

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 WALTER ROLOFF and)
5 VERNON RODIGHIERO,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF MILTON-FREEWATER,)
12)
13 Respondent,)
14)
15 and)
16)
17 KEVAN KVAMME,)
18)
19 Intervenor-Respondent.)

LUBA No. 93-213
FINAL OPINION
AND ORDER

20
21
22 Appeal from City of Milton-Freewater.
23

24 D. Rahn Hostetter, Enterprise, filed the petition for
25 review and argued on behalf of petitioners. With him on the
26 brief was Mautz Baum Hostetter & O'Hanlon.
27

28 No appearance by respondent.
29

30 Wm. A. Galbreath, Portland, filed the response brief
31 and argued on behalf of intervenor-respondent. With him on
32 the Brief was Pozzi, Wilson & Atchison.
33

34 SHERTON, Referee; HOLSTUN, Referee, participated in the
35 decision.
36

37 REMANDED 03/25/94
38

39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council resolution annexing a
4 24 acre tract to the City of Milton-Freewater.

5 **MOTION TO INTERVENE**

6 Kevin Kvamme, the applicant below, moves to intervene
7 in this proceeding on the side of respondent. There is no
8 opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject 24 acre tract is part of a 42 acre parcel
11 owned by intervenor. The remaining 18 acres are already
12 within city limits. The entire parcel is undeveloped. At
13 the time of the challenged annexation, the applicable city
14 or county comprehensive plan and zoning ordinance designated
15 and zoned each portion of intervenor's property for
16 industrial use.¹

17 On October 1, 1993, intervenor submitted a request for
18 annexation to the city. The city conducted the annexation
19 proceeding pursuant to ORS 222.125, which provides:

20 "The legislative body of a city need not call or
21 hold an election in the city or in any contiguous
22 territory proposed to be annexed or hold the
23 hearing otherwise required under ORS 222.120 when
24 all of the owners of land in that territory and
25 not less than 50 percent of the electors, if any,

¹Subsequent to the decision challenged in this appeal, the city adopted decisions changing the plan and zoning designations for the entire 42 acre parcel from industrial to residential use. Those decisions are appealed in Roloff v. City of Milton-Freewater, LUBA Nos. 94-011 and 94-021.

1 residing in the territory consent in writing to
2 the annexation of the land in the territory and
3 file a statement of their consent with the
4 legislative body. Upon receiving written consent
5 to annexation by owners and electors under this
6 section, the legislative body of the city, by
7 resolution or ordinance, may set the final
8 boundaries of the area to be annexed by a legal
9 description and proclaim the annexation."

10 On November 8, 1993, the city council adopted the challenged
11 resolution. There is no dispute the city gave no notice of
12 its annexation proceeding, held no hearing on the proposed
13 annexation, and gave interested parties no opportunity for
14 oral or written comment on the proposed annexation.

15 **JURISDICTION**

16 In Petersen v. Klamath Falls, 279 Or 249, 566 P2d 601
17 (1985), the Oregon Supreme Court held that under
18 ORS 197.175(1), annexation is a planning responsibility
19 which cities must exercise in accordance with the statewide
20 planning goals.² In Heritage Enterprises v. City of
21 Corvallis, 300 Or 168, 708 P2d 601 (1985), the court held
22 that a city council decision determining a proposed
23 annexation was allowed under the city comprehensive plan,
24 and referring the matter to the voters, was a final land use
25 decision reviewable by LUBA. However, intervenor argues
26 neither case is applicable here. According to intervenor,
27 this is because those cases predate the enactment of

²The court also concluded that determination of whether a proposed annexation of 141 acres is consistent with those goals is quasi-judicial in nature.

1 ORS 222.125, and do not involve city annexations pursuant to
2 that statute. Intervenor contends the challenged resolution
3 is not a "land use decision" subject to this Board's
4 jurisdiction.

