

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioner appeals City of Tigard Resolution No. 89-27
4 which approves applications for a minor land partition, site
5 development review and a variance.

6 FACTS

7 The subject property is designated Medium High Density
8 Residential by the Tigard Comprehensive Plan (plan), and is
9 zoned Multi-family, 25 units/acre (R-25). The property
10 includes 35.39 acres. The applicant proposes to develop a 266
11 unit apartment complex on a portion of the property.

12 Petitioner is the owner of property adjacent to the proposed
13 development.

14 On December 22, 1988, the planning director approved the
15 applications subject to several conditions, including a
16 condition requiring the applicant to dedicate a right of way
17 for street purposes between 130th and 135th Avenues. The
18 planning director's decision was appealed to the planning
19 commission.

20 On February 7, 1989, the planning commission upheld the
21 planning director's decision approving the applications.
22 However, the planning commission modified some of the
23 conditions of approval and eliminated the condition of approval
24 requiring dedication of right of way between 130th and 135th
25 Avenues.

26 On February 21, 1989, the applicant appealed the decision

1 of the planning commission to the city council. The
2 applicant's appeal cited several of the conditions of
3 approval. However, the applicant's notice of appeal did not
4 cite, as a ground for appeal, the planning commission's
5 elimination of the condition of approval requiring the
6 dedication of a right of way between 130th and 135th
7 Avenues.¹ On February 24, 1989, the decision of the planning
8 commission was brought to the attention of the council as an
9 "Agenda Summary Item." Record 45. On February 27, 1989, the
10 city council decided to initiate review of the decision of the
11 planning commission on its own motion and refunded the
12 applicant's appeal fee.

13 After a public hearing, the city approved the applications,
14 reimposing the condition the planning commission removed, viz,
15 that a right of way be dedicated for a public street between
16 130th and 135th Avenues. Record 25. This appeal followed.

17 MOTIONS

18 Before turning to the assignments of error, we first
19 address several motions presented by the parties.

20 A. Motion to File Reply Brief

21 The oral argument in this case was held July 13, 1989. On
22 July 10, 1989, this board received petitioner's motion to file
23 a reply brief. Petitioner moved to file a reply brief to
24 respond to the city's motion to dismiss included in its
25 response brief.² During a conference call with the parties
26 on July 12, 1989, respondent objected to petitioner's request

1 to file a reply brief because petitioner asked for additional
2 time to prepare the reply brief extending beyond the oral
3 argument scheduled for the next day. Respondent argued that
4 the date of the oral argument should not be extended.
5 Respondent maintained that the five (5) day period between the
6 time it filed its response brief and the date petitioner filed
7 its motion for permission to file a reply brief was adequate
8 time to prepare a reply brief.

9 We agree with petitioner that respondent's first motion to
10 dismiss raises new issues to which petitioner should be allowed
11 to respond. Accordingly, we grant petitioner's motion for
12 leave to file a reply brief.³

13 B. Petitioner's Motions to Strike

14 Respondent filed two motions to dismiss -- one in its
15 response brief filed on July 3, 1989 (first motion to
16 dismiss) and one on July 11, 1989, two days before oral
17 argument in this appeal (second motion to dismiss).
18 Petitioner moves to strike both. In its first motion to
19 dismiss, respondent argues this appeal is moot because the
20 disputed right of way condition has been satisfied by
21 execution of the right of way dedication on April 25,
22 1989, and that acceptance of the right of way by the city
23 on July 3, 1989. In its second motion to dismiss,
24 respondent contends that certain actions taken by the city
25 concerning Resolution 89-27 (after the decision was
26 appealed to this Board) render this appeal moot and

1 alternatively, that the city has voted to remand its
2 decision. Before turning to respondent's motions to
3 dismiss, we first consider petitioner's motions to strike
4 the motions to dismiss. We do this because petitioner
5 contends we lack authority to consider the motions to
6 dismiss.

7 Petitioner moves to strike respondent's motions to
8 dismiss arguing that under our decision in Standard
9 Insurance v. Washington Co., ___ Or LUBA ___ (LUBA No.
10 88-109, April 26, 1989), the city had no authority to meet
11 for the purpose of deciding to move this Board for remand
12 or to take any action which "moots" this appeal.

13 Petitioner also maintains that if the city had authority
14 to move this Board for remand, or to take action to moot
15 the appeal, we may not consider respondent's motions
16 because the evidence supporting the motions is not in the
17 record of this appeal. Petitioner contends that the
18 exceptions to the rule that LUBA's review is limited to
19 the record below do not apply here.⁴ Petitioner also
20 contends that it violates the statutory policy favoring
21 expeditious review of land use decisions to allow a local
22 government to cause a remand, unilaterally, before LUBA
23 has decided the issues on appeal.

24 Respondent argues that its actions were taken in local
25 proceedings separate from the proceedings which resulted
26 in the decision at issue in this appeal. Respondent

1 reasons, therefore, that the principle discussed in our
2 decision in Standard Insurance, supra, does not apply to
3 the city's actions. Alternatively, respondent asks that
4 we reconsider our decision in Standard Insurance.

5 We said in Standard Insurance:

6 "* * * [w]here jurisdiction is conferred upon an
7 appellate review body, once appeal/judicial review is
8 perfected, the lower decision making body loses its
9 jurisdiction over the challenged decision unless the
statute specifically provides otherwise." * * * Slip
op 16.

