

**BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON**

MICHELLE BARNES,

Petitioner,

v.

CITY OF HILLSBORO,

Respondent,

and

THE PORT OF PORTLAND,

Intervenor-Respondent.

LUBA Case No. 2010-011

JOINT RESPONDENTS' BRIEF

Pamela J. Beery, OSB No. 801611
David F. Doughman, OSB No. 002442
Beery, Elsner & Hammond LLP
1750 SE Harbor Way, Ste. 380
Portland, OR 97201-5164
Phone: (503) 226-7191

Of Attorneys for Respondent

William Kabeiseman, OSB No. 944920
Jennifer Bragar, OSB No. 091865
Garvey Schubert Barer
121 SW Morrison, 11th Floor
Portland, Oregon 97204
Phone: (503) 228-3939

Of Attorneys for Petitioner

Misti K. Johnson, OSB No. 010638
The Port of Portland
7000 NB Airport Way, 3300
Portland, Oregon 97218

Of Attorneys for Intervenor-Respondent

Dana L. Krawczuk, OSB No. 994477
Ball Janik LLP
101 SW Main St Ste 1100
Portland OR 97204

Of Attorneys for Intervenor-Respondent

Table of Contents

I. STANDING OF PETITIONER AND JURISDICTION OF THE BOARD..... 1

II.STATEMENT OF THE CASE..... 1

III.RESPONSE TO FIRST ASSIGNMENT OF ERROR..... 3

IV.RESPONSE TO SECOND ASSIGNMENT OF ERROR..... 16

V.RESPONSE TO THIRD ASSIGNMENT OF ERROR..... 28

VI.CONCLUSION..... 37

Exhibits and Appendices

- Exhibit 1
- Exhibit 2
- Appendices A - G

1 **I. STANDING OF PETITIONER AND JURISDICTION OF THE BOARD.**

2 Respondent City of Hillsboro (“City”) and Intervenor-Respondent Port of Portland
3 (“Port”), collectively referred to as Respondents, accept Petitioner’s statement of standing and
4 her statement regarding LUBA’s jurisdiction.

5 **II. STATEMENT OF THE CASE.**

6 **a. Nature of the Decision.**

7 The Respondents accept Petitioner’s description of the City’s decision on appeal,
8 however Petitioner’s First and Second Assignments of Error are not directed at the decision on
9 appeal.

10 **b. Summary of Material Facts.**

11 The Respondents generally accept Petitioner’s summary of the material facts, with one
12 exception. The Respondents deny that the Airport Safety and Compatibility Overlay (“ASCO”) zone
13 compels a property owner to provide an easement to the Port of Portland. As discussed
14 below and assuming the Board’s scope of review in this appeal permits it to reach this issue, the
15 City is obligated to apply the ASCO’s requirements in a constitutional manner when property
16 develops in the ASCO zone. Part of the City’s obligation would include a determination on a
17 case-by-case basis whether it could require a property owner to grant the easement described in
18 the Petitioner’s First Assignment of Error.

19 The aviation easement standard that Petitioner challenges descends from the Airport
20 Planning Rule at OAR Chapter 660, division 13. That rule directs the Oregon Department of
21 Aviation (“ODA”) to adopt a system plan and related documents “to provide state policy
22 guidance and a framework for planning and operation of a convenient and economic system of
23 airports, and for land use planning to reduce risks to aircraft operations and nearby land uses.”

24 Consistent with the rule, the Oregon Aviation Board (the ODA’s governing board)
25 adopted the “Airport Land Use Compatibility Guidebook” in January 2003. The guidebook
26 seeks to assist those responsible for planning and zoning in and near airports to ensure

1 compatibility among competing land uses. The guidebook contains model legislation in the form
2 of an overlay zone that specifically contemplates the use of avigation easements as a tool to
3 achieve that compatibility.¹

4 **c. Summary of Arguments.**

5 Petitioner's First and Second Assignments of Error are directed at standards contained in
6 the existing Airport Use Zone ("AU") and ASCO Zone, which resulted from land use decisions
7 that are not the subject of this appeal. The only land use decision subject to this appeal is a
8 zoning map amendment that applies the AU and ASCO zones. If the Board reaches the merits of
9 Petitioner's First Assignment of Error, Respondents assert that Petitioner may not assert a facial
10 challenge to the ordinance adopting the avigation easement standard. Additionally, the City is
11 obliged to apply the standard in a constitutional manner and nothing in the record or in the
12 Petition demonstrate that it cannot or will not.

