area on the site.

$$\frac{\text{SK NW Exaction Area}}{\text{Total SK NW Site Area}} = \frac{9,250 \text{ sq. ft.}}{79,683 \text{ sq. ft.}} = 11.6\%$$

Comparing these ratios shows that the impacts generated by the SK NW development (14% and 131%) are greater than the amount of site area required for a trail on the SK NW site (11.6%). This demonstrates that the impacts the SK NW development will have on the transportation system are higher relative to the amount of property required for the trail improvements.

Proof Two

As another comparison between impacts and exactions, the pedestrian and bicycle use generated from the SK NW development is compared to the current pedestrian and bicycle use of the interim greenway trial (off-street path). This value is then compared to the size and cost of the trail improvements.

Percentage of Pedestrian/Bicycle Trips – As noted in the response from *Portland Transportation*, a minimum of 5 of the 25 SK Northwest employees will travel to and from the site by bicycling and walking. This is equivalent to approximately 3 to 5 percent of the total number of trail users during peak hours, as shown in the following calculation of peak hour use from the SK NW site and that on the greenway trail:

$$\frac{\text{SK NW Pedestrian/Bicycle Trips}}{\text{Trail Pedestrian/Bicycle Trips}} = \frac{5 \text{ PM peak trips}}{150 \text{ PM peak trips}} = 3.3\%$$

$$\frac{5 \text{ AM peak trips}}{109 \text{ AM peak trips}} = 4.6\%$$

The *Portland Transportation* response includes two ratios comparing the exaction area on the SK NW site to the overall area of the existing trail facilities within two noted (pedestrian and bicycle) impact areas. The pedestrian impact area includes the total Off-Street Path area between the nearest TSP Pedestrian designations in each direction (Figure 1, Exhibit E.E.5). The bicycle impact area is the total Off-Street Path between the nearest TSP Bicycle designation in each direction (Figure 2, Exhibit E.5). These ratios are as follows:

Table 3 – Exaction Area Comparisons			
	Exaction Area (25' wide)	Total Trail Impact Area (25' wide)	Percent
Pedestrian Connection	9,250 sq.ft.	385,750 sq. ft.	2.4%
Bicycle Connection	9,250 sq.ft.	233,000 sq. ft.	4.0%

Portland Transportation also provides a comparison between the cost of the trail improvements on the SK NW site and the cost of the established trail corridors, in the noted impact areas, that have already been constructed by others, which shows the following:

Table 4 Cost Comparisons			
	Construction cost of 12-foot wide path in exaction area	Total Cost for 12-foot wide path	Percent
Pedestrian Length Only	\$26,640 (4,440 sq.ft.)	\$1,110,960 (185,160 sq.ft.)	2.4 %
Bicycle/Pedestrian Length	\$26,640 (4,440 sq.ft.)	\$671,040 (111,840 sq.ft.)	4.0%

These ratios show that both the size of the exaction area and the cost of the trail improvements (2.4% to 4%) are smaller than the level of impacts (3.3% to 4.6%) the SK NW development will place on the current transportation facilities.

Conclusion: Based on the analysis above, and as further outlined in the response from *Portland Transportation*, considering the lower range of trips likely to be generated by the SK NW development, the proposal will increase the demand on the existing transportation facilities, increase congestion on the narrow SE Fourth corridor, and increase conflicts between vehicles, cyclists, and pedestrians using the existing facilities. These identified impacts and safety concerns have been quantified, and justify requiring the SK NW development to provide a separated trail to minimize or eliminate the conflicts on SE Fourth created by the additional traffic traveling to and from the SK NW site.

The requirement to provide a 25-foot wide easement, within the greenway setback, and to build a 12-foot wide concrete trail along the site’s riverfront is related both in nature and extent to the impacts of the SK NW development. Requiring 11 percent of the SK NW site area to be contributed to the trail improvements is proportional to the 14 percent increase the SK NW development will create on the existing transportation (street and trail) systems. The trail improvements will provide SK NW employees and customers with connections to other transportation and recreation facilities, as well as contribute to the completion of the citywide public trail infrastructure.”

Portland Transportation supplemented the BDS staff comments above as follows (Exhibit H.11, pages 3-5):

“If it is appropriate to include the frontage improvements on SE Division Place for this property in the Dolan analysis, then the following information is a discussion of the impact ratio and the exaction amounts related to the street frontage improvements and combined trail and street improvements.

Impact Ratio – SE Division Place Frontage Improvements

The impact ratio for frontage improvements is defined by the percent of vehicle trips from the site compared to the total trips on SE Division Place in the section from the site to the nearest minor arterial, SE 4th Avenue. These trips are referenced from the Office of Transportation response memo dated March 23, 2007 [Exhibit E.6]. In the March 23 memo, it was demonstrated that the 562 trips from the SK Northwest site is a 131% increase over the existing trip impact on the intersection of SE Division Place and 4th Avenue. The following calculation describes the SK Northwest portion of total impacts on the use of SE Division Place:

$$\frac{\text{Total site trips}}{\text{Total vehicle trips on SE Division}} = \frac{562 \text{ trips}}{562 + 408} = \frac{562 \text{ trips}}{970 \text{ total trips}} = 0.58 \text{ or } 58\% \text{ of daily trips}$$

Exaction Comparisons – SE Division Place Frontage Improvements

Exaction Area Percentage – SE Division Place Frontage Improvements

Additional dedication is required at the end of SE Division Place to provide for the future alignment of SE Water Avenue. The amount of dedication is approximately 71 feet or property in the east-west direction by 28 feet of property in the north-south direction. The total site dedication is 1988 square feet. When compared to the 79,863 square feet of total site area, as noted in the Office of Transportation March 23 memo, the street dedication of 1988 square feet is equivalent to approximately 2.5% of the total site area.

Cost Percentage – SE Division Place Frontage Improvement

The existing right-of-way on SE Division Place is 330 feet in length and 80 feet in width, when measured from SE 4th Avenue. The final length of SE Division Place is expected to be approximately 400 feet in length. The total right-of-way on SE Division Place is expected to be 32,000 sq.ft. The SK Northwest portion of the total SE Division Place right-of-way is 6.2% (1988/32,000).

The total cost for a full width street improvement that is 400 foot long (including 40 ft wide paved road with curbs and sidewalks on both side) is approximately \$450,000. The cost per lineal foot of a full street width is \$1125/lineal foot. The cost per lineal foot for a half street is \$562.50/lineal foot. The cost for the SK portion of the improvements is approximately \$61,875 (110 foot long half street width X \$562.50 per lineal foot.)

Therefore, the cost of the SK Northwest half-street improvement is approximately 13.8% (\$61,875/\$450,000) of the cost of street improvements for the entire street on SE Division Place.

Dolan analysis conclusion – Frontage Improvements

The 13.8% SK Northwest portion of the street improvement cost is substantially less than the 58% proportional share of impact on SE Division Place. In addition, the amount of dedication is only 2.5% of the total SK Northwest site area.

