BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THE PETRIE COMPANY, Petitioner, vs. CITY OF TIGARD, Respondent.	LUBA No. 94-110 FINAL OPINION AND ORDER

Appeal from City of Tigard.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner.

Pamela J. Beery and Ty K. Wyman, Portland, filed the response brief. With them on the brief was O'Donnell Ramis Crew Corrigan & Bachrach. Pamela J. Beery argued on behalf of respondent.

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

TRANSFERRED 01/17/95

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

Petitioner appeals a city council decision repealing a sanitary sewer reimbursement district.

FACTS

Petitioner is the developer of a residential subdivision approved by the city on May 26, 1993. Following this decision, petitioner made certain improvements required by the decision, including extension of an 8 inch sewer line at petitioner's cost to provide sewer service to the subdivision. Installation of this sewer line extension provides potential benefits to adjoining undeveloped properties. Pursuant to Tigard Municipal Code (TMC) Chapter 13.08, "Street, Sewer and Water Improvements," petitioner sought formation of a reimbursement district and establishment of a "zone of benefit" under TMC 13.08.020(a).[1] The city engineer prepared a report, dated February 11, 1994, recommending approval of the requested reimbursement district and identifying a zone of benefit, a reimbursement amount and an interest rate.[2] On

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[1]As relevant, TMC 13.08.010(7) defines "zone of benefit" as an "area which is determined by the city council to derive a benefit from the construction of * * * sewer improvements, which is financed in whole or in part by [another] person * * *."

[2]Under TMC 13.08.020(b), the city engineer may require that the person seeking formation of a zone of benefit submit the information needed to evaluate the request. The city engineer is required prepare a report for the city council and make recommendations concerning certain factors. A total of five factors are set out at TMC 13.08.020(b)(1) through (5). The

March 8, 1994, the city council adopted Resolution 94-11, which approved the requested reimbursement district.[3] On May 6, 1994, two affected property owners objected to the reimbursement district and requested a hearing before the city council.[4] The city council held a hearing on the disputed reimbursement district on June 7, 1994. At the conclusion of the June 7, 1994 hearing, the city council voted "to deny the reimbursement district." Record 14. On June 8, 1994, the city council provided notice of that decision.

DECISION

Petitioner argues LUBA should remand the city council's decision for a variety of reasons.[5] Because we conclude we

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factors include: (1) whether the person making the request has financed the cost of a sewer improvement that an adjacent property owner would otherwise be required to pay for, (2) the area and termination date of the zone of benefit, (3) the portion of the cost of the improvement to be reimbursed, (4) a methodology for sharing the cost of the improvements, and (5) an annual interest rate to be applied to the reimbursement charge.

[3]TMC 13.08.020(e) provides:

> "The [city] council shall approve, reject or modify the recommendations contained in the city engineer's report. The council has the sole discretion to decide whether or not a zone of benefit is to be established. The council's decision shall be embodied in a resolution. * * *"

[4]After a resolution establishing a zone of benefit is adopted, TMC 13.08.020(f) and (g) require that affected property owners be mailed a copy of the resolution. TMC 13.08.020(h) provides "[a]n affected property owner may petition the city council for a hearing at which the council will consider and rule upon any objections to the zone of benefit charge."

[5]Petitioner contends the city council erred by (1) failing to follow quasi-judicial land use decision making procedures, (2) failing to adopt findings demonstrating compliance with applicable land use standards,

lack jurisdiction in this matter, we do not consider any of petitioner's arguments on the merits.

This Board's jurisdiction is limited to "land use decisions." As defined by ORS 197.015(10), a land use decision includes a decision that applies a "land use regulation."[6] We understand petitioner to contend that the provisions of TMC Chapter 13.08 which were applied by the city in the decision challenged in this appeal constitute a land use regulation.

