

Written Testimony  
Quasi-Judicial Public Hearing  
Tigard Triangle LID No. 1  
Continued from October 8, 2013 to  
November 12, 2013

Submitted to  
City Recorder Wheatley  
during 10/8/2013 City  
Council Mtg. Y.

Remonstrance against Local Improvement District  
and Petition for Removal of Property from Local Improvement District  
via Partial Abandonment

Petitioner, Dartmouth Townhomes, LLC (DTLLC), hereby submits its remonstrance against the Dartmouth Local Improvement District (LID), adopted by the Tigard City Council as Ordinance No. 08-03 on 2/26/2008. Petitioner makes this remonstrance under Tigard Municipal Code Chapter 13.04 General Procedures.

Petitioner also requests removal of its property (bounded by SW 69<sup>th</sup> Avenue, 70<sup>th</sup> Avenue, and north of SW Dartmouth Street; Washington County Tax Map 1S136DD, Tax Lots 07500 and 07600) from the LID via a partial abandonment of the LID.

When the LID was created, Petitioner was under a non-remonstrance requirement. This requirement lapsed in December 2012 with the expiration of Site Development Review (SDR 2007-00008). Petitioner now seeks abandonment of the LID as it applies to its property for the present and any future owners of the lots. Abandonment is permitted under Tigard Municipal Code Chapter 13.04.070-4 entitled "Abandonment of Proceedings."

Arguments for remonstrance and partial abandonment are included in the attached document.

Submitted this 8<sup>th</sup> Day of October, 2013

By: [Signature]  
John M. Kearney, Member  
Dartmouth Townhomes, LLC

Arguments in Support of Remonstrance against LID and for Partial Abandonment as Applied to  
Dartmouth Townhomes LLC's Property

SDR 2007-00008

Under SDR 2007-00008, which granted conditional approval to build a seven-unit condominium project on Tax Lots 07500 and 07600 (DTLLC Property), DTLLC was not permitted to submit a remonstrance against the proposed Dartmouth LID, which was adopted by the Tigard City Council under emergency circumstances on 2/26/2008. SDR 2007-00008 and extensions thereto lapsed in December 2012. Accordingly, DTLLC may submit a remonstrance against its continued inclusion in the LID.

Dartmouth LID and History

In December 2007 through February 2008, the Tigard City Council heard testimony from staff, the neighborhood, and engineers for and against the creation of an LID to improve the neighborhood bordered by Baylor Street, SW 68<sup>th</sup> Avenue, Dartmouth Street, and 70<sup>th</sup> Avenues in Tigard, Oregon.

According to the City Engineer, Gus Duenas, this work needed to be approved and completed by the end of 2008. Group MacKenzie prepared a Preliminary Engineer's Report, date 12/3/2007, which covered its analysis of the proposal and recommendation to proceed with the formation of the LID. A copy of this report was emailed to City Engineer, Mike Stone, on 10/8/13. On page 15, the Project Schedule called for contractor substantial completion to be performed by 11/15/2008.

Based on the testimony and on the Preliminary Report, the City Council adopted the LID under emergency circumstances on 2/26/2008. Despite the emergency status, little to no work has been done on the project in the more than five years since its adoption.

In 2005, Petitioner paid \$500,000 for the DTLLC property, which was finished along the perimeter with sidewalks, curbs, gutters, street trees, driveway aprons, and utility stubs. The property also included storm and public sewers in the streets. The cost basis plus the holding costs, development fees, taxes, and insurance associated with this property now exceed \$800,000. The property has been listed for sale on the RMLS and/or Loopnet since 10/9/2008. The initial asking price was \$490,000. The current asking price is \$125,000, which was done to accommodate the estimated LID costs of approximately \$135,000. Petitioner has received only two offers on the property; both coming in 2013 with one \$40,000 below the asking price.

In May 2012, Petitioner DTLLC contacted the City Engineer to determine the status of the LID. This was after a potential purchaser of the property passed on buying it. The purchaser inquired with the city planning department about the timing, scope, and cost of the LID project and there were no concrete answers. The planners did not know when it would be done, how large the project was, or how much the work would cost. Petitioner's holding costs on the property are approximately \$3,000/month. The property is bare land that produces no income.

One of the principal rights of a property owner is the right to sell or alienate their property. In this case, the uncertainty of the timing, scope, and cost of the LID is impacting Petitioner's right to sell their property. Petitioner wants to sell the property at a fair market value, not at a deep discount due to the uncertain status of the LID. Based on Petitioner's monthly holding costs and lack of income, they are being damaged by \$3,000/month. This totals \$51,000 in holding costs in the 17 months since Petitioner first contacted the City Engineer about the LID. This is causing Petitioner irreparable harm and will continue to do so as long as the property remains in the LID.