Dolan Analysis for combined trail and frontage improvements

Exaction Area Percentage – Combined Trail and Frontage Improvementss

When the street improvement dedication is added to the trail easement, the total square footage of 11,508 (1988 for the street dedication and 9520 for the trail easement) is approximately 14.4% of the total SK Northwest site area (79,863 square feet).

Construction Cost Percentage – Combined Trail and Frontage Improvements

When the total construction costs for the trail plus the street improvements are compared with the total construction costs for the entire trail plus full-street improvements, the total SK Northwest site-borne costs are 7.9% of the total construction costs for the entire trail plus full-street improvements. This is illustrated as follows:

The cost of the SK Northwest segment of the trail is \$26,640

The cost of the SK Northwest segment of the frontage improvements is \$61,875
(\$500/lineal foot X 110 lineal feet)

The total cost of the SK Northwest segments of trail plus street improvements is \$88,515

The cost of the total bicycle/pedestrian trail corridor is \$671,040

The costs of the total full street frontage improvement on SE Division is \$450,000
(\$500/lineal foot, 362 lineal feet)

The total cost of the full-length trail plus full block improvement is \$1,121,040

The total SK Northwest cost compared to total trail plus frontage improvement cost is
 $\$88,515/\$1,121,040 = 7.9\%$

Dolan Analysis Summary – Combined Trail and Frontage Improvements

- Total impacts from SK Northwest site on interim trail alignment is 14% (reference March 23 memo)
- Expected percentage of impacts from SK Northwest site on Division Place is 58%
- Expected percentage of bike/ped use from SK Northwest site on the Greenway Trail during peak commuting hours is 3.3-4.6% (reference March 23 memo)
- Exaction area for both trail easement and street dedication is 14.4% of total site
- Total cost of exaction area is approximately 7.9% of total cost of both trail and street improvements

The exaction are and cost requirements of SK Northwest, for both the trail and street frontage improvements, are roughly proportional or substantially less than the impacts fro the SK Northwest on Division Place and the interim trail alignment. It is important to note that the easement for the trail does not restrict the use of the SK site, since it is located within the greenway setback of the site. In that sense, it is not taking any property.”

****End of BDS/PDOT quoted material****

Appellants take exception to numerous aspects of the City approach (BDS and Portland Transportation comments quoted above). The Hearings Officer summarizes Appellants' expressed concerns:

- The City must include SDC assessments in the *Dolan* rough proportionality balancing formula (Exhibit H.8, pages 15 and 16); and
- The City cannot justify the trail exaction because it does not impose similar obligations on properties in the vicinity which do not have the greenway trail map designation symbol (Exhibit H.8, page 16, Exhibit H.10, page 11); and
- The City requested exactions do not alleviate the impacts the City alleges (Exhibit H.8, page 18); and
- The City adopted an erroneous/flawed assumption that additional uses may be made of the Subject Property (Exhibit H.10, page 8); and
- The greenway trail, as a whole, may serve some transportation purpose but in the location of the Subject Property, the trail segment the City is attempting to exact only serves recreational purposes (Exhibit H.10, page 8); and
- The City's trip assumptions are incorrect regarding employees of the Applicant using the greenway trail as a link to transit (Exhibit H.10, page 10); and
- The City's modal split estimates (vehicles v. bicycle/pedestrian) are incorrect because the current SK NW facility is located in close proximity to the Subject Property and therefore modal splits at the current location should be the same as the Subject Property (Exhibit H.10, page 10); and
- The "proofs" for the City's *Dolan* rough proportionality analysis utilize too large an impact area (*Dolan* requires impact areas to be "local street network")(Exhibit H.10, pages 10 and 11); and
- The City selected an incorrect "peak hour" day/time for greenway trail (Exhibit H.10, page 11); and
- The City places an inappropriate weight on the number of trips on Division Place (Exhibit H.10, page 11); and

The Hearings Officer will next address the Appellants' above-referenced concerns in the context of the *Dolan* rough proportionality review. The Hearings Officer begins by restating the oft-quoted *Dolan* statement that "no precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the" exactions beyond a conclusory statement. *Dolan*, @ 391 *Dolan* set the standard and Oregon courts and the Land Use Board of Appeals have attempted to explain how the standard is to be interpreted on a case-by-case basis.

The Oregon Court of Appeals expanded on the *Dolan* rough proportionality analysis by saying that it requires "considerable particularity in local government findings that are aimed at showing the relationship between a developmental condition and the impacts of the development." *Art Piculell v. Clackamas County*, 142 Or App 327, 922 P2d 1227 (1996). The Court of Appeals, more recently, addressed the "particularity" of findings related to dedication exactions in *McClure v. Springfield*, 37 Or LUBA 759 (2000), *aff'd*, 175 Or App 425, 28 P3d 1222 (2001), *rev.den.*, 334 Or 327, 52 P3d 435 (2002). *McClure*, affirmed the City of Springfield's rough proportionality balancing findings for

a condition requiring the dedication of a street ('M' Street) and rejected Springfield's findings, as being inadequate, for conditions requiring a "clipped corner" dedication and a sidewalk (8th Street) dedication. One additional Court of Appeals case, *Hallmark v. Lake Oswego*, 193 Or App 24, 88 P3d 284 (2004), was also considered instructive by the Hearings Officer in illustrating the particularity of findings required of a local government in justifying an exaction condition.

The Hearings Officer, in a discussion earlier in this decision, addressed Appellants' argument that any SDC charges imposed upon the Applicant must be considered in the *Dolan* rough proportionality balancing test. The Hearings Officer will not again address, in this section, the SDC argument except to add that the Hearings Officer views all property owners as having obligations imposed by government against the property to pay for public services. Property taxes are imposed against real property and are not, in the opinion of the Hearings Officer, to be included in the *Dolan* rough proportionality balancing test. Property taxes are applied to a wide variety of governmental fiscal needs; some directly related to a specific parcel of real property and a large quantity of the funds expended for services not directly impacting the specific property. Likewise, an individual parcel of real property, when developed, has a variety of impacts upon a local government's transportation system. Some of those impacts may be considered rather indirect such as a parcel of property in SE Portland whose owner has employees/customers who may use a roadway and/or intersection in NE Portland; the impact from the specific property in SE Portland are not readily directly measurable at the NE Portland intersection. However, the specific property in SE Portland does receive benefit from an efficient/functioning transportation network including the roadway and/or intersection in NE Portland. The City of Portland recognizes such benefits and obligations and imposed SDC charges against development to increase capacity, etc. of certain identified segments/portions of the Portland transportation network. Finally, on the transportation continuum, are the very localized and direct impacts that a development creates. These impacts are considered during a development application process, are measurable, and must undergo the rigors of the *Dolan* rough proportionality balancing test. The Hearings Officer rejects the Appellants' argument that SDC charges against the Subject Property must be considered in the *Dolan* analysis.

