BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SOUTHWOOD HOMEOWNERS ASSOCIATION, and WILLIAM GATES, Petitioners,	LUBA No. 91-167
vs.	FINAL OPINION AND ORDER
CITY OF PHILOMATH, Respondent.	

Appeal from City of Philomath.

George B. Heilig, Corvallis, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hill, Huston, Cable, Ferris & Haagensen.

Scott A. Fewel, Corvallis, filed the response brief and argued on behalf of respondent.

HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 02/28/92

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 a city decision granting tentative plan approval for a 41-lot subdivision.

FACTS

This is the petitioners' second appeal of a city decision granting approval of Southwood Phase III. We remanded a city decision granting tentative plan approval in Southwood Homeowners Assoc. v. City of Philomath, ___ Or LUBA ___ (LUBA No. 90-103, June 12, 1991)(Southwood I). On remand the city council conducted an additional public hearing, adopted additional findings, and again granted tentative plan approval. This appeal followed.

JURISDICTION AND SCOPE OF REVIEW

As a threshold question, respondent suggests our jurisdiction and scope of review in this matter may be limited by former ORS 197.015(10)(b)(B).[1] See Southwood Homeowners Assoc. v. City of Philomath, 106 Or App 21, 806 P2d 162 (1991). Former ORS 197.015(10)(b)(B) was repealed by Oregon Laws 1991, chapter 817, section 1, which became effective September 29, 1991. The notice of intent to appeal in this matter was filed October 10, 1991. Therefore, our jurisdiction is not governed by former ORS

[1]Prior to amendments adopted by the legislature in 1991, ORS 197.015(10)(b)(B) provided this Board's jurisdiction did not include decisions granting approval of subdivisions located with an urban growth boundary, provided the decision was "consistent with land use standards."

197.015(10)(b)(B), and our scope of review is not limited in the manner explained in Southwood Homeowners Assoc. v. City of Philomath, 106 Or App 21, 806 P2d 162 (1991). Under current ORS 197.015(10), it is clear that the challenged decision is a land use decision subject to our review under ORS 197.835.

FIRST ASSIGNMENT OF ERROR

> "The Philomath City Council deprived petitioners of a fair hearing. The council's failure to disqualify council member Hartz for bias deprived petitioners of a fair and impartial tribunal."

The decision challenged in this proceeding was approved by a 4 to 3 vote of the city council. Councillor Hartz, one of the city councillors voting in the majority to grant tentative plan approval, was elected to the city council after completion of the local proceedings leading to the first decision to grant tentative plan approval. During the local proceedings leading to the first decision granting tentative plan approval, councillor Hartz testified in favor of the application. He testified that he believed the property's soils and topography are appropriate for residential development. He further testified that, as a realtor, he believed there was a housing shortage and a shortage of available buildable lots in the city. He also stated that the street extension proposed by the opponents would cost $30,000 or more. Petition for Review, Appendix 18.

Councillor Hartz disclosed his prior testimony during the proceedings on remand and declared that he believed he could render an unbiased decision in this matter. Despite this disclosure and declaration, petitioners contend councillor Hartz's participation in the decision denied them the impartial tribunal they are entitled to under Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973). Petitioners contend councillor Hartz's prior involvement as a proponent of the subdivision demonstrates he has an "actual personal bias" as well as a "pecuniary interest in the success of the subdivision." Petition for Review 7-8.

Beyond suggesting that councillor Hartz might benefit as a realtor involved in the future sale of lots in the subdivision, petitioners do not develop their argument that councillor Hartz has a pecuniary interest in the subdivision. Absent a more direct or substantial connection with the proposal, we reject that argument as too speculative to support a determination that councillor Hartz was influenced in his decision by bias or self interest.[2] See 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 80-85, 742 P2d 39 (1987).