As defined by ORS 197.015(11), land use regulations include "any local government zoning ordinance, land division ordinance * * * or similar general ordinance establishing standards for implementing a comprehensive plan." Although the provisions of TMC Chapter 13.08 are not a zoning or land division ordinance, we agree with

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(3) violating Article I, section 20, of the Oregon Constitution and the Fourteenth Amendment to the United States Constitution by making a decision that improperly discriminates against petitioner and lacks a rational basis, and (4) violating Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the United States Constitution by either taking private property for the benefit of another private party or failing to pay petitioner just compensation for private property taken for a public purpose.

[6]As relevant, ORS 197.015(10)(a)(A) provides that "land use decision" includes:

> "A final decision or determination made by a local government * * * that concerns the * * * application of:
>
> "* * * * *
>
> "(iii) A land use regulation[.]
>
> "* * * * *"

petitioner that TMC Chapter 13.08 falls within the literal definition of land use regulation contained in ORS 197.015(11).

The TMC sewer improvement provisions applied by the city in reaching the decision challenged in this appeal appear at TMC Title 13 rather than TMC Title 18, which is the Tigard Community Development Code. The Tigard Community Development Code includes the city's zoning, site development and land division regulations. Nevertheless, TMC Chapter 13.08 is a "general ordinance establishing standards for implementing a comprehensive plan."[7]

TMC Chapter 13.08 clearly is a general ordinance establishing circumstances in which the city will form reimbursement districts and the procedures the city follows in forming such reimbursement districts. Tigard Comprehensive Plan Public Facilities and Services Policy Implementing Strategy 3 provides:

> "Where sewer is not available to [a] site, the developer shall be required to extend the services to the site at the developer's cost. The City shall adopt an ordinance providing for partial cost [reimbursement] as intervening parcels are developed by the intervening landowners."

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[7]In its brief, respondent contends that TMC Chapter 13.08 cannot be a land use regulation as defined by ORS 197.015(11) because it includes no standards. Although TMC Chapter 13.08 leaves a great deal of discretion to the city council in determining whether to approve or deny a request for a reimbursement district, there is sufficient question about whether TMC Chapter 13.08 is properly interpreted as not including any standards that we do not agree with respondent's position, absent such an interpretation by the city council itself. Compare notes 2 and 3, supra.

TMC Chapter 13.08 clearly implements the above quoted plan policy. TMC Chapter 13.08 therefore falls within the literal words of ORS 197.015(11), and the challenged decision applying TMC Chapter 13.08 would appear to qualify as a land use decision under ORS 197.015(10). See n 6, supra.

In a case applying land use decision review statutes that were in effect prior to the creation of LUBA, the Court of Appeals limited the scope of the Land Conservation and Development Commission's jurisdiction under former ORS 197.300(1)(a).[8] Housing Council v. City of Lake Oswego, 48 Or App 525, 617 P2d 655 (1980), rev dismissed 291 Or 878 (1981).[9] The Court of Appeals first recognized that ORS 197.300(1)(a) was broad enough to encompass the systems development charge ordinance at issue in that case, and thereby make the disputed systems development charge ordinance subject to review by LCDC for compliance with the statewide planning goals. Id. at 529. Moreover, the court

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[8]ORS 197.300(1)(a), which was repealed by Oregon Laws 1979, chapter 772, section 26, provided that LCDC:

> "* * * shall review * * * a comprehensive plan provision or any zoning, subdivision or other ordinance or regulation * * * that the [petitioner] considers to be in conflict with state-wide planning goals * * *."

[9]The Oregon Supreme Court first allowed review in Housing Council and then dismissed the petition for review. See Housing Council v. City of Lake Oswego, 291 Or 878, 635 P2d 647 (1981) (Tongue, J., dissenting). In City of Pendleton v. Kerns, 294 Or 126, 131, 653 P2d 992 (1982), the Oregon Supreme Court specifically reserved judgment concerning whether Housing Council was correctly decided.

acknowledged that a number of statewide planning goal provisions specifically refer to and encourage consideration of fiscal measures, including tax measures, to implement land use policies. Id. at 534. The court stated

> "In sum, it appears that many fiscal statutes and ordinances have an impact on land use. The impact can range from intended to unintended, direct to indirect, dramatic to inconsequential, but the reality is that taxation policy impacts land use." Id.

