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

1  
2  
3 CENTURY 21 PROPERTIES, INC., )  
4 an Oregon Corporation, and )  
5 DAVID ORINGDULPH, )  
6 )  
7 Petitioners, )  
8 vs. )  
9 CITY OF TUALATIN, )  
10 Respondent, )  
11 and )  
12 BRIDGEPORT DEVELOPMENT, LTD., )  
13 Respondent-Intervenor. )

LUBA No. 86-065  
FINAL OPINION  
AND ORDER

14 Appeal from City of Tualatin.

15 Corinne C. Sherton, Salem, filed the petition for review  
16 and argued on behalf of petitioners. With her on the brief  
17 were Mitchell, Lang & Smith.

18 Mark Pilliod, Tualatin, filed the response brief and argued  
19 on behalf of Respondent City.

20 Stephen H. Barram, Milwaukie, filed a response brief and  
21 argued on behalf of Respondent-Intervenor Bridgeport  
22 Development, LTD. With him on the brief were Selander & Barram.

23 BAGG, Referee; DuBAY, Chief Referee; KRESSEL, Referee;  
24 participated in the decision.

25 REMANDED 01/30/87

26 You are entitled to judicial review of this Order.  
Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a City of Tualatin Resolution No.  
4 1825-86 entitled "A RESOLUTION GRANTING APPROVAL OF A  
5 PRELIMINARY SUBDIVISION PLAT TO BE KNOWN AS BRIDGEPORT  
6 SUBDIVISION." The approval became final on July 28, 1986, and  
7 petitioners seek reversal and remand of this decision.

8 FACTS

9 Intervenor Bridgeport Development, LTD. filed an  
10 application with the city for a subdivision preliminary plat  
11 approval on May 12, 1986. The new subdivision will consist of  
12 73 units. The subdivision covers 19.9 acres.

13 Bridgeport Subdivision is in the vicinity of three other  
14 approved subdivisions, Fox Hill East, Fox Hill I and Fox Hill  
15 II. To the west and at the northern end of its western  
16 boundary is land planned for Fox Hill III Subdivision. Fox  
17 Hill III Subdivision is not yet approved, however.

18 Nyberg Lane is a collector street to eventually extend from  
19 Southwest 65th to Southwest 50th Avenues. It presently exists  
20 only from Southwest 65th Avenue to the northwest corner of the  
21 Bridgeport Subdivision site where it becomes a private  
22 driveway. Should Fox Hill III Subdivision be approved, Nyberg  
23 Lane would furnish access to Fox Hill III. A condition in the  
24 first Fox Hill Subdivision Plat requires improvement of this  
25 roadway before further development.

1 FIRST ASSIGNMENT OF ERROR

2 "Respondent misconstrued the applicable law, made a  
3 decision not supported by adequate findings and failed  
4 to comply with Section 8(2)(d) of Tualatin Ordinance  
5 No. 176-70 in approving an alignment for the extension  
6 of Nyberg Lane which will be offset from 40 to 50 feet  
7 from that of the existing portion of Nyberg Lane."

8 The city subdivision ordinance provides:

9 "(d) Alignment. All streets shall, as far as  
10 practicable, be in alignment with the existing streets  
11 by continuations of the center lines thereof. In no  
12 case shall the staggering of streets make a 'T'  
13 intersection or be so designed as to allow a dangerous  
14 condition. Offsets of less than 100 feet will not be  
15 allowed." City of Tualatin Ordinance 176-70, Section  
16 8(2)(d).

17 Petitioners argue the Bridgeport Subdivision Plat does not  
18 show proper alignment of the extension of Nyberg Lane. The  
19 center line of the existing Nyberg Lane is some 20 feet to the  
20 north of the north boundary of the tax lots being subdivided.  
21 The Nyberg Lane extension is located south of the line. This  
22 fact will cause the extension of Nyberg Lane center line to be  
23 offset between 40 and 50 feet from the existing center line of  
24 Nyberg Lane. Petitioners note that there are no findings  
25 interpreting Section 8(2)(d) or how it was applied. Given this  
26 fact, petitioners argue it is impossible for this Board to  
review the city's decision for compliance with the standard  
other than to hold that the prohibition against offsets of less  
than 100 feet is violated.

As a second part of this assignment of error petitioners  
argue that a condition of the Bridgeport Subdivision approval  
improperly delegates a power to the city engineer which must be

1 exercised by the governing body. The condition states

2 "Prior to construction of Nyberg Lane, the final  
3 alignment for Nyberg Lane shall be reviewed and  
4 approved by the City Engineer."

