

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

FRAN RECHT, )  
Petitioner, )  
and )  
CURTIS SORTE, ANDRA BOBBITT, and ) LUBA  
No. 93-097 )  
PENELOPE KACZMAREK, )  
Intervenors-Petitioner, ) FINAL OPINION  
AND  
ORDER )  
vs. )  
CITY OF NEWPORT, )  
Respondent, )  
and )  
A.D. DORITY III, )  
Intervenor-Respondent. )

Appeal from City of Newport.

Fran Recht, Depoe Bay, Curtis Sorte, Albany, Andra Bobbitt, Seal Rock, and Penelope Kaczmarek, Siletz, filed the petition for review. Fran Recht argued on her own behalf.

Brett V. Kenney, Newport, filed a response brief and argued on behalf of respondent. With him on the brief were Evan P. Boone and Minor and Boone, P.C.

Lawrence R. Derr, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Josselson, Potter & Roberts.

1           HOLSTUN, Referee; SHERTON, Referee, participated in the  
2 decision.

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4                   REMANDED                                   12/29/93

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6           You are entitled to judicial review of this Order.  
7 Judicial review is governed by the provisions of ORS  
8 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner and intervenors-petitioner (hereafter  
4 petitioners) challenge a city decision granting preliminary  
5 planned development, conditional use, tentative plat and  
6 shoreland natural resource impact review approval.

7 **MOTIONS TO INTERVENE**

8 Curtis Sorte, Andra Bobbitt and Penelope Kaczmarek move  
9 to intervene in this proceeding on the side of petitioner.  
10 A.D. Dority III, moves to intervene in this proceeding on  
11 the side of respondent. There is no opposition to the  
12 motions, and they are allowed.

13 **FACTS**

14 The challenged decision describes the project as  
15 follows:

16 "The planned development will include 82 to 90  
17 condominium units in 17 buildings each on a  
18 separate lot, 86 single family dwellings on  
19 separate lots, a 150 unit hotel, and accessory  
20 uses, recreational facilities and the Village  
21 Square, a 51,000 square foot commercial area and  
22 community square to serve the residents and hotel  
23 guests. \* \* \*" Record 13.

24 The decision describes the subject property as being "in the  
25 City of Newport and in the City of Newport Urban Growth  
26 Boundary and \* \* \* zoned City R-4 High Density Multi-Family  
27 Residential.

1 **DECISION**

2 The decision challenged in this appeal was adopted on  
3 June 8, 1993 and grants "permit" approvals for the proposed  
4 planned development.<sup>1</sup> We refer to this June 8, 1993  
5 decision as the "permit decision." Prior to rendering the  
6 permit decision, the city annexed and rezoned the property  
7 on April 6, 1993. We refer to the April 6, 1993 decision as  
8 the "annexation and rezoning decision." The annexation and  
9 rezoning decision brought the subject property within the  
10 city's corporate boundaries and replaced the then existing  
11 county zoning map designations with city zoning map  
12 designations.

13 Both the annexation and rezoning decision and the  
14 subsequent permit decision were appealed to this Board. In  
15 Sorte v. City of Newport, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-067,  
16 December 10, 1993), this Board remanded the annexation and  
17 rezoning decision. We first consider the impact of our  
18 decision in Sorte on this appeal of the permit decision.

19 In approving the permit decision, the city applied its  
20 own zoning map designations, not those of the county.  
21 Apparently, the city relied on its annexation and rezoning  
22 decision, adopted two months earlier, as establishing its

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<sup>1</sup>In pertinent part, ORS 227.160(2) defines "permit" as follows:

"'Permit' means discretionary approval of a proposed development of land under ORS 227.215 or city legislation or regulation. \* \* \*"

1 jurisdiction to grant the requested permits and to apply the  
2 city's, rather than the county's, zoning map designations in  
3 granting the permit approvals.

4 **A. Jurisdiction to Grant Permits**

5 **1. ORS 215.130(2)**

6 ORS 215.130(2) provides, in part, as follows:

7 "An ordinance designed to carry out a county  
8 comprehensive plan and a county comprehensive plan  
9 shall apply to:

10 "(a) The area within the county also within the  
11 boundaries of a city as a result of extending  
12 the boundaries of the city or creating a new  
13 city unless, or until the city has by  
14 ordinance or other provision provided  
15 otherwise \* \* \* [.]