13 If the Board reaches the merits of Petitioner's Second Assignment of Error, existing and
14 recent case law support Respondents' position that the challenged provisions do not unlawfully
15 delegate the City's legislative authority. As such, the Board can and should conclude that the
16 provisions do not amount to a prospective delegation of the authority. In addition, the Board
17 should avoid any potential constitutional question concerning the challenged provisions based on
18 a recent Court of Appeal's decision.

19 In response to the Third Assignment of Error, Respondents note that the Petitioner does
20 not allege that the zoning map amendment "significantly affects" transportation facilities in
21 violation of the Transportation Planning Rule, and as such the Third Assignment of Error
22 provides no basis for a reversal or remand. In any event, the map amendment complies with the
23 Transportation Planning Rule because, as demonstrated in the record and through the findings
24 contained in this brief, the rezone is a down-zone that drastically reduces the permissible land
25

26 ¹ The model overlay zone is attached as Exhibit 1, and the avigation easement standard is found at page 20. The Board may take judicial notice of the guidebook and its model overlay zone pursuant to ORS 40.090(2).

1 uses on affected properties and the related traffic that could have been generated by previously
2 allowed uses. Therefore, the map amendment will not significantly affect transportation
3 facilities.

4 **III. RESPONSE TO FIRST ASSIGNMENT OF ERROR.**

5 **a. Short Answer.**

6 Petitioner's arguments under its First Assignment of Error are outside the scope of
7 LUBA's review because they collaterally attack existing legislation arising out of a distinct, prior
8 land use decision that is not the subject of this appeal. To the extent LUBA finds Petitioner's
9 arguments to be within the scope of its review in this appeal and not a collateral attack, Petitioner
10 cannot assert in a facial attack that the legislation constitutes a taking under *Dolan v. City of*
11 *Tigard*, 512 US 374 (1994). If LUBA were to determine that Petitioner may indeed facially
12 challenge the legislation under *Dolan*, the City will apply the relevant criteria in a constitutional
13 manner on a case-by-case basis. Finally, the legislation does not violate anyone's substantive
14 due process rights, impose an unconstitutional condition or violate the Oregon Constitution's
15 Privileges and Immunities Clause.

16 **b. Discussion.**

- 17 i. Petitioner's arguments under the First Assignment of Error are a collateral
18 attack against a land use decision that is not the subject of this appeal.

19 Petitioner's First Assignment of Error is directed entirely at a land use decision that it did
20 not appeal and is not the subject of this appeal. As Petitioner's Notice of Intent to Appeal
21 ("NITA") and her Petition for Review ("PFR") make clear, she is only challenging Hillsboro
22 Ordinance No. 5935 (the "Decision").

23 As Petitioner correctly notes, the Decision "amends the official Zoning Map of the City
24 of Hillsboro changing the zoning of multiple properties at and surrounding the Hillsboro Airport
25 by applying the Airport Use ("AU") Zone and the Airport Safety and Compatibility Overlay
26 ("ASCO") Zone." PFR at 1. In other words, the Decision simply applies the City's zone change

1 standards at Hillsboro Zoning Ordinance (“HZO”) Section 114(2), considers relevant goal and
2 comprehensive plan criteria and approves the zone changes.

3 Under the First Assignment of Error, the Petitioner alleges a variety of constitutional
4 violations, and states that therefore “LUBA must reverse or remand the County’s [sic] decision.”
5 However, Petitioner’s First Assignment of Error does not assert or imply that the *Decision* is
6 constitutionally flawed. In fact, the First Assignment of Error does not evaluate or assign fault to
7 any aspect of the Decision.