5 The city argues that until the Fox Hill III Subdivision is  
6 approved, the exact alignment of Nyberg Lane can not be known.  
7 The city points to the engineer's report of June 6, 1986, which  
8 the city incorporated in its order, stating the construction of  
9 a roadway would take place at the same time as construction of  
10 that portion of Nyberg Lane adjacent to the Fox Hill III  
11 Subdivision. Until the Fox Hill III Subdivision is platted,  
12 the alignment of Nyberg Lane can not be known and petitioners'  
13 argument is premature, according to respondent.

14 While we agree the precise alignment of Nyberg Lane can not  
15 now be determined, the approved Bridgeport Subdivision Plat  
16 shows the center line of the existing Nyberg Lane to be 20 feet  
17 north of the Bridgeport property line. In order for the center  
18 lines to match, property north of the Bridgeport property line  
19 (not owned by the Bridgeport subdivider) must be dedicated to  
20 provide enough right-of-way for a new center line.

21 The city is apparently relying on its ability to obtain  
22 additional right-of-way from other land owners to permit an  
23 alignment of Nyberg Lane which does not violate the city's  
24 standard. The fact remains, however, that the approval of this  
25 plat shows an apparent violation of the city's requirement that  
26 there be no offsets of less than 100 feet.<sup>1</sup>

We therefore sustain petitioners' claim that the city has

1 impermissibly approved a development showing alignment of  
2 existing streets with an offset of less than 100 feet.

3 Petitioners' second point is more difficult to answer.  
4 Absent procedural safeguards, the city may not delegate its  
5 responsibility to find compliance with an approval standard.  
6 Downtown Community Association v. City of Portland, 3 Or LUBA  
7 244 (1981); Turner v. Washington County, 8 Or LUBA 234; aff'd  
8 70 Or App 575, 689 P2d 1318 (1984). However, where the city  
9 finds an approval standard satisfied, it may delegate to its  
10 city engineer those final technical decisions which do not  
11 affect compliance with the approval standards. Meyer v. City  
12 of Portland, 7 Or LUBA 184 (1983); aff'd 67 Or App 274, 678 P2d  
13 741; rev den 297 Or 82 (1984).

14 Because this case must be remanded for further proceedings  
15 to insure compliance with Section 8(2)(d) of the ordinance, we  
16 need not assume that the delegation to the city engineer is a  
17 grant of permission (1) to exceed the scope of the ordinance or  
18 (2) to assume a power reserved for the city council. That is,  
19 providing the city council finds that alignment of Nyberg Lane  
20 complies with ordinance standards, a delegation to the city  
21 engineer to adjust the center line within city ordinance  
22 standards is not error.

23 The first assignment of error is sustained in part.

24 SECOND ASSIGNMENT OF ERROR

25 "Respondent misconstrued the applicable law and  
26 violated Section 5(6) and (7) of City of Tualatin  
Ordinance No. 176-70 in allowing the developer of the

1 Bridgeport Subdivision not to submit its financial  
2 guarantee for the construction of the portion of  
3 Nyberg Lane within the subdivision until 50% of the  
building permits in the subdivision are issued."

4 Section 5(6) of the city's subdivision ordinance provides  
5 that before final plat approval, the subdivider must either  
6 complete all required improvements or make an agreement with  
7 the council which specifies the time within which all required  
8 improvements will be completed. If an agreement is used, the  
9 ordinance requires that the subdivider file a bond along with  
10 the agreement which assures full performance of all provisions  
11 of the agreement.<sup>2</sup>

12 The city's approval of Bridgeport Subdivision provides that  
13 if Nyberg Lane is not improved along with other improvements in  
14 the subdivision, the subdivider shall enter into an agreement  
15 with the city assuring completion. The condition also requires  
16 the agreement to provide for financial guarantees to insure  
17 completion of the construction. However, the last sentence of  
18 the condition states:

19 "The agreement may provide that the financial  
20 guarantee need not be provided until 50 percent of the  
building permits in the subdivision are issued."

21 Petitioners argue this provision is inconsistent with the  
22 ordinance because it authorizes a delay in submission of  
23 financial guarantees until after final plat approval (building  
24 permits may not be issued until final plat approval).  
25 According to petitioners, final plat approval is not possible  
26 until (1) all improvements have been completed or (2) financial

1 guarantee covering 100 percent of construction costs has been  
2 submitted and approved by the city.

3 We are cited to nothing in the ordinance which allows final  
4 plat approval without (1) completion of all required  
5 improvements or (2) complete financial guarantee for  
6 construction of all improvements.<sup>3</sup> The condition included in  
7 the city's order excuses this assurance.<sup>4</sup> The condition is  
8 in violation of the ordinance, and requires a remand.

