BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD BECK and LOIS BECK, Petitioners, vs. CITY OF HAPPY VALLEY, Respondent,	LUBA No. 94-073 FINAL OPINION AND ORDER

Appeal from City of Happy Valley.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

James E. Redman, Milwaukie, and Mark J. Greenfield, Portland, filed the response brief and argued on behalf of respondent.

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

REMANDED 08/24/94

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the city council approving four separate partition applications.

FACTS

The subject property consists of four lots located along Champagne Lane in the City of Happy Valley. All parcels created by the proposed partitions will access Champagne Lane. There are a total of nine existing lots located along Champagne Lane. Three of the nine lots along Champagne Lane are developed with residences. The remaining lots, including the subject property, are undeveloped. The subject property is zoned Residential (R-7), as are the other lots located on Champagne Lane.

Champagne Lane is currently a private street. In addition to the requested partitions, the proposal envisions dedicating Champagne Lane to the city and upgrading Champagne Lane to public road standards to allow the installation of sewers. Record 115-16. The planning commission conditionally approved the proposal. Petitioners appealed to the city council and, after a public hearing on the proposal, the city council affirmed the planning commission decision and approved the proposal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and failed to make adequate findings supported by

substantial evidence that the application herein complied with [City of] Happy Valley Revised Comprehensive Plan [(Plan)] Policies * * * 99 and 102."

Plan Policy 99 provides as follows:

"Any and all development within the City shall be subject to participation in the provision of Level 2 facilities and services which are essential to the development of the City as a whole, and shall include:

"[S]chools[.]

"* * * * *"

Plan Policy 102 provides as follows:

"When, as the coordinator of land use activities and service provision to development areas, the City must make determinations regarding fulfillment of the Growth Management Policies and Procedures, the City shall rely on a determination provided by the service providers and other affected agencies, including but not limited to the following:

"* * * * *

"North Clackamas School District No. 12

"* * * * *

"Any determination shall be within the parameters of the providers' or agency's own standards, criteria, requirements or plans. The service providers' decision shall be treated as a rebuttable presumption as to the ability of that provider <u>to provide an acceptable level of service</u>. However, the evidence that can rebut said decision must be compelling evidence based upon objective data and the agencies' standards, criteria, requirements or plans in order to controvert the determination of the service provider." (Emphasis supplied.)

The school district's response to the city concerning

its ability to provide service to the proposal is as follows:

> "Based on statistical averages, the development could potentially add 5 students in grades K-12. The impacted schools would be Mount Scott Elementary, Sunrise Junior High, and Clackamas High School. The District cannot accommodate such growth, particularly at the high school level, and would have to allocate additional financial resources to provide services for the students generated by this development, and/or change boundaries." (Emphasis supplied.) Record 294.

The challenged decision discusses the above quoted school district response as follows:

> "* * * The City Council interprets this evidence to mean that the school district can and will provide the additional financial resources needed to service the additional 5 anticipated students added by [the proposed development]. The City Council in exercising an abundance of caution adds as its own condition that the applicants provide a statement from the school district that it can and will provide school services to the anticipated additional 5 students prior to the issuance of any building permits." (Emphasis supplied.) Record 21.

The decision also states:

> "The City notes and believes the [response of the school district] as to the adequacy of services. * * *" Record 23.

Petitioners argue the city misinterpreted the school district's position regarding its ability to provide adequate service to the proposed development. According to petitioners, the school district's response states the district cannot serve the proposed development and, therefore, Plan Policies 99 and 102 are not satisfied.