10 Nothing in our decision in Standard Insurance suggests a
11 local government loses its authority to request that LUBA
12 remand a land use decision while it is on appeal. The city
13 claims both that it voted to request LUBA to remand its
14 decision and that it has taken action which renders our review
15 moot. We do not believe our decision in Standard necessarily
16 precludes a local government from taking such actions, after an
17 appeal of its decision is filed with this Board.⁵ In any
18 event, as we explain in our discussion of the second motion to
19 dismiss, infra, the evidence the city provides to establish the
20 city's representations that it has revoked, withdrawn and
21 voided its decision does support those representations.⁶

22 Petitioner correctly points out that our review is
23 generally limited to the record of proceedings below.
24 ORS 197.830(11)(a). There are exceptions to this rule
25 recognized for circumstances where standing is at issue or
26 where our jurisdiction is questioned. In Hemstreet Improvement

1 Corp v. City of Seaside, ___ Or LUBA ___ (LUBA No. 87-094,
2 April 22, 1988), aff'd, 93 Or App 73 (1988), we decided that
3 consistent with sound principles of judicial review, we may
4 look outside the local record to determine whether we have
5 jurisdiction to review a land use decision. In this
6 proceeding, respondent's motions to dismiss claim, essentially,
7 that there is nothing for this Board to decide and also that it
8 is unnecessary for us to decide the appeal. Under these
9 circumstances, it does not serve the interests of judicial
10 economy or the statutory policy in favor of the expeditious
11 resolution of land use disputes for this Board to refuse to
12 consider matters outside of the record to determine whether the
13 appeal is moot. Similarly, we believe sound principles of
14 judicial review support our review of matters outside of the
15 record, if necessary, to determine whether the local government
16 should be entitled to have its decision remanded for further
17 consideration, over petitioner's objection. Accordingly, we
18 deny petitioner's motions to strike.

19 C. Respondent's First Motion to Dismiss

20 Respondent claims

21 "The appeal is moot and should be dismissed because
22 the applicant has deeded the right of way to the city,
23 satisfying the condition of approval challenged by
petitioner."

24 Respondent asserts that the only real dispute in this appeal
25 concerns the city's imposition of condition of approval No. 6
26 which states: "Right of way shall be dedicated to the public

1 for a street between 135th Avenue and 130th Avenue."
2 Record 25. Respondent contends petitioner's appeal is "moot"
3 because the applicant has deeded to the city the disputed right
4 of way between 130th and 135th Avenues. Deeds conveying the
5 right of way to the city are attached to respondent's brief.
6 Respondent reasons that because the right of way has been
7 conveyed to the city, "a LUBA decision on the merits will not
8 have any effect on the challenged right of way dedication [and]
9 the appeal is moot." Respondent's Brief 4. Respondent asserts
10 "[n]o relief this Board could grant would undo the property
11 conveyance." Respondent's Brief 5. Respondent contends that
12 the deed conveying the right of way to the city contains no
13 language requiring the property to be reconveyed to the
14 applicant in the event the condition is invalidated.
15 Respondent reasons, therefore, there is nothing this Board can
16 do to affect the disputed condition of approval.

17 In Matter of Holland, 290 Or 765, 767, 625 P2d 1318 (1981)
18 the Oregon Supreme Court explained:

19 "A case becomes moot for purposes of an appeal when,
20 because of a change of circumstances prior to the
21 appellate decision, the decision would resolve merely
an abstract question without practical effect."

22 See also Port of Brookings v. Mather, 245 Or 230, 231, 421 P2d
23 695 (1966) and Fluhrer v. Brammel, 158 Or 694, 73 P2d 1265
24 (1938). If respondent is correct that our review can only
25 answer an abstract question, and will have no practical effect
26 this appeal must be dismissed. 1000 Friends v. Dept. of

1 Environmental Quality, 7 Or LUBA 84, 85 (1982).

2 Petitioner asks that we deny respondent's motion on several
3 grounds.⁷ Petitioner contends that the appeal is not moot
4 because the right of way deeded to the city may be vacated.
5 Petitioner also contends the dedicated right of way was not
6 lawfully accepted by the city. Finally, petitioner argues the
7 condition of approval is not an abstract issue because this
8 Board may determine that the condition was improperly imposed
9 and require the city to amend or delete the condition.

10 We agree with petitioner that the motion to dismiss must be
11 denied. The basic issue on appeal is whether the city went
12 beyond the scope of its authority in imposing a condition
13 requiring the dedication. Although the applicant executed a
14 deed conveying right of way to the city, that action does not
15 render the issues before us moot. In essence, the rule
16 respondent urges would permit parties to avoid reversal or
17 remand simply by racing to final completion of projects while
18 an appeal is pending before this Board.

19 Our review will have "practical effect." It will determine
20 the lawfulness of the city's condition regarding dedication of
21 the right of way. Our decision could provide a basis for the
22 applicant or petitioner to seek vacation of the right of way
23 pursuant to ORS 271.130(1) or for legal action to require
24 reconveyance.

25 Finally, even if a valid conveyance and acceptance of the
26 right of way would render this appeal moot, petitioner argues

1 the city's acceptance of the deeds violates several city
2 ordinance requirements. We are in no position to determine the
3 validity of petitioner's claims concerning the alleged
4 ordinance violations. Neither are we in a position to
5 determine whether a separate proceeding to challenge acceptance
6 of the deeds is possible and, if so, whether the city's
7 acceptance would be invalidated. With such uncertainty
8 concerning the deeds, they provide no basis for dismissing this
9 appeal as moot.