8 Instead, Petitioner’s First Assignment of Error, and the constitutional arguments
9 contained within it, exclusively and collaterally attacks a development standard contained in the
10 ASCO zone. R. at 61 – 64, 66. As Petitioner admits, the zones and their relevant standards,
11 including the avigation easement standard that is the subject of the First Assignment of Error,
12 were previously enacted pursuant to Ordinances Nos. 5925 and 5926 (the “Prior Decisions”).
13 PFR at 2. The Petitioner could not and does not allege that the zones and their standards,
14 including the standard challenged in the First Assignment of Error, were created by or applied in
15 the Decision being appealed.

16 The Prior Decisions were adopted in October 2009. R. at 33, 45. The Prior Decisions
17 were not appealed by any party and are now deemed acknowledged under ORS 197.625.² In
18 fact, the record demonstrates that the Petitioner was well aware of the Prior Decisions. R. at 233
19 – 235; 245 – 248. If she had standing pursuant to ORS 197.620, Petitioner could have appealed
20 the Prior Decisions, including the standard she collaterally attacks in her First Assignment of
21 Error. However, neither the Petitioner nor any other party appealed the Prior Decisions.

22 LUBA has never held that in an appeal of a decision implementing a zone change, a
23 person may challenge an existing underlying standard of the zone when that standard is not
24 applied in the zone change decision itself. This is precisely what Petitioner seeks to do in this
25 appeal. It is analogous to a property owner whose property is rezoned from zone “X” to zone
26

² See Exhibit 2 (copies of DLCD’s acknowledgement orders for both ordinances).

1 “Y” challenging the constitutionality of an existing setback in zone Y, when that setback is not
2 being applied in the decision being appealed. To the contrary, LUBA and the Oregon Court of
3 Appeals have rejected this kind of untimely challenge, and have held that a person may only
4 challenge a land use regulation or decision that is the subject of the decision being appealed.

5 In *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, *aff’d* 195 Or App 763, 100
6 P3d 218 (2004), the Board considered the issue of whether a Petitioner could collaterally attack a
7 prior land use decision. Unlike the unambiguous nature of the zone change decision being
8 appealed in this case, LUBA was confronted with a very complicated fact pattern that made it
9 difficult for the Board to evaluate the scope of its review authority in *Butte Conservancy*. 47 Or
10 LUBA at 293.

11 The decision at issue in *Butte Conservancy* concerned a final plat approval that followed
12 a 1998 tentative subdivision approval. *Id.* While it obviously could have been clearer, the
13 tentative approval ultimately required the applicant to receive final plat approval by 2003. *Id.*
14 However, based on a mutual misunderstanding of when the tentative approval expired, the
15 applicant applied for and the city approved an “extension” of the approval that required the
16 applicant to seek final plat approval by late 1999, some three years earlier than the tentative
17 approval actually required. *Id.*

18 Realizing that it would not meet the revised 1999 deadline, that year the applicant applied
19 for and the city approved placing the tentative approval on inactive status and required the final
20 plat to be approved by 2002. *Id.* LUBA determined that the 1999 decision approving the
21 tentative plan’s inactivity, however inconsistent with the original approval, was a final decision
22 that could not be challenged in the *Butte Conservancy* appeal. *Id.*

23 In 2000, Gresham staff realized that the 1999 decision “inactivating” the tentative plan
24 was wrong based on their ultimate realization that the 1998 tentative approval was originally
25 valid for five years. *Id.* The city informally communicated this fact to the applicant and both
26 parties proceeded based upon the understanding that the final plat had to be filed in 2003. *Id.* at

1 294. In 2002, the applicant sought and the city approved another extension to the deadline,
2 requiring the final plat to be approved no later than 2004. *Id.*

3 At LUBA, the petitioner argued that the final plat approval was void based upon the
4 original “extension” that required the final plat to be approved in 1999. The respondents argued
5 that either staff’s informal communication to the applicant in 2000 or the 2002 formal extension
6 impliedly voided the original extension, and thus the petitioner was improperly collaterally
7 attacking those decisions on appeal.