The city argues that Plan Policies 99 and 102 do not require a demonstration that any particular level of school service can be provided by the district. However, the city also argues that if such a demonstration is required, the city correctly interpreted the school district's response as constituting the required demonstration of service adequacy. Next, the city argues that even if the school district's statement is inadequate to comply with Plan Policies 99 and 102, the sentence of the city's findings emphasized above is a condition of approval requiring a statement a service adequacy from the school district before building permits are issued. The city argues this condition of approval ensures that school services will ultimately be provided and Plan Policies 99 and 102 will ultimately be satisfied. Finally, the city argues it may not deny the proposal under Plan Policies 99 and 102 on the basis of inadequate school services because to do so would impose a moratorium, contrary to ORS 195.110(8).[1]

The city council determined Plan Policies 99 and 102 constitute mandatory approval standards applicable to the proposed partitions. However, we cannot tell with any certainty what the city council believes Plan Policies 99 and 102 require with respect to the adequacy of Level 2

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[1]ORS 195.110(8) provides:

> "The capacity of a school facility shall not be the basis for a development moratorium under ORS 197.505 to 197.540."

public services -- here school services. In other words, it is not clear whether the city interprets Plan Policies 99 and 102 to require a determination by the city that an adequate level of service can or will be provided, a showing by the service provider that it will provide some level of service, or something else. Therefore, the challenged decision must be remanded for the city to explain what it believes Plan Policies 99 and 102 require. Weeks v. City of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992).

However, we note that if Plan Policies 99 and 102 do require a statement from the school district that it can provide adequate service to the proposed development, petitioners are correct that the city's reliance on the above quoted school district response is misplaced. The school district's response unambiguously states the district cannot accommodate the proposed development and in order to accommodate the proposed development, the school district would be required to allocate additional financial resources. Conspicuously absent from the school district's response is any commitment by the district to allocate additional resources to accommodate the proposed development.[2] Whatever else it may require, Plan Policy 102 requires that evidence to overcome a service provider's

[2]This is not a situation where we must defer to a local government's interpretation of its own comprehensive plan or code. ORS 197.829. Here, the city's interpretation concerns the school district's response, not the local plan or code.

determination that it cannot provide service must be "compelling evidence based upon objective data and [the school districts'] standards, criteria, requirements or plans in order to controvert" the provider's determination. That the school district may be able to provide school services to the proposed development if it decides to allocate additional financial resources to do so does not conform to the evidentiary standard required by Plan Policy 102.

Further, no party disputes that Plan Policies 99 and 102 are applicable to the subject partition applications. Therefore, the city must determine these standards are satisfied by the proposal, or that it is feasible for the proposed partitions to comply with these standards, before it approves the subject partition applications. The city may not defer determinations of compliance with approval standards applicable to partition approval to the building permit stage. See Bartels v. City of Portland, 20 Or LUBA 303 (1990). The above emphasized condition does not establish the proposed partitions comply with Plan Policies 99 and 102, but rather erroneously defers that decision to the building permit stage.

Finally, if the city chooses to deny the proposed partitions on the basis that they fail to comply with Plan Policies 99 and 102 because the requisite level of school services has not been established, this does not demonstrate

the imposition of a development moratorium prohibited by ORS 195.110(8). ORS 195.110(8) applies only to development moratorium established by a local government under the procedures authorized by ORS 197.505 to 197.540. No party argues any such moratoria has been adopted by the city.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "Respondent's findings are insufficient to support its condition with respect to reimbursement of street improvement costs."

THIRD ASSIGNMENT OF ERROR

> "The procedure established by respondent for ascertainment and reimbursement of street improvement costs exceeds respondent's jurisdiction, is prohibited as a matter of law, and is unconstitutional."

The issues raised under the second and third assignments of error relate to a condition of approval imposed by the city council, quoted below, regarding private parties administering and collecting assessments for the proposed improvements to Champagne Lane. In the planning commission decision appealed to the city council, there was also a condition imposed concerning such assessments. However, the planning commission condition placed the responsibility for administration and collection of the assessments on the city. Under these assignments of error, petitioners contend the city council's decision erroneously authorizes private parties to administer and collect street assessments.

A. Preliminary Issue

The city argues the issues raised under the second and third assignments of error were not raised with sufficient specificity during the local proceedings and, therefore, are waived under ORS 197.835(2) and ORS 197.763(1).