10 Petitioner's first motion to dismiss is denied.

11 D. Respondent's Second Motion to Dismiss

12 Respondent claims that the Community Development Code of
13 the City of Tigard, (CDC) sections 18.20.10(B) and
14 18.32.390(A)(4),⁸ authorize the city to revoke or void any
15 approval "'issued or granted in conflict with' applicable
16 regulations." Respondent's Memorandum in Support of Motion to
17 Dismiss 1. Respondent claims that it has exercised this
18 authority and has "withdrawn," "revoked" and "voided" its
19 decision on appeal:

20 "* * * due to the defective notice of the planning
21 commission decision * * * new notice will be sent to
22 all parties, which will result in the original
23 Planning Commission decision becoming final unless a
24 new appeal of that decision is filed with LUBA or the
25 City Council initiates a new review proceeding."
26 Respondent's Memorandum in Support of Motion to
Dismiss 1.

As evidence of the above action, respondent supplies
unapproved draft of minutes of a July 10, 1989 meeting of

1 the city council, which provide as follows:

2 "9. NON-AGENDA ITEMS:•

3 "Phil Grillo of the City Attorney's office recommended
4 City Council consider a motion to voluntarily remand
and review their decision concerning a minor land
5 partition, site development review, and variance (MLP
88-16, SDR, V 88-39) requested by Burton Grabhorn
6 (Centron). Council had considered this issue on
April 10, 1989, and subsequently adopted Resolution
7 No. 89-027. The issue was currently before the Land
Use Board of Appeals; it was Legal Counsel's
8 recommendation this matter be preserved for judicial
review. Mr. Grillo suggested this action be
9 considered tonight in advance of the LUBA oral
argument which was scheduled for July 13th.

10 "Motion by Councilor Schwartz, seconded by Councilor
11 Johnson, to voluntarily remand and review Council's
previous action (Resolution No. 89-027) as was
12 proposed by the City Attorney's office.

13 "Motion was approved by unanimous vote of the Council
present.

14 "10. EXECUTIVE SESSION:

15 "The Tigard City Council went into Executive Session
16 at 9:56 p.m., under the provisions of ORS 192.660(1),
(d), (e) and (h) to discuss labor relations, real
17 property transactions, and current and pending
litigation issues.

18 "11. ADJOURNMENT: 10:15 P.M."

19 Respondent provides no explanation of the meaning or effect of
20 the unsigned draft minutes other than the argument advanced in
21 its memorandum in support of its motion to dismiss.

22 Our fundamental problem with respondent's second motion to
23 dismiss and subsequent memorandum in support thereof, is that
24 we are provided no evidence that the city has actually
25 withdrawn, voided or repealed Resolution 89-27. Respondent
26 must provide us with some evidence that the city has in fact

1 withdrawn, voided or revoked Resolution 89-27 as it argues it
2 has in its memorandum. The draft minutes do not demonstrate
3 that such action occurred. At most, those minutes suggest the
4 city council desires that its decision be remanded for further
5 action. We therefore deny respondent's second motion to
6 dismiss, and treat that motion, instead, as a motion for
7 voluntary remand.

8 Petitioner contends, as in its motions to strike, that the
9 city does not have authority to affect its decision once its
10 decision has been appealed to LUBA, and also that we cannot
11 examine the draft minutes reflecting what the city did, because
12 our review is limited to the record and the draft minutes are
13 not in the record below.

14 We have stated above that nothing in our decision in
15 Standard Insurance v. Washington County, supra, prevents the
16 city from voting to ask this Board to remand its decision.
17 Although the more conventional procedure for requesting a
18 voluntary remand would be for the city to set forth its reasons
19 for (and proposed course of action on) remand in its motion for
20 remand, we see no reason why the city's proposal for voluntary
21 remand cannot be included in the minutes of a meeting of the
22 city council. In reviewing the minutes for this purpose, we do
23 not exceed our statutory limitation to review of the local
24 record any more than we would if the city's proposal for remand
25 were contained solely in a motion for remand.

26 A local government's request for remand, over petitioner's

1 objection, is only appropriate where the local government
2 demonstrates that remand will provide the petitioner with
3 everything it would otherwise be entitled to from this Board.
4 Mobile Crushing v. Lane County, (LUBA No. 84-092, January 16,
5 1985, Order Denying Motion for Remand of Respondent Lane
6 County); Brice v. Portland Metropolitan Area Local Government
7 Boundary Commission, 2 Or LUBA 245 (1980). For example, where
8 a petitioner alleges that a local government adopted inadequate
9 findings and requests that we remand the decision for adequate
10 findings, the local government could agree its findings are
11 inadequate and agree to a remand of its decision. If the local
12 government's agreement to a remand of its decision includes an
13 agreement to address all of petitioner's allegations regarding
14 inadequate findings, remand is appropriate. Mobile Crushing v.
15 Lane County, supra; Brice v. Portland Metropolitan Area Local
16 Government Boundary Commission, supra.

17 The draft minutes, however, do nothing to explain what the
18 city proposes to do on remand. The course of action respondent
19 suggests in its memorandum does not make it clear to us that
20 the city intends to address the errors petitioner alleges in
21 this appeal.⁹ Having failed to demonstrate that all of
22 petitioner's allegations of error will be addressed on remand,
23 we believe it is inappropriate to remand the city's decision
24 over petitioner's objections, and respondent's motion for
25 remand is denied.

26 / / /

1 FIRST ASSIGNMENT OF ERROR

2 "The City Council did not take the matter up for
3 consideration within the prescribed time limits, or in
4 accordance with the procedures specified by the Community
5 Development Ordinance."

6 Under CDC 18.32.310(b) city council review of a decision of the
7 planning commission may be initiated in the following ways:

8 "(1) The filing of a notice of review as provided by
9 Section 18.32.340 by any party to the decision by the
10 close of the city business day within ten days of the
11 sending of the notice of final decision;

12 "(2) The council or commission, on its own motion seeks
13 review by voice vote within ten days of mailed notice
14 of the final decision; or

15 "(3) Referral of a matter under Section 18.32.090(d) by the
16 initial hearings body to the council, upon closure of
17 the hearing, when the case presents a public policy
18 issue which requires council deliberation and
19 determination, in which case the council shall decide
20 the application.

