

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 WILLIAM LARSSON and DEBRA LARSSON,)

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LUBA No. 93-174

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FINAL OPINION
AND ORDER

10 CITY OF LAKE OSWEGO,)

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1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the city council
4 denying, in part, their request to modify conditions of
5 approval for a previously approved partition.

6 **FACTS**

7 The subject property is a residential parcel located
8 within the City of Lake Oswego. The challenged decision
9 states the following additional facts:

10 "The original minor partition * * * was approved
11 by staff on April 16, 1990, as a 'minor
12 development' pursuant to [Lake Oswego Code
13 (LOC)] 49.140(1)(H). Minor developments are staff
14 decisions, subject to notice and an opportunity to
15 appeal. Staff imposed a number of conditions of
16 approval on the partition pursuant to LOC 49.620,
17 which allows the City to impose conditions or
18 restrictions on any major or minor development
19 approval in order to protect the public, implement
20 the requirements of the Comprehensive Plan and
21 [LOC] Chapter 49, and/or to fulfill a need for
22 public services created or increased by the
23 proposal. LOC 49.620(1)(A), (B) and (C). These
24 conditions include [c]ondition 3, which required
25 the applicants to sign a non-remonstrance
26 agreement and petition for formation of a local
27 improvement district (LID) for future street
28 improvements along Iron Mountain Boulevard and
29 Chandler Road; and [c]ondition 11, which required
30 the applicants to post a cash deposit for the
31 purpose of constructing a pathway along Iron
32 Mountain Boulevard. The applicants did not appeal
33 [the previous minor partition decision] and
34 subsequently executed the non-remonstrance
35 agreement and paid the pathway deposit. The
36 partition was completed, the new parcel (parcel 2)
37 was sold and a new dwelling was constructed on the
38 new parcel during the summer of 1990. The
39 applicants retained [the remainder of the original

1 parcel (parcel 1)], which is occupied by a
2 preexisting dwelling.

3 "The applicants subsequently filed an application
4 to modify the approved partition by deleting
5 conditions 3 and 11 as applied to parcel 1. * * *
6 Staff denied the request * * *. The applicants
7 appealed the decision to the Development Review
8 Board [(DRB)] pursuant to LOC 49.225, which held a
9 de novo hearing and denied the modification * * *.
10 Applicants then appealed the DRB's decision to the
11 [City] Council." Record 9-10.

12 After a public hearing, the city council issued an
13 order modifying the minor partition approval by deleting
14 condition 11, but denying petitioners' request to delete
15 condition 3.¹ This appeal followed.

16 **INTRODUCTION**

17 Most of petitioners' arguments are principally directed
18 at deficiencies associated with the non-remonstrance
19 agreement they executed with the city pursuant to
20 condition 3. However, the proceedings below were, and
21 indeed the challenged decision is, concerned solely with the
22 question of whether condition 3 should be deleted from a
23 prior, unappealed, city partition decision. Therefore, the
24 only issue before us is whether the challenged city decision
25 refusing to delete condition 3 is erroneous.²

¹The portion of the decision that deletes condition 11 is not challenged, and we do not consider it further.

²That the agreement petitioners executed pursuant to condition 3 may or may not accurately reflect the requirements of condition 3 is an issue not before us in this appeal proceeding. Issues associated with the validity of the agreement itself may well arise if the city chooses to enforce the

1 The challenged decision states as follows:

2 "* * * The [City] Council concludes that requiring
3 an applicant for a partition to sign a
4 non-remonstrance agreement to allow future
5 improvement of a substandard City street is
6 reasonably related to mitigating the impacts of
7 the partition on that public facility, and is more
8 practical and less onerous on the property owner
9 than requiring immediate construction of a
10 half-street improvement or denying all development
11 which increases density or intensity of use until
12 the street is improved." Record 18.

13 Petitioners do not challenge these findings.

14 In its brief for this appeal the city explains its
15 understanding of what is not in dispute in this appeal
16 proceeding:

17 "[P]etitioners did not and do not contest any of
18 the City's findings and conclusions as they relate
19 to the evidence in the record or to the local code
20 requirements. Based upon these uncontested
21 findings and conclusions, the non-remonstrance
22 agreement condition is directly related to
23 mitigating the impact created by the partition
24 and, therefore, more than survives scrutiny under
25 [Parks v. Watson, 716 F2d 646 (9th Cir 1983)]."
26 Respondent's Brief 26.

27 Similarly, we do not understand petitioners to contest
28 that condition 3 is directly related to the city's original
29 partition approval. Further, there is no contest that
30 condition 3, together with other conditions of approval, was
31 imposed as an alternative to denial of petitioners' original
32 partition proposal. In this regard, there is no dispute the

condition. However, the validity of the agreement is not presented in this appeal, and we do not consider it further.