8 The Board analyzed the effect this procedural morass had on its scope of review by
9 stating that the respondents’ position “is based on the *unexceptional* principle that assignments of
10 error that collaterally attack a decision other than the decision on appeal do not provide a basis
11 for reversal or remand.” *Id.* at 291. (emphasis added). Having found its way through the factual
12 thicket described above, the Board concluded that Gresham’s 2002 extension voided the original
13 extension. The Board concluded that “[t]o the extent petitioner’s assignments of error are
14 directed at the challenged May 14, 2004 decision, those assignments of error do not provide a
15 basis for reversal or remand. To the extent petitioner’s assignments of error are in substance a
16 challenge to the December 11, 2002 decision, that decision cannot be collaterally attacked in this
17 appeal, and therefore those assignments of error do not provide a basis for reversal or remand.”
18 *Id.* at 296.

19 Thankfully, this appeal presents the Board with a much simpler analysis relative to its
20 scope of review. Only two land use decisions are relevant. Echoing LUBA’s conclusion in the
21 *Butte Conservancy* appeal, to the extent Petitioner’s First Assignment of Error in this appeal is
22 directed at the challenged Decision, it does not provide a basis for reversal or remand. This is
23 because the Decision did not create or apply the standard to which Petitioner directs her First
24 Assignment of Error. To the extent Petitioner’s First Assignment of Error is directed at the Prior
25 Decisions, those decisions cannot be collaterally attacked in this appeal, and therefore it similarly
26 does not provide a basis for reversal or remand.

1 The Petitioner's First Assignment of Error is without question entirely directed at the
2 Prior Decisions. As the Board held in *Butte Conservancy*,³ such a collateral attack is outside
3 LUBA's scope of review and does not provide a basis to reverse or remand the Decision.
4 Therefore, the First Assignment of Error must be denied on this basis.

5 ii. Petitioner's claim that the legislation constitutes a taking can only be
6 brought as an as-applied challenge, if at all.

7 If the Board were to find that its scope of review in this appeal extends to Petitioner's
8 First Assignment of Error, the Petitioner faces a fundamental hurdle in her attempt to have the
9 Prior Decisions declared unconstitutional. Petitioner asserts a facial challenge against the Prior
10 Decisions,⁴ but the challenge necessarily depends upon analyses that apply to, and depend on
11 facts unique to, the actual application of standards to specific property.

12 As Petitioner's First Assignment of Error makes clear, she believes that a standard
13 contained in the Prior Decisions constitutes a taking of private property for which just
14 compensation must be paid. Specifically, Petitioner asserts that the Prior Decisions on their face
15 compel a property owner to surrender an "avigation easement" when property subject to the
16 standard is developed.

17 In order to sustain her facial challenge to the Prior Decisions, the Petitioner must
18 demonstrate to LUBA that the *mere adoption* of those decisions, and the avigation easement
19 standard contained within, constitute a taking of private property and that they cannot be applied
20 in a constitutional manner. *Carson Harbor Village, Ltd. v. City of Carson*, 37 F3d 468, 473 (9th

21
22 ³ Many other cases also stand for the proposition that challenging a land use decision that is not the subject of a
23 petitioner's NITA provides no basis for reversal or remand of the decision being appealed. See *Just v. Linn County*,
24 59 Or LUBA 233, 235 (2009); *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005); *Robson v. City of La*
25 *Grande*, 40 Or LUBA 250, 254 (2001); *Bauer v. City of Portland*, 38 Or LUBA 715, 721 (2000).

26 ⁴ Petitioner arguments under the First Assignment of Error read at times like an as-applied challenge to the Prior
25 Decisions. See PFR at 1, 20-21 ("*[t]his imposition of a required Avigation Easement . . .*"); PFR at 9, 22-23 ("*the*
26 *imposition of avigation easements . . .*"); PFR at 13, 15-16 ("*the imposition of the easement . . . is still arbitrary . . .*).
The reality is that the avigation easement was not imposed or applied in this appeal. As such, Petitioner's argument
under the First Assignment of Error is fairly viewed a facial challenge to the avigation easement standard.

1 Cir. 1994). As discussed below, Petitioner cannot make that demonstration because her
2 challenge relies on cases and theories that are only applicable in as-applied, not facial,
3 challenges.