[2]As respondent notes, taken to the extreme petitioners suggest, a realtor effectively would be precluded from serving on a local government planning commission or governing body. ORS 227.030(4) explicitly provides that city planning commissions may include persons who "engage principally in the buying, selling or developing of real estate for profit as individuals or [are] members of * * * any corporation [engaged in such activities]."

In Eastgate Theater v. Bd. of County Comm'rs, 37 Or App 745, 588 P2d 640 (1978), the Court of Appeals explained that the "impartiality" standard imposed on local government quasi-judicial decision makers is different from the impartiality required of judges. In pointing out some of the differences between judicial and quasi-judicial proceedings, the Court of Appeals stated an obvious difference is "the consequences of disqualification are greater in the latter." Id. at 751. While a disqualified judge can be replaced, a disqualified municipal official cannot, and disqualification of the latter is therefore a more drastic step.[3] The Court of Appeals also emphasized the difference in the nature of the two offices.

> "* * * A judge is expected to be detached, independent and nonpolitical. A county commissioner, on the other hand, is expected to be intensely involved in the affairs of the community. He is elected because of his political predisposition, not despite it, and he is expected to act with awareness of the needs of all elements of the county * * *." Id. at 752.

The record in this case does not establish that councillor Hartz had either actual personal bias or a pecuniary interest, such that he was required to disqualify himself from involvement as a decision maker in this matter. Councillor Hartz's statements during the first round of

[3]The disqualification is even more drastic where, as appears to be the case here, the disqualification would leave the city council unable to achieve a majority vote.

proceedings in this matter, when he was a private citizen, are those of a realtor advocating approval of the subject application in order to provide more buildable lots within the city. The statements do not demonstrate any formal connection with the proposed subdivision, financial or otherwise. Certainly there is nothing in the statements councillor Hartz made during the first round of proceedings in this matter to contradict his latter declaration that he could put his prior view aside and judge the proposed subdivision application on its merits now that he is a city councillor.

The statements made by the county commissioner, who the Court of Appeals determined in Eastgate could participate as a decision maker without violating the impartial tribunal requirement of Fasano, suggest a far more involved and aggressive role in the prior proceedings than is the case in this appeal.[4] Additionally, the county commissioner in

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[4]The prior participation of both county commissioners who disqualified themselvesin Eastgate was as a member of a public body. While that distinction could be important, we do not believe it provides a basis for a different result in this case. One of the county commissioners who disqualified himself in Eastgate explained his decision to do so as follows:

> "Because I am vitally concerned about some of the basic issues involved in this plan change, I have determined that according to the [Fasano] criteria, I am not qualified to take part in this hearing. Since I am concerned, it's been a difficult decision to remove myself from the active role. To me, after removing all the side issues, the basic land use that best suits this area is obvious. I am afraid I would become an advocate for that use rather than a judicial officer. * * * I also adamantly expressed my views at the Aloha Cooper Mountain

Eastgate affirmatively expressed concern about his ability to consider the matter objectively as a decision maker. Councillor Hartz expressed no such concerns, and we are cited nothing in the record that would lead us to question the veracity of his statement that he could decide the matter objectively. We conclude councillor Hartz's declaration that he could participate objectively in this matter, viewed in context with his earlier statements, is sufficient to demonstrate that petitioners were afforded the impartial tribunal they are entitled to under Fasano.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The city's findings regarding granting an exception to the block length standard are inadequate and not supported by substantial evidence."

Philomath Subdivision Ordinance (PSO) 7.030(2) provides as follows:

> "Size. No block shall be less than 600 feet in length. No block shall be more than 1,000 feet in length between street corner lines unless the topography or the location of adjoining streets justifies an exception. A block shall have sufficient width to provide for two tiers or building sites unless topography or the location of adjoining streets justifies an exception."

The proposed subdivision creates a block with more than 1,000 feet between street corner lines. In Southwood I, we

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CPO meeting and those views have not changed so I'd appreciate you [excusing] me from the next item." Id. at 748 n 2.

remanded the city's decision for lack of findings demonstrating an exception to the requirement of PSO 7.030(2) is justified. On remand the city adopted findings explaining why it believes an exception is justified.