In addition to a partial abandonment of the LID, Petitioner requests that the City Council investigate the events that led to the delay or permanent "hold" status of the LID. Since 2008, there have been three city engineers. Mr. Stone, has been helpful in this process, he has had time and budgetary constraints that have prevented him from providing a clear trail. In this age of government mistrust, private citizens demand increased accountability. Governmental transparency is what ensures that private citizens are provided due process and equal protection. The only written explanation received on this was that several neighbors asked for a delay. Petitioner requests information on who made the decision to delay and whether a public hearing was ever held on this topic. These questions will determine whether due process and equal protection were respected.

#### Site Development Review and Impact Study Proportionality Analysis

Under City of Tigard Code Section 18.390.040, when real property is to be contributed to a public improvement, Traffic Impact Fees (TIFs) are used to determine proportionality by comparing a portion of those fees to the value of the real property contributed plus any required improvements.

In Petitioner's case, it was required to dedicate real property and to make improvements. Under Petitioner's SDR 2007-00008 (on thumb drive), the total Traffic Impact anticipated by the development was \$66,062. This amount was multiplied by 32% to determine the TIF fees. That left a total of \$21,140 TIF payments. The balance (or 68%) was \$44,922. This figure is called the "unmitigated impact"

The city planner determined that the value of the land contribution (\$7,194) plus other fees (\$5,844) was \$12,679. They concluded that because the value of the exactions (\$12,679) was less than the unmitigated impact to the transportation system (\$44,922), the level of exaction met the proportionality test. Accordingly, the unmitigated impact exceeded exactions by \$32,243 or by a multiplier of 3.54 to 1.

#### SDR Appeal Process

Petitioner's SDR 2007-00008 was issued on 11/8/2007, with an appeal period ending on 11/28/2007. During that period, Dennis Grayson of DTLLC called the city to determine if there were any existing, planned, or future LIDs affecting our property. Greg Berry replied that there weren't any existing, planned, or future LIDs affecting the property. Mr. Berry's failed to answer a direct question regarding the existence of the proposed Dartmouth LID. This compromised DTLLC's ability to appeal the SDR and to later file a remonstrance against the LID. This failure to disclose was a due process violation that has led to nearly \$200,000 in holding costs since November 2007.

In his proportionality analysis in SDR 2007-0008, Associate Planner Gary Pagenstecher did not include the exactions from the LID, which was being worked on at the same time. In SDR 2007-00003 (emailed to City Engineer on 10/8/13), which applied to the LID petitioner Specht Properties, the document was loaded with references to the proposed LID and to contingencies applying if it was not approved. That document was issued on 10/5/2007, only a month before the date of the SDR 2007-00008. That document was also prepared and signed by Gary Pagenstecher, so he had knowledge of the proposed LID and included it in one SDR, but did not disclose it in another.

SDR 2007-00003 included multiple references to a proposed LID, while SDR 2007-00008 included no information on a proposed LID, but contained Condition #25 requiring DTLLC to participate in any future LIDs along Dartmouth Street. In Petitioner's opinion, the city planner should have disclosed the proposed LID so that Petitioner could have challenged it during the appeal period. This is a second violation of due process leading to greater holding costs.

With respect to proportionality, Petitioner's initial LID contributions were listed at \$126,436 in the Preliminary Engineer's Report. If these fees were included in the city's proportionality figures, it would total \$139,115 for exactions directly related to the public transportation system. The dedication of an 11'-wide strip of property to widen a road and install a bike lane, and redevelopment of that strip, is certainly related to the public transportation system. This amount exceeds the unmitigated impact by \$94,143 or by a multiplier of 3.1 to 1. That number is hardly proportional under the city's line of thinking. If the correct proportionality had been applied to SDR 2007-00008, Petitioner might not have been required to participate in the LID on Dartmouth. Petitioner asks that the City Council undo the multiple due process violations and abandon the LID as it applies to Petitioner's property.

#### Group MacKenzie Preliminary Engineer's Report

This report was dated 12/3/2007, only five days after the expiration of Petitioner's appeal period. It included two sets of drawings for the proposed LID. The first, dated 1/26/06, did not include the DTLLC property, but did include three Specht-owned properties on SW 70<sup>th</sup> Avenue. The second version, which was the LID map adopted under Ordinance No. 08-03, included DTLLC's tax lots, but did not include the three Specht-owned lots on SW 70<sup>th</sup> Avenue.

This smacks of manipulation and LID gerrymandering. The City Council should investigate who made the changes that affected the properties included in the report. It is Petitioner's fear that future LIDs can be forced on unsuspecting neighbors if one property owner controls a large portion of a neighborhood.