Appellants argue that because similar treatment (greenway trail exaction) is not required for properties located immediately east of the Subject Property (properties that do not have the Greenway trail symbol) the greenway trail exactions are not roughly proportional. The Hearings Officer finds this argument to be misplaced. The correct approach to each and every *Dolan* rough proportionality balancing test is to *compare* the impacts of a *specific* proposal to the exactions being required of the *specific* proposal. This approach does not require the same nature of exactions from every Applicant but rather that whatever exactions are being requested are roughly proportional to the specific proposal's impacts. Therefore, the "properties to the east" may not be required to dedicate a portion of the land for a greenway trail but, the "properties to the east" may be required to make other dedications or suffer other exactions so long as the exactions are roughly proportional to the impacts created by the development.

Appellants argue that the greenway trail, in the vicinity of the Subject Property, only serves recreational purposes and does not serve transportation purposes. The Hearings Officer disagrees. Evidence is in the record that the greenway trail is used by commuters to/from work, by customers

of businesses and for persons traveling to/from their residence and shopping and other activities. (Exhibit H.11, pages 1 and 2)

The Appellants argue that the proposed exactions will not alleviate impacts as suggested by the City. The Hearings Officer finds that there is evidence in the record that conflicts between motor vehicles and pedestrians/bicycles using the interim trail will be reduced by separating the pedestrians/bicycles from the interim alignment onto a waterfront greenway trail. The Hearings Officer acknowledges that all conflicts will not be reduced as some pedestrians and bicycles may use SE Caruthers/Fourth alongside motor vehicles; but the numbers of such pedestrians/bicycles sharing these roads with motor vehicles will be significantly reduced and the Hearings Officer finds that the greenway trail exaction will reduce safety conflicts.

Appellants suggest that the dedication and construction of a greenway trail on the Subject Property will not complete the greenway trail; rather only create an isolated link. However, in response to a similar argument the Court of Appeals in *McClure* stated that “if each property owner could avoid an exaction because the city had not yet obtained all dedications necessary to improve the street, no improvement would be possible.” Evidence was presented at the hearing that a property immediately south of the Subject Property had tentatively agreed to dedicate and develop the greenway trail. Further, appellant #1, in an earlier case before the same Hearings Officer, representations were made that the property immediately north of the Subject Property had room (not on the river) for a future greenway trail to be located. Irrespective of what happens in the immediate future on the properties neighboring the Subject Property it is reasonable to conclude that at some date in the future the greenway trail will complete the link in the vicinity of the Subject Property and eliminate the necessity of the interim trail location now in use.

The Appellants argue that the City’s traffic assumptions related to SK NW employees using the greenway trail to connect to transit is flawed. The Appellants suggest that, at this time, all transit connections are east of the Subject Property and using the greenway trail would not be a logical route (additional distance and time to use greenway trail). The Hearings Officer agrees, in the short term, that transit stops are currently located to the east of the Subject Property and the proposed greenway trail location would not be the shortest or most convenient route for many employees to walk/bike to transit. However, there is ample evidence in the record that light rail and/or streetcar service are proposed in the vicinity of SE Caruthers and Water/Fourth Avenue. It is anticipated that transit stops, in the future, will be located to the north of the Subject Property and access from those stops will most conveniently be accessed by the greenway trail. (Exhibit H.11, page 3) The Hearings Officer reiterates Portland Transportation’s focus on the greenway trail being part of a transportation network. The Hearings Officer finds that the surrounding roads, bridges, and greenway trail are all parts of the transportation network.

The exactions being sought by the City, in this case, include the (1) dedication of land for a greenway trail, (2) construction of a section of the greenway trail, (3) install public signage related to the greenway trail and (4) dedication of frontage along SE Division Place. The remaining discussion of these findings relates to whether or not these “exactions” are roughly proportional to the impacts created by the proposed development.

The City set forth two “proofs” to support their claim that the exactions are roughly proportional per *Dolan*. Proof One looks at the impacts created by all SK NW vehicles will distribute on the street system affecting the interim trail alignment. (Exhibit H.8a, page 12) Proof One describes an impact area, for Proof One, to be between SE Caruthers at SE Water Avenue to SE Fourth and then south on SE Fourth to the developed Greenway Trail just south of SE Ivon Street. (See Exhibit H.8a, page 12 for diagram of the impact area for Proof One) The Hearings Officer finds, considering the impact being considered is the impact of SK NW vehicles on the interim trail area, the City’s geographic description to be reasonable.

The City, in Proof One, describes the specific impacts created by the SK NW proposal to be the (1) vehicles crossing Fourth Avenue at SE Division conflict with pedestrian and bicycle movement on the interim trail location; and (2) motor vehicles traveling northbound on SE Fourth conflict with non-motorized movements of people (pedestrian/bicycle) in the shared vehicle lane. The Hearings Officer finds no credible evidence in the record to refute the two potential conflicts created by vehicles traveling to/from the Subject Property as proposed to be developed in this case.

Next, in Proof One, the City postulated two formulas to support “rough proportionality.” The first formula relates the number of trips created by the Applicant (all vehicles) to the total number of vehicles currently using the described impact area. Portland Transportation stated that the “average daily volume in the impact area” for vehicles is “between approximately 1000-2100 vehicle per day.” (Exhibit E.6, page 3) Portland Transportation utilized the “higher” end of the vehicle trip estimate (2100 per day). In addition Portland Transportation estimated 1860 trail trips per day. The total trips impacted were estimated by Portland Transportation to be 3960 per day (using the upper vehicle trip estimate of 2,100 per day). The first formula results in an estimated 14% impact created by the new trips created by the SK NW proposal. The percentage impact would increase to approximately 20% if the lower vehicle trip estimate (1000 per day) was used. The Hearings Officer finds that the impacts created by the SK NW proposal on the interim trail impact area ranges between 14% and 20%.

Portland Transportation presented a second impact formula by looking directly at the number of new vehicle trips created by the SK NW proposal and the current volume of traffic using SE Division Place (west of SE Fourth Avenue). This formula resulted in an estimate increase in impacts upon SE Division Place (west of SE Fourth Avenue) of 131%.

Proof One then compared the impacts (14%-20% on interim trail and 131% on SE Division) to the area of exaction. Portland Transportation compared the size of the SK NW area of dedication to the Total Size of the SK NW site. The size of the extraction (for the greenway trail) of 9,250 square feet was divided by 79,683 square feet (the size of the Subject Property) resulting 11.6%. Portland Transportation then compared the impact percentages (14%-20 for interim trail and 131% for SE Division) to the 11.6% for the extraction. Portland Transportation concludes that the 11.6% is less than both the 14% (or, using the lower vehicle count percentage of 20%) and 131% for SE Division.