> "* * * The city bases its conclusion [that an exception under PSO 7.030(2) is warranted] upon evidence in the record that an extension of 34th Street in compliance with the 1,000 feet block standard, as suggested by the petitioners, would of necessity intersect with Benton View Drive in a location which would create a traffic hazard due to:
>
> "a) topographic conditions with terrain of 12 1/2 to 20% slopes,
>
> "b) multiple intersections within close proximity, and
>
> "c) poor sight distance due to vertical curve on Benton View Drive."[5] Record 4.[6]

Petitioners do not challenge the above findings or their evidentiary support. Rather, petitioners contend the city was required to apply PSO Article IX (Exceptions and Variances) and the city adopted no findings addressing the relevant standards in that article.

PSO 9.010 provides for exceptions for subdivisions that are approved as part of a planned unit development. PSO

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[5]The city also explained that an extension of 34th Street to comply with PSO 7.030(2), in the location requested by petitioners, would result in a through street that exceeds adopted city street grade standards.

[6]The record submitted by the city in this appeal includes both the local government record submitted in the prior appeal and the local government record compiled on remand. All record citations in this opinion are to the record compiled by the city on remand.

9.010 permits such subdivisions to deviate from subdivision approval standards that would otherwise apply so that they may conform to the standards applied to planned unit developments. PSO 9.020 authorizes the city to grant variances to the requirements of the PSO, and PSO 9.030 and 9.040 establish standards and procedures for such variances.

Respondent contends that these provisions of PSO Article IX are inapplicable to the challenged tentative subdivision plan approval, and the city therefore committed no error by failing to apply or demonstrate compliance with PSO Article IX. Respondent first argues the challenged subdivision is not part of a planned unit development; and, therefore, PSO 9.010 does not apply. Further, PSO 7.030(2) does not state that a variance is required to approve a subdivision creating a block more than 1000 feet in length between street corner lines. Therefore, PSO 9.020 to 9.040 do not apply. Respondent points out that PSO 7.030(2) itself sets out the relevant considerations in allowing exceptions to the 1,000 foot block length limitation (i.e. topography and location of adjoining streets). Respondent argues the city applied those relevant considerations in its decision and, because petitioners do not challenge those findings, but rather base their arguments entirely on the inapplicable requirements of PSO Article IX, they present no basis for remand.

We agree with respondent.[7]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

"The city has erred in interpreting the provisions of PSO 8.030(3) regarding storm drainage for the subdivision. The findings erroneously implement a 'technical feasibility' test when the evidence does not support that the system can succeed."

PSO 8.030 provides in relevant part, as follows:

"Improvements in Subdivisions or Partitions. The following improvements shall be installed at the expense of the land divider at the time of subdivision or partition:

"* * * * *

"(3) Surface drainage and storm sewer facilities. Grading shall be performed and drainage facilities shall be provided within the subdivision or partition and to connect the area drainage to drainage ways or storm sewers outside the subdivision or partition. Design of drainage systems within the subdivision or partition, as reviewed and approved by the city engineer, shall take into account the capacity and grade necessary to maintain unrestricted flow from areas draining through the subdivision or partition and to allow extension of the system to serve such areas. If necessary, provision shall be made for retention storage areas designed and constructed to standards as provided by the city engineer.

[7]We note the PSO does not include a definition of the term "exception." However, that term as used in PSO 7.030(2), when read in context with the balance of that section, simply means that the city need not adhere to the 1000 foot block limit if there are topographic or street location reasons for allowing a block longer than 1000 feet.

"* * * * *."[8]

Under PSO 5.010, final subdivision plan approval may not be given until required improvements are completed, the developer enters an agreement pursuant to PSO 5.020 to assure completion of required improvements, or the required improvements are completed using an assessment district procedure.