Petitioner also requests that the City Council examine the last page of Group MacKenzie's report. On that page 17, they note that a 3:1 land-value-to-assessment ratio is typically desirable for the formation of an LID. Based on their estimated LID total cost of \$2,443,367 and a total square footage of 235,055, the cost per square foot was \$10.39. In order to achieve their ratio, land values would have to be \$31 per square foot. They then note that based on average land values in the neighborhood, that 3:1 ratio

would not be met. It would certainly not be met with respect to Petitioner's property, which had been limited to residential-only use as part of the transfer of development rights in 2004.

Even on completion of the project, the 3:1 ratio would not be met. They anticipated that the post-project ratio would be 2.5:1 to 2.8:1. That's like saying you have to be 6' tall to take a ride at Oaks Park, but then letting in people who are 5'0" tall through 5'7" because "they're tall enough." It simply makes no sense to set a goal and then to fall seven to 17% below that goal. The City of Tigard would likely not offer a permit applicant a 17% discount just because they liked them or if it's "close enough for government purposes."

For the foregoing reasons, Petitioner asks to be removed from the Dartmouth LID with a partial abandonment as it applies to Petitioner's property. Petitioner also asks that the City Council exclude DTLLC and any future owners from any other future LIDs that would affect the area.

**Cathy Wheatley**

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**From:** Marty Wine  
**Sent:** Monday, October 07, 2013 9:09 PM  
**To:** Cathy Wheatley  
**Cc:** Mike Stone; Kenny Asher; Tim Ramis  
**Subject:** Fwd: Dartmouth LID - Prior Land Use Decision on Lots 7500/7600

- Agenda Item 4  
LID # 1 - 10/8/13  
Testimony - Jack  
Kearney

Cathy, first of two items to please enter into the record and please be sure that CD staff is notified because we may have research after tomorrow nights meeting to prepare for a future hearing. Thanks.

Marty

Sent from my iPhone

Begin forwarded message:

**From:** Mike Stone <[MStone@tigard-or.gov](mailto:MStone@tigard-or.gov)>  
**Date:** October 7, 2013 at 8:22:35 PM PDT  
**To:** Jack Kearney <[jkearney66@gmail.com](mailto:jkearney66@gmail.com)>  
**Cc:** Marty Wine <[Marty@tigard-or.gov](mailto:Marty@tigard-or.gov)>  
**Subject:** Re: Dartmouth LID - Prior Land Use Decision on Lots 7500/7600

Jack. I appreciate the effort here and the informational research which obviously took some time and effort.

Unfortunately, we have a scheduled hearing tomorrow night and given the lateness of this email I'm not likely to have much in the way of answers/comments available and I hope you can understand.

Hope to see you tomorrow, M

Michael Stone, PE  
City Engineer  
City of Tigard  
Sent from my iPad

On Oct 7, 2013, at 4:56 PM, "Jack Kearney" <[jkearney66@gmail.com](mailto:jkearney66@gmail.com)> wrote:

Mike,

Attached is SDR 2004-00011 for applicant Pacific NW Properties (PNWP) for the lots currently owned by Dartmouth Townhomes LLC (DTLLC) (Lots 7500/7600) which are now part of the Dartmouth Local Improvement District (LID). DTLLC purchased the lots directly from PNWP. I looked for the document on the City of Tigard website, but it was not there. I also requested it from Kim McMillan several times via email and did not receive an answer. I finally received the

document from Fidelity National Title. The file is rather large, so it had to be put in two PDFs.

At the City Council hearing on 8/20/2013, Ms. McMillan stated that re-development of Dartmouth Street was required as part of the prior land use decision for these lots. Mr. Specht used that statement to argue for our continued inclusion in the LID. I have read and analyzed the SDR. Most of the contents pertain to Phases I and II (of III) of the buildings now located two blocks east of our property. Our property was Phase III and the commercial rights (FAR) from our property were transferred to Phases I and II as part of the process.

SDR2004-00011 does not state anything requiring the owner (or future owners) to re-develop the land along Dartmouth Street. It simply required them to dedicate and/or reserve an 11' strip along Dartmouth for future street widening. It also required them to make improvements along Dartmouth, 69th Avenue, and 70th Avenue (these improvements were made prior to our purchase). The final requirement was that they file the proper forms with the City of Tigard limiting future use to residential only (these forms were presumably filed). If you have any other documents that state differently, please forward them to us for review.

In our land use decision, SDR 2007-00008 (attached, dated 11/09/2007), the city planner included an "Impact Study" (page 30 of 32). That section addressed DTLLC's Traffic Impact Fee (TIF) at a total of \$66,062. This is the amount by which our proposed development would impact the public. They used a multiplier of 0.32 to determine that we should pay \$21,140 in TIF permit fees. The difference between these two numbers was \$44,922 and is called the "unmitigated impact." That figure was used by the planners in their proportionality analysis.