4 The Petitioner begins by citing approvingly to *Griggs v. Allegheny County*, 369 US 84,
5 82 S Ct 531, 7 LEd 2d 585 (1962) and *Thornburg v. Port of Portland*, 233 Or 178, 376 P2d 100
6 (1962). These cases do not assist Petitioner because they are products of inverse condemnation
7 actions against the government, not facial challenges against a new land use regulation. While
8 both cases involved flights over private property, their resulting decisions depended upon facts
9 specific to such flights and relative to each specific property and its owner. Neither case
10 establishes that flights over private property and related impacts are per se nuisances, or infringe
11 upon any property right, as asserted by Petitioner. PFR at 6 and 8. Moreover, neither case
12 involved a broad based challenge to a land use regulation that had yet to be applied to any
13 property. The unique facts present in both cases are entirely absent in Petitioner's facial
14 challenge to the Prior Decisions.

15 In *Thornburg* and in *Griggs*, property owners sued the government based upon facts that
16 were unique to each owner and the airplane flights that passed over their property. The property
17 owner in *Thornburg* resided about 6000 feet beyond of the end of one runway and 1500 feet
18 beyond the end of a second runway. 233 Or at 181, 376 P2d at 101. The *Thornburg* owner
19 claimed that noise from airplanes overhead were compensable takings under the Oregon
20 Constitution. *Id.* at 180, 101.

21 The *Thornburg* court did not decide whether or not the flights themselves constituted
22 takings. Instead, the court was asked to determine "whether, under the circumstances of [the
23 case at bar], the landowner has a right to have a jury pass upon his claim." *Id.* at 183, 102. In
24 essence, all the *Thornburg* court determined was whether the property owner in that case had
25 alleged facts sufficient for a jury to determine whether or not a taking had occurred.
26

1 Therefore, *Griggs* and *Thornburg* are not relevant to Petitioner’s facial challenge that
2 collaterally attacks the ordinance that contains aviation easement standard. In those cases,
3 courts were presented with concrete facts regarding flight patterns, the height of the flights at
4 issue, and the precise nature and degree of alleged interference with the properties under review.
5 Moreover, and perhaps most distinguishable from Petitioner’s collateral attack, the *Thornburg*
6 court’s analysis was premised on the fact that “a plaintiff aggrieved by a public activity must
7 show that there has been a taking of his property. There must be more than merely the suffering
8 of some damage.” *Id.* at 184, 103.

9 A more recent case additionally illustrates why cases such as *Griggs* and *Thornburg* are
10 distinguishable from Petitioner’s facial challenge in this appeal. In *Testwuide v. U.S.*, 56 Fed Cl
11 755 (2003), the Court of Federal Claims considered a complaint filed by property owners who
12 alleged a taking due to naval aircraft operations in Virginia. Although the case focused on
13 whether a class of plaintiffs could be certified, the court did address the difficult hurdle such
14 plaintiffs (whether or not they are part of a class) have in making a prima facie case for aviation-
15 related takings.

16 The *Testwuide* court noted that the Supreme Court has stated that the “ancient doctrine
17 that the common law ownership of the land extended to the periphery of the universe . . . has no
18 place in the modern world, as [t]he air is a public highway.” *Id.* at 763 (quoting *U.S. v. Causby*,
19 328 US 256, 66 S Ct 1062, 90 L Ed 1206 (1946)). The court further stated that “[c]ases
20 following *Causby* have concluded that flights above 500 feet in non-congested areas are in the
21 public domain, *i.e.* in navigable airspace.” *Id.*

22 The *Testwuide* court summarized the general test for such takings claims that a plaintiff
23 must meet: “(1) that the planes flew directly over the claimant’s land; (2) the flights were low . . .
24 and frequent, and (3) the flights directly and immediately interfered with the claimant’s
25 enjoyment and use of the land.” *Id.* at 764.