1 city could have required petitioners to construct their fair
2 share of improvements to the substandard roadway on which
3 the subject property fronts, instead of imposing
4 condition 3.

5 **FIRST ASSIGNMENT OF ERROR**

6 "The non-remonstrance agreement violates the right
7 to freedom of speech under the First Amendment to
8 the U.S. Constitution."

9 **SECOND ASSIGNMENT OF ERROR**

10 "The non remonstrance agreement violates Article
11 I, Section 8, of the Oregon Constitution."

12 **THIRD ASSIGNMENT OF ERROR**

13 "The city's conditioning the approval of a
14 partition on petitioners' entering into a
15 non-remonstrance agreement was illegal."

16 Disputed condition 3 provides:

17 "The applicant[s] shall provide the City a signed
18 agreement of non-remonstrance and petition for
19 future street improvements anticipated in Iron
20 Mountain Boulevard and Chandler Road. This
21 agreement shall apply to all parcels approved and
22 be binding on subsequent owners." Record 140.

23 There is no specific definition in the city code of the
24 terms remonstrance or non-remonstrance. However, the
25 challenged decision interprets remonstrance and
26 non-remonstrance, in the context of condition 3, as follows:

27 "* * * Lake Oswego Charter Article IX, Section 37
28 and LOC Chapter 40 govern formation of [limited
29 improvement districts (LIDs)]. LOC 40.060
30 and 40.090 require two public hearings to be held:
31 The first hearing is to determine whether the
32 proposed LID should be formed, draw the
33 appropriate boundaries of the LID, determine the

1 appropriate assessment formula and set the
2 appropriate interest rate. The second hearing is
3 to hear objections to the amount of the
4 assessment. LOC 40.050(1) authorizes affected
5 property owners to file written remonstrances
6 objecting to formation of the LID at the time of
7 the first hearing. If written remonstrances are
8 received from at least two-thirds of the property
9 owners, formation of the LID is suspended for 6
10 months. A non-remonstrance agreement waives the
11 property owner's right to file a written
12 remonstrance and thereby potentially delay the
13 project for six months.

14 "LOC 40.050(2), however, expressly authorizes and
15 requires the [City] Council to consider oral
16 objections to the project at the first hearing.
17 LOC 40.040 expressly requires the published notice
18 to state that oral objections will be considered
19 at the public hearing. LOC 40.060(2) expressly
20 requires the [City] Council to consider any
21 testimony in addition to written remonstrances in
22 deciding whether to proceed with formation of the
23 LID. LOC 40.080(2) and 40.090 notifies and allows
24 'all persons' to testify in objection to the
25 proposed assessments at the second hearing.
26 Regardless of whether a person has waived his or
27 her right to delay the project in a
28 non-remonstrance agreement, such persons are
29 notified of their right to appear, and may appear,
30 before the Council at the first and second public
31 hearings and object or otherwise testify regarding
32 the LID on the merits. Based upon this express
33 language, the [City] Council concludes that the
34 non-remonstrance agreement condition does not
35 limit the applicants' right to speak on any issue
36 or to seek redress of grievances from the [City]
37 Council in violation of the [Oregon and United
38 States Constitutions]." (Emphasis supplied.)
39 Record 14-15.

40 Petitioners advance a number of reasons why they
41 believe condition 3 is unconstitutional. Essentially,
42 petitioners contend condition 3 is impermissibly vague and

1 violates their right to free expression under the First
2 Amendment to the United States Constitution and Article I,
3 section 8, of the Oregon Constitution. We address these
4 contentions below.

5 **A. Vagueness and Overbreadth**

6 **1. Introduction**

7 Petitioners contend condition 3 is impermissibly vague
8 and overbroad under both the United States and Oregon
9 constitutions. The legal analysis applied to vagueness and
10 overbreadth challenges under both the United States and
11 Oregon constitutions are essentially the same. See State v.
12 Plowman, 314 Or 157, 162, 838 P2d 558 (1992) (vagueness);
13 City of Hillsboro v. Purcell, 306 Or 547, 556 n 8, 761 P2d
14 510 (1988) (overbreadth). The most significant difference
15 between the legal analysis applied to claims concerning
16 restrictions on free expression under the First Amendment to
17 the United States Constitution and claims under Article I,
18 section 8, of the Oregon Constitution has to do with the
19 merits of such claims, not with whether the restricting law
20 is vague or overbroad. Article I, section 8, of the Oregon
21 Constitution permits no direct limitation on the exercise of
22 free expression, whereas the First Amendment to the United
23 States Constitution permits some limitations on certain
24 classes of speech, i.e. obscenity and commercial speech.
25 Compare State v. Robertson, 293 Or 402, 435, 649 P2d 569
26 (1982); Tidyman v. City of Portland, 306 Or 174, 759 P2d 242

1 (1988), with Metromedia Inc. v. San Diego, 453 US 490,
2 101 S Ct 2882, 69 L Ed2d 800 (1981); Young v. American Mini
3 Theaters, 427 US 50, 96 S Ct 2440, 49 L Ed2d 310 (1976); see
4 also Lehman v. City of Shaker Heights, 418 US 298,
5 94 S Ct 2714, 41 L Ed2d 770 (1974). We address petitioners'
6 vagueness and overbreadth challenges before addressing the
7 merits of their constitutional claims.

