

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

THOMAS H. TONGUE, )  
 )  
Petitioner, ) LUBA NO. 83-050  
 )  
v. ) ORDER ON MOTION  
 ) TO DISMISS  
CITY OF SALEM and SALEM )  
DEVELOPMENT, INC., )  
 )  
Respondents. )

COX, Board Member.

Respondent moves this Board for an order dismissing petitioner's appeal upon the ground the city action complained of is not a final land use decision within the jurisdiction of LUBA. The "decision or determination" upon which petitioner bases his appeal was entered into on April 19, 1983 and is entitled "Annexation Agreement" between Respondent City of Salem and Salem Development, Inc. Salem Development Inc. is the applicant for approval of a proposed 55 unit PUD on a 22.5 acre tract of land zoned R/A (Residential/Agriculture) adjacent to petitioner's home near Illahe Country Club.

FACTS

In 1982 Salem Development Inc. (Applicant) applied to Marion County for approval of a proposed 55 unit PUD on a 22.5 acre tract of land adjacent to petitioner's home. The subject tract is within the Salem Urban Growth Boundary but outside the Salem city limits. In accordance with the "coordination" provision of the Salem Area Comprehensive Plan, Marion County

1 referred the application to the City of Salem for approval. On  
2 August 16, 1982, the City of Salem disapproved the proposed PUD  
3 unless the tract was first annexed to the city for development  
4 under the provisions and requirements of Salem's urban growth  
5 management ordinance. That decision was not appealed.

6 On March 9, 1983, the county commissioners for Marion  
7 County granted outline approval for the proposed PUD subject to  
8 the condition, among others, that the city approve the use of  
9 the company's private sewer and water system. That decision  
10 was appealed to this Board on March 14, 1983 in Tongue v.  
11 Marion County, LUBA No. 83-029.

12 On March 17, 1983, the applicant approached the city in  
13 writing, requesting, among other things, that the city "consent  
14 to the county's preliminary approval of this PUD." At the city  
15 council meeting of March 21, 1983, the applicant was permitted  
16 to offer statements in support of its request to "approve the  
17 development." The council took no action on that date.

18 Following that presentation to the city council, the  
19 applicant's attorney met with the city manager and the city  
20 attorney to discuss possible annexation of the tract and "an  
21 appropriate Annexation Agreement." As a result of that meeting  
22 a proposed "Annexation Agreement" was submitted to the city for  
23 approval. Record 19 and 66. On April 18, 1983 despite  
24 objections by petitioner, the city council instructed its mayor  
25 to sign that proposed agreement. Record 74-79. Under the  
26 terms of the agreement (attached to this order as Appendix A

1 and by this reference made a part hereof), the city approved  
2 the applicant's requested PUD, including extensions of the  
3 company's private sewer and water systems to it, subject to  
4 conditions as stated in the agreement. Commitments included in  
5 the agreement include:

6 (1) That the City "will annex" the 22.5 acre tract.

7 (2) That the tract "will be zoned for residential  
8 purposes" and that "such residential zoning will  
9 permit" the PUD.

10 (3) That the PUD "shall be developed" according to  
11 the standards of the relevant Marion County ordinances.

12 (4) That with respect to the PUD:

13 "City's urban growth management provisions, such as  
14 those requiring the developer to obtain a development  
15 review permit and to extend [city] sewer, water and  
16 roadway improvements, shall not apply." (Record 107)

17 (5) That the "various components of this agreement"  
18 are to be "implemented" at the "earliest possible  
19 time."

20 (6) That "this agreement shall be binding" upon both  
21 the City and the Company."

22 Page 78 of the record indicates that when presented the  
23 agreement, Salem's Mayor inquired why she should sign it.  
24 According to the record she was told that "in this instance  
25 there are a number of conditions" and that the company wanted  
26 to be "assured of receiving approval from the city."

The respondents' argument that this "Annexation Agreement"  
is not a land use decision may be true but not for the reasons  
they present. We have strong reservations about whether the  
"agreement" is worth the paper its written upon. A local

1 government can not contract away its responsibility to comply  
2 with state law and its own ordinances. Based on the reasoning  
3 used by respondents in their memoranda of law it appears they  
4 believe this agreement is an enforceable contract but not yet  
5 in effect due to yet unmet conditions precedent, such as  
6 annexation. We can not agree with that reasoning because we  
7 doubt the enforceability of the contract. However, that issue  
8 was not raised or briefed by the parties.

9 Notwithstanding the foregoing discussion, and in light of  
10 the city's apparent intent to live up to "its contractual  
11 obligation" we find unconvincing the city's argument that this  
12 "Annexation Agreement" is not a land use decision. ORS  
13 197.015(10) defines a land use decision as:

14 "(a) A final decision or determination made by a  
15 local government or special district that concerns the  
adoption, amendment or application of:

16 "(A) the goals;

17 "(B) a comprehensive plan provision; or

18 "(C) a land use regulation."