1 Simply put, Petitioner can make no such showing in this appeal. The record is silent as to
2 whether any damage to any property owner exists (let alone damage that would rise to the level
3 of a taking) for the simple reason that flights and their effect on property owners are not at issue
4 in the decision on appeal. Similarly, there is no evidence in the record that the Petitioner is a
5 property owner that could bring a cognizable claim for inverse condemnation from overhead
6 flights at the Hillsboro Airport, much less whether she is a person from whom an avigation
7 easement may be compelled in the future. Indeed, the record does not reveal that Petitioner owns
8 any property affected by the AU or ASCO zones, nor has she made that assertion. Finally, the
9 record does not suggest whether properties potentially subject to the avigation easement
10 experience or will experience flights that would permit a property owner to allege a taking of
11 property. To the extent flights over such properties never fall below navigable airspace, no
12 taking is cognizable.

13 The absence of such facts supports Respondents' position that Petitioner is improperly
14 replying on *Griggs* and *Thornburg* as circumstantial, case-specific authority to support its
15 wholesale facial challenge to the ordinance that contains the avigation easement standard. At
16 most, the Petitioner can attempt to assert in its collateral attack that the standard violates *Dolan's*
17 rough proportionality requirement. However, as the following discussion illustrates, that attempt
18 necessarily fails as well.

19 The Petitioner cites to no authority permitting a *Dolan*-based takings claim in the context
20 of a facial challenge to a regulation. That is because such authority does not exist. To the
21 contrary, courts have consistently held that takings claims premised upon *Dolan* are not
22 permitted in facial challenges to land use regulations.⁵ Because *Dolan's* rough proportionality
23

24
25 ⁵ Other cases include *Action Apartment Ass'n v. City of Santa Monica*, 166 Cal.App.4th 456, 82 Cal.Rptr.3d 722
26 (2008); *Kamaole Pointe Development LP v. County of Maui*, 573 F.Supp.2d 1354 (D. Hawai'i 2008); *Wisconsin
Builders Ass'n v. Wisconsin Dept. of Transp.*; 285 Wis.2d 472, 702 N.W.2d 433 (Wis. App. 2005); *Greater Atlanta
Homebuilders Ass'n v. DeKalb County*, 277 Ga. 295, 588 S.E.2d 694 (Ga. 2003).

1 test is designed to limit overreaching in ad-hoc, quasi-judicial settings, it is cognizable only in
2 as-applied challenges.

3 The Ninth Circuit had the opportunity to consider *Dolan's* applicability in a facial
4 challenge in *Garneau v. City of Seattle*, 147 F3d 802 (1998). In that case, the City of Seattle
5 passed an ordinance that required landlords to pay one-half the cost of relocating low-income
6 tenants. *Id.* Certain affected property owners sued and claimed in part that the ordinance was a
7 taking under *Dolan*.

8 The *Garneau* court left little doubt as to *Dolan's* applicability to facial challenges when it
9 stated “[t]he *Dolan* analysis cannot be applied in facial takings claims.” *Id.* at 811 (emphasis
10 added). The court held that *Dolan* relates “only to as-applied challenges” to regulations and that
11 “*Dolan* does not address when a taking has occurred [but rather] only how close a fit the
12 exaction (which would otherwise constitute a taking) must have to the harms caused by
13 development.” *Id.*

14 The *Garneau* court recognized that the limitations inherent in a *Dolan* analysis do not
15 assist courts in deciding facial takings claims. That is because a facial challenge necessarily
16 “involves a claim that the mere enactment of [legislation] constitutes a taking, while an as-
17 applied challenge involves a claim that the particular impact of a government action on a specific
18 piece of property requires the payment of just compensation.” *Id.* As the court explained, in the
19 *Dolan* case, the Supreme Court considered whether the exaction was disproportionate to the
20 permit requested. *Id.* However, in a facial challenge, a court cannot analyze the exaction at all,
21 because it necessarily has not yet occurred. *Id.* The court cited to *Lucas v. South Carolina*
22 *Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992) as an example of a
23 successful facial claim. In *Lucas*, the Coastal Council promulgated regulations that prohibited
24 all beneficial use of the owner’s property. *Id.* The Supreme Court found that the mere
25 enactment of such regulations rendered the owner’s property unusable and without value. *Id.*
26

1 The *Garneau* court also found no support for *Dolan* in a facial challenge because *Dolan*
2 doesn't address when a taking occurs, but rather if a taking occurs whether under the rough
3 proportionality test the government can avoid paying just compensation in exchange for granting
4 a permit. *Id.* Again, this can only be determined on a case-by-case basis and in consideration of
5 the myriad facts that accompany every development proposal.

