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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

BENCHMARK ENTERPRISES, LLC,)
)
 Petitioner,)
)
 vs.)
)
 CITY OF STAYTON,)
)
 Respondent.)
)

LUBA No. 98-106

FINAL OPINION
AND ORDER

Appeal from City of Stayton.

Donald M. Kelley and Patrick E. Doyle, Silverton, filed the petition for review. Donald M. Kelley argued on behalf of the petitioner. With them on the brief was Kelley and Kelley.

Wallace W. Lien, Special Counsel for the City of Stayton, filed the response brief and argued on behalf of the respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; and BASSHAM, Board Member, participated in the decision.

REMANDED 07/16/99

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

1 Opinion by Briggs.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city's decision to deny a petition for annexation and a subdivision
4 application filed in conjunction with the annexation request.

5 **FACTS**

6 The subject property includes seven acres located within the City of Stayton's urban
7 growth boundary, adjacent to the existing city limits. Adjacent land use is primarily single
8 family residential. The property is designated Low Density Residential in the Stayton
9 Comprehensive Plan, and is zoned Urban Transitional Farm (UTF) on the Marion County
10 zoning maps. Property within the urban growth boundary is subject to county jurisdiction.
11 The county applies the city's comprehensive plan provisions to ensure that the uses permitted
12 under the county's zoning are consistent with the city's plan for the area.

13 Petitioner requested annexation into the City of Stayton, and also requested approval
14 of a 23-lot subdivision on the subject parcel. The city staff and planning commission
15 recommended approval of both requests. The city council held a hearing on the matter and
16 voted to deny the annexation, because the applicant had failed to show that "need exists in
17 the community for the land proposed to be annexed" as required by Section 17.12.460.5 of
18 the Stayton Land Use and Development Code (SLUDC). In its decision, the city council
19 cited to the lack of a 1998 Buildable Lands Inventory as the reason why the applicant had
20 failed to show the requisite "need."

21 The city also found that the subdivision application complied with all relevant
22 criteria, but the city council voted to deny the subdivision request, because the related
23 annexation was denied. The decision states that the city council does not believe it is prudent
24 to approve a subdivision upon a condition that it be annexed into the city sometime in the
25 future. Record 8. This appeal followed.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 There are three key issues presented under these assignments of error. The threshold
3 issue is whether, as petitioner argues, the city denied petitioner's request for annexation
4 because the city's 1998 Buildable Lands Inventory was not available at the time the city
5 rendered its decision. If that was the controlling basis for the city's decision in this matter,
6 two additional issues are presented. The first issue is whether the city's decision would have
7 to be remanded because availability of the city's 1998 Buildable Lands Inventory is not one
8 of the adopted approval criteria for approval of annexation requests. The second issue is
9 whether the city's decision results in a de facto moratorium, because it constitutes either a
10 delay or a refusal to issue "permits, authorizations or approvals necessary for the subdivision
11 * * * of * * * any land." ORS 197.505(1).

12 Because we have some question whether resolving the threshold issue in petitioner's
13 favor necessarily requires that the challenged decision be remanded, we first consider
14 whether, assuming that the city denied the request for annexation because the 1998 Buildable
15 Lands Inventory is not available, such a decision would have to be remanded for the reasons
16 petitioner alleges.

17 **A. Moratorium**

18 Petitioner argues that on June 1, 1998, the city effected a de facto moratorium on land
19 development by denying its annexation request and future annexation requests until the city's
20 1998 Buildable Lands Inventory is completed.¹ Petitioner argues that the city adopted the
21 moratorium without following the process described in ORS 197.505 through ORS 197.540.

¹ ORS 197.505(1) defines "moratorium on construction or land development" as:

"engaging in a pattern or practice of delaying or stopping issuance of permits, authorizations or approvals necessary for the subdivision and partitioning of, or construction on, any land. It does not include denial or delay of permits or authorizations because they are inconsistent with applicable statutes, rules, zoning or other laws or ordinances * * *."

1 The minutes of the city's council's deliberations in June 1, 1998 reflect a motion to
2 deny the annexation of the subject property, which passed, and a motion to approve the
3 proposed subdivision upon annexation to the city, which failed. A third motion, which
4 passed, directed staff not to accept any petitions for annexation until the city had current data
5 and an approved buildable lands inventory. The council's written decision, dated June 15,
6 1998, states that the reason for denying the subject application was because the "lack of
7 current buildable lands data and housing needs data leaves the City Council suspecting the
8 applicant's justification of need within the community." Record 10.

9 Petitioner argues that when the decision regarding the subject application is reviewed
10 in light of the city's contemporaneous decision to refuse to accept new applications for
11 annexation until it completed its own updated buildable lands inventory, the only logical
12 conclusion is that challenged decision effects a moratorium on development on the subject
13 parcel.