19 At a minimum the "annexation agreement" is a  
20 "determination" made by a local government that concerns the  
21 application of a comprehensive plan provision or land use  
22 regulation. The city committed itself, in contractual form,  
23 not to enforce provisions of its own Urban Growth Management  
24 Plan and ordinance that may have otherwise prohibited the  
25 construction of the project. The city also committed itself to  
26 rezoning the property in a manner that would allow construction

1 of the project. The condition imposed on the city in order to  
2 implement the contract is to annex the property which, by the  
3 agreement, it has agreed to do.

4 In effect, the city's approval of the 55 unit PUD on land  
5 in an R/A zone was a determination that "\* \* \* the permissible  
6 use of the specific piece of property should be changed \* \* \*"  
7 within the meaning of Fasano v. Washington County Comm., 264 Or  
8 574, 581, 507 P2d 23 (1973), wherein it was held that

9 "\* \* \* a determination whether the permissible use of  
10 a specific piece of property should be changed is  
usually an exercise of judicial authority \* \* \* \*"

11 In Petersen v. Klamath Falls, 279 Or 249, 253-4, 566 P2d 1193  
12 (1977), the Oregon Court of Appeals extended the above stated  
13 Fasano "rule" to "other local planning activities which will  
14 have a significant impact on present or future land uses, such  
15 as the decision to extend city boundaries by annexation."  
16 Furthermore, in Auckland v. Bd. of Comm. Mult. Co., 21 Or App  
17 596, 601, 536 P2d 444 (1975), the Oregon Court of Appeals  
18 stated:

19 "Whenever one seeks to use property in a manner that  
20 is not an outright permitted use, and must therefore  
21 obtain governmental approval, the necessary  
22 governmental proceedings are quasi-judicial in nature  
23 within the meaning of Fasano v. Washington Co. Comm.,  
24 264 Or 574, 507 P2d 23 (1973). This is true whether  
25 the other-than-permitted-use is sought by way of a  
26 zone change, comprehensive plan change, conditional  
use permit, variance, or as in this case, 'a  
reclassification.' The labels are not controlling.  
Instead, Fasano is applicable when land-use decisions  
affect specific individuals and involve application of  
general rules to individual interests. 264 Or at  
579-81."

1 See also Cannady v. Roseburg, 2 OR LUBA 251, 252 (1980).

2 Applying the Auckland language to the present case, just  
3 because the decision is a written agreement rather than an  
4 order or ordinance, it nevertheless is a determination because  
5 "the labels are not controlling." See also Bienz v. City of  
6 Dayton, 29 Or App 761, 764-5, 566 P2d 904 rev den (1977); Golf  
7 Holding Co. v. McEachron, 39 Or App 675, 677, 593 P2d 1202  
8 (1979); Emerson v. Deschutes Cty. Bd. of Comm'rs., 46 Or App  
9 247, 249, 610 P2d 1259 (1980); and Rockway v. Stefani, 23 Or  
10 App 639, 642, 543 P2d 1089 (1975) wherein the rule was applied  
11 to a conditional use permit.

12 By its "Annexation Agreement" committing itself to annex,  
13 rezone and permit construction of a 55 unit PUD project, the  
14 city made a land use decision under the rules of Fasano,  
15 Petersen and Green v. Hayward, 23 Or App 310, 312, 542 P2d 144  
16 (1975), rev on other grounds, 275 Or 693, 552 P2d 815 (1976).  
17 After all, the written contract declares itself to be a  
18 "binding" commitment. See also 1000 Friends of Oregon v.  
19 Clackamas Co., 3 Or LUBA 233, 234 (1981).

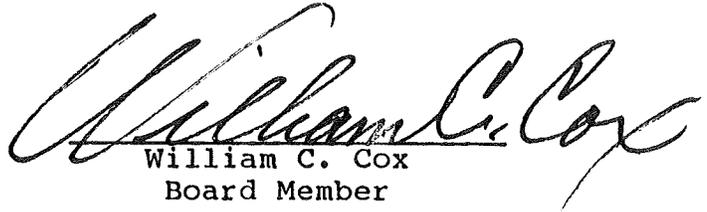
20 Based on the foregoing, we determine that the decision of  
21 the Salem City Council to approve this 55 unit PUD project by  
22 the terms of the written "Annexation Agreement" and to  
23 undertake the "binding" commitments provided by the terms of  
24 that contract was a "final decision or determination" from

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1 which petitioner is entitled to appeal. Therefore, Respondent  
2 City of Salem's motion to dismiss is denied.

3 Dated this 29th day of June, 1983.

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7 William C. Cox  
Board Member

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