6 Regardless of *Dolan's* inapplicability to facial challenges, it is not at all clear that the
7 Board can consider Petitioner's facial takings challenge. The Ninth Circuit has clearly held that
8 in order to sustain a facial takings challenge, the person bringing the challenge must have owned
9 property subject to the challenged regulations at the time the regulations were enacted. *See*
10 *Carson Harbor, supra*, at 476. As stated above, the record does not demonstrate that Petitioner
11 owns any property in the area subject to the zone changes.

12 iii. The mere enactment of the avigation easement standard does not cause a
13 taking and City may exercise discretion in applying the avigation
14 easement standard.

15 If the Board were ultimately to determine that: (1) Petitioner's facial challenge is not a
16 collateral attack against a prior land use decision; (2) Petitioner can raise *Dolan*-based arguments
17 in her facial challenge; and (3) the Board can consider Petitioner's facial claims even though the
18 record does not indicate that she owns affected property, the Respondents offer the following
19 response.

20 First, the mere enactment of the avigation easement standard has not reduced the value of
21 any property, much less any of Petitioner's property, and certainly does not cause any property
22 interest to be transferred. *See Carson Harbor* at 476 (in takings context, basis of facial challenge
23 is regulation enactment itself has reduced property values or has transferred a property interest).
24 Petitioner can point to no evidence in the record that analyzes the easement standard and its
25 effect on property values, and certainly cannot demonstrate that the standard *will* reduce property
26 values. Similarly, Petitioner cannot and does not argue that the City's enactment of the easement

1 standard itself transfers any property interest. For these reasons, Petitioner's facial takings
2 challenge to the easement must be denied.

3 Petitioner's arguments essentially predict a future scenario where the City compels an
4 avigation easement from every person developing property in the ASCO zone, where in every
5 instance compelling the easement would be a taking⁶ and in every instance the City could not
6 demonstrate that rough proportionality exists. These are rather absurd assumptions, and
7 precisely why such takings claims are only susceptible to analysis on an as-applied basis.

8 To the extent the City must demonstrate rough proportionality if an avigation easement is
9 required in a future development proposal, the City will have a range of options available to it.
10 First, it may find based upon the facts in a given case that the requirement would be roughly
11 proportional.⁷ Second, an applicant could seek a variance to the standard. Third, the City could
12 elect not to apply the standard. *See Columbia Riverkeepers v. Clatsop County*, 58 Or LUBA 235
13 (2009) (When *Dolan* applies, it can function as a variance, and a local government may choose
14 not to exact property as a condition of development approval that it would otherwise be entitled
15 to exact under its land use regulations, as an alternative to compensating the landowner for the
16 taking). Finally, the City and/or the Port could compensate the landowner.

17 iv. The avigation easement standard does not violate any substantive due
18 process rights.

19 Although the record does not indicate that she owns affected property, the Petitioner also
20 asserts that the avigation easement standard violates the substantive due process rights of

21 ⁶ Given the legislative nature of the easement standard, it is not clear that it *Dolan* will be applicable. Both *Dolan*
22 and its predecessor, *Nollan v. California Coastal Com'n*, 483 US 825 (1987) addressed conditions that resulted from
23 adjudicatory, not legislative processes. *See Ehrlich v. City of Culver City*, 12 Cal 4th 854, 911 P2d 429 (1996); *San*
24 *Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal 4th 643, 41 P3d 87 (2002). In any event, the
25 "essential nexus" demanded by *Nollan* and the "rough proportionality" test under *Dolan* are or can be met when the
26 standard is applied. The easement requirement is one tool to assure that the area around the Airport is safe and that
uses near the Airport will be compatible with one another, and thus an essential nexus exists between the standard
and the City's legitimate interest in protecting and improving safety in the area.

⁷ To the extent *Dolan* would be applicable to the easement requirement, this as-applied analysis would include
whether and to what extent the easement may constitutionally permit a right of entry on property.