8 **2. Vagueness**

9 Because the terms remonstrance and non-remonstrance are
10 not defined in either the city code or the challenged
11 condition, condition 3 is ambiguous. However, the fact that
12 condition 3 contains an ambiguous term does not, of itself,
13 establish that condition 3 is unconstitutionally vague. See
14 State v. Plowman, supra, 314 Or at 160 (a reasonable degree
15 of certainty about the kind of conduct falling within a
16 statute's prohibition is required; but absolute certainty is
17 not). Clearly, regulations purporting to limit "speech" are
18 vulnerable to vagueness challenges. See State v. Henry,
19 78 Or App 392, 396, 712 P2d 189, rev'd 302 Or 510 (1987).
20 However, some ambiguity is allowed where the ambiguous
21 language is circumscribed by reference to specific,
22 non-vague regulations. See Juv. Dept. v. D, 27 Or App 861,
23 866, 557 P2d 687 (1976). In the instant case, Condition 3
24 is circumscribed by relatively clear LOC regulations.

25 In Davidson v. Oregon Government Ethics Comm., 300 Or
26 415, 425, 712 P2d 87 (1985), a public official challenged an

1 ethics statute under which he had been prosecuted for civil
2 violations. In determining the ethics statute was not
3 vague, the court observed:

4 "The rule against vagueness does not invalidate
5 every law that leaves room for two or more
6 interpretations on which legislators, lawyers and
7 courts may differ; most laws do. Nor does any
8 rule require that one must be able to predict with
9 certainty the application of the law to every
10 hypothetical set of facts. * * *" Id.

11 After reviewing controlling authorities, we believe the
12 vagueness issue presented here may be framed as whether
13 reasonable applicants can understand what they must do to
14 comply with condition 3. See Anderson v. Peden, 284 Or 313,
15 324, 587 P2d 59 (1978); Oswego Properties, Inc. v. City of
16 Lake Oswego, 108 Or App 113, 814 P2d 539 (1991); Lee v. City
17 of Portland, 57 Or App 798, 646 P2d 662; ORS 227.173(1).

18 The city has specifically interpreted condition 3.
19 Where the interpretative question centers on a local
20 government's interpretation of its prior decision, we have
21 previously said that, under the Clark v. Jackson County,
22 313 Or 508, 836 P2d 710 (1992), standard of review, we must
23 defer to such an interpretation. This is because it is a
24 local government interpretation of locally adopted
25 "applicable law." Perry v. Yamhill County, ____ Or LUBA
26 ____ (LUBA No. 93-072, October 7, 1993), slip op 10, aff'd
27 125 Or App 588 (1993). However, ORS 197.829, which became
28 effective November 4, 1993, may have changed this
29 requirement that LUBA defer to local interpretations of

1 prior local decisions. Under ORS 197.829, LUBA is required
2 to defer to a local government's interpretation of "its
3 comprehensive plan and land use regulations * * *."
4 ORS 197.829 does not specifically require that LUBA defer to
5 local interpretations of prior local decisions.
6 Consequently, it is unclear under ORS 197.829, whether LUBA
7 is to defer to a local government's interpretation of a
8 prior decision or whether LUBA is required to determine
9 whether the local government interpretation of a prior
10 decision is reasonable and correct. See McCoy v. Linn
11 County, 90 Or App 271, 752 P2d 323 (1988).

12 In this appeal, however, we need not determine whether
13 ORS 197.829 changes our scope of review of local government
14 interpretations of prior decisions. As we explain below,
15 the city's interpretation is a reasonable and correct
16 interpretation of the LOC provisions governing the formation
17 of LIDs and, therefore, of condition 3. Thus, we would
18 uphold the city's interpretation of condition 3 regardless
19 of the degree of deference owed to that interpretation.³

20 The only references to the term "remonstrance" in the
21 LOC provisions governing the formation of LIDs refer to a
22 specific kind of written objection, required to be filed
23 with a particular person, in a particular manner, within a

³We also note we must adopt a constitutional interpretation of local law over an interpretation that renders the local law unconstitutional, and that "[u]nconstitutionality is not to be presumed." Miotke v. Gladden, 250 Or 466, 468, 443 P2d 612 (1968).