21 Petitioner contends that under CDC 18.32.310(b)(2), the
22 city council is required to, but did not, initiate its review
23 of the decision of the planning commission within ten days from
24 the date the decision of the planning commission was mailed to
25 the parties. Petitioner contends that the city does not have
26 authority to review the planning commission decision on its own
27 motion if that motion is made more than ten days after notice
28 of the planning commission's decision is mailed to the parties.

29 Respondent argues that petitioner may not attack, in this
30 appeal of the council's final review decision, the council's
31 earlier decision to initiate review. Respondent argues that to
32 challenge the council's decision to initiate review petitioner

1 must, but did not, file a timely notice of intent of appeal to
2 this Board from the council's decision to initiate review of
3 the decision of the planning commission. Respondent also
4 argues that the city council had authority to initiate review
5 of the commission's decision in the manner it did. These
6 arguments are addressed separately below.

7 A. Scope of Petitioner's Appeal

8 Respondent argues that petitioner may not attack the city's
9 decision to review the action of the planning commission
10 because no notice of intent to appeal was filed with this Board
11 within 21 days from the time that the city council made its
12 decision to initiate review.

13 We disagree. The city's council action to initiate review
14 of the decision of the planning commission was not a final land
15 use decision subject to our review. See ORS 197.015(10)(a).
16 It was merely part of the process leading up to its adoption of
17 the challenged resolution. The city council's final land use
18 decision is the decision from which the petitioner's notice of
19 intent to appeal was filed, i.e., the city council's resolution
20 approving the applications. Any part of the single city
21 process which led to the city council's adoption of the
22 challenged resolution may be attacked so long as a timely
23 notice of appeal is filed from the city's final decision
24 adopting the resolution. We conclude that petitioner's first
25 assignment of error is properly before us.

26 / / /

1 B. Authority of Council to Initiate Review

2 Respondent argues that the city council did timely initiate
3 review of the decision of the planning commission. Respondent
4 points out that under CDC 18.32.310(b)(2) the period during
5 which the city must initiate its review begins to run ten days
6 from the date of "mailed notice" of the commission's decision.
7 Respondent contends that "mailed notice" means notice provided
8 under CDC 18.32.270.¹⁰ Respondent argues that under
9 CDC 18.32.270, the council had ten days to initiate review of
10 the planning commission decision from the date the decision was
11 made available to the council, not ten days from the date the
12 decision was mailed to the parties. Respondent argues that the
13 time for the city council to initiate review of the decision of
14 the planning commission does not begin to run until after the
15 city council has been properly notified of the decision.
16 Respondent contends the Court of Appeals reasoning in League of
17 Women Voters v. Coos County, 82 Or App 673, 729 P2d 588 (1986),
18 that a petitioner's time to appeal a land use decision should
19 not begin until the petitioner receives the notice to which it
20 is entitled, applies to the city council in these circumstances
21 as well. Respondent maintains that the period for council
22 review did not expire until the council received proper notice.

23 Respondent argues that the council did not receive the
24 notice of the decision of the planning commission to which it
25 was entitled, until the council was given the Council Agenda
26 Summary Item on February 24, 1989 for its regular meeting of

1 February 27, 1989. Respondent contends that this was the
2 council's notification under CDC 18.32.270 that the planning
3 commission had reached a decision in the matter. Respondent
4 points out that the city council took action to initiate review
5 three days after the decision was made available to it, on
6 February 27, 1989. Respondent concludes that the city
7 council's initiation of review of the decision of the planning
8 commission was timely.

9 We must decide whether the council initiated review of the
10 decision of the planning commission within ten days of "mailed
11 notice of the final decision" of the planning commission under
12 CDC 18.32.310(b)(2) and 18.32.270. These CDC provisions are
13 ambiguous. It is not clear whether the "mailed notice" to
14 which CDC 18.32.310(b)(2) refers includes only notice mailed to
15 the applicant and parties, or also includes notice of the
16 decision "made available to the members of the council."
17 CDC 18.32.270.

18 CDC 18.32.270 establishes a process for providing notice of
19 the commission's final decisions. We believe the term "mailed
20 notice of the final decision" in CDC 18.32.310(b)(2) is a
21 shorthand description of this process. CDC 18.32.270 describes
22 "notice" as both the provision of notice mailed to the
23 applicant and the parties and provision of notice "made
24 available to the members of the council." The purpose of
25 CDC 18.32.310 is to provide a procedure for council initiation
26 of review of decisions of the planning commission. It is

1 reasonable to interpret the city's ordinance to provide that
2 the period for initiating council review of decisions of the
3 planning commission does not expire before the council is made
4 aware of the action it has authority to review. As respondent
5 points out, it would be unreasonable to interpret the city's
6 ordinance to require it to schedule special meetings to
7 initiate review of planning commission decisions.¹¹ We
8 review the city's interpretation of CDC 18.23.270 and 310 to
9 determine whether it is correct. McCoy v. Linn County, 90 Or
10 App 271, 275, 752 P2d 323 (1988). We also interpret the city's
11 ordinance in a manner which gives meaning to all parts. League
12 of Women Voters v. Metropolitan Service District, ___ Or
13 LUBA ___, (LUBA No. 88-102, July 11, 1989), slip op 7.