With regard to the scope of the specificity requirement of ORS 197.763(1), we have stated:

> "* * * ORS 197.763(1) does not require that arguments identical to those in the petition for review have been presented during local proceedings, but rather that 'argument presented in the local proceedings sufficiently raise the issue sought to be raised in the petition for review, so that the local government and other parties had a chance to respond to that issue.' Hale v. City of Beaverton, 21 Or LUBA 249, 254 (1991); Boldt v. Clackamas County, 21 Or LUBA 40, 46 (1991). The Court of Appeals affirmed our interpretation of the ORS 197.763(1) 'sufficient specificity' requirement, stating '* * * the statute requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts.' Boldt v. Clackamas County, 107 Or App 619, 623, 813 P2d 1078 (1991)." DLCD v. Coos County, 25 Or LUBA 158, 167 (1993). (Emphasis in original.)

Here, based on the only condition of approval regarding street improvement assessments that petitioners were in a position to argue about (the above mentioned planning commission condition), petitioners adequately raised an issue regarding the legality of that condition. Record 112. However, the condition allowing the administration and collection of street assessments by private parties (the

subject of the second and third assignments of error) was not imposed until the city council adopted the challenged decision. Under these circumstances, petitioners were not in a position to raise with specificity, prior to the close of the evidentiary hearing, issues regarding a condition of approval that did not yet exist. Washington Co. Farm Bureau v. Washington Co., 21 Or LUBA 51 (1991).

The issues raised under the second and third assignments of error are not waived.

B. Merits

The challenged decision includes the following disputed condition of approval:

> "* * * Building permits on Champagne Lane may be issued after the final [street improvement] construction is completed and approved and final platting is recorded. Building permits on Champagne Lane shall be issued only to those participating in the cost of public improvements [to Champagne Lane] by paying their fair share. The fair share costs shall be determined by the City based upon the documented total cost of City regulated Public Improvements. In the case of [petitioners'] property, a prior agreement has been made for payment of fair share costs of Public Improvements. Reimbursement of costs to the participating property owners/developers shall be completed in a manner approved by the City and shall be based on a 10 year time period from the date of this final order and an interest rate based on the annual Consumer Price Index (CPI) for the Portland area. The agreement shall provide that the administration of the reimbursements shall be handled by the applicants herein." (Emphasis supplied.) Record 26.

Petitioners argue the challenged decision effectively

delegates to private parties the responsibility for administering and recovering the costs associated with improving Champagne Lane to public street standards. Petitioners contend the city may not delegate to private parties such administration and collection tasks associated with assessments for public street improvements. Petitioners also contend the disputed condition of approval authorizes street improvement assessments without provision of an opportunity to be heard and participate in the amount of the assessment or to present and rebut evidence concerning the assessment.[3]

We agree with petitioners that the city may not delegate the responsibilities associated with the administration and collection of assessments to improve Champagne Lane to public street standards to private parties. Rather, as far as we can tell, the assessment and collection of city street assessments are nondelegable public duties that must be discharged by the city. See City Charter, Section 38; ORS 223.387; see also School District

[3]We do not understand the city to disagree that the disputed condition of approval delegates administration and cost recovery functions associated with the improvement of Champagne Lane to public street standards. The city relies primarily on its arguments that these issues were not raised during the local proceedings, and that in 1975 petitioners entered into an agreement with the city concerning the improvement of Champagne Lane and that petitioners are raising issues that will affect only third parties. We dispose of the city's waiver arguments in the text, supra. Further, nothing prevents parties in a land use proceeding from raising issues before this Board that may not have direct personal consequence to such parties.

No. 3J v. City of Wilsonville, 87 Or App 246, 249, 742 P2d 59, rev den 304 Or 548 (1987); Stanley v. City of Salem, 247 Or 60, 64, 427 P2d 406 (1967); Wilson v. City of Salem, 24 Or 504, 508, 31 P 9 (1893) (cases dealing generally with the process of establishing public street assessments for improvements and also with LIDs, and which demonstrate that such processes are governmental functions).

Petitioners also assert the challenged decision is unconstitutional. However, because we resolve this matter on other grounds, we do not reach petitioners' constitutional arguments.

The second and third assignments of error are sustained, in part.

The city's decision is remanded.