16 " \* \* \* \* " (Emphasis added.)

17 In Allen v. City of Banks, 9 Or LUBA 218, 238 (1983), we  
18 concluded, based on the "unless or until" language in  
19 ORS 215.130(2)(a), that the statute envisioned the  
20 possibility that a city might "plan and zone for property  
21 outside its jurisdictional limits in anticipation of  
22 annexation." We explained that where the city does not take  
23 action to plan and zone property, prior to annexing the  
24 property, the statute provides that the county planning and  
25 zoning continues to apply "until" the city provides  
26 otherwise. We also explained the statute's use of the word  
27 "unless" apparently envisions action by a city to plan or  
28 zone property outside its corporate limits prior to, or  
29 simultaneously with, annexation of the property.

1 Citing our decision in Allen, intervenor-respondent  
2 (hereafter intervenor) argues the city's permit decision,  
3 and this appeal of that decision, are unaffected by our  
4 decision in Sorte remanding the underlying annexation and  
5 rezoning decision. Intervenor argues as follows:

6 "A city can adopt planning and zoning for property  
7 prior to annexation. The only requirement is that  
8 the action cannot take effect prior to annexation.  
9 It follows that a City can also approve a planned  
10 development and subdivision for property prior to  
11 annexation subject to the same condition. The  
12 authority relied on in Allen is ORS 215.130(2)(a)  
13 which refers not just to planning and zoning but  
14 to any 'ordinance designed to carry out a county  
15 comprehensive plan.' The planned development and  
16 subdivision approvals were issued pursuant to such  
17 ordinances, namely, the zoning ordinance and the  
18 subdivision ordinance.

19 "The [permit decision includes] condition 6 [which  
20 provides, 'prior to issuance of building permits,  
21 the property shall first have been annexed to the  
22 City of Newport and zoned R-4.' A reversal or  
23 remand of the [annexation and rezoning decision]  
24 will not invalidate the City's decision in this  
25 case. It will still remain subject to the  
26 condition precedent of annexation and rezoning."  
27 (Citation omitted.) Memorandum in Support of  
28 Request for Reconsideration 2.

29 For purposes of this appeal, we assume intervenor is  
30 correct that the city may, consistent with ORS  
31 215.130(2)(a), enact city plan and zoning map designations  
32 for property located outside its city limits, so long as  
33 those plan and zoning map designations do not become  
34 effective until the property is annexed. The plan and  
35 zoning map designations in such circumstances are

1 "tentative" or "proposed" plan and zoning map designations,  
2 until the property to which they are applied is annexed.

3       However, we reject intervenor's argument in all other  
4 respects. First, the city did not purport to grant the  
5 permit approvals challenged in this appeal prior to  
6 annexation. The challenged decision assumes the property is  
7 within the city's corporate jurisdiction and that city  
8 zoning applies to the property. By virtue of our decision  
9 in Sorte, that assumption is incorrect. Moreover, we do not  
10 agree the condition concerning issuance of "building  
11 permits," quoted supra, makes the permit decision challenged  
12 in this appeal a tentative or proposed decision. The  
13 preliminary planned development, conditional use, tentative  
14 plat and shoreland natural resource impact review approvals  
15 are effective now, even though the cited condition would bar  
16 issuance of building permits by the city prior to  
17 annexation.

18       Second, and more importantly, we do not agree with  
19 petitioner that ORS 215.130(2) provides the city authority  
20 to grant contingent or tentative "permits" for property  
21 outside the city's corporate limits. In Allen we construed  
22 ORS 215.130(2) to grant the city authority to apply its plan  
23 and zoning map designations in advance of annexation. ORS  
24 215.130(2) refers to the "comprehensive plan" and "[a]n  
25 ordinance designed to carry out a comprehensive plan." The  
26 challenged permit decision is neither a comprehensive plan

1 nor an ordinance designed to carry out a comprehensive  
2 plan.<sup>2</sup>

3 ORS 215.130(2) is concerned with identifying the  
4 comprehensive plan and implementing ordinances that control  
5 land use decision making in unincorporated areas following  
6 annexation. As interpreted in our decision in Allen,  
7 ORS 215.130(2) allows a city to adopt tentative or  
8 contingent plan map and zoning map designations for property  
9 outside its city limits. However, the authority the city  
10 enjoys under ORS 215.130(2) does not extend to adopting  
11 contingent permit decisions based on such contingent plan  
12 map and zoning map designations.<sup>3</sup> The statute is simply a  
13 tool which allows the city to enable its plan and land use  
14 regulations to take effect immediately upon annexation of  
15 property, rather than have the county's plan and land use  
16 regulations apply "until" the city takes action to provide  
17 otherwise.