9 The second assignment of error is sustained.

10 THIRD ASSIGNMENT OF ERROR

11 "Respondent has exceeded its jurisdiction, improperly  
12 construed the applicable law and failed to follow the  
13 procedures applicable to the matter before it in a manner  
14 that prejudiced the substantial rights of Petitioners in  
15 requiring, as a condition of the Bridgeport Subdivision  
16 preliminary plat approval, that Intervenor, Petitioner  
17 Century 21 and other property owners jointly finance the  
improvement of a section of Nyberg Lane not adjacent to  
developable property, and that "all final details of the  
agreements and funding estimates [for such improvement] be  
approved by the City Council prior to the execution of the  
final plat of the Bridgeport Subdivision."

18 Petitioners object to a condition included in the  
19 Bridgeport Subdivision preliminary approval as follows:

20 "Prior to the approval of the final plat, an agreement  
21 shall be entered into governing participation in  
22 financing of Nyberg Lane improvements as per the City  
23 Engineer's report, dated June 9, 1986. The agreement  
24 shall provide for financial guarantees satisfactory to  
25 the City.

26 Petitioners complain that the condition is ambiguous in  
that it does not specify whether the agreement referred to must  
be between the subdivider and the city, or whether the  
agreement is also binding upon petitioners, Century 21.

1 Petitioners ask that we remand the decision to clarify this  
2 issue.

3 It is not clear how petitioners are affected by this  
4 condition. The "agreement" referred to in the condition has  
5 already been entered into, and petitioners are not included.  
6 Petitioners are correct that the condition and the engineer's  
7 report do not provide for a clear allocation of costs, but we  
8 are not prepared to say that an agreement to which Century 21  
9 is not a party will require Century 21 to pay a share of the  
10 road improvement expense.

11 Petitioners acknowledge that they are already subject to a  
12 requirement to improve Nyberg Lane as the result of a condition  
13 in the original Fox Hill Subdivision Plat approval.

14 Petitioners advise that under the county's assessment  
15 scheme, petitioners are entitled to recover some of the costs  
16 of improvement to Nyberg Lane from others benefitted by the  
17 improvements. Petitioners fear, however, that under the  
18 condition attached to this subdivision approval, the city may  
19 already have limited the amount petitioners recover from the  
20 owners of Bridgeport.

21 While the condition may lack clarity, we do not understand  
22 the condition to excuse adherence to city ordinances. That is,  
23 we do not understand the condition to vitiate an ordinance  
24 which allows Century 21 to recover costs of development against  
25 those benefitted by the roadway. Petitioners' argument is, in  
26 our view, premature. The time to challenge a city decision on



1 assessment for road costs is at the time of the assessment.

2 We therefore deny this assignment of error.

3 The decision of the City of Tualatin is remanded.  
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1 FOOTNOTES

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4 The city is empowered under its ordinance to approve  
5 developments in phases. Presumably, were this development to  
6 be approved as a phase of a series of developments along Nyberg  
7 Lane, exact alignment of the roadway would not be a condition  
of the present plat approval. However, this subdivision stands  
by itself; it is not part of a phased overall development of  
the area.

8 2

9 Section 5(6) of the city's ordinance states:

10 "Agreement for Improvements. Before city council  
11 approval is certified on a final plat, a subdivider  
12 shall complete all required subdivision improvements  
13 and have the same accepted by resolution of the city  
14 council; or, in the alternative, the subdivider shall  
15 execute and file with the city council an agreement  
16 between the subdivider and the city specifying the  
17 period within which all required subdivision  
18 improvements and repairs shall be completed; providing  
19 that if such work is not completed within the period  
20 specified, the city may complete the same and recover  
the full costs and expense thereof from the  
subdivider.

21 Subsection 7 requires the subdivider to file a bond if an  
22 agreeemnt is used

23 "which bond shall assure the subdivider's full and  
24 faithfull performance of the provisions of said  
25 agreement."

26 3

27 The city can accept a maintenance bond of not less than 15  
28 percent of the cost of construction of improvements. The  
29 maintenance bond, however, covers improvements and maintenance  
30 after construction of all required subdivision improvements.  
31 Ordinance Section 5(b).

32 4

33 The city argues the improvements required are "offsite."  
34 We understand the city to argue therefore that city ordinance  
35 requirements cited by petitioner are somehow not applicable.

1 We note the ordinance makes no distinction between on and  
2 offsite improvements. The ordinance simply requires that  
3 improvements be completed (or agreed and bonded for). The  
4 ordinance requires completion of "all required subdivision  
5 improvements...." Tualatin City Ordinance, Section 5(6).

6 The city makes an additional argument that because the  
7 ordinance allows the agreements to provide for construction in  
8 "phases," that the 50 percent limitation in this condition is  
9 in compliance with the ordinance. We note nothing in this  
10 approval or the agreement provides for construction in phases.  
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