

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioner appeals the issuance of a building permit,
4 together with a condition "that the applicant grant an easement
5 or dedicate for sidewalk purposes five additional feet of
6 right-of-way along the north property line." Petitioner asks
7 this Board to reverse the order and remand the case to the city
8 with instructions to issue the building permit without the
9 subject condition.

10 FACTS

11 Petitioner occupies a 1000 square foot building on
12 Foothills Road in an industrial area of Lake Oswego.
13 Petitioner seeks to expand the building by 1,685 square feet.
14 The expansion, according to petitioner, will not add any
15 employees, but only enlarge work space available for the
16 existing work force. The present work force consists of four
17 employees.

18 Petitioner asked for a building permit in February of
19 1982. On May 17, 1982, the city's Development Review Board
20 granted the permit but attached a condition that petitioner
21 redesign the parking lot, connect the building to a sewer and
22 dedicate a ten foot right-of-way along the north property
23 line. This dedication was for the future widening of Foothills
24 Road. Petitioner objected to the required dedication, and the
25 matter was reopened on May 17. At that hearing, the ten foot
26 dedication requirement was dropped in favor of a five foot

1 dedication requirement. Petitioner objected to this dedication
2 also.

3 The petitioner appealed the matter to the Lake Oswego City
4 Council. At the city council meeting, a city planning employee
5 testified that the five foot dedication was consistent with the
6 Lake Oswego Comprehensive Plan and development ordinances. It
7 was believed necessary because of possible increased pedestrian
8 traffic resulting from future development in the area not
9 related to the petitioner's building expansion. The planner
10 urged the city to acquire the land now so it would not have to
11 condemn land in the future. The petitioner, through an
12 attorney, objected on the ground that its expansion would
13 occasion no increase in employees. Since there was no increase
14 on city services, the dedication was a taking of petitioner's
15 property without compensation, according to petitioner.

16 The city includes in its order a list of the criteria and
17 standards it believes relevant. Included in the list is
18 development standard 14, a utility standard. Section 14.020 is
19 as follows, in part:

20 "1. Utilities Required. The following utilities,
21 whether on or off site, shall be provided to all
22 development in the City of Lake Oswego, in
23 accordance with City standards, plans and
24 specifications:

25 "* * *

26 "c. Sidewalks and any special pedestrian ways
and bicycle paths.

"* * *

1 "h. Streets * * * *"

2 The city found that the street in question was Foothills Road,
3 and Foothills Road is a collector street. See Lake Oswego
4 Code (LOC) 44.373. Collector streets require a five foot
5 sidewalk on at least one side. LOC 44.379, 44.380, 44.387,
6 44.398. The city justified the imposition of a sidewalk
7 dedication, but not its construction on the ground that the
8 area, the Willamette River Industrial Area, is not yet fully
9 developed. All development, according to the city's findings,
10 increases demand for public facilities, and though the
11 developer does not intend to add workers,

12 "it is a fact that the proposed expansion will result
13 in a building which is over twice the size of the
14 present building. After completion of the
15 improvements space will be available for an expanded
16 work force for the appellant or some other employer.
17 This portion of the sidewalk, when constructed in the
18 future over the required dedicated right-of-way, will
19 provide one part of a pedestrian walkway which will
20 link the industrial area and this development with the
21 public transit and commercial development presently
22 available on State Street. Workers need adequate
23 access to transit and commercial facilities. If there
24 are no workers in the industrial area, there would be
25 no need for the sidewalk. This development increases
26 the work space available for workers and, therefore,
increases the need for public services which meets the
City standards. The five foot requirement and
Condition #2 is in accordance with City standards
found in LOC Chapter 44." Record, p. 3-4.

23 ASSIGNMENT OF ERROR

24 The petitioner's assignment of error states as follows:

25 "The Lake Oswego City Council's required dedication of
26 property or grant of an easement as a condition for
issuance of a building permit is error.

"ARGUMENT

1
2 "THE REQUIRED DEDICATION OR EASEMENT IS INVALID
3 BECAUSE IT IS AN UNCONSTITUTIONAL TAKING OF PRIVATE
4 PROPERTY WITHOUT COMPENSATION. THE EVIDENCE
5 CONCLUSIVELY INDICATES THAT THE PROPOSED BUILDING
6 EXPANSION WOULD NOT CAUSE ANY APPRECIABLE ADDITIONAL
7 PEDESTRIAN TRAFFIC OVER AND ABOVE THAT CURRENTLY
8 EXISTING SO AS TO MERIT TAKING OF LAND FOR POSSIBLE
9 CONSTRUCTION OF A SIDEWALK. THEREFORE, THE CITY'S
10 ACTION EXCEEDS THE VALID USE OF THE POLICE POWER AND
11 IS AN UNCONSTITUTIONAL EXERCISE OF THE POWER OF
12 EMINENT DOMAIN."