1 particular period of time. LOC 40.050. LOC 40.050(1)
2 specifically distinguishes between written remonstrances and
3 oral objections. LOC 40.050(1) requires written
4 remonstrances be filed with the city recorder by the "close
5 of the business day of the hearing." Oral comments at the
6 public hearings concerning the formation of LIDs are
7 uniformly referred to in the LOC as oral objections.
8 Further, there is a specific consequence associated with the
9 filing of remonstrances by a 2/3 majority of the affected
10 property owners -- an LID proposal is suspended for a period
11 of six months.

12 We agree with the city that the terms of condition 3
13 are clear enough for petitioners to understand what is
14 expected of them. Read in context with the LOC Chapter 40
15 provisions condition 3 is designed to implement, petitioners
16 are required to execute an agreement that they will not file
17 a LOC 40.050(1) remonstrance with the city recorder. We
18 also conclude it is sufficiently clear that condition 3 does
19 not purport to limit petitioners' presentation of oral
20 objections at public hearings on the LIDs, or to prevent
21 petitioners from making any other form of written objection
22 to a proposed LID, other than a remonstrance under
23 LOC 40.050(1).

24 Condition 3 is not impermissibly vague.

25 This subassignment of error is denied.

1 **3. Overbreadth**

2 Petitioners claim condition 3 is overbroad.

3 Overbreadth in this context refers to legislative action
4 having a sweep so broad that it unreasonably limits
5 constitutionally protected activity. Broadrick v. Oklahoma,
6 413 US 600, 93 S Ct 2908, 2916, 2918, 37 L Ed2d 830 (1973).

7 An overbroad law is one which is not "limited to and
8 contained by the consequences the law seeks to prevent."

9 City of Hillsboro v. Purcell, supra, 306 Or at 556; see also
10 State v. Plowman, supra, 314 Or at 164, and cases cited
11 thereat.

12 We note at the outset that it is difficult to apply the
13 overbreadth doctrine to a quasi-judicial decision
14 interpreting a previously imposed condition of approval. It
15 may be that petitioners mean to allege the LID provisions in
16 the city code are themselves overbroad. However, if this is
17 their claim, we believe petitioners should have made such a
18 claim in an appeal of the city's original partition
19 decision. This is because here, the challenged decision
20 purports to justify only the existence of condition 3 on the
21 basis of its LOC provisions relating to LIDs. We do not
22 understand the city's decision to have opened the door for a
23 general inquiry into whether the city's LID provisions are
24 facially unconstitutional.

25 In any case, we do not believe either condition 3, or
26 the LID provisions condition 3 implements, are overbroad

1 under either the United States or Oregon Constitutions. In
2 Broadrick v. Oklahoma, supra, 93 S Ct at 2918, the United
3 States Supreme Court stated the following with regard to the
4 overbreadth doctrine:

5 "* * * Application of the overbreadth doctrine
6 * * * is, manifestly, strong medicine. It has
7 been employed by the Court sparingly and only as a
8 last resort. Facial overbreadth has not been
9 invoked when a limiting construction has been or
10 could be placed on the challenged statute.

11 "* * * * *

12 "[W]e believe that the overbreadth of a statute
13 must not only be real, but substantial as well,
14 judged in relation to the statute's plainly
15 legitimate sweep. It is our view that [the
16 disputed statute] is not substantially overbroad
17 and that whatever overbreadth may exist should be
18 cured thorough a case-by-case analysis of the fact
19 situations to which its sanctions, assertedly, may
20 not be applied." (Citations omitted.)

21 Here, petitioners have not established the challenged
22 decision does anything that gives condition 3 a "sweep" that
23 substantially exceeds the boundaries of legitimate
24 government regulation. In this regard, it is critical that
25 petitioners do not challenge the city's findings that
26 condition 3 is "reasonably related to mitigating the impacts
27 of the partition" on the substandard city street on which
28 both parcel 1 and parcel 2 front. Record 18. Finally,
29 petitioners have not established the limiting construction
30 the city placed on both its LOC LID provisions and
31 condition 3 is inadequate to avoid claims that condition 3
32 is overbroad.

1 This subassignment of error is denied.

2 **B. Freedom of Expression**

3 Petitioners argue condition 3 unconstitutionally
4 requires relinquishment of their constitutionally protected
5 rights to address their government and object to a proposed
6 LID. Petitioners characterize this as an infringement upon
7 their rights to political speech.

8 We determine above the only limitation condition 3
9 imposes is that petitioners may not file remonstrances
10 against the formation of certain LIDs; meaning petitioners
11 may not avail themselves of a specific process that under
12 some circumstances will result in a six month suspension of
13 the proposal to form a LID. Stated another way, condition 3
14 simply states that in exchange for a partition approval, to
15 which petitioners would not otherwise be entitled,
16 petitioners must agree not to file remonstrances against the
17 formation of certain street improvement LIDs with the city
18 recorder under LOC 40.050(1). Condition 3 does not forbid
19 petitioners from filing any other written objection with the
20 city concerning a proposed LID or from testifying at public
21 hearings on such a proposal.

