

The Columbian

Columbia Country

Clark County and Southwest Washington

County loses 'takings' case

□ Judge says Clark County should not have required developer to extend a road

By **JEFF MIZE**
The Columbian

Clark County ran afoul of the U.S. Constitution when it required a local developer to extend a 32-foot-wide street.

Clark County Superior Court Judge Thomas Lodge ruled last week that the condition placed on developer Lance Burton represents an unconstitutional taking of private property.

Burton wants to divide a .78-acre parcel into three lots on Northeast 65th Street in Hazel Dell. The county approved the plan, as long as

Burton agreed to extend 65th Street through the property. With further development, the road would curve north and connect to Northeast 20th Avenue.

Burton never built the street. Instead, he spent his money — some \$30,000 by his own estimation — fighting the county.

He also became an outspoken advocate for Referendum 48, which would have forced local governments to compensate landowners anytime regulations decrease property values.

Washington voters rejected Referendum 48 by a 3-2 ratio in Tuesday's election, but property rights remain a hot issue, both in the courts and in state legislatures across the country.

The Fifth Amendment prohibits

governments from taking private property for public use without paying for it, but there are wildly different views on what constitutes an illegal taking.

Lodge's decision relies heavily on the U.S. Supreme Court's 1994 decision in *Dolan vs. the city of Tigard*. The court determined there must be "rough proportionality" between the effect of a new development and the conditions imposed.

Lodge sided with the county by finding a reasonable connection between increased traffic from Burton's development and the county's conditions.

But he said the county failed to make an "individualized determination" for rough proportionality as required by Dolan. Thus, it commit-

ted a taking.

Mark A. Erikson, Burton's attorney, wanted the conditions themselves declared unconstitutional.

"I would have liked to have more because we're making law in the area," he said.

But Erikson wasn't complaining about the decision.

"It's a taking, and it's reversed and remanded," he said. "We won."

The next move is up to Clark County. It could acquiesce and eliminate Burton's requirement to extend 65th Street.

Or it could try to show that it's proportional to the expected increase in traffic caused by dividing the property into three lots.

Erikson said he doesn't believe that argument would hold up in court.

"There are cases before the appellate court in which the court found 25 trips per hour in similar conditions did not satisfy the Dolan rough proportionality requirement," he said. "Here we're talking about an additional 20 trips per day."

But Rich Lowry, the county's chief civil attorney, said the Washington Supreme Court last week overturned a Court of Appeals' decision that involves similar issues.

"We may well be asking Judge Lodge to reconsider his decision based on this very recent Supreme Court case," he said.

Lowry said the case will be discussed in a closed session with county commissioners. No date has been set.

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