BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GORDON R. MARTIN, GORDON S. MARTIN, Petitioners, vs. CITY OF TIGARD, Respondent.	)	LUBA No. 88-034 FINAL OPINION AND ORDER

Appeal from the City of Tigard.

Charles D. Ruttan and John C. Cahalan, Portland, filed the petition for review. With them on the brief was Dunn, Carney, Allen, Higgins & Tongue. John C. Cahalan argued on behalf of petitioners.

Timothy V. Ramis and Jeff Bachrach, Portland, filed the response brief. With them on the brief was O'Donnell, Ramis, Elliott & Crew. Jeff Bachrach argued on behalf of respondent.

Charles D. Ruttan, John C. Cahalan and Douglas V. Van Dyk, Portland, filed a reply brief. With them on the brief was Dunn, Carney, Allen, Higgins & Tongue.

HOLSTUN, Referee; BAGG, Chief Referee, participated in the decision.

DISMISSED 09/19/88

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal Ordinance 88-08 which amends a 1984 city ordinance establishing the Dartmouth Street Local Improvement District (LID).

FACTS

On April 9, 1984, the city adopted Ordinance 84-17 establishing the Dartmouth Street LID.[1] Ordinance 84-17 was challenged in a writ of review proceeding, and the circuit court upheld the city's decision. On appeal, the Court of Appeals rejected all challenges to the formation of the LID, but set aside the original assessment because a portion of the planned improvement was located outside the boundary of the LID. Martin v. City of Tigard, 78 Or App 181, 714 P2d 1115 (1986).

Following remand from the Court of Appeals, there were discussions between the city, the Oregon Department of Transportation (ODOT) and affected property owners, including petitioners. Included in those discussions was ODOT's requirement that the city enter an agreement prior to issuance of a permit by ODOT for connection of the proposed Dartmouth LID roadway improvements to Highway 99W.

The Tigard Municipal Code Sec. 13.04.050 - .055 allows modification of an existing LID without repeating the formation process. Under these provisions, the city adopted Ordinance 88-08, on May 9, 1988, to clarify that the portion of the

proposed roadway improvements located outside the LID would be paid for with funds from other sources, not from assessments against properties within the LID. In addition, Section 9 of Ordinance 88-08 provides as follows:

> "The designated city officials are authorized and shall enter an agreement with the Oregon Department of Transportation."

Following adoption of Ordinance 88-08, the city adopted Resolution 88-04 on June 1, 1988. Section 1 of Resolution 88-04 provides, in part:

> "The City Council hereby authorizes the Mayor and the City Recorder to sign, on behalf of the city, the Cooperative Improvement Agreement/Traffic Signal Project with the Oregon Department of Transportation, providing for the design and construction of intersection revisions at the intersection of Pacific Highway West [Hwy 99W] and Southwest 78th Avenue." Record 3-4.

On June 1, 1988, the mayor and city recorder signed an agreement with ODOT entitled "Cooperative Improvement Agreement Traffic Signal Project". Record 5. The agreement specifies state and city obligations. The first of the city's obligations provided:

> "1. The City shall complete a Transportation Plan for the Tigard Triangle which will identify major roadway and lane requirements to adequately serve buildout development of the Triangle. This Transportation Plan shall be based upon the current Land Use Plan. The City shall initiate hearings and complete their study on such comprehensive plan amendments within 12 months after final publication of the State's Environmental Assessment for the I-5 Interchange at Highway 217/Kruse Way project.
>
> "<u>Until additional access is built, the City will be required to limit development to that which</u>

> can be served by the existing system supplemented by Dartmouth. The criteria for measuring development impact will be traffic volumes on several streets measured along a north screenline and a southeast screenline. The north screenline will be just south of 99W and includes 69th Avenue, 72nd Avenue, Dartmouth Street, and 78th Avenue. The southeast screenline will be the Haines Road structure over I-5, the southbound I-5 on-ramp from Haines Road and 72nd Avenue just north of the 217 interchange. The City will be required to monitor the volumes at these sites annually. When the sum of the outbound PM peak hour volumes along either screenline reaches 90 percent of the calculated available capacity of the existing system plus Dartmouth additional development will not be allowed until the additional capacity identified in the City's study has been constructed. The 90 percent of calculated capacity will be 2,000 vehicles along the north screenline and 2,400 vehicles along the southeast screenline." Record 7. (Emphasis added).