Nevertheless, the Court of Appeals held that tax and other fiscal matters are not subject to review for compliance with land use requirements:

> "Having rejected as substantively and procedurally unmanageable any attempt to say that some but not all fiscal policy must comply with the goals and having rejected as inconceivable the notion that the legislature intended that all fiscal policy had to comply with the goals, the only remaining possibility is that no local taxation or budget ordinance has to comply with the goals. We so hold." Id. at 538.

In Westside Neighborhood v. School Dist. 4J, 58 Or App 154, 161, 647 P2d 962, rev den 294 Or 78 (1982), the Court of Appeals extended the holding in Housing Council in concluding that a fiscally motivated decision to close a school did not constitute a "land use decision" subject to review by LUBA under the statutes governing LUBA review of land use decisions. In addition, the Court of Appeals recently cited Housing Council with approval, and relied on that decision in part in concluding that farm and forest ad valorem tax preferential assessment programs, while clearly

affecting land use, are not state agency programs affecting land use subject to review under ORS 197.180(1) for compliance with the statewide planning goals. Springer v. LCDC, 111 Or App 262, 267, 826 P2d 54, rev den 313 Or 354 (1992). We therefore conclude that the exemption from review for compliance with land use requirements announced in Housing Council for tax and other fiscal local legislation still applies.

The exemption created by Housing Council clearly applies to TMC Chapter 13.08. Petitioner's subdivision approval was granted in a decision rendered in 1993, which is not the subject of this appeal.[10] The sewer improvements have already been constructed pursuant to that 1993 decision. The only purpose served by TMC Chapter 13.08 is to provide a means whereby petitioner can recoup a portion of the cost of the sewer improvements that it has already constructed pursuant to the 1993 subdivision approval decision. TMC Chapter 13.08 is much more a purely fiscal ordinance than was the systems development charge ordinance at issue in Housing Council.

While Housing Council dealt with a facial challenge to a city fiscal ordinance, and the decision before LUBA in

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[10]Although a copy of the notice of the 1993 decision approving petitioner's subdivision is in the record, the decision itself is not. Following oral argument, at the Board's request, the city provided a copy of the 1993 decision approving the subdivision. That decision is therefore part of the LUBA record, but it is not part of the local government record in this matter.

this appeal is the city's application of a fiscal ordinance, the Court of Appeals' decision in Housing Council made it clear that just as the adoption of fiscal policy does not result in a decision reviewable for compliance with land use requirements, neither does the application of such fiscal policy. Id. at 538.

We conclude TMC Chapter 13.08 is purely a fiscal ordinance. For that reason, the challenged decision applying TMC Chapter 13.08 is not a land use decision reviewable by LUBA.[11]

MOTION TO TRANSFER

ORS 19.230(4) provides in part:

> "A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision as defined in ORS 197.015(10) shall be transferred to the circuit court and treated as a petition for writ of review. * * * "

Petitioner filed a "Motion to Transfer to Circuit Court" requesting that LUBA transfer this appeal to Washington County Circuit Court "in the event [LUBA] determines the challenged decision is not a reviewable as a

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[11]Petitioner does not contend the challenged decision qualifies as a land use decision under the significant impacts test. See Billington v. Polk County, 299 Or 471, 475, 703 P2d 232 (1985); City of Pendleton v. Kerns, supra. In any event, the exception to reviewability for compliance with land use standards for fiscal measures identified in Housing Council applies equally to decisions that would otherwise qualify as significant impact test land use decisions. See Westside Neighborhood v. School Dist. 4J, supra, 58 Or App at 158-59.

land use decision or limited land use decision * * *."

Motion to Transfer to Circuit Court 1. Respondent does not object to the motion.

Petitioner's motion to transfer this appeal to Washington County Circuit Court is granted.