14 In order to give effect to the purpose of
15 CDC 18.32.310(b)(2) and 18.32.270, we conclude that proper
16 notice of a planning commission decision includes both mailing
17 the decision to parties and making the decision available to
18 the city council. We believe that under these CDC provisions,
19 the city council must initiate review of a planning commission
20 decision within 10 days from the date notice of the decision of
21 the planning commission is made available to the council
22 pursuant to CDC 18.31.270.¹²

23 The planning commission's decision was made available to
24 the council three days before the regularly scheduled council
25 meeting following the planning commission's decision. Within
26 three days after the decision was made available to the

1 council, it met and decided to initiate review. Under these
2 circumstances, the council timely initiated review of the
3 decision of the commission and, therefore, the council had
4 authority to initiate review under CDC 18.32.310(b)(2).¹³

5 The first assignment of error is denied.

6 SECOND ASSIGNMENT OF ERROR

7 "The City Council exceeded their [sic] authority in
8 reviewing the creation of an east-west street
9 connecting 130th to 135th Avenue."

10 Petitioner contends that council review of the decision of
11 the planning commission is limited by CDC 18.32.320(b)(6) as
12 follows:

13 "The review of a decision by the commission * * * by
14 the council shall be:

15 "* * * * *

16 "(2) Limited to the grounds relied upon in the notice
17 of review as provided in Section 18.32.340(a),
18 and conducted in accordance with the provisions
19 of Sections 18.32.160 through 18.32.260 and
20 18.32.310;

21 "* * * * *."

22 Petitioner contends that because it believes the council did
23 not properly initiate review of the decision by its own motion,
24 it only had authority to review the issues raised in the
25 applicant's appeal of the commission decision, notwithstanding
26 that the council dismissed the applicant's appeal in favor of
conducting its own review. Petitioner contends that because
the right of way issue was not raised in the applicant's
appeal, the council could not consider or impose a condition

1 requiring dedication of right of way between 130th and 135th
2 Avenues.

3 Respondent contends that when the Council initiates review
4 on its own motion, CDC 18.32.320(b)(2) does not apply.
5 Respondent argues, alternatively, that the applicant's appeal
6 sufficiently raised the 130th to 135th Avenue right of way
7 issue for the council to consider that issue.

8 We agree with respondent that CDC 18.32.320(b)(2) does not
9 apply in this case. By its terms, CDC 18.32.320(b)(2) only
10 applies to city council reviews initiated by a notice of
11 review. CDC 18.32.270 does not apply to limit the scope of
12 council review where the council initiates review on its own
13 motion. Accordingly, we conclude the council had authority to
14 consider the condition of approval requiring dedication of
15 right of way between 130th and 135th Avenues.¹⁴

16 The second assignment of error is denied.

17 THIRD ASSIGNMENT OF ERROR

18 "The Planning Director exceeded his authority by
19 requiring the dedication of a right-of-way and
20 construction of an east-west street connecting 130th
21 and 135th Avenues."

21 Petitioner contends that neither the planning director nor
22 the city council has the authority to require as a condition of
23 approval, dedication for a new street of right of way between
24 130th and 135th Avenues. Petitioner's contention is that
25 because the planning director, who originally imposed the
26 disputed condition, did not have authority to impose the

1 condition, the council (in reviewing the planning commission
2 decision on the appeal of the decision of the planning
3 director) did not have authority to impose the condition.
4 Petition for Review 12. Petitioner maintains that although the
5 code specifically gives the hearings officer authority to
6 require a right of way dedication for a new street in approving
7 conditional use permits (CDC 18.130.040(c)(6)), it does not
8 specifically give such authority to the planning director in
9 approving a minor partition or site review.

10 Respondent argues that the city council's authority to
11 impose the condition does not depend on the decision of the
12 planning director. Respondent argues the city council has the
13 authority and responsibility to impose the disputed condition
14 of approval under the comprehensive plan and the CDC in order
15 to manage the impacts "on the transportation system occasioned
16 by this development and future development." Respondent's
17 Brief 15. Specifically, respondent points out that it has done
18 exactly what is contemplated by its comprehensive plan by
19 requiring the developer to dedicate the right of way for a
20 street. Respondent cites the following comprehensive plan
21 policies to support the right of way condition:

22 " * * * Generally, new streets are dedicated and
23 constructed by a developer. * * * [s]treet
24 dedications and improvements can be required as part
of the development approval process. Plan Vol. 1,
page 227, 228.

25 We agree with respondent that it has authority under both
26 its ordinance and comprehensive plan, to require as a condition

1 of approval, that the applicant dedicate right of way to create
2 a new street. This is evidenced by the provisions cited by
3 respondent¹⁵ and by CDC 18.32.250(f)(2)(D)¹⁶ which
4 specifically authorizes the imposition of a condition requiring
5 "dedication of easements," which is what the city did.¹⁷

6 Respondent has established that the condition is an exercise of
7 the city's authority to mitigate the impact of the proposed
8 development. Respondent has shown that the condition is
9 reasonably related to the development proposed. The condition
10 is a valid exercise of the city's power. See Benjamin Franklin
11 Dev. v. Clackamas County, 14 Or LUBA 284 (1986); O'Keefe v.
12 West Linn, 14 Or LUBA 284 (1986).

13 Petitioner has not established that the condition exceeded
14 the authority of the city.

15 The third assignment of error is denied.

16 FOURTH ASSIGNMENT OF ERROR

17 "The Director, by requiring dedication of street
18 right-of-way and construction of a new street,
19 effectively changed the application from a minor
20 partition to a major partition, without the authority
21 to do so."