The Hearings Officer, based upon evidence in the record (including zoning maps, plot plans) estimated the square footage in the described interim trail impact area. The Hearings Officer estimated the right-

of-way within SE Caruthers (starting at SE Water Avenue) and SE Fourth (from SE Caruthers to SE Clinton) to be approximately 43,000 square feet. The Hearings Officer compared the 9,250 square feet of greenway dedication to the square footage in the area of the interim greenway trail impacted by the SK NW proposal (43,000 square feet). The results of this comparison suggests that SK NW's dedication represents approximately 21% of the impacted area. Using this percentage impact estimate and comparing it to the 14% impact (using 3960 vehicle trips per day) is likely not roughly proportional. However, the 21% figure is roughly equal to the 20% estimate of Applicant's impact (using 2860 vehicle trips) and the 21% exaction percentage is far less than the 131% impact estimate.

The Hearings Officer finds the Hearings Officer's calculation (square feet dedicated v. square feet of impact area) is more consistent with *McClure* than the comparison percentage (square feet dedicated v. square feet of total site). However, the Hearings Officer is not prepared to find that Portland Transportation's approach is not consistent with *Dolan* and subsequent Oregon interpretations of *Dolan* by *McClure* or *Hallmark*. *Hallmark*, decided subsequent to *McClure* appears to the Hearings Officer to impose somewhat less stringent comparison requirements upon a jurisdiction than *McClure* and may have found Portland Transportation's comparison approach roughly proportional.

The bottom line for the Hearings Officer is that the impacts (14%-20% depending on the vehicle count used) is roughly proportional to the Hearings Officer's percentage of exaction (21%). The Hearings Officer returns to the statement in *Dolan* that no precise mathematical calculation is required and that the impacts must be shown to be only "roughly proportional" to the exaction. The Hearings Officer finds that there is sufficient evidence in the record to demonstrate rough proportionality between the dedication of the greenway trail easement to the impacts created by SK NW.

Proof Two

Proof Two of rough proportionality, as presented by the City, compares the pedestrian and bicycle usage created by SK NW's development and the current pedestrian and bicycle use. Thereafter, Proof Two utilizes various formulas to compare the impacts to the size and cost of trail improvements.

Proof Two contains a number of assumptions which Appellants' assert are incorrect. Appellants suggest that the "impact areas" selected by Portland Transportation are too large and not "local." Appellants also suggest that Portland Transportation selected the wrong "peak day/hour."

Appellant #1 states:

"when looking at the 'vehicle/trail impact area,' BDS looks at the area between SE Caruthers at Water Avenue to SE Caruthers at Fourth Avenue, to the developed Greenway trail just south of Ivon Street. This is the local area served by the proposed trail, so this area is appropriate to examine in the *Dolan* analysis. However, the BDS analysis then inexplicably jumps to an 'exaction area comparison' that looks at some three miles of pedestrian path and nearly two miles of bike path. This is contrary to the type of *Dolan* analysis that was allowed in *McClure*" (cite omitted by Hearings Officer) (Exhibit H.10, page 11)

Appellant #1 goes on to say that the *McClure* court

“held that it was appropriate to look at the area of an exaction as a proportion of the total area of the local street network serving the development. The area at issue in *McClure* extended a block or two in most directions and only seven blocks in the longest direction. Similarly, in *Hallmark* (cite omitted by Hearings Officer) the City also looked at the local street network and compared 160 feet of trail to 1,250 feet that had been dedicated by other local landowners. An appropriate denominator would be to look at the local section of the proposed trail as shown on the zoning map between Caruthers and Woodward. This amounts to a little less than 1,500 linear feet of trail. By using a denominator based on 15,430 linear feet of pedestrian path and 9,320 linear feet of bicycle path, the BDS analysis is off by a factor of 10.” (Exhibit H.10, pages 10 and 11)

Portland Transportation describes the off-site path area separately for bikes and pedestrians as “The length of each connection is defined by where it intersects with other TSP designated pedestrian and bicycle connections. Each designation has different intersection endpoints on the south end. As shown in Figure 1, the pedestrian connection is defined from SE Caruthers St to a location in Oaks Park, that connects to SE Bybee Blvd near SE 14th Avenue. The total length of this connection for pedestrians is 15,430 linear feet. As shown in Fig. 2, the bike connection is defined from SE Caruthers St to the Off-Street Path connection to SE Oaks Drive near SE Milwaukie Avenue, known as the Oaks Bottom Trail. The total length of this connection is 9320 linear feet. The bike and pedestrian designations are the same path, but for purposes of this analysis, both will be calculated separately to demonstrate the upper and lower limits of proportionality.” (Exhibit E.6, pages 5 and 6).

The Hearings Officer finds that establishing the geographic boundaries of impact areas to be the most subjective exercise under the *Dolan* analysis. Further, the consequences of setting the wrong boundaries for impact areas to be significant; if the boundary is too large the percentage impact by an individual property will be relatively smaller than if the boundary had been established correctly. Determining a correct boundary, however, is not such an easy task for city staff, hearings officer or reviewing court.

McClure, the 2001 Oregon Court of Appeals decision, approached the impact area boundary issue by agreeing with the City of Springfield that comparing the “square footage of right-of-way exacted with the total right-of-way area on the two local streets” is a sufficient way to satisfy the *Dolan* standard. *McClure* @ 435 The *McClure* court did find two of the City of Springfield’s exactions did not satisfy the *Dolan* rough proportionality test but that decision was not based on the scope or size of the impact area. *McClure* @ 436.

The Oregon Court of Appeals addressed the *Dolan* rough proportionality test again in *Hallmark*. *Hallmark* @ 36-40. Lake Oswego’s findings appear to describe the impact area as a local street adjacent to Hallmark’s development and also an adjacent retail/shopping center. In *Hallmark* the City of Lake Oswego estimated the linear footage “contributed” by 50 residents along Collins Way (the adjacent local street) per household and compared that number to the linear footage per employee (the City used 17 current employees and not 44 potential employees). The Court of Appeals held the Lake Oswego findings sufficient to satisfy the “extent” portion of the *Dolan* rough proportionality test. The Court did not discuss, in any detail, the merits of the City’s selection of a

portion of Collins Way where there were 50 residences located as being the “impact area.” The Court did not discuss why the “impact area” did not include linear footage within the retail/shopping center.

The Hearings Officer returns to a concept which was discussed earlier in this decision (should SDC assessments be included in *Dolan* rough proportionality test?). That concept relates to the continuum of transportation impacts that are created by a new development. Some transportation impacts resulting from new development are direct; such as the impacts in this case created by the SK NW development on the intersection of SE Division Place and SE Fourth. That SK NW impacts that intersection, in the opinion of the Hearings Officer cannot be seriously disputed. However, the addition of employees and customers to the Subject Property location will also impact the Hawthorne Bridge, Martin Luther King Boulevard and roads/intersections more distant from the Subject Property. Employees, customers, product distributors will travel to and from the Subject Property from varying distances and locations. Impacts created by those employees, customers and distributors on the freeways, for example, are more difficult to trace directly to development on the Subject Property. They occur but are less tangible than the impacts on the intersection of SE Division Place and SE Fourth.