In Southwood I we determined the city improperly failed to determine whether required drainage facilities are feasible. We explained as follows:

> "[T]he city's findings merely impose a requirement for detailed studies and defer the issue of adequacy of storm drainage facilities to be worked out between the city's engineer and the applicant. As we have previously explained, the city may properly defer resolution of the technical details, but it may not defer the decision of whether the manner in which the tentative plan proposes to discharge storm water is feasible. Again, we do not mean to suggest that a complete hydrologic analysis and storm water discharge plan necessarily is needed to respond to the issues petitioners raise and to make the required findings. All that is required are findings explaining that the drainage plan proposed by the applicant is feasible, i.e. that it will be sufficient to comply with the requirements of PSO § 8.030(3), and that such findings be supported by substantial evidence." Southwood I, supra, slip op at 19.

At the evidentiary hearings conducted on remand, the

[8]The omitted subsections of PSO 8.030 impose requirements concerning water supply systems, sanitary sewer systems, streets, sidewalks, bicycle routes, street name signs and other improvements.

city received evidence from the applicant's expert and the petitioners' expert concerning the adequacy of the proposed storm drainage facilities. The applicant's expert stated he had studied the drainage pipe capacities within the subdivision and analyzed expected storm water discharges and concluded the applicant's drainage plan is sufficient to comply with PSO 8.030(3). The city manager's report to the city council explains as follows:

> "Mr. Matin, the applicant's engineer, reviewed the engineering requirements for the proposed development and concluded that the existing storm sewers could accommodate the runoff from the project. Mr. Matin also concluded it was feasible to install storm sewers within the project which would connect with the existing lines. Mr. Matin recommended that the outlet drainage ditch be improved to accommodate the design storm. The improvement would likely require expanding the capacity by cleaning and widening the ditch." Record 73.

In the decision challenged in this appeal, the city council adopted findings in which it acknowledged criticisms of the applicant's expert's analysis, but found the applicant's expert adequately responded to the proposal. The city found that all of the experts, including the petitioners' expert, agreed that an adequate storm water collection system was technically feasible. The city council then concluded that the evidence submitted was sufficient to support a finding that adequate surface drainage and storm water facilities for the proposed

subdivision in compliance with PSO 8.030(3) are feasible.[9]

Petitioners argue the city's decision is based on a finding of "technical feasibility." Petition for Review 13. Petitioners contend that a technical feasibility standard is

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[9]The city council also imposed the following conditions:

"a) The applicant shall improve that portion of the outfall drainage from the Southwood 2nd Addition through the design and construction of a storm sewer within a drainage easement obtained by the City of Philomath in October. The storm sewer shall direct stormwater east to Bellfountain Road. Engineering Plans and hydrologic calculations shall be submitted to both the City Public Works Director and the County Engineer for review and approval. All construction shall occur under the review authority of the City Public Works Director.

"b) The applicant shall design and install an adequate stormwater collection system within all areas of the proposed subdivision, including the required half-street improvements to Benton View Drive and Mount Union Drive. The stormwater collection system shall be designed to control runoff to the degree that no upgrading of storm sewers will be required within the Southwood 2nd Addition. The City Public Works Director shall be responsible for the review and approval of plans, specifications, calculations and construction.

"c) The applicant shall design and construct a drainage ditch west of Bellfountain Road within the road right-of-way with sufficient capacity to accommodate all stormwater runoff from the basin which it will serve. The County Engineer shall be responsible for the review and approval of plans, specifications, calculations and construction.

"d) The applicant shall conduct necessary hydrologic analysis to determine the capacity of culverts under Southwood Drive at Bellfountain Road and under Bellfountain Road at Chapel Drive to accommodate projected storm flows. The County Engineer shall review the analysis and determine if the structures are adequate. In the event that the culverts are undersized, the applicant shall develop and implement an engineering alternative selected by the County Engineer to provide for unrestricted flow of stormwater." Record 9-10.

not consistent with the requirement set out in Meyer v. City of Portland, 67 Or App 274, 280 n 3, 678 P2d 741, rev den 297 Or 82 (1984) and Southwood I that the storm water collection system must be "possible, likely and reasonably certain to succeed." Petitioners contend the city erred by failing to require a more detailed hydrologic analysis and storm water discharge plan prior to tentative plan approval in order to demonstrate that needed storm water facilities are economically feasible.