22 **1. First Amendment**

23 The First Amendment to the United States Constitution
24 proscribes laws:

25 "* * * abridging the freedom of speech, or of the
26 press; or the right of the people peaceably to
27 assemble, and to petition the Government for a

1 redress of grievances."

2 **a. Nature of Condition 3**

3 The United States Supreme Court has stated the
4 guarantee of free expression embodied in the First Amendment
5 prohibits:

6 "[A]ny action of the government by means of which
7 it might prevent such free and general discussion
8 of public matters as seems absolutely essential.
9 * * *" Bigelow v. Virginia, 421 US 809, 829,
10 95 S Ct 222, 44 L Ed2d 600 (1975).

11 The United States Supreme Court has noted in First
12 Amendment cases that it is important to distinguish between
13 governmental compulsion and conditions relating to
14 governmental benefits. Boden v. Roy, 476 US 693, 705,
15 106 S Ct 2147, 2155, 90 L Ed2d 735 (1986); see Blackwell v.
16 City of St. Charles, 726 F Supp 256, aff'd 917 F2d 1150 (8th
17 Cir 1990). Condition 3 falls into the latter category.
18 This is because conditions related to the acquisition of
19 governmental benefits, even those that may impinge on a
20 constitutionally protected right such as expression, are
21 permissible if there is a legitimate governmental purpose
22 advanced by the condition, and the governmental benefit is
23 not one to which the person is legally entitled. Boden v.
24 Roy, supra; Blackwell v. City of St. Charles, supra.

25 In Parks v. Watson, supra, 716 F2d at 653, the court
26 stated that:

27 "[C]onditions requiring the relinquishment of a
28 constitutional right have been upheld when the
29 condition was related to a benefit conferred."

1 In Parks, the court invalidated a condition of approval
2 because it was unrelated to the benefit conferred. Here,
3 there is no challenge to the city's findings that
4 condition 3 is directly related to the impact created by the
5 approved partition. Further, the city correctly states in
6 its brief:

7 "[Petitioners] could have avoided [condition 3] by
8 building a one-half street improvement but chose
9 not to pursue that option." Respondent's Brief 3.

10 Condition 3 is remarkably similar to a condition of
11 annexation approval analyzed by the Washington Court of
12 Appeals in Five Mile Prairie v. City of Spokane, 51 Wash
13 App 816, 755 P2d 836 (1988). In Five Mile Prairie, the
14 court determined a city condition requiring land owners to
15 support an annexation proposal was not an unconstitutional
16 infringement on the land owners' First Amendment free
17 expression guarantees. It was persuasive to the court in
18 Five Mile Prairie that (1) the annexation support condition
19 was clear, (2) the condition was not coerced, and (3) the
20 land owners were given an opportunity to voice their
21 opposition to the annexation proposal, in any event.

22 Similarly, here the terms of condition 3 are reasonably
23 clear when read in the context of the LOC provisions the
24 condition implements. Further, there is no evidence the
25 city coerced petitioners to accept condition 3. Petitioners
26 had at least three options, and they chose condition 3.
27 Those options included (1) accepting denial of their

1 partition application or appealing a denial decision, (2)
2 paying for a one-half street improvement before partitioning
3 the property, and (3) accepting condition 3. Petitioners
4 accepted condition 3, partitioned their property, accepted
5 the benefits of that partition by selling the partitioned
6 piece and retaining the remainder, and then requested relief
7 from condition 3. This is a far cry from establishing that
8 petitioners were coerced into accepting condition 3.
9 Finally, under condition 3 petitioners are given ample
10 opportunity to object to the proposed formation of an LID.
11 They simply cannot avail themselves of a remonstrance under
12 LOC 40.050(1).

13 Another case provides analytical guidance on the
14 validity of condition 3. In Blackwell v. City of St.
15 Charles, supra, a city required as a condition of water and
16 sewer hookup approval that affected landowners sign a
17 petition for voluntary annexation. The landowners
18 challenged the condition as an unconstitutional restriction
19 on their rights to free expression. The court in Blackwell
20 v. City of St. Charles, supra, 726 F Supp at 258 (1989),
21 determined the condition did not violate the First Amendment
22 as follows:

23 "Plaintiffs' first amendment claim is without
24 merit. * * * First, the Court finds plaintiffs'
25 characterization of the required assent to
26 annexation as compelled political speech to be
27 rather strained. The signing of the petition is
28 not a 'compulsion to declare a belief,' nor a
29 communication of ideas, nor 'a symbol of adherence

1 to government as presently organized,' nor an
2 acceptance of political ideas; it does not require
3 'affirmation of a belief and an attitude of mind.'
4 * * *

5 "Second, even if the political speech
6 characterization is accepted, the first amendment
7 is not implicated by a rational requirement of
8 assent to a particular proposition in order to
9 obtain a benefit to which the would-be recipient
10 has no legal entitlement. In the freedom of
11 religion context, the Supreme Court has noted the
12 importance of the distinction between governmental
13 compulsion and conditions relating to governmental
14 benefits. * * * The same distinction is
15 applicable in the sister first amendment context
16 of free speech.