In the earlier section the Hearings Officer found that SDC charges are not assessed to address (in most cases) the impacts such as those created by the SK NW development on SE Division Place and SE Fourth; however, they were created to address the cumulative impacts (such as on bridges, major intersections, etc.) on the transportation network as a whole. This concept, it seems to the Hearings Officer, to be relevant to the description of the appropriate geographical extent of an impact area used as part of the *Dolan* rough proportionality analysis. The Hearings Officer finds that the impact area for the *Dolan* analysis should not exceed the area where direct and tangible impacts are created by the Subject Property.

The Hearings Officer notes that the City used different impact areas for Proof One and Proof Two. In theory, the Hearings Officer finds the use of different impact areas for different tests/proofs to be acceptable. However, overriding every description of an impact area is the issue expressed above: Is the area described one which direct and tangible impacts arise from the proposed development? If the answer is yes, then the description of the impact area is reasonable and would be accepted by the Hearings Officer.

The City stated that “the bike and pedestrian designations are the same path, but for purposes of this analysis, both will be calculated separately to demonstrate the upper and lower limits of proportionality.” (Exhibit E.6, page 5) The Hearings Officer appreciates this comment but it is important that both impact areas utilized by the City be tested to determine a range of impacts created by the SK NW development and whether those impacts are direct and tangible.

The City described the greenway trail in the vicinity of the Subject Property. To the north are a variety of destinations and transportation alternatives. The northern endpoint (for Proof Two) of the impact area to be SE Fourth and SE Caruthers Street. Appellants do not seem to question this endpoint description.

The Hearings Officer notes that the trail to the south has more limited destinations and transportation options in close proximity to the Subject Property. The City utilized TSP pedestrian and bicycle designations. Considering the limited transportation alternatives (virtually no destinations along the greenway trail until Oaks Bottom, Oaks Park and SE Bybee) the Hearings Officer finds that once a pedestrian or bicycle is on the greenway trail south of the Subject Property it is reasonable to expect the person (pedestrian/bicyclist) to travel all of the way to SE Bybee. Following this logic pedestrians/bicyclists traveling south, from the Subject Property, can be expected to utilize the greenway trail all of the way to Bybee. Therefore, the Hearings Officer finds that the southern endpoint (SE Bybee) is directly and tangibly impacted by pedestrians/bicyclists traveling to/from the Subject Property. The Hearings Officer finds that both the pedestrian (SE Bybee) and pedestrian (SE Oaks Drive) are appropriate impact areas for pedestrian and bicycle impacts respectively.

Appellants also suggest that Portland Transportation selected the wrong “peak day/hour.” (Exhibit H.10, page 11) Appellant #2 states that “the importance of a peak hour analysis is that it measures impacts on capacity when a facility is at peak use. In this case, that occurs on the weekends. During the week, when the use of the trail is less half of the weekend peak use, the effect or impact of a few additional trips is not meaningful, since there is plenty of capacity during those times.” (Exhibit H.10, page 11)

Portland Transportation responded by saying:

“standard methodology for comparing peak hour trips on a transportation facility is to evaluate commuter peak trips. The peak hour trail data that was used in the Office of Transportation response, March 23, 2007, coincides with typical peak commuter travel patterns. Typical peak commuting hours are defined in the transportation engineering profession as 7-9 AM and 4-6PM weekdays.” (Exhibit H.11, page 3)

As noted earlier in this decision the Hearings Officer considers the evidence in the record and the expertise and credibility of the presenter of evidence and/or argument. The appellant’s provided no traffic engineering evidence to support the argument made by appellant #2’s attorney that the incorrect peak hour was utilized in Proof Two *Dolan* analysis. In this case the City provided evidence and argument from a professional transportation engineer. The Hearings Officer finds the City’s evidence to be more credible.

The City extended its discussion about the peak hour by saying:

“if the SK Northwest pedestrian/bicycle commute trips were to occur outside of the standard peak commuting hours in the transportation system, then the percentage of trail use by SK Northwest is expected to be higher.” (Exhibit H.11, page 3) The Hearings Officer also finds that, based on the evidence in the record, the City utilized conservative bicycle trip estimates. The Bicycle Transportation Alliance argued that based on studies it reviewed that bicycle trips in the central and inner eastside make up between 5% and 12% of all trips.” (Exhibit H.12, page 1)

A traffic engineer at Greenlight Engineering, citing various studies, opined that 19% of central eastside employees commute by bicycle and foot. (Exhibit H.13, page 2)

The City, in Proof Two, compared (using only a 5% pedestrian/bicycle commuter allocation) the number of SK NW pedestrian/bicycle users to the number of trail pedestrian/bicycle users at the AM and PM weekday peak times. The results indicate the SK NW will impact the trail from 3.3% (PM peak) to 4.6% (AM peak). (Exhibit H.7, page 13) The City then compared (using the pedestrian and bicycle impact areas discussed above) the number of square feet of exaction (9,250) to the total square footage of trail in the impact areas (385,750 sq.ft and 233,000 sq.ft.). This comparison indicated a range of 2.4% (larger pedestrian impact area) to 4.0% (smaller bicycle impact area). According to the City “these ratios show that both the size of the exaction area and the cost of the trail improvements (2.4% to 4%) are smaller than the level of impacts (3.3% to 4.6%) the SK NW development will place on the current transportation facilities.” (Exhibit H.7, page 14)

The Hearings Officer finds Proof Two to be a reasonable measure of the extent of the exaction to the impacts created by the proposed development. The Hearings Officer also finds that had the City chosen to use more aggressive pedestrian and bicycle trip generation estimate, which the Hearings Officer would have found reasonable, the comparison would have tilted even further in favor of the City.

Finally, the City presented a rough proportionality analysis to support the dedication of SE Division Place frontage. (Exhibit H.11, pages 4 and 5) The Hearings Officer finds the City’s comparison of total SK NW generated site trips to the total vehicle trips on SE Division Place to be appropriate and responsive to the test set forth in *Dolan*. The Hearings Officer also finds the exaction comparisons (exaction area percentage and cost percentage) to be responsive to the test set forth in *Dolan*.

The City provided a final summary of its *Dolan* analysis in Exhibit H.11 (pages 4 and 5 – quoted earlier in this decision). The Hearings Officer finds that the summary further confirms that exactions from the Applicant in this case are roughly proportional.

The Oregon Court of Appeals in *McClure* summarized the dilemma facing the City, the Hearings Officer, property owners and reviewing courts, by stating the following:

“The McClures argument, and the city’s serial efforts to justify its requirements, illustrate the quandary facing a local government that attempts to justify a street exaction under *Dolan*. It is true, as the concurring LUBA board member pointed out, that the 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 McClures challenge calls for a highly detailed 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.”
McClure @ 436,437

The City in this case made dramatic improvement in its presentation of evidence and argument related to the *Dolan* rough proportionality test. In the prior case the Hearings Officer found the City's *Dolan* rough proportionality analysis woefully inadequate; it compared the cost of the greenway trail improvements to the cost of the SK NW site/building improvements. However, in this case the City has, in the opinion of the Hearings Officer, taken care to identify the impacts expected to be caused by the SK NW development and to use comparisons between the impacts and exactions that are reasonable to the Hearings Officer. The Hearings Officer finds the City has met its burden of demonstrating rough proportionality under *Dolan*.