14 The city argues that the decision to refuse new applications for annexation was a
15 separate decision of the city council and that if the petitioner wanted to contest that decision,
16 it should have done so by filing a separate appeal. In the alternative, the city argues that the
17 moratorium statutes address development only, and that an annexation petition does not fall
18 within the purview of the statute. The city relies on Clark v. City of Albany, 142 Or App
19 207, 921 P2d 406 (1996), for the proposition that annexations are not a type of land use
20 action subject to ORS 197.505. In Clark, the Court of Appeals stated "[t]he various statutes
21 concerning annexation confirm that the term does not ordinarily mean approval of a request
22 to develop land." Clark, 142 Or App at 211.

23 We do not agree with respondent that Clark is controlling in this case. In Clark, the
24 question was whether a city decision to deny an annexation met the definition of "permit" at
25 ORS 227.178(7) so as to be subject to writ of mandamus proceedings under that provision.
26 The ORS 227.178(7) mandamus procedure is limited to applications for "permits, limited

1 land use decisions or zone change." The court held that, although annexation was a step in
2 the process to develop land, it was not a permit within the meaning of the mandamus statute.
3 Clark, 142 Or App at 211.²

4 The ORS 197.505(1) definition of moratorium is both broader and narrower than the
5 ORS 227.160(2) definition of permit. Moratoria include the "practice of delaying or
6 stopping * * * authorizations or approvals necessary for the subdivision * * * of * * * any
7 land." In this case, the city determined that the subdivision application complied with the
8 relevant approval standards, but decided that the denial of the annexation petition warranted
9 a denial of the subdivision application as well.

10 We agree with petitioner that if the city's decision to deny its request for annexation is
11 based solely on the reason petitioner alleges, the city's decision constitutes a moratorium.
12 Such a decision falls within the literal terms of the first sentence of ORS 197.505(1) and does
13 not qualify for the exclusion provided by the second sentence of the statute. See n 1.

14 **B. Application of Unadopted Criteria**

15 Petitioner assumes the challenged decision constitutes a "permit" as that term is
16 defined by ORS 227.160(2). Petitioner argues that to the extent that availability of the
17 buildable lands inventory was applied by the city as an approval criterion, petitioner argues
18 the city's action violates ORS 227.178(3) because no applicable criterion requires that the
19 1998 Buildable Lands Inventory be available at the time the subject petition was submitted.³

²ORS 227.178(7)(b) allows a writ of mandamus to be issued when the governing body, or its designee, fails to render a decision on an application for a permit, limited land use decision or zone change within 120 days of the date the application is deemed complete. A "permit" in this context is defined as a "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation." ORS 227.160(2).

ORS 227.215(1) defines "development" as "a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and subdivisions as provided in ORS 92.010 to 92.285, and creating or terminating a right of access."

³ORS 227.178(3) provides, in relevant part that "approval or denial of [an] application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

1 Based on the reasoning in Clark, we do not believe the challenged decision
2 concerning the requested annexation constitutes a "permit," as ORS 227.160(2) defines that
3 term. Nevertheless, as noted below in our discussion of the city's findings, the city has
4 adopted criteria governing applications for annexation. If, as petitioner alleges, the city
5 applied an unadopted criterion to deny the request for annexation, i.e., that the 1998
6 Buildable Lands Inventory must be available, we agree with petitioner that the city's decision
7 would have to be remanded. Denying the application based on such an unadopted approval
8 criterion, instead of limiting its review to the adopted approval criteria, would constitute an
9 improper construction of the applicable law. ORS 197.835(9)(a)(D).

10 **C. The City's Findings**

11 We turn now to the threshold question of whether the city council denied petitioner's
12 request for annexation because the 1998 Buildable Lands Inventory is not available.

13 Respondent argues that the city denied the application because the applicant failed to
14 show that the proposed annexation was needed in light of developments that were approved
15 between the time the 1996 Stayton Inventory of Vacant and Buildable Land was adopted and
16 the submittal of the subject application. Respondent points to evidence in the record to show
17 that land is currently available within the city limits to address existing need, and that the
18 denial was justified based on the countervailing evidence in the record which undermines the
19 petitioner's evidence.

20 The SLUDC requires that a petition for annexation comply with six criteria. One
21 criterion, SLUDC 17.12.460.5.a, requires a showing that "[n]eed exists in the community for
22 the land proposed to be annexed." In presenting evidence to the city council, petitioner
23 relied, in part, on the 1996 Stayton Inventory of Vacant and Buildable Land to show a
24 shortage of residential housing within the city limits. Petitioner also cited to testimony by
25 real estate agents regarding a shortage of low density residential property within the city
26 limits. Petitioner submitted evidence to the city to show that some of the property on the

1 housing inventory is not buildable, that the city is rapidly growing, and that the city is
2 unlikely to accommodate needed housing without the proposed annexation.