If we understand petitioners' argument correctly, they contend that if one is willing spend a sufficient amount of money, anything is technically feasible and the city therefore erred in imposing a technical feasibility standard. We agree that a local government may not be oblivious to costs in satisfying its obligation to find that required improvements are feasible. However, neither must the city do an economic feasibility analysis in adopting the required findings of feasibility.[10]

There remain questions about the nature of the improvements that may ultimately be required to adequately collect and discharge storm water from the proposed subdivision. The applicant's expert, the city staff and petitioners' expert all identified potential problems.

[10]Indeed the city is not really in any position to determine what portion of the lot prices may be dedicated to paying the cost of on-site and off-site improvements or how high the lots could be priced without rendering the project economically infeasible.

However, all the experts agreed solutions were technically feasible. As we explained in Southwood I:

> "Admittedly, an approach that permits a city to demonstrate compliance with an approval standard by (1) finding it is feasible to meet that standard, and (2) deferring the actual adoption of technical solutions to meet the standard to a later stage with no opportunity for public participation, presents some difficulties for all parties. The lack of a requirement for a complete technical solution at the tentative plan approval stage will likely not satisfy opponents who believe a satisfactory technical solution is not possible. On the other hand, the applicant frequently will be motivated to keep costs as low as possible until tentative plan approval is assured, and may not want to incur the costs of providing additional information where questions are raised concerning particular approval standards or site conditions. The city's obligation is to require sufficient information at the tentative plan approval stage to make the initial determination of feasibility. As long as the determination of feasibility is adequately explained and supported by substantial evidence, i.e. evidence a reasonable person would accept as adequate to support the decision, the city may properly defer final engineering review to its staff." Southwood I, supra, slip op at 16.

We conclude the city's findings adequately respond to the requirement stated in Southwood I that the city find the proposed storm drainage facilities are feasible, and that those findings be supported by substantial evidence.

Finally, petitioners contend the city failed to coordinate its decision in this matter with Benton County and the City of Corvallis, as required by ORS 92.044(1)(c), and that the city has not yet obtained easements from the county that will be required to discharge water into county

owned rights of way.

Respondent argues petitioners never raised any issue below concerning compliance with coordination obligations under ORS 92.044(1)(c) and may not do so for the first time at LUBA. Respondent also contends there is no indication in the record that any difficulties will be encountered in obtaining required easements and that there is no requirement that all necessary easements be obtained prior to tentative plan approval.

Petitioners identify no place in the record where they raised the coordination issue. We therefore conclude they may not raise the issue for the first time in this appeal. ORS 197.763(1); ORS 197.835(2).[11] We also agree with the city that it need not require that the applicant possess at the time of tentative plan approval every easement that may be required in connection with the proposed storm drainage facilities.

The third assignment of error is denied.

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[11]ORS 197.763(1) provides as follows:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) limits our scope of review to issues raised in accordance with ORS 197.763, provided the local government follows the procedures set out in ORS 197.763.

FOURTH ASSIGNMENT OF ERROR

> "The city council erred in concluding that it is 'feasible' for lot grading standards to be met, as set out in § 7.050 of the Philomath Subdivision Ordinance."

PSO 7.050 provides as follows:

> "Lot Grading. Lot grading shall conform to the following standards unless physical conditions demonstrate the propriety of other standards:
>
> "(1) Cut slopes shall not be steeper than one foot vertically to two feet horizontally.
>
> "(2) Fill slopes shall not exceed two feet horizontally to one foot vertically.
>
> "(3) The character of soil for fill and the characteristics of lots made usable by fill shall be suitable for the purpose intended."