## 18 2. City Plan Provisions

19 Under the City of Newport Comprehensive Plan (Plan),  
20 the city explicitly recognizes that the county has  
21 jurisdiction to grant land use permits prior to annexation

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<sup>2</sup>The challenged decision is not an "ordinance" of any kind.

<sup>3</sup>Nothing in this decision is intended to suggest that ORS 215.130(2) precludes contemporaneous actions by a city to adopt plan and zoning map designations and grant permit approvals based on those plan and zoning map designations. However, as we explain in the text below, certain problems may be presented in adopting such contemporaneous actions.

1 of unincorporated areas.<sup>4</sup> In order for the city to have  
2 jurisdiction to issue land use permits, it must first annex  
3 such unincorporated areas. Again, the challenged permit  
4 decision is based on an assumption that the subject property  
5 was properly annexed to the city. By virtue of our decision  
6 in Sorte, that assumption is incorrect. Therefore, even if  
7 ORS 215.130(2) did allow the city to grant contingent land  
8 use permit approvals prior to annexation of the affected  
9 property, the cited Plan policies would preclude issuance of  
10 such permit approvals until the city took action to annex  
11 the property. See Hoffman v. City of Seaside, 24 Or LUBA  
12 183 (1992).

13 The city must first have jurisdiction over the subject  
14 property before it can apply its zoning designations and  
15 grant permits based on those city zoning designations. Id.,  
16 cf. Standard Insurance Company v. Washington County, 93 Or  
17 App 625, 776 P2d 1313 (1989) (city lacks jurisdiction to  
18 make final land use decision in county proceeding that is

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<sup>4</sup>Plan Urbanization Goal Policies 2 and 3 provide as follows:

"Policy 2: The city will recognize county zoning and control of lands within the unincorporated portions of the UGB." Plan 279.

"Policy 3: The city recognizes Lincoln County as having jurisdiction over land use decisions within the unincorporated areas of the UGB." Id.

In applying similar provisions, we held a city lacked jurisdiction to take action to amend the zoning for property outside its corporate limits. See Hoffman v. City of Seaside, 24 Or LUBA 183 (1992).

1 pending when property is annexed). For the reasons  
2 explained above, the city lacked jurisdiction to grant the  
3 challenged permit approvals and, therefore, the decision  
4 must be remanded. See Standard Insurance Company v.  
5 Washington County, 93 Or App 276, 278, 761 P2d 1348 (1988)  
6 (permit approval should be remanded, rather than reversed,  
7 where the plan map amendment upon which the permit depends  
8 is remanded).

9 **B. Remaining Issue**

10 Both the city's and the county's comprehensive plans  
11 and land use regulations have been acknowledged by the Land  
12 Conservation and Development Commission. ORS 197.251; OAR  
13 Chapter 660, Division 3. In the challenged decision, the  
14 city replaced the county's acknowledged zoning map  
15 designations with city zoning map designations and granted  
16 permits based on the new city zoning map designations. At  
17 the time the city took action on the permit decision, the  
18 city's zoning map designations were not yet deemed  
19 acknowledged pursuant to ORS 197.625.<sup>5</sup> In view of the court  
20 of appeals' decision in Von Lubken v. Hood River County, 118  
21 Or App 246, 846 P2d 1178 (1993), the city's application of

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<sup>5</sup>Following initial acknowledgment of a local government's comprehensive plan and land use regulations, a new or amended comprehensive plan or land use regulation provision is deemed acknowledged under ORS 197.625 upon expiration of the time for appeal of the decision adopting the new or amended provision or, if the decision is appealed, on the date an appellate decision affirming the decision adopting the new or amended provision becomes final.

1 its own (unacknowledged) zoning appears to have been  
2 premature.

3 Because we remand the decision on other grounds, we  
4 need not resolve this issue here. We simply note the issue,  
5 as it could affect the city proceedings on remand. We also  
6 note the 1993 legislature adopted amendments to ORS 197.625  
7 that may have some bearing on the proceedings on remand. Or  
8 Laws 1993, ch 792, § 44.

9 The city's decision is remanded.