17 "Furthermore, only in the governmental compulsion
18 context would the 'least restrictive means' test,
19 on which plaintiffs rely, come into play. Here,
20 [the city] meets its burden when it demonstrates
21 that the challenged requirement 'is a reasonable
22 means of promoting a legitimate public interest.'
23 * * * The distinction between governmental
24 compulsion and conditions relating to governmental
25 benefits, and the corresponding difference in the
26 government's burden to justify the challenged
27 practice, preclude relief for plaintiffs on first
28 amendment grounds.

29 "The consent to annexation requirement is not
30 compulsory in the constitutional sense. It is
31 'forced' upon plaintiffs only in the sense that it
32 is a contract term which they must accept in order
33 to obtain the city's agreement to provide them
34 with water. Conversely, plaintiffs may reject the
35 required assent as too high a price for the
36 benefit they seek. * * * [I]t is a 'government
37 regulation that indirectly and incidentally calls
38 for a choice between securing a governmental
39 benefit and adherence to [political
40 preferences].'" (Emphasis supplied; citations
41 omitted.)

42 We conclude condition 3 does not impermissibly infringe

1 on petitioners' rights to freedom of expression guaranteed
2 by the First Amendment to the United States Constitution.
3 Nothing about condition 3 allows or requires the city to
4 disregard petitioners' political views about LIDs.
5 Condition 3 limits one method for objecting to the formation
6 of a LID, but leaves petitioners free to object to a
7 proposed LID in a variety of other ways.

8 Further, as stated above, there is no evidence of
9 coercion in the imposition of condition 3. Nothing
10 indicates condition 3 is not the result of an arms-length
11 transaction between the city and petitioners. Petitioners
12 do not dispute they received a benefit from the city as a
13 result of that transaction (approval of the partition of
14 their property). Clearly, part of that benefit included not
15 immediately having to contribute funds to improve the
16 substandard street upon which the subject property fronts,
17 or to improve that part of the street themselves.

18 The First Amendment does not forbid the city from
19 imposing condition 3 in the circumstances presented here.

20 **b. Waiver**

21 In the alternative, to the extent condition 3 may
22 offend the First Amendment (although we do not believe it
23 does), we believe the circumstances presented here establish
24 that petitioners waived any First Amendment protection.

25 Cases demonstrate the First Amendment does not forbid
26 the waiver or relinquishment of what is otherwise a

1 constitutionally protected right in the circumstances
2 presented here, so long as the waiver is voluntary and
3 knowing. Leonard v. Clark, 758 F Supp 616, 619 (DC Or
4 1991), provides a legal analysis relevant to determining the
5 validity of condition 3.⁴ In Leonard, a union entered into
6 a collective bargaining agreement restricting the union's
7 ability to endorse and sponsor legislative issues involving
8 benefit improvements that could result in higher payroll
9 costs for the city. The court described the following
10 factors as relevant in determining the validity of a
11 contractual waiver of a First Amendment right:

12 "[T]he United States Supreme Court outlined the
13 factors to be considered in determining whether
14 there has been a valid contractual waiver of a
15 constitutionally guaranteed right. These factors
16 were summarized by the Third Circuit Court of
17 Appeals in Erie Telecommunications, Inc. v. City
18 of Erie, Pa., 853 F.2d 1084, 1097 (3rd Cir. 1988).
19 In Erie, the court held that a party is deemed to
20 have voluntarily waived its constitutional rights
21 through a contract where 1) the parties to the
22 contract have bargaining equality; 2) the parties
23 have negotiated the terms of the contract; and 3)
24 the waiving party is advised by competent counsel
25 and has engaged in other contract negotiations."
26 Leonard, supra.

27 We conclude condition 3 was voluntarily accepted by
28 petitioners as an alternative to having to make current
29 expenditures of money toward the street improvements

⁴Although Leonard involves a contract waiver of constitutionally protected speech rights, and not a condition of approval adopted in a quasi-judicial decision as is the case here, we believe the principles expressed by the court in Leonard are analytically relevant.