The version of the agreement signed by the city on June 1, 1988 apparently was never signed by ODOT. On August 22, 1988, two days before oral argument in this appeal, the city adopted Resolution 88-82. That resolution ratified an amended agreement signed by the city and ODOT, dated August 15, 1988. The amended agreement deleted the above emphasized portion of the June 1, 1988 version of the agreement and added the following language:

> "The City shall provide for such additional access and/or capacity when the Plan criteria requires [sic] it and in accordance with its comprehensive plan and zoning codes."[2]

Petitioner filed a notice of intent to appeal Ordinance 88-08 on May 19, 1988. Petitioners did not file separate notices of intent to appeal Resolutions 88-45, 88-082, or the

June 1, 1988 or August 15, 1988 versions of the ODOT/City of Tigard agreement.

DECISION

Respondent first argues Ordinance 88-08 is not a land use decision subject to our review because it satisfies neither the statutory test in ORS 197.015(10) nor the significant impact test enunciated in Peterson v. Klamath County, 279 Or 249, 566 P2d 1193 (1977) and City of Pendleton v. Kerns, 294 Or 126, 133, 653 P2d 992 (1982). See, Billington v. Polk County, 299 Or 471, 479, 703 P2d 233 (1985).

Second, respondent argues even if Ordinance 88-08 were a land use decision subject to our review, petitioner appealed Ordinance 88-08, not the June 1, 1988 version of the agreement between the city and ODOT. Petitioners' challenge in the petition for review is directed only at the June 1, 1988 version of the agreement. Therefore, respondent argues, petitioners' attack on a proposed agreement that is not even properly before LUBA provides us with no grounds for remand or reversal of Ordinance 88-08.

As explained below, we agree with both of respondent's contentions and dismiss the appeal.

A. Jurisdiction

1. Statutory Test

Our jurisdiction is limited to land use decisions. ORS 197.825(1). In determining whether we have jurisdiction to review a particular decision, we look first to the statutory

definition of land use decision provided in ORS 197.015(10):

> "'Land use decision':
>
> "(a) Includes:
>
> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation;
>
> "* * * * *"

Petitioners cite no goal, comprehensive plan or land use regulation provisions applicable to Ordinance 88-08. Petitioners do argue in their third assignment of error, see footnote 6, infra, that the disputed city obligation in the June 1, 1988 version of the agreement constitutes a new land use regulation.

The only link between the June 1, 1988 version of the ODOT agreement and Ordinance 88-08 is Section 9 of that ordinance which, as noted previously, provides:

> "The designated city officials are authorized and shall enter an agreement with the Oregon Department of Transportation."

This reference is not sufficient to adopt, as part of Ordinance 88-08, the particular version of the agreement signed by the city on June 1, 1988. Petitioners point to nothing else about Ordinance 88-08 that suggests it satisfies the statutory test for a land use decision.[3] Accordingly, we conclude

Ordinance 88-08 is not a land use decision, as that term is defined in ORS 197.015(10).

2. Significant Impact Test

In Portland Oil Service v. City of Beaverton, ___ Or LUBA ___ (LUBA No. 87-076, December 9, 1987), we determined a modification of an LID satisfied the significant impact test and thus was a land use decision subject to our review.[4] However, we made it clear that when an LID is modified, we do not have jurisdiction to review the modification simply because the LID as originally approved has significant impacts on present or future land use. Rather, it is the modification itself that must satisfy the significant impact test. Portland Oil, supra, slip op at 6.

In this case, the ordinance provides that a portion of the proposed improvement located outside the LID boundaries will not be paid for with special assessments levied within the LID. The ordinance also approved final plans and specifications, authorized the city engineer to approve minor adjustments or revisions to the final plans and specifications, approved the preliminary assessment, authorized execution of general obligation warrants, and directed city officials to enter an agreement with the Oregon Department of Transportation.