City Code Section 18.390.040 states that when a condition of approval requires the transfer to the public of an interest in real property, the approval authority shall adopt findings which support the conclusion that the interest is roughly proportional to the impact the proposed development will have on the public. DTLLC was required to dedicate land and to pay fees-in-lieu of improvements. The Impact Study included both exactions in its proportionality analysis and findings.

The city planner noted that DTLLC was being asked to contribute land via a right of way dedication, to pay fees for future signalization on 68th and 72nd, and to pay fees for bicycle striping on SW Dartmouth. The value of those items was stated as \$12,679. The city planner reasoned that the value of the proposed dedication and improvements (\$12,679) was less than the unmitigated impact of the project on the transportation system (\$44,922) and that, therefore, the level of exaction met the test of proportionality.

SDR 2007-00008 also required DTLLC to participate in any future development on Dartmouth Street through an LID. During our appeal period, which ended on 11/28/2007, Dennis Grayson of DTLLC inquired with Greg Barry at the City of

Tigard to determine whether there were any existing, pending, or planned LIDs that would affect us. Mr. Barry indicated that there were no existing, pending, or planned LIDs.

In December 2007, about two weeks after our appeal period ended, we received a letter indicating that we were included in the proposed LID. Our initial contribution to the LID exceeded \$120,000 and went above \$130,000 by the time the LID was adopted, under "emergency" conditions, as Ordinance No. 08-03 on 2/26/2008.

During the LID-consideration period, we were presented with a Group MacKenzie Preliminary Engineer's Report (dated 12/3/2007) that included preliminary drawings for the district (dated 1/26/2006) and a final drawing (undated) that was adopted by the City Council. The preliminary map included three Specht-owned properties on SW 70th, but did not include either of our tax lots. The final map included our tax lots, but did not include the formerly included Specht lots. The date of the Group MacKenzie report is only five days after the end of our appeal period (11/28/2007), so it's illogical to think that the City of Tigard or Mr. Barry had no knowledge of a pending or planned LID that would affect our property.

In my opinion, the city should have asked for our portion of the LID work to be done as part of our SDR, as it was directly related to (and a condition of approval for) our development. It would be one thing if the LID work was to be done years in the future, but the planned LID construction was to be finished by 11/15/2008 according to the Group MacKenzie Report. Had the city planners included this exaction in our SDR, rather than using a deceptive LID requirement, they would have had to include the extra \$120,000-130,000 in their proportionality analysis.

Based on the totality of these circumstances, it was dishonest for the City of Tigard to fail to disclose the LID when we inquired during our appeal period. Based on the knowledge the City of Tigard had and did not disclose, it was equally dishonest to not include the \$120,000-130,000 into the proportionality analysis of our SDR. A total of more than \$140,000 in land contributions and improvement exactions/fees-in-lieu of improvements is hardly proportional to the unmitigated impact of \$44,922.

In addition, SDR 2007-00008 required DTLLC to pay for other fees that were not included in the proportionality analysis. There was a charge of \$5,775 as a fee-in-lieu of undergrounding utilities across the street from us on SW 69th (property that belongs to Mr. Specht). According to SDR 2004-00011, PNWP was required to pay \$18,550 for a fee-in-lieu of undergrounding utilities on SW 68th and SW 69th. A similar fee-in-lieu was applied to Mr. Specht's property under SDR 2007-00003, provided the LID was not approved. As we now know, the LID was approved and undergrounding work is part of the plan. That means that the city was paid once for a fee-in-lieu from PNWP, they asked for a second fee from DTLLC, and the actual work was to be paid for as part of the LID (shifting a

portion of those fees to the other landowners in the LID). Billing three times for the same item is hardly equitable or ethical no matter which way you look at it.

That brings me to a seminal topic that the City Council should be investigating. The main question is what person or group of people made the decision to hold off the LID? Several of the council members alluded to transparency and government trust in the 8/20/2013 meeting. I would like to know who made the decision to wait. I would also like to know why, after more than five years, has little to no work been performed on this one-time emergency project. Was it the City Engineer and Mr. Specht? Was it the City Council? Who is in charge of making such determinations? My fear is that private citizens are stepping in and playing the role of the government and affecting the right of other private citizens. That's a slippery slope that should be avoided at all costs.

To close, widening Dartmouth Street to include a bike lane and to accommodate more traffic is a benefit to the Tigard Triangle and to the City of Tigard, not to our property. DTLCC maintains that it should be removed from the LID and that it not be re-applied, in whole or in part, to any future development at this site. We started this conversation with Mike Stone in June 2012 (16 months ago) and it has cost us another \$50,000 to hold the property during that time. The city should be looking toward general or transportation funds to pay for the widening of Dartmouth Street, not taking it from small developers who were trying to improve the city and its tax base.

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Respectfully,

Jack.

Jack Kearney, J.D., LL.M. in Taxation

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