1 condition 3 furthers, or to having their original partition
2 application denied. The circumstances establish petitioners
3 knew exactly what they were giving up when they accepted
4 condition 3, and failed to take advantage of reasonable
5 opportunities to object to the condition, i.e. by filing an
6 appeal.⁵ Therefore, with regard to condition 3, petitioners
7 have waived their First Amendment rights.

8 This subassignment of error is denied.

9 **2. Article I, Section 8**

10 Article I, section 8, of the Oregon Constitution
11 provides:

12 "No law shall be passed restraining free
13 expression of opinion, or restricting the right to
14 speak, write, or print freely on any subject
15 whatever, but every person shall be responsible
16 for abuse of this right."

17 **a. Nature of Condition 3**

18 There are essentially three lines of cases dealing with
19 the scope of the prohibition on laws restricting freedom of
20 expression established by Article I, section 8. None are
21 dispositive in the circumstances presented here, but all
22 provide legal principles relevant to assisting the analysis
23 of whether condition 3 constitutes an impermissible
24 limitation on petitioners' rights under Article I,

⁵We note that it is unclear whether petitioners were represented by legal counsel during the city proceeding leading to the original partition approval decision. However, the original partition decision was made at the city staff level. Therefore, in any event, it is unlikely the city had the benefit of legal counsel.

1 section 8.

2 The first line of cases involves criminal laws that
3 directly or indirectly restrict the content of expression.
4 Compare State v. Robertson, supra (criminal laws punishing
5 certain expressive conduct are unlawful under Article I,
6 section 8), with State v. Plowman, supra (criminal
7 intimidation law is not invalid as it punishes only
8 forbidden effects of expressive conduct). In State v.
9 Plowman, the court determined that an element of criminal
10 intimidation requiring action based on the actor's
11 "perception of the victim's race, color, religion, national
12 origin, or sexual orientation," did not proscribe Article I,
13 section 8 rights to free expression, but rather prohibited
14 unlawful effects. The court explained the distinction in
15 this way:

16 " * * * One may hate members of a specified group
17 all one wishes, but still be punished
18 constitutionally if one acts together with another
19 to cause physical injury to a person because of
20 that person's perceived membership in the hated
21 group. * * *" State v. Plowman, supra, 314 Or
22 at 165.

23 The second line of cases deals with the kinds of
24 constitutionally permissible remedies available for abuse of
25 the right to free expression. Wheeler v. Green, 286 Or 99,
26 119, 593 P2d 777 (1979) (punitive damages in defamation
27 cases are unconstitutional under Article I, section 8,
28 because they can "easily inhibit the exercise of freedom of
29 constitutionally protected expression * * *"); see also

1 Huffman and Wright Logging Company v. Wade, 317 Or 445,
2 458-59, _____ P2d _____ (1993) (Article I, section 8 does
3 not prevent the award of punitive damages for the tort of
4 trespass despite the fact that such damages may incidentally
5 punish those who protest against logging practices); Hall v.
6 The May Dept. Stores, 292 Or 131, 145-47, 637 P2d 126
7 (1981).

8 The final line of cases deals with the enactment or
9 application of civil laws which have the effect of directly
10 or indirectly limiting expressive rights. Under these
11 cases, laws that directly and absolutely prohibit expressive
12 conduct rather than forbidden effects are invalid under
13 Article I, section 8. Tidyman v. City of Portland, supra.
14 On the other hand, laws which may have an indirect effect of
15 limiting expression are permissible so long as they are
16 reasonably related to a legitimate governmental purpose and
17 are reasonable in scope. See Davidson v. Oregon Government
18 Ethics Comm., supra. In this regard, the court in Tidyman,
19 supra, 306 Or at 183, observed:

20 "A regulation is not always unconstitutional
21 because it restricts one's choice of a place or
22 time for self-expression * * * when that is not
23 the object of the regulation. The concern may be
24 with the medium, not the message, as when park
25 regulations ban fireworks even for a Fourth of
26 July celebration. To decline an exception from a
27 land-use regulation for a theater, a printing
28 plant or a church differs from attempting to
29 restrict prayer meetings, film showings or
30 desk-top publishing in a residence, or in turn
31 enforcing safety codes or parking regulations when

1 a residence is so used. * * * This court has
2 never held that an otherwise valid restriction
3 must cover all or nothing * * *."

4 Under these authorities, it is clear Article I,
5 section 8 forbids passage of any law absolutely and directly
6 restraining free expression.⁶ State v. Robertson, supra;
7 Ackerly Communications, Inc. v. Mult. Co. 72 Or App 617, 696
8 P2d 1140 (1985). However, the line between regulations
9 absolutely and directly restraining free expression and
10 those proscribing only prohibited effects is not bright.
11 See State v. Plowman, supra; Huffman and Wright Logging
12 Company v. Wade, supra. It is also clear that reasonable
13 regulations limiting the manner of the exercise of free
14 expression are valid under Article I, section 8. Tidyman v.
15 City of Portland, supra; State v. Henry, 302 Or 510, 525,
16 732 P2d 9 (1987); State ex rel Oregonian Pub. Co. v. Deiz,
17 289 Or 277, 287, 613 P2d 23 (1980).