The disputed potential development limitation in the June 1, 1988 agreement is the only aspect of Ordinance 88-08 petitioners specifically argue will have significant impacts on land use. As explained supra, the city did not adopt the

June 1, 1988 agreement when it adopted Ordinance 88-08. Petitioners point to nothing else about Ordinance 88-08 that would satisfy the significant impact test. Petitioners' therefore have failed to carry their burden to demonstrate Ordinance 88-08 will have significant impacts on land use. City of Pendleton v. Kerns, supra, 294 Or at 134 n 7.

In their reply brief, petitioners suggest the development limitations they object to are "inherent in the existing LID regardless of whether they are expressed in writing as a condition of the permit to be issued by ODOT." Reply brief 6. Petitioners then suggest their objections in the petition for review are not altered by deletion of the disputed condition in the June 1, 1988 ODOT agreement. As noted supra, the petition for review attacks only the disputed limitations in the June 1 version of the agreement. Petitioners' undeveloped suggestion in their reply brief is not sufficient to demonstrate Ordinance 88-08 will have a significant impact on land use. Neither is it sufficient to comply with OAR 661-10-030(3)(d) which requires petitioners to set forth separate assignments of error and argument in support of each assignment of error. We will not develop an argument for petitioners.[5] Deschutes Development v. Deschutes Cty., 5 Or LUBA 218, 220 (1982); Tichy v. Portland City Council, 6 Or LUBA 13, 23-24 (1982).

B. Agreement With ODOT

Petitioners' three assignments of error challenge development limits included in the June 1, 1988 version of the

agreement, but deleted from the agreement entered August 15, 1988.[6] Respondent city argues the final decision at issue in this appeal is Ordinance 88-08, not Ordinance 84-17, Resolution 88-45 or the June 1 or August 15 versions of the agreement between the city and ODOT.

Even if we assume Ordinance 88-08 is a land use decision subject to our review, all three assignments of error are limited to the possible development limitation provided in the June 1, 1988 version of the ODOT agreement. Because that agreement is not part of the city's decision in Ordinance 88-08, and therefore not before us for review, petitioners have provided us with no basis for reversal or remand.

Petitioners do not argue the city erred in deciding to enter an agreement with ODOT.[7] Rather, petitioners argue the city erred in deciding to enter the version of the agreement that was signed by the mayor and city recorder on June 1, 1988. Although everyone apparently assumed on May 9, 1988 when Ordinance 88-08 was adopted that the city and ODOT would execute that version of the agreement, Section 9 of Ordinance 88-08 does not identify any particular version of the agreement. The parties' assumptions notwithstanding, Section 9 of Ordinance 88-08 is simply a decision to make another decision at some later date. In its appeal of Ordinance 88-08, petitioner attempts to challenge the terms of an agreement, before the parties reached final agreement on its terms and fully executed the agreement.

Just as petitioners may not, in appealing a land use decision, attack prior land use decisions for which the appeal period has run, Cope v. City of Cannon Beach, 15 Or LUBA 558 (1987); Corbett/Terwilliger/Lair Hill Neighborhood Association v. Portland, ___ Or LUBA ___ (LUBA Nos. 86-063/86-064, September 9, 1987), slip op at 5; they may not attack anticipated decisions which are not yet final. Hemstreet v. City of Seaside, ___ Or LUBA ___ (LUBA No. 87-118, June 23, 1988) slip op at 6-7 (urban renewal agency's decision directing city attorney to negotiate a lease subject to approval of the Urban Renewal Agency is not a land use decision because it is not a final decision). In this case petitioners' attempt to challenge the June 1 version of the ODOT agreement in its appeal of Ordinance 88-08 was not only premature, it was misdirected, since the agreement signed on August 15, 1988 deletes the disputed development limitation.