The requirement to provide a 25-foot wide easement, within the greenway setback, and to build a 12-foot wide concrete trail along the site's riverfront is related both in nature and extent to the impacts of the SK NW development. The trail improvements will provide SK NW employees and customers with connections to other transportation and recreation facilities, as well as contribute to the completion of the citywide public trail infrastructure.

A specific trail alignment will need to be provided to ensure the requirements of this Issue can be satisfied. Since that information has not been provided, this Issue is **not met**.

Issue G. Viewpoints: This Issue "applies to all applications for Greenway Approval with a public viewpoint shown on the property in the *Willamette Greenway Plan* and for all applications proposing to locate a viewpoint on the property. These guidelines provide direction about the features and design of viewpoints, as required at specific locations:

1. Design
2. Facilities
3. Access to Water's Edge
4. Relationship to Trail

Response to Issue G: No public viewpoints are identified on the property, nor is any public viewpoint proposed. Therefore, this Issue is **not applicable**.

Issue H. View Corridors: This Issue "applies to all applications for Greenway Approval with a view corridor shown on the property in the *Willamette Greenway Plan*". These guidelines provide guidance in protecting view corridors to the river and adjacent neighborhoods.

1. Right-of-way Protection
2. View Protection
3. Landscape Enhancement

Response to Issue H: The *Willamette Greenway Plan* does not identify a designated view corridor on this site, so this Issue is **not applicable**.

B. River frontage lots in the River Industrial zone. In the River Industrial zone, uses that are not river-dependent or river-related may locate on river frontage lots when the site is found to be unsuitable for river-dependent or river-related uses. Considerations include such constraints as the size or dimensions of the site, distance or isolation from other river-dependent or river-related uses, and inadequate river access for river-dependent uses.

Findings: The site is in the River General zone, so this criterion **does not apply**.

C. Development within the River Natural zone. The Applicant must show that the proposed development, excavation, or fill within the River Natural zone will not have significant detrimental environmental impacts on the wildlife, wildlife habitat, and scenic qualities of the lands zoned River Natural. The criteria applies to the construction and long-range impacts of the proposal, and to any proposed mitigation measures. Excavations and fills are prohibited except in conjunction with approved development or for the purpose of wildlife habitat enhancement, riverbank enhancement, or mitigating significant riverbank erosion.

Findings: The closest areas with a River Natural (n) zoning designation are approximately 600 feet upstream of the site near the Ross Island Bridge (as noted in Criterion A/Issue C, above). These areas provide significant wildlife habitat and support a number of wildlife species, which could be detrimentally impacted by the proposed development. However, in this case, none of the proposed work will occur within the River Natural zone, so this criterion is **not applicable**.

D. Development on land within 50 feet of the River Natural zone. The Applicant must show that the proposed development or fill on land within 50 feet of the River natural zone will not have a significant detrimental environmental impact on the land in the River Natural zone.

Findings: No development is proposed within 50 feet of a River Natural Zone, so this criterion **does not apply**.

E. Development within the greenway setback. The Applicant must show that the proposed development or fill within the greenway setback will not have a significant detrimental environmental impact on Rank I and II wildlife habitat areas on the riverbank. Habitat rankings are found in the *Lower Willamette River Wildlife Habitat Inventory*.

Findings: There are no Rank I or II wildlife habitat areas on the Subject Property. BDS staff identified the wildlife habitat as being Rank IV wildlife habitat. Therefore, the Hearings Officer finds this criterion **does not apply**.

F. Development riverward of the greenway setback. The Applicant must show that the proposed development or fill riverward of the greenway setback will comply with all of the following criteria:

1. The proposal will not result in the significant loss of biological productivity in the river;
2. The riverbank will be protected from wave and wake damage;
3. The proposal will not:
 - a. Restrict boat access to adjacent properties;
 - b. Interfere with the commercial navigational use of the river, including transiting, turning, passing, and berthing movements;
 - c. Interfere with fishing use of the river;
 - d. Significantly add to recreational boating congestion; and
4. The request will not significantly interfere with beaches that are open to the public.

Findings: Development proposed riverward of the greenway setback includes the construction of a new dock in the waterway adjacent to the site, and the installation of native plantings on the shoreline.

Comments from boaters note that the construction of and operations at the dock could create detrimental impacts to the aquatic and near shore environment, and add to the boating congestion and conflicts between motorized and non-motorized watercraft.

There are a number of measures, which can be undertaken during the construction activities to avoid and/or limit detrimental impacts to the near shore and aquatic environment, such as:

- Providing work area isolation and containment measures for bank and in-water work areas;
- Implementing a fish salvage program during in-water work activities, to capture and release fish, in accordance with requirements of *Oregon Department of Fish and Wildlife* (ODFW) and *National Marine Fisheries Service* (NOAA);
- Using hydraulic vibratory equipment to install the piles, to limit sediment displacement;
- Performing the construction in accordance with the ODFW established in-water work windows for the lower Willamette River;
- Complying with City of Portland, Title 10, *Erosion Control* and *Balanced Cut and Fill* regulations for grading activities, and for construction within the 100-year floodplain; and
- Employing City of Portland *Stormwater Management Manual* regulations for ground water and surface water protection.

The narrative (Exhibit A.1, p 13-17) notes that the dock is to consist of concrete encapsulated foam, timbers, and galvanized bolts, rods, and hardware, and will be supported by four 18-inch diameter piles. An aluminum ramp is to be set into place by crane from the water. The narrative indicates that the dock, piles, and ramp are to be fabricated off-site and transported to the site for assembly. As outlined in the narrative, the Applicant intends to employ “standard local operating procedures” (SLOPES) for the in-water structures and construction (Exhibit A.1), in accordance with the requirements of the *US Army Corps of Engineers* and the *Department of State Lands*.

The proposed jet-ski testing may result in an increase in wave and wake action on the bank. However, the narrative indicates that the use of the dock will be limited to employees of the facility to perform open water testing, which, the narrative notes, is necessary to troubleshoot and test repairs. Normally up to 4 craft will be tested per day to confirm the repairs were successful (Exhibit A.1, p 3, 5, 8). Limiting the number of in-water jet ski repairs to 4 per day may not reduce conflicts with non-motorized craft; however, at this level, the proposal should not significantly increase boating congestion or interfere with commercial navigation.