18 At the outset, we note condition 3 does not fit neatly
19 into the category of a reasonable regulation limiting the
20 manner of speech. Neither does condition 3 fit neatly into

⁶It appears the strict prohibition in Article I, section 8 refers only to the passage of laws, i.e. legislative enactments, and does not answer the question presented here concerning conditions of approval in quasi-judicial land use decisions. While a quasi-judicial decision certainly results in the adoption of local law applicable to a particular piece of property, it is unclear how such a decision fits into the prohibition stated in Article I, section 8. In any event, for purposes of resolving this assignment of error, we assume without deciding that Article I, section 8 potentially limits the authority of the city to impose a condition of approval such as condition 3.

1 the category of a regulation proscribing impermissible
2 effects of free expression. However, condition 3 also does
3 not fit neatly into the category of an outright prohibition
4 on the content of expression. Therefore, we must determine
5 which type of regulation condition 3 most resembles.

6 We state above that condition 3 does no more than limit
7 the manner of exercise of petitioners' rights to oppose an
8 LID, and that petitioners are only prohibited from
9 submitting an LOC 40.050(1) remonstrance potentially
10 suspending action on an LID for six months. Petitioners are
11 free, however, to oppose an LID by other forms of written
12 communication or by presenting testimony at city LID
13 hearings. Therefore, we conclude that condition 3 is most
14 analogous to a reasonable limitation on the manner of the
15 exercise of petitioners' right to free expression. Such a
16 limitation does not violate Article I, section 8.

17 This subassignment of error is denied.

18 **b. Waiver**

19 To the extent we may be incorrect in concluding that
20 condition 3 does not offend Article I, section 8, we
21 consider in the alternative whether petitioners waived their
22 rights under Article I, section 8.

23 In Oregon, waiver is uniformly held to be the
24 "relinquishment of a known right." In re Jordan, 290 Or
25 669, 672-73, 624 P2d 1074 (1981); see Drews v. EBI
26 Companies, 310 Or 134, 150, 795 P2d 531 (1993); see also

1 Lyons v. Pearce, 298 Or 554, 560-63, 694 P2d 969 (1985). In
2 Carrier v. Hicks, 316 Or 341, 352, ___ P2d ____ (1993), the
3 court held the fact that a complainant voluntarily entered
4 into arbitration pursuant to ORS 742.504(1), instead of
5 demanding a jury trial of an uninsured motorist claim, was
6 enough to constitute a voluntary waiver of the
7 constitutionally guaranteed right to jury trial. Accord
8 Mazorol v. Coats, 316 Or 367, ___ P2d ____ (1993). From
9 Carrier v. Hicks, it appears the waiver threshold for
10 constitutional rights is a relatively easy one to cross.
11 Therefore, even if condition 3 can be read to be an absolute
12 prohibition on petitioners' rights under Article I,
13 section 8, we are persuaded that the circumstances described
14 in the preceding sections clearly demonstrate that
15 petitioners voluntarily and knowingly waived the right to
16 file a LOC 40.050(1) remonstrance in exchange for the
17 partition approval. See Leonard v. Clark, supra.

18 This subassignment of error is denied

19 **3. Conclusion**

20 Petitioners have not established how condition 3
21 violates either the First Amendment to the United States
22 Constitution or Article I, section 8, of the Oregon
23 Constitution, and we do not see that it does. In addition,
24 even if condition 3 offends those constitutional provisions,
25 petitioners have failed to establish they have not waived
26 those rights.

1 The first, second and third assignments of error are
2 denied.

3 **FOURTH ASSIGNMENT OF ERROR**

4 "The non remonstrance agreement impairs voting
5 rights."

6 Petitioners argue condition 3 violates
7 ORS 260.665(2)(a) through (c), which prohibits "undue
8 influence" on a person either not to vote at all or to vote
9 in a particular manner.

10 There are several reasons why this assignment of error
11 provides no basis for reversal or remand of the challenged
12 decision. We address two of them.

13 First, we state above the city exercised no "undue
14 influence" over petitioners in imposing condition 3.
15 Second, under condition 3, petitioners are neither prevented
16 from voting nor required to vote in any particular manner on
17 a proposed LID. As we state above, the limitation imposed
18 by condition 3 is very narrow. Petitioners simply may not
19 pursue a remonstrance against the formation of an LID under
20 LOC 40.050(1), but are free to participate in the city's LID
21 process in all other respects.

22 The fourth assignment of error is denied.

23 The city's decision is affirmed.

24