22 Petitioner points out that the CDC distinguishes between major
23 partitions and minor partitions based on whether a new street
24 is created. CDC 18.162.020(a) and (b). Petitioner reasons
25 that because the application was for a minor partition, the
26 city may not require, as a condition of approving a minor
27 partition, the creation of a street. Petitioner claims that
28 the city's condition requiring dedication of right of way for

1 public street purposes converted the minor partition to a major
2 partition and the applicant must reapply for a major partition.

3 Respondent argues that if the city committed error in
4 requiring dedication of a right of way for a public street as a
5 condition of approval for a minor partition, the error is
6 procedural and prejudices no one. Respondent points out that
7 under ORS 197.835(8)(a)(B) we may not reverse or remand on the
8 basis of a procedural error which does not prejudice
9 petitioner's substantial rights.

10 Respondent further contends that under CDC 18.162.040(F)
11 the procedures and the substantive approval criteria for major
12 and minor partitions are identical.¹⁸ Respondent maintains
13 that requiring an applicant to apply for a major partition for
14 the sole purpose of enabling the city to impose an otherwise
15 lawful condition of approval accomplishes nothing. Respondent
16 states that the only distinction between a major and minor
17 partition is the description of the application on the mailing
18 label placed on public notices.

19 Petitioner only identifies the distinction between the
20 definitions of minor and major partitions regarding creation of
21 a street as its basis for remand. We do not understand how
22 this difference in definition affects the authority of the city
23 to require dedication of right of way as a condition of
24 approval of a minor partition.

25 There are three distinctions between the city's standards
26 for major and minor partitions. For the preliminary

1 applications

2 "[i]n the case of a major partition, the applicant
3 shall include the proposed right of way location and
4 width, and a scaled cross section of the proposed
street (to include any reserve strip.)"
CDC 18.162.070(b)(7).

5 For the final application

6 "[i]n the case of a major partition, the applicant
7 shall include the proposed right of way location and
8 width, and a scaled cross section of the proposed
street (to include any reserve strip)."
CDC 18.162.080(b)(10).

9 Finally, CDC 18.162.110 provides that major partitions must be
10 monumented and provides monumenting standards. We do not view
11 these provisions as providing a basis for us to conclude that
12 the city's failure to nominally process this partition as a
13 major partition is error.¹⁹ Alternatively, if it is error,
14 it is a procedural error and petitioner fails to demonstrate
15 prejudice to its substantial rights, as required by
16 ORS 197.835(8)(a)(B).²⁰

17 We are cited to no distinction in the manner in which a
18 major and minor partition are processed by the city and we find
19 none. The persons entitled to receive notice of partition are
20 the same for both, (CDC 18.162.040(e)); the approval criteria
21 employed are the same for both (CDC 18.162.040(f)). The only
22 distinctions relate to the information required to be placed on
23 the partition map and to monumentation. The city, however,
24 required both the monumentation and the major partition map
25 information. Any error committed by the city is harmless.

26 The fourth assignment of error is denied.

1 FIFTH ASSIGNMENT OF ERROR

2 "Dedication of a "local street" right-of-way and
3 construction of the required "local street" is
4 inconsistent with the provisions of the Tigard
Comprehensive Plan."

5 Petitioner contends that a condition of approval requiring
6 dedication of a "local street" right of way and construction of
7 the required local street is inconsistent with the provisions
8 of the Tigard Comprehensive Plan (plan).

9 Petitioner points out that the disputed right of way is
10 termed by the city a "local street." Petitioner points out,
11 however, that 130th and 135th Avenues are classified by the
12 city as minor collectors. Petitioner argues that any street
13 connecting two minor collectors is not consistent with the
14 plans specifications for a local street.²¹

15 Petitioner also argues the city's plan does not list a new
16 collector connecting 130th and 135th Avenues, and contends the
17 city may not authorize creation of such a street without first
18 amending its plan. Petitioner asserts that the plan "* * *
19 clearly articulates the location and number of collector
20 streets that are required in the planning area, and does not
21 include the proposed street." Petition for Review 16.

22 Respondent states that the disputed right of way dedication
23 is for a "local street." Respondent maintains that this
24 conclusion is inevitable because the right of way and pavement
25 widths required for the right of way comply with plan standards
26 for a local street. See n 21. Respondent agrees with

1 petitioner that a local street is designed to allow traffic
2 movement out of neighborhoods "to major collectors and
3 arterials." Respondent's Brief 23. Respondent points out that
4 the right of way it required meets all of the standards for a
5 local street and that, importantly, the city required the
6 design of the right of way to be curvilinear to "discourage
7 through traffic." Respondent Brief 23.

8 Respondent also contends that its condition of approval
9 requiring a right of way be dedicated between 130th and 135th
10 Avenue at the location proposed is consistent with plan policy
11 8.1.1, which provides "[t]he city shall plan for a safe and
12 efficient roadway system that meets the current and anticipated
13 growth and development." Respondent further argues that the
14 right of way dedication is consistent with CDC 18.108.060(b)
15 which discourages direct access onto collector streets such as
16 130th and 135th Avenues. Respondent's Brief 21.²²

17 The city's findings state in part:

18 "The creation of an east-west local street, * * *
19 would enhance traffic circulation within the
20 neighborhood and allow for improved access to
21 Summerlake Park which lies to the east. The adopted
22 park plan calls for improvements to Summerlake Park as
23 a community park, with vehicular access primarily from
24 130th Avenue/Winterlake Drive. The park will be a
25 traffic generator, attracting traffic from the
26 residential areas along 135th Avenue. Currently,
Brittany Drive is the only direct connection between
135th and 130th. Therefore, it is desirable to have
an alternative connection to serve the multi-family
residential area south of Scholls Ferry Road. * * *"

25 We believe the street right of way the city required is
26 appropriately characterized by the city as a local street. A

1 local street serves "primarily" to provide direct access to
2 abutting property and to allow traffic movement within the
3 neighborhood. Direct access onto collector streets is
4 discouraged under the plan. The city found that the proposed
5 development will result in several driveway access points.
6 Record 23. In order to avoid access direct from these driveway
7 access points onto collector streets, the city required the
8 provision of a right of way for a local street to accommodate
9 the increased traffic circulation needs of the neighborhood due
10 to the development. The city also found the local street will
11 serve to facilitate the movement of traffic within the
12 neighborhood as well as to allow improved access to Summerlake
13 Park. Record 24.