With conditions requiring all work areas to be isolated and erosion controls to be installed prior to any construction activities, these measures will help to reduce harm to aquatic species and the river environment. There may be some temporary limits on access for fishing and recreational boating activities near the site, during the construction activities. Otherwise, the project will not diminish long-term opportunities for fishing and recreational boating, restrict boat access to the neighboring properties, or interfere with commercial shipping.

All areas of the river, up to the Ordinary High Water (OHW) line, are generally open to the public; however, there are no public beaches on the site and it is likely that public access will continue to be limited along the site's riverfront.

With the implementation of appropriate construction management methods, as outlined above, and the installation and maintenance of appropriate riverbank plantings, the proposal **will meet** this criterion.

G. Development within the River Water Quality overlay zone setback.

Findings: The project site does not have a River Water Quality designation, so this criterion **does not apply**.

H. Mitigation or remediation plans. Where a mitigation or remediation plan is required by the approval criteria of this chapter, the Applicant's mitigation or remediation plan must demonstrate that the following are met:

1. Except when the purpose of the mitigation could be better provided elsewhere, mitigation will occur:
 - a. On site and as close as practicable to the area of disturbance;
 - b. Within the same watershed as the proposed use or development; and
 - c. Within the Portland city limits.
2. The Applicant owns the mitigation or remediation site; possesses a legal instrument that is approved by the City (such as an easement or deed restriction) sufficient to carry out and ensure the success of the mitigation or remediation plan; or can demonstrate legal authority to acquire property through eminent domain;
3. The mitigation or remediation plan contains a construction timetable and a minimum one year monitoring and maintenance plan that demonstrates compliance with Subsection 33.248.090.E and includes the following elements:
 - a. Identification of the responsible party or parties that will carry out the mitigation or remediation plan;
 - b. Identification of clear and objective performance benchmarks that will be used to judge the mitigation or remediation plan success; and
 - c. A contingency plan that indicates the actions to be taken in the event that performance benchmarks are not met.

Findings: The Hearings Officer finds no specific approval criteria imposing a mitigation plan or remediation plan. The Hearings Officer found, in an earlier section of this decision, that the Applicant's landscape plan was acceptable. The Hearings Officer finds that this approval criteria, based upon the evidence in the record, is **not applicable**.

PLANS AND POLICIES

Willamette Greenway Plan (1988) identifies the purpose and goals for the regulations governing development along the Willamette River. This plan calls for a primary greenway trail on the subject site,

and for an interim greenway trail along SE Fourth and SE Caruthers. Interim trails are temporary alternative routes for the greenway trail until such a time as the primary trail is completed (p 7).

Portland Transportation System Plan (TSP) (2004) provides guidance on how Portland's transportation system should function over the life of the *Comprehensive Plan*. As noted in the comments from *Portland Transportation*, the TSP identifies required street improvements on SE Division Place, and that plan identifies an Off-Street Path for both Bicycles and Pedestrians across the project site. Off-Street Paths are intended to serve as transportation corridors and recreational routes for bicycling, walking, and other non-motorized modes (p 2-12 and 2-14).

Hosford Abernathy Neighborhood Plan (1988) notes that land for river dependent development is in short supply (Policy 5/Commercial and Industrial) and calls for improvements to transportation and recreation facilities to reduce truck/pedestrian conflicts and to increase public access and facilities along the waterfront (Objectives 1.5, 1.7 through 1.11, 3.5, and 3.7 through 3.9).

DEVELOPMENT STANDARDS

Unless specifically required in the approval criteria listed above, this proposal does not have to meet the development standards in order to be approved during this review process. The plans submitted for a building or zoning permit must demonstrate that all development standards of Title 33 can be met, or have received an Adjustment or Modification via a land use review prior to the approval of a building or zoning permit.

III. CONCLUSIONS

This Appellants and City, in this appeal, raised a number of issues. The issues of facial constitutionality of Zoning Code sections 33.272.020, 33.272.030 D., and 33.440.240 B., claim/issue preclusion in land use cases, location of the "top of bank," easement access right, and categorization of uses are discussed in the preliminary matters section. In summary, the Hearings Officer found that in this case neither claims nor issue preclusion applies in to this case. The Hearings Officer found that sections 33.272.020, 33.272.030 D., and 33.440.240 B. are facially constitutional. The Hearings Officer found that the City's *interpretation* of the Applicant's data relating to the location of the "top of bank" was correct. The result of the "top of bank" finding is that a portion of the Applicant's proposed building is within the greenway setback which is not allowed; either the Applicant must redesign the building to remove the portion of the building within the greenway setback or apply for a Greenway Goal Exception. The Hearings Officer found that the City's insistence on clarifying access easement matters was premature and could be dealt with through a condition of approval. The Hearings Officer found that an opponent's argument that the Applicant incorrectly categorized uses (thereby necessitating a different land use review) was not persuasive.

The Hearings Officer reviewed each of the relevant approval criteria and determined that 33.440.350 A. Issues A, B, and F were not met. The primary basis for making the determination that these approval criteria were not met was the failure of the Applicant to provide for a segment of the greenway trail. The Hearings Officer reviewed the Applicant's traffic estimates, the impacts created by the Applicant's

proposed development and compared the impacts to the exactions for the greenway trail and other right-of-way improvements. The Hearings Officer found that the trail and right-of-way exactions satisfied the *Nollan* and *Dolan* constitutional nexus and rough proportionality tests.

The result of the above findings is a decision is to uphold the BDS staff decision (Exhibit H.7) and deny the Appellants' appeal.

IV. DECISION

The appellants did NOT prevail in this appeal.

The BDS administrative decision rendered on May 22, 2007 (Exhibit H.7) is upheld and the application for Greenway Review is denied. The Hearings Officer finds the City to be the prevailing party.

Gregory J. Frank, Hearings Officer

Date

Application Determined Complete:	February 26, 2007
Report to Hearings Officer:	May 22, 2007
Decision Mailed:	July 13, 2007
Last Date to Appeal:	August 3, 2007

Procedural Information. The application for this land use review was submitted on October 23, 2006, and the Applicant requested it be considered complete on February 26, 2007.

Zoning Code Section 33.700.080 states that Land Use Review applications are reviewed under the regulations in effect at the time the application was submitted, provided that the application is complete at the time of submittal, or complete within 180 days. Therefore this application was reviewed against the Zoning Code in effect on October 23, 2006.

Appealing this decision. The Hearings Officer's decision is final and takes effect on the day the notice of decision is mailed. The decision may not be appealed to City Council, but may be appealed to the Oregon Land Use Board of Appeals (LUBA), as specified in the Oregon Revised Statute (ORS) 197.830. Among other things, ORS 197.830 requires that:

- an appellant before LUBA must have presented testimony (orally or in writing) as part of the local hearing before the Hearings Officer; and

- a notice of intent to appeal be filed with LUBA within 21 days after the Hearings Officer's decision becomes final.

Please contact LUBA at 1-503-373-1265 for current information on your rights to file and any rules related to filing an appeal before LUBA.