In Southwood I, we concluded the city failed to adopt findings demonstrating compliance with PSO 7.050. Before turning to the city's findings and the evidentiary support for those findings, we note that there are essentially two ways the city may properly find compliance with PSO 7.050. Under the first option, the city may find that it is feasible to comply with the cut and fill slope limitations set out in PSO 7.050(1) and (2). Under the second option, the city may find that while development of the proposed subdivision may not comply with those slope limitations in all instances, the "physical conditions demonstrate the propriety of [applying] other standards." This option gives the city significant flexibility to deviate from the standards of PSO 7.050(1) and (2), and impose different

standards, where it determines it is appropriate to do so.

On remand the city adopted the following findings:

> "* * * The council * * * finds that the record shows that natural lot grades conform to the 2:1 grade standard and that a Conditions [sic] of Approval imposed as a part of this Order will require that the 2:1 cut and fill slopes standards be maintained in conjunction with the construction of individual residences on each of the proposed lots. The City Council further finds that soils utilized for fill in conjunction with required road improvements will be suitable for this purpose in accordance with standard engineering specifications applied as a part of the review of detailed engineering plans. * * *" Record 13.

The city included a condition of approval requiring that "[c]ut and fill of lots in conjunction with the construction of residences shall conform to the 2:1 slope standards contained in [PSO] 7.050 * * *." Record 14.

We understand the above findings and the quoted condition to follow the first of the options discussed above for demonstrating compliance with PSO 7.050(1) and (2), i.e. that it is feasible to construct dwellings and related improvements on the lots within the proposed subdivision in conformance with the 2:1 cut and fill slope requirements.

Petitioners' challenge is limited to the city's findings concerning the feasibility of developing the proposed lots in conformance with the slope limitations of PSO 7.050(1) and (2). Petitioners contend there is not

substantial evidence to support the above findings.[12]

The evidence cited by respondent in support of the above findings is inconclusive, but suggests that the 2:1 slope limitation will not be met in some instances. The applicants' expert testified that there was a "[p]roblem with some of the individual lots," but suggested that exceeding the slope limitations would not present problems that could not be solved. Record 28. Respondent also cites discussion suggesting that certain unidentified height limitations might have some bearing on the ability of certain development to comply with the slope limitations of PSO 7.050(1) and (2). Record 38. Additionally, at one point in the discussion, there appears to be confusion concerning whether use of retaining walls would violate the 2:1 slope limitation and, if so, whether deviating from the standard in that manner would be proper in view of the physical conditions of the property. Respondent also cites the following statement by the applicant's expert:

> "After a thorough review of [the] existing topographic map it appears that the tentative plan, as submitted and approved, does comply with the standards specified in PSO 7.050. The [slopes] of existing [lots are] not steeper than 1V : 2H, however, in the cases where slope is steeper than specified standard, use of proper slope protection measures is recommended to insure compliance with PSO 7.050 (1) through (3). * * *"

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[12]Petitioners also repeat their argument that the city improperly imposed a technical feasibility standard. We rejected that argument under the third assignment of error, and reject it here for the same reasons.

Record 78.

The above evidence in the record fairly suggests that while development of certain lots within the subdivision will not comply with the 2:1 slope requirements of PSO 7.050(1) and (2), there are acceptable methods of protecting these steeper slopes. In other words, the evidence tends to support findings following the second of the two options identified above. However, as we explain above, the city found that the 2:1 slope requirements could be achieved, and imposed a specific condition requiring compliance with the 2:1 slope requirements of PSO 7.050(1) ad (2). The evidence in the record cited by respondent does not support that finding.

On remand, the city must include evidence in the record that the 2:1 slope requirements can be met. Alternatively, the city may find that although the 2:1 slopes cannot be met in all instances, it is proper to impose a different standard in such circumstances. If this latter approach is taken, the city must include at least a brief explanation of why it believes it is proper to impose different slope standards based on the "physical conditions."[13]

The fourth assignment of error is sustained.