14 The city's resolution does not appear to contemplate that
15 the right of way it required will be used to "collect and
16 transport traffic from local neighborhoods and abutting
17 property out of the neighborhoods to major collectors and
18 arterials," (emphasis supplied), a function properly satisfied
19 by a minor collector. Similarly, there is nothing in the
20 evidence or findings to which we have been cited which suggest
21 that the right of way will serve the function of a major
22 collector. The purpose of the right of way, as we understand
23 it, is to provide for traffic movement within the neighborhood
24 and to provide direct access to abutting properties. The right
25 of way for the proposed street also provides additional access
26 to Summerlake Park, located in the neighborhood. We see

1 nothing in the plan which requires that streets running through
2 neighborhoods be constructed to collector street standards
3 simply because a park is located within the neighborhood and
4 park traffic may be served. We are cited to no evidence to
5 show that the expected traffic impact from creating the
6 proposed street will exceed the volume or the other plan
7 standards for a local street. See n 21. Nothing about
8 provision of improved access to the park suggests that the
9 primary function of the right of way for the proposed local
10 street, is any more than a means for providing for traffic
11 movement within the neighborhood and access to abutting
12 property.

13 The fifth assignment of error is denied.

14 SIXTH ASSIGNMENT OF ERROR

15 "The City Council's decision to require a new
16 right-of-way and construction of a local access street
17 across petitioner's property amounts to an
18 unconstitutional taking."

19 Petitioner contends that the city's decision in this case
20 authorizes and determines the existence of a street connecting
21 130th and 135th Avenues at the subject location. Petitioner
22 argues that, because it has the misfortune of owning adjacent
23 property in the path of the new street, petitioner will be
24 required to dedicate to the city the balance of the
25 contemplated right of way when petitioner attempts to develop
26 its own property. Petitioner argues that the city's
requirement that the applicant dedicate right of way for a new

1 street has, therefore, taken petitioner's property in violation
2 of the Oregon and U.S. Constitutions.

3 Respondent argues that the appealed decision does not
4 extend the right of way across petitioner's land, and does not
5 exact anything from petitioner. Respondent argues that the
6 petitioner's claim of an unconstitutional taking is premature
7 at best.

8 We agree with respondent that no taking of petitioner's
9 property has occurred. Petitioner has not requested
10 development approval from the city, and the city has not made
11 any decision which would deny petitioner any use of its
12 property. Petitioner's claim of an unconstitutional taking is
13 premature. See Williamson County Regional Planning Commission
14 v. Hamilton Bank, 473 US 172, 105 S Ct 3108, 87 L Ed2d 126
15 (1985).

16 The sixth assignment of error is denied.

17 The decision of the city is affirmed.

FOOTNOTES

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Planning staff suggested to the council that it review the decision of the planning commission to "evaluate the right of way issue raised by the applicant and the need for an east-west street as originally required by the Planning Division decision." Record 115.

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2.
Respondent's motion to dismiss is styled a "first affirmative defense." In this opinion, we refer to respondent's first affirmative defense contained in its response brief as respondent's first motion to dismiss.

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Petitioner's motion for reply brief was granted orally by the Board during a conference call with the parties on July 12, 1989. We required that petitioner file the reply brief before the time set for oral argument in this proceeding, and petitioner did so.

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4.
The Board may consider matters outside of the record in determining whether a party has standing and to determine whether it has jurisdiction to consider an appeal, Hemstreet v. Seaside, ___ Or LUBA ___ (LUBA No. 87-094, April 24, 1988), slip op 4, and in the circumstances specified in ORS 197.830(11)(C) regarding evidentiary hearings.

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5
The parties argue at length concerning the effect of our recent decision in Standard Insurance Co. v. Washington County, supra, on a local government's authority to withdraw, void or revoke a decision while that decision is pending before this Board. Standard Insurance did not concern a local government decision to revoke or repeal a decision while that decision was pending before this Board. We have no occasion in this proceeding to determine whether our decision in Standard Insurance is properly interpreted to preclude such action.

24
25
26
6
It is not clear that the city actually made a decision to request that we remand its decision. The minutes of the meeting at which the city voted to "voluntarily remand and

1 review [its] decision * * *" on appeal are unsigned.

2

7

3 Petitioner contends that the motion to dismiss relies
4 entirely on new matter not in the record below. We have
5 already explained above that we may review evidence outside the
6 record to determine whether the appeal is moot.

6

8

7 CDC 18.20 010(B) provides:

8 "Any permit or approval issued or granted in conflict with
9 the provisions of this chapter shall be void. (Ord. 89-06;
10 Ord. 83-52)"

11 CDC 18.32.390(A)(4) provides:

12 "A material misrepresentation or mistake of fact or policy
13 by the City in the written or oral report regarding the
14 matter whether such misrepresentation be intentional or
15 unintentional."

13

9

14 We have been asked in this case to reverse the city's
15 decision on the basis that its decision, in several
16 particulars, exceeds the city's authority. Remanding the case
17 will not resolve issues which petitioner contends warrant
18 reversal.