EXHIBITS
NOT ATTACHED UNLESS INDICATED

- A. Applicant's Statement
 - 1. Narrative (Approval Criteria, Environmental Report, NOAA-Programmatic Biological Opinion)
 - 2. River Traffic Counts
 - 3. Top of Bank/Greenway Setback
 - 4. Easement Documents
 - 5. Supplemental Narrative
- B. Zoning Map (**attached**)
- C. Plans/Drawings:
 - 1. Site Plan (Sheet A.1) (**attached**)
 - a. Overall Site Plan (3/5/2007 and 3/6/2007)
 - 2. Landscape Plans (Sheets L1.0, L1.1, L1.2)
 - 3. Floor Plan (Sheet A2.0)
 - 4. Building Elevations (Sheets A3.0, A3.1)
 - 5. Dock Plan
 - 6. Dock Gangway Details
 - 7. Construction Management Plan
 - 8. Full size plan set (site, landscape, floor, dock)
- D. Notification information:
 - 1. Mailing list
 - 2. Mailed notice
- E. Agency Responses:
 - 1. Urban Forestry and Water Bureau
 - 2. Life Safety/BDS
 - 3. Fire Bureau
 - 4. Site Development/BDS
 - 5. Bureau of Environmental Services
 - 6. Portland Transportation (**attached**)
 - 7. Portland Parks and Recreation
 - 8. Department of State Lands
- F. Correspondence:
 - 1. Ed Birnbaum, 3/22/2007, re: trail safety
 - 2. Christine Cook, 3/22/2007, re: trail requirements
 - 3. Sam Livingston-Gray, 3/22/2007, re: trail safety
 - 4. Ben Schonberger, 3/22/2007, re: trail requirements
 - 5. Bjorn Warloe, 3/22/2007, re: trail requirements
 - 6. Frank Dufay/*Hosford Abernathy Neighborhood Association*, 3/21/2007, re: trail requirements
 - 7. Michelle McDonald, 3/16/2007, re: boat safety
 - 8. Elisabeth Flaum, 3/14/2007, re: trail requirements and boating conflicts
 - 9. Sid Smith, 3/14/2007, re: trail safety and boating impacts on waterway
 - 10. Tom Lea, 3/13/2007, re: trail requirements
 - 11. Ken Nichols, 3/13/2007, re: trail requirements

12. Gayle Norie, 3/13/2007, re: trail requirements
13. Patrick Brandimore, 3/12/2007, re: trail requirements
14. Sean Green, 3/12/2007, re: trail safety
15. Chas Hrastar, 3/12/2007, re: trail safety
16. Savannah Teller-Brown, 3/12/2007, re: trail requirements
17. Jonathan Vinson, 3/12/2007, re: trail requirements
18. Natalie Yager, 3/12/2007, re: trail requirements

G. Other:

1. Original LU Application
2. Site History Research
3. Plat Map-Kern's Addition (pre 1959) and Tax Map (2007)
4. Letter to Applicant re: incomplete application
5. Correspondence to/from Applicant re: general review issues
6. Correspondence to/from Applicant re: easements
7. Correspondence to/from Applicant re: review timeline extensions
8. Wetland Notification to DSL
9. Benefits of Non-Motorized Trails, Oregon Parks and Recreation Department
10. Central Eastside Urban Renewal Area Baseline Report, Portland Development Commission
11. Oregon Bicycle and Pedestrian Plan, Oregon Department of Transportation
12. Joint Permit Application

H. Received in the Hearings Office:

1. Hearing notice and appeal
2. Appeal form - Shawn Karambelas, SK Northwest = appellant
- 2a. Appellant's Statement
3. Appeal form - Wayne B. Kingsley & Craigievar Invest, LLC = appellant
- 3a. Owners' written statement
4. 8/16/06 Letter Steve Morasch to Hearings Officer - Appeal of Administrative Decision
5. 8/23/06 Letter Morasch to Hearings Officer - Appeal of Administrative Decision
6. 9/13/06 Letter Morasch to Frank - Appeal of Administrative Decision
7. Staff Administrative Decision
8. 20-page letter Allan, Richard
- 8a. HO decision in LU 05-178171 GW (406039); attached to H-8 Allan, Richard
- 8b. Staff decision, LU 06-182816 GW; attached to H-8 Allan, Richard
- 8c. PCC Chapter 17.15; attached to H-8 Allan, Richard
- 8d. "Project descriptions" Allan, Richard
- 8e. Site plan - Applicant's version (8-1/2x14); attached to H-8 Allan, Richard
- 8f. Site plan / pedestrian's path - Applicant's version (8-1/2x14); attached to H-8 Allan, Richard
- 8g. Site plan / alt. ped. path - Applicant's version (8-1/2x14); attached to H-8 Allan, Richard
9. Letter Birk, Mia
10. 13-page letter Morasch, Steve C.
- 10a. Exhibits A-H; attached to H-10 Morasch, Steve C.
- 10b. Excerpts - LU 05-178171 GW documents 1-2; attached to H-10 Morasch, Steve C.
- 10c. Excerpts - LU 05-178171 GW documents 3-8; attached to H-10 Morasch, Steve C.
11. Memorandum Jeffrey, Jamie

12. Written testimony Poyourou, Michelle
13. Letter from Greenlight Engineering Schonberger, Ben
14. Written testimony Schonberger, Ben
15. Written testimony Kabeiseman, Bill
16. Memo from Kathryn Beaumont, City Attorney's Office
17. Grade comparison chart Green, Kate
18. Memo from Elisabeth Reese Cadigan, BES
19. Letter from Mia Birk
20. Trail siting and design (prepared by Parks Bureau)
21. Letter (duplicate of H-9) Birk, Mia
22. Memo with Portland maps printout Schonberger, Ben
23. Letter from Rick Nys with Greenlight Engineering
24. Letter Morasch, Steve C.
- 24a.4/27/06 Saltzman Letter Morasch, Steve C.
- 24b.Zoning Code Draft Recommended Draft April 1990 with Commentary Morasch, Steve C.
- 24c.1/28/00 Memo to Planning Commissioners from Jill Grenda with Items for Discussion Morasch, Steve C.
- 24d.LU 06-171821 GW 6/6/07 Public Hearing Excerpts Morasch, Steve C.
25. Letter with attachments Allan, Richard
26. Memo Jeffrey, Jamie
- 26a.E-mail Steve Morash to Chris Clemow Jeffrey, Jamie
- 26b.PortlandMaps printouts Jeffrey, Jamie
- 26c.Multnomah County Property Records printouts Jeffrey, Jamie
27. Memo Green, Kate
- 27a.BDS Staff Presentation to Hearings Officer LU 06-171821GW Green, Kate
- 27b.Transportation System Development Charges Rate Study - 6/11/97 Green, Kate
28. Memo with map Green, Kate
29. Letter requesting record be re-opened Cook, Christine M.
30. Intermediate Ruling Hearings Officer
31. Letter/Applicant's Closing Argument Allan, Richard