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[13]We emphasize that this need not be a needlessly detailed or complex endeavor. All that is required is a brief explanation of why the standards otherwise required by PSO 7.050(1) and (2) may properly be waived for areas of the subdivision where they cannot be met, and some attempt to identify the standards that will be applied in place of the 2:1 slope standard.

FIFTH ASSIGNMENT OF ERROR

> "The city council's findings regarding school facilities do not comply with the requirements of General Policy 5 and General Policy 1 of the Public Facilities and Services Section of the [Philomath Comprehensive Plan]."

SIXTH ASSIGNMENT OF ERROR

> "School bus service is an 'urban service' as used in General Policy 5 of the Public Facilities and Services Section of the Philomath Comprehensive Plan. Urban services must be provided to a subdivision prior to or during its development. There is no substantial evidence in the record to support the city's findings with respect to redefining bus service for this development."

This Board remanded the city's first decision in this matter, in part, based on the city's failure to demonstrate compliance with General Policy 5 of the Public Facilities and Services Section of the Philomath Comprehensive Plan (Policy 5), which provides as follows:

> "Prior to or concurrent with the development of subdivisions or planned unit developments within the Urban Growth Boundary, provision for urban services shall be provided to the development site."

In Southwood I we could not determine from the city's decision and findings whether the challenged decision complied with Policy 5, with regard to schools and school bus service.

Following our decision in Southwood I, the city reopened the record and accepted additional testimony from the superintendent of schools. The superintendent estimated the number of children who would likely reside in the

subject subdivision and how those children could be accommodated by the school district.[14] The superintendent also pointed out that the school district had made a budget decision to eliminate bus service in the area of the proposed subdivision, so the challenged subdivision would have no impact on bus service.

Based on the superintendents' testimony, the city found schools would be provided in accordance with Policy 5 and that bus service was not within the urban services that must be provided under Policy 5.

Petitioners argue the city's findings are inadequate to show the needed school facilities will be provided prior to or concurrently with the subdivision, as required by Policy 5. Petitioners argue the plan includes schools as an "urban service," and that school bus service is an essential part of a school system. Petitioners also argue the city cannot avoid its obligation to provide school bus service by defining that obligation away.

School facilities serving the area in which the proposed subdivision is located already exist, and therefore are provided prior to approval of the subdivision. The school superintendent stated that as the expected number of additional children from the proposed subdivision enters the

[14]The options identified by the superintendent for accommodating additional students from the proposed subdivision included a bond measure to allow construction of additional classrooms, increased class sizes, adding modular units and operating split shifts.

school system, the existing schools will accommodate those children by expanding the school facilities or, if bond measures necessary to expand the physical plant fail, by adding modular units, expanding class size or having split sessions. There is no evidence that the school children from the proposed subdivision cannot be accommodated in the ways stated by the superintendent. We conclude that this is substantial evidence supporting the city's finding that school facilities can be provided "[p]rior to or concurrent with the the [proposed subdivision]."

We also see no reason to question the city's determination that school bus service is not among the urban services subject to Policy 5. Petitioners point to no plan provision identifying school bus service as an "urban service." Respondent points out that school bus service is provided as part of school services by some districts, but in other districts such service is not provided at all or is provided on a fee for service basis. We believe drawing a distinction between school buildings, curricula, books and teachers on the one hand and school bus service on the other is legitimate. Although we see no reason why the city could not interpret school services as <u>including</u> school bus service, we do not believe it must do so. The city's construction of the scope of school services is within the range of reasonable and correct constructions of "school services" and, therefore, within the city's interpretive

discretion. Van Mere v. City of Tualatin, 16 Or LUBA 671, 679 (1988).

The fifth and sixth assignments of error are denied.

The city's decision is remanded.[15]

[15]Petitioners' Motion for Directed Order of Reversal is denied without comment.