17

10

18 CDC 18.32.270 provides that notice of decisions of the
19 planning commission "shall be mailed to the applicant, and to
20 all parties to the decision, and shall be made available to the
21 members of the council."

21

11

22 The Tigard City Council is a lay body which meets at
23 regular intervals to conduct city business.

23

12

24 This interpretation ensures that the interests of the
25 public are protected in that the council has a meaningful
26 opportunity make a decision to initiate review of a planning
27 commission decision under CDC 18.32.310(b)(2). We need not
28 determine whether CDC 18.32.310(b)(2) would permit council

1 review where there was a unreasonably long delay between the
2 decision by the planning commission and making the decision
3 available to members of the council. Such was not the case
4 here.

4 13

5 Because of our interpretation of CDC 18.32.310(b)(2), we
6 need not address respondent's alternative argument that the
7 council had authority to review the planning commission's
8 decision under CDC 18.32.310(b)(1).

7 14

8 In view of our resolution of the first assignment of error,
9 we need not consider respondent's alternative argument that the
10 applicant's appeal adequately raised the right of way issue.

10 15

11 Respondent identifies comprehensive plan policies and CDC
12 approval criteria which it contends apply to the development
13 proposed and justify the condition of approval requiring
14 dedication of the right of way. Respondent cites
15 comprehensive plan Policy 8.1.1 which states:

14 "The city shall plan for a safe and efficient roadway
15 system that meets the current needs and anticipated future
16 growth and development."

16 Respondent also cites CDC 18.162.030 which provides that
17 with regard to partitions the city must find:

17 "(1) The proposal conforms with the City's Comprehensive
18 Plan;

19 "* * * * *

20 "(3) Adequate public facilities are available to serve the
21 proposal;

22 "* * * * *"

22 Respondent further cites CDC 18.120.180(1)(H) which
23 provides with regard to site development review:

24 "Approval standards. The director shall make a finding
25 with respect to each of the following criteria when
26 approving, approving with conditions or denying an
application:

1 "(1) Provisions. The provisions of the following chapters:

2 "* * * * *

3 "(H) Chapter 18.108, Access and Egress;

4 "* * * * *"

5

16

6 The CDC's definition of "development" includes partitions
7 and site development. CDC 18.26.030. The provisions of CDC
8 Chapter 18.32 are applicable to all development applications.
9 CDC 18.32.250(F)(2)(d) provides:

10 "(F) The decision [of the approval authority on a
11 development application] may be for denial, approval
12 or approval with conditions, pursuant to (2) of this
13 subsection:

14 "* * * * *

15 "(2) Conditions may include, but are not limited
16 to:

17 "* * * * *

18 "(D) Dedication of easements."

19

17

20 Petitioner offers no explanation why authority to
21 require as a condition of approval the dedication of
22 easements, is not authority to require dedication of a
23 right of way. We believe the term "easement," as used in
24 this context, is broad enough to encompass a right of way.

25

18

26 CDC 18.162.040(f) provides:

27 "The Director shall approve, approve with conditions
28 or deny an application. The Director shall apply the
29 standards set forth in Section 18.162.030 of this code
30 when reviewing an application for a major or minor
31 partition or the standards in 18.162.060 when reviewing an
32 application for a lot line adjustment."

33

19

34 We note that the city requires in its decision
35 monumentation of the partition. Record 27. We note also

1 that the city provides specific instructions regarding the
2 location, and width of the right of way and requires that
3 the right of way be approved by the city's engineering
4 division before final approval is given. Record 25. We
5 note also that notice of the decision of the planning
6 director was provided petitioners. Record 191-206. This
7 notice identified that the disputed right of way was
8 required as a condition of approval. Record 200.
9 Petitioner was provided notice of the planning
10 commission's decision omitting the right of way
11 condition. Record 140-157. Petitioner also was notified
12 that the council had chosen to "review the planning
13 commission's approval." Record 93-97. We have already
14 decided that as a matter of law that the council had the
15 authority to consider and impose the disputed right of
16 way. Under these circumstances, petitioner was adequately
17 advised of the scope of the issues which could be
18 discussed at the council's meeting.

11 20

12 Petitioner participated in the hearing before the city
13 council and offered testimony on the disputed right of
14 way. Record 44.

14 21

15 The plan provides the following street classification
16 definitions:

16 "3. Minor Collector:

17 "The primary function of a minor collector is to
18 collect and transport traffic from local neighborhoods
19 and abutting property out of the neighborhoods to
20 major collectors and arterials. The minor collector
21 should provide an efficient circulation pattern within
22 the neighborhood for distribution of traffic to local
23 streets as well as the major collectors and
24 arterials. A secondary function is to provide a means
25 for pedestrian and bike travel. Parking may or may
26 not be provided.

22 "Standards:

23	"Right-of-Way Width	60 feet
24	"Pavement Width	40 feet
25	"Moving Lanes	2
26	"Volumes per day	500-3,00 vehicles
	"Driving Speed	25-30 miles per hour

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" * * * * *

"4. Local:

"This street classification's primary function is to provide direct access to abutting property and to allow traffic movement within a neighborhood. Local streets should also emphasize and provide for pedestrian and bike travel.

"Standards:

- "Right-of-Way 50 feet
- "Pavement Width 34 feet
- "Moving Lanes 2
- "Volumes 0-1,500 vehicles
per day
- "Driving Speed 10-25 miles per hour
- "Cul-de-sacs 40 foot radius
turn-around and 400 feet maximum length.

" * * * * * " Plan I-224.

22

CDC 18.108.060(b) provides, in part as follows:

"Direct individual access to arterial or collector streets * * * shall be discouraged * * *"