3 The city's council's findings explain:

4 " * * * * *

5 "In 1994, the Council made the following finding [regarding an earlier
6 annexation and subdivision application on the subject property]:

7 "The Council finds the existing 180 acres of vacant, buildable lands
8 inside the current city limits are sufficient to handle the anticipated
9 single family home growth of the community during the next 7 years.'

10 "Staff finds the applicant's arguments persuasive, noting that the situations
11 outlined by the applicant are supported by facts and the Planning
12 Department's experience with working with the development industry in
13 trying to locate buildable and available land. However, lack of current
14 buildable lands data and housing needs data leaves the City Council
15 suspecting the applicant's justification of need within the community.
16 Council believes that when the 1998 Buildable Lands Inventory and Analysis
17 is complete, it will provide them with a firm, quantifiable basis on which to
18 make decisions on need for land to be annexed into the City." Record 9-10
19 (emphasis added).

20 The city's findings can be construed in two ways. First, the findings can be read to
21 say that the city determined the petitioner's application was deficient because it failed to
22 provide current information, similar to that found in a buildable lands inventory, sufficient to
23 show that the property in question must be annexed in order to provide needed residential
24 land. Second, the findings also can be read to say that the city determined that only the city-
25 generated 1998 Buildable Lands Inventory could support a finding that the subject property
26 is needed in order to satisfy SLUDC 17.12.460.5.a.

27 The rationale for the city's decision must be found in the city's findings. Le Roux v.
28 Malheur County, 30 Or LUBA 268, 271 (1995). It is not possible to determine with
29 sufficient certainty which of the two possible rationales for denying the requested annexation
30 the city intended to adopt. While we might be tempted to simply assume the city did not
31 intend to base its decision on a legally impermissible rationale, we are unable to do so in this

1 case. When the city's ambiguous findings are viewed in context with the city's
2 contemporaneous decision to refuse to accept new applications for annexation until it
3 completed the 1998 buildable lands inventory update, we agree with petitioner that the city
4 determined petitioner's annexation request must be denied because the 1998 Buildable Lands
5 Inventory is not available.

6 For the reasons already explained above, the city may not deny the requested
7 annexation based on the unavailability of the city's 1998 Buildable Lands Inventory.
8 Because the city did so in this case, the city's decision must be remanded. However, in doing
9 so we do not intend to foreclose the possibility that the city may conclude on remand,
10 independent of the unavailability of the city's 1998 Buildable Lands Inventory, that petitioner
11 failed to carry its burden of proof concerning SLUDC 17.12.460.5.a .

12 Finally, we note that as part of the second assignment of error, petitioner argues the
13 evidentiary record in this matter includes substantial evidence that SLUDC 17.12.460.5.a is
14 satisfied. In view of our decision concerning the city's findings concerning SLUDC
15 17.12.460.5.a, we need not and do not consider the parties' substantial evidence arguments.
16 Forster v. Polk County, 22 Or LUBA 380, 388 (1991).

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

18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioner's final argument is that the city improperly construed the applicable law by
20 concluding that approval of the subdivision was contingent upon approval of the annexation
21 application. The city found that the subdivision application complied with all of the relevant
22 city subdivision standards, however, it declined to approve the subdivision. Petitioner claims
23 that the city could have, and should have, approved the subdivision with a condition that the
24 final plat approval be contingent upon annexation into the city at a later date.

25 The city responds that it had no jurisdiction to approve a land use application
26 affecting land outside its corporate boundaries. An application in conjunction with a petition

1 for annexation may not be approved unless the city acquires jurisdiction through the
2 annexation process.

3 The city is correct. A city may exercise authority over subdivisions outside the city
4 limits only when the county has not adopted regulations to address land divisions. In other
5 circumstances, absent an agreement between the city and Marion County to the contrary, the
6 county retains control over unincorporated land within its boundaries. ORS 92.042(1). The
7 city must first have jurisdiction over the subject property before it can apply its zoning
8 designations and grant permits based on those city zoning designations. Recht v. City of
9 Newport, 26 Or LUBA 316, 321 (1993). Petitioner has not shown that the city has the
10 authority to act on a land use application outside the city limits. Nor has petitioner shown
11 that the city is obliged to approve a subdivision application with the condition petitioner
12 would like attached. Van Mere v. City of Tualatin, 16 Or LUBA 671, 677 (1988).

13 The third assignment of error is denied.

14 The city's decision is remanded.