1 property owners in the ASCO zone. There are a few problems with this assertion. To establish a
2 substantive due process violation, the Petitioner must prove that the avigation easement is
3 “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety,
4 morals or general welfare.” *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F2d 1398,
5 1407 (9th Cir. 1989). Legislative acts that do not impinge on fundamental rights or employ
6 suspect classifications are presumed valid, and this presumption is overcome only by a “clear
7 showing of arbitrariness and irrationality.” *Hodel v. Indiana*, 452 US 314, 331-32, 101 S Ct
8 2376, 2387, 69 L Ed 2d 40 (1981). Moreover, and contrary to the Petitioner’s implication that an
9 avigation easement would be irrationally turned over to a third party, the easement would be
10 provided to the Port of Portland, the governmental entity responsible for ensuring that the
11 Airport’s operations occur in a manner that facilitates and promotes regional air travel while
12 balancing the safety needs of the surrounding area.

13 Petitioner indicates that an avigation easement may implicate a fundamental right, but
14 concedes that it may well not. *Cf.* PFR at 12, 10-22; PFR at 13, 15. At the very least, Petitioner
15 has not established with any degree of certainty that the easement affects a fundamental right,
16 and as discussed above Petitioner cannot and does not argue that the City’s enactment of the
17 avigation easement standard itself transfers any property interest. As such, the standard does not
18 violate substantive due process and the standard must be upheld as long as it advances any
19 legitimate public purpose, *Construction Indus. Ass'n v. Petaluma*, 522 F2d 897, 906 (9th Cir.
20 1975) and if it is “at least fairly debatable” that the decision to adopt the standard was rationally
21 related to legitimate governmental interests. *Christensen v. Yolo County Bd. of Supervisors*, 995
22 F2d 161, 165 (9th Cir. 1993).

23 The avigation easement standard easily clears that hurdle. It is a tool that is recommended
24 and endorsed by the ODA to address airport compatibility and avoid land use conflicts in areas
25 surrounding airports. It is part of the ASCO’s development standards and is one that
26 implements the zone’s purpose. The zone’s purpose is “to establish compatibility and safety

1 standards to promote air navigational safety and reduce potential safety hazards for persons
2 living, working or recreating near the Hillsboro Airport, thereby encouraging and supporting its
3 continued operation and vitality.” R. at 51. Based on such language, it is beyond debatable that
4 the standard is rationally related to the City’s interest in promoting safety in and around the
5 Hillsboro Airport and supporting its operations.

6 In addition, in light of Petitioner’s takings challenge discussed above, she may not bring a
7 substantive due process challenge. If she can establish that the mere adoption of the avigation
8 easement standard took private property, and because the takings clause “provides an explicit
9 source of constitutional protection” against the challenged governmental conduct, a substantive
10 due process argument is not proper in this appeal. *See Garneau, supra*, at 806; *see also Macri v.*
11 *King County*, 126 F3d 1125, 1129 (9th Cir. 1997).

12 v. The avigation easement standard does not result in the imposition of an
13 unconstitutional condition.

14 The Petitioner’s assertion that the avigation easement standard constitutes an
15 unconstitutional condition is substantively a return to its *Dolan* arguments, described and
16 responded to above. To the extent it is necessary, Respondents incorporate that response here.

17 In addition, the Petitioner “must establish that no set of circumstances exists under which
18 the [easement standard] would be valid. The fact that [the easement standard] might operate
19 unconstitutionally under some conceivable set of circumstances is insufficient to render [it]
20 wholly invalid.” *Rust v. Sullivan*, 500 US 173, 111 S Ct 1759 (1991) (quoting *United States v.*
21 *Salerno*, 481 US 739, 745, 107 S Ct 2095, 2100, 95 L Ed 2d 697 (1987)). The Petitioner has
22 certainly not established that there are no set of circumstances under which the easement could
23 be imposed in a constitutional manner. And as Respondents discuss above, there may be future
24 instances when the standard is applicable that the City would choose not to require a property
25 owner to provide the easement, thereby avoiding an unconstitutional condition.