Because the city did not finally decide to enter a particular agreement in Ordinance 88-08, the June 1, 1988 version of the agreement is not properly before us for review. Aside from petitioners' complaints concerning the June 1, 1988 agreement, they provide us no basis to review Ordinance 88-08. Accordingly, even if Ordinance 88-08 is a land use decision, we are provided no basis for reversal or remand. We therefore would be required to affirm the city's decision, if we had jurisdiction.

This appeal is dismissed.

FOOTNOTES

1 Ordinance 84-17 is entitled

> "AN ORDINANCE CONFIRMING AND RATIFYING THE RESOLUTION OF THE CITY COUNCIL OF FEBRUARY 27, 1984, WITH RESPECT TO THE BOUNDARIES OF THE DARTMOUTH STREET LOCAL IMPROVEMENT DISTRICT (LID No. 40) ESTABLISHING THE DISTRICT; IMPROVING, RATIFYING AND ADOPTING PLANS, SPECIFICATIONS AND ESTIMATES FOR CONSTRUCTION OF STREET IMPROVEMENTS; DECLARING RESULTS OF THE HEARING HELD WITH RESPECT TO THE IMPROVEMENT; AND DETERMINING THE BENEFITED PROPERTIES TO BE ASSESSED." Record 985.

2 At oral argument respondent city provided the Board with a copy of resolution 88-82 and a copy of the above-referenced amendment. Without objection from the parties, the Board takes administrative notice of Resolution 88-82 and the amended agreement.

3 Even if the June 1, 1988 version of the agreement had been incorporated into Ordinance 88-08, we have some question whether the development limitation stated in that version of the agreement was a final decision as required by ORS 197.015(10)(a). See Hemstreet v. City of Seaside, ___ Or LUBA ___ (LUBA No. 87-118, June 23, 1988); General Growth of California v. City of Salem, ___ Or LUBA ___ (LUBA No. 87-110, March 1, 1988).

4 In Portland Oil the modification was a change in the originally approved improvements to substitute a cul-de-sac for the through street originally proposed. In the present case, respondent notes there are no changes to the project originally envisioned in Ordinance 84-17, and petitioner does not challenge respondent's claim.

5 Petitioners also do not demonstrate that the "inherent" limitations are the result of Ordinance 88-08, rather than limitations existent in the design as originally approved in 1984. As explained supra, petitioners may not use the occasion of Ordinance 88-08 to challenge limitations that existed when

the LID was originally created in 1984. See Portland Oil Service v. City of Beaverton, supra, slip op at 6.

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6 The petitioners' three assignments of error are as follows:

FIRST ASSIGNMENT OF ERROR

> "As a result of limitations on development imposed on property owners by Ordinance No. 88-05 [sic] and Resolution No. 88-45, Respondent has substntially changed the character and impact of the Dartmouth LID. All this has created a new LID and caused an abandonment of the original LID. Property owners must have the opportunity to remonstrate against the new LID. Respondent has no jurisidiction to proceed withthe Dartmouth LID now that it has been amended to include the development limitations.

SECOND ASSIGNMENT OF ERROR

> "As a result of the development limitation imposed upon the Tigard Triangle by Ordinance No. 88-08 and Resolution No. 88-45, the Dartmouth LID contains property that will receive no special benefits from the LID improvements. In addition, a portion of the properties within the Dartmouth LID will be deprived of any opportunity for development. The Dartmouth LID, therefore, results in a taking of property without compensation in violation of Article I, section 18 of the Oregon Constitution and the takings clause of the 5th Amendment of the United States Constitution."

THIRD ASSIGNMENT OF ERROR

> "The development limitations imposed upon the Tigard Triangle by Ordinance No. 88-08 and Resolution 88-45, are a new land use regulation within the meaning of ORS 197.610, and ORS 197.615. Respondent violated ORS 197.610(1) by failing to provide the Director for the Land Conservation and Development Commission with the new land use regulation at least 45 days before final hearing on adoption of the regulation. Respondent violated ORS 197.615 by failing to submit findings to the Director after the final decision on the regulation."

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7 Petitioners nowhere question ODOT's policy of requiring the city to enter an agreement as a precondition for granting access permits to connect roadway improvements to Highway 99W.