13
14 Under this general heading, petitioner includes subheadings
15 entitled "Eminent Domain," "Police Power," "Reasonableness
16 Standard" and "Failure of Reasonableness Standard." The sum
17 total of petitioner's argument as presented in the petition for
18 review is that the dedication is an unconstitutional taking of
19 private property.

20 We conclude we have no power to consider the assignment of
21 error as stated. Our power to review a local government
22 decision for constitutional error is restricted to situations
23 in which the local government has the authority to make the
24 decision in the first instance. Here, the challenge is not to
25 the procedure used by the local government, that is, whether it
26 provided petitioner due process of law, but to whether or not
the city has engaged in an unconstitutional taking of private
property. A local government is not authorized to award
damages for a taking or to consider a claim of taking. As a
practical manner, such cases are controlled by ORS 223.005 to
ORS 223.105, ORS ch 281 and ORS ch 35. As we stated recently

1 in Brady v. Douglas County, ____ Or LUBA ____ (LUBA No. 82-072,
2 1983),

3 "Even though takings issues are colored with land use
4 overtones, taking determinations have historically
been the province of the circuit courts.

5 "The circuit court is the only body that can engage in
6 complex evidentiary matters, grant injunctive relief,
7 and award damages. Those are not traditional or
statutory powers held by LUBA, more importantly,
local governments." Slip Opinion at 21-22.

8 See Union Oil Co. v Clackamas Co., 5 Or LUBA 150 (1982) and
9 Morgan and Shonkwiler, Regulatory Takings in Oregon: A Walk
10 Down Fifth Avenue Without Due Process, 15 Willamette L Rev 591,
11 644, 674 (1980). If we are to review this case, it must be on
12 some ground found in Oregon Laws 1979, ch 772, as amended by
13 Oregon Laws 1981, ch 748.¹

14 Fairly read, the assignment may also be considered as an
15 attack on the substantial evidence to support the city's
16 decision to require the dedication. We may review for
17 substantial evidence. Under "question presented on appeal" at
18 page 2 of the petition for review, petitioner says

19 "[m]ay a municipality, as a condition for approval of
20 a requested change in land use, require an easement or
21 dedication of land where there is no evidence that the
land use change will create any additional burden upon
city services?"

22
23 Later, petitioner argues the evidence shows the building
24 will not require any increase in pedestrian or vehicular
25 traffic. There will be no additional employees, and additional
26 customer traffic is not contemplated. Petitioner characterizes

1 the city's evidence as "entirely devoted to the possibility
2 that property surrounding petitioner's land will be further
3 developed at some distant point in the future." Petition for
4 Review at 12.

5 Respondent argues the condition is necessary because the
6 development otherwise does not conform to city standards. In
7 order to reverse the council's decision, respondent claims this
8 Board would have to say that the city lacks authority to
9 establish a requirement that development is to be served by
10 adequate public facilities. The city urges it must have the
11 power to provide for public services.

12 Respondent also states petitioner's representations as to
13 its intended use has nothing to do with a potential sale to a
14 new owner with different plans. Respondent reminds the Board
15 that work space is created by this development, and that work
16 space is sufficient for an increased number of workers.
17 Respondent adds the petitioner does not challenge any of the
18 findings or conclusions in the council's order, and respondent
19 asserts there is substantial evidence in the record to support
20 this order.

21 We think the city adequately explained its reason for
22 imposing the requirement of a sidewalk or dedication for a
23 sidewalk on the developer. The petitioner does not challenge
24 the city's findings or its conclusion that this is a collector
25 street. The city code at Section 44.379(f) requires sidewalks
26 on at least one side of the street for any collector street.

1 Further, Section 14.020 requires sidewalks to be provided to
2 all development in the city. It is our view that the city's
3 failure to require a sidewalk under these circumstances might
4 be reason for some other person to file a petition for review
5 before this Board. Even if the sidewalk were a matter of
6 discretion for the city, we think the city's concern about
7 future use of the street, particularly in a developing
8 industrial area, is sufficient reason to abide by its own code
9 and require the dedication. In short, we believe the city's
10 code requires the dedication, and we believe the city's
11 exercise of its code under these circumstances was quite
12 adequately explained in the findings.

13 The decision of the City of Lake Oswego is affirmed. .
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FOOTNOTE

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At the hearing on this matter, petitioner argued that the remedy it sought is a remand for a determination as to whether the development would cause additional traffic and thereby make it reasonable to require a dedication of property. Petitioner claims it really is challenging the city's application of its comprehensive plan requiring "adequate" dedication as may be established by street needs.

To the extent the petitioner is trying to amend its assignment of error to claim a violation of the city's comprehensive plan, we reject the amendment. The time for filing the petition for review has long past, and petitioner had the opportunity to add such an assignment of error in its petition and apparently chose not to do so.