5 ORS 222.125 was enacted in 1985. Or Laws 1985, ch 702,
6 § 3. Intervenor argues the intent of this legislative
7 provision was to enable cities to annex contiguous
8 territory, with the consent of all property owners, without
9 the necessity for a hearing or interference from adjoining
10 land owners. Intervenor argues that because annexations
11 under ORS 222.125 are excepted from the hearing requirement
12 of ORS 222.120, the procedural requirements of ORS 222.125
13 are inconsistent with such annexations being "land use
14 decisions" subject to requirements for a hearing and
15 findings demonstrating compliance with applicable goal and
16 comprehensive plan provisions.

17 This Board has exclusive jurisdiction to review "land
18 use decisions." ORS 197.825(1). As relevant here, the
19 statutory definition of "land use decision" includes:

20 "A final decision or determination made by a local
21 government * * * that concerns the * * *
22 application of:

23 "(i) The [statewide planning] goals;

24 "(ii) A comprehensive plan provision;

25 "(iii) A land use regulation; or

26 "(iv) A new land use regulation[.]"

27 ORS 197.015(10)(A).

1 ORS 197.175(1) provides, in relevant part:

2 "Cities * * * shall exercise their planning and
3 zoning responsibilities, including but not limited
4 to, a city or special district boundary change[,]
5 which shall mean the annexation of unincorporated
6 territory by a city, * * * in accordance with ORS
7 chapters 195, 196 and 197 and the goals approved
8 under ORS chapters 195, 196 and 197. * * *"
9 (Emphasis added.)

10 ORS 197.175(1) has included a specific reference to
11 annexation of unincorporated territory by cities since such
12 a reference was first added by Oregon Laws 1977,
13 chapter 664, section 12. Thus, under ORS 197.175(1), city
14 decisions to annex unincorporated territory concern the
15 application of the statewide planning goals and, therefore,
16 satisfy the statutory definition of a "land use decision."³
17 In addition, as explained in Petersen, supra, a
18 determination that a specific proposed annexation involving
19 a relatively small, discrete area complies with applicable
20 land use standards is quasi-judicial in nature and requires
21 quasi-judicial procedures.

22 However, the issue raised by intervenor is whether,
23 notwithstanding the language of ORS 197.175(1), ORS 222.125

³We note, however, that in DLCD v. Marion County, 23 Or LUBA 619, 626-27 (1992), we explained that after a local government's comprehensive plan and land use regulations are acknowledged by the Land Conservation and Development Commission under ORS 197.251, it is the acknowledged plan and land use regulation provisions, rather than the statewide planning goals, which govern another type of city or special district boundary change decision specifically listed in ORS 197.175(1) -- the formation of a county special service district authorized by ORS 451.010 to 451.600. However, decisions that concern the application of comprehensive plans and land use regulations are also "land use decisions" under ORS 197.015(10)(a)(A).

1 renders the particular type of annexation governed by that
2 section something other than a land use decision. In
3 general, the provisions of ORS ch 222 governing annexations
4 do not specifically refer to or incorporate the requirements
5 of the ORS ch 197 land use statutes. ORS 222.120 provides
6 that unless expressly required to do so by the city charter,
7 a city is not required to submit an annexation proposal to
8 an election, provided that the city council holds a public
9 hearing on the proposed annexation "at which time the
10 electors of the city may appear and be heard on the question
11 of annexation." ORS 222.120(2). ORS 222.125 provides an
12 exception to the requirement for such a public hearing when
13 all of the owners of the land proposed to be annexed (and
14 not less than 50 percent of any electors residing on such
15 land) consent in writing to the annexation.

16 In Heritage Enterprises, supra, there was no dispute
17 that the subject annexation process included a land use
18 decision. Rather, the question was whether (1) the city
19 council's decision determining the annexation complied with
20 applicable land use standards and calling an election, or
21 (2) the outcome of the election itself, was the "land use
22 decision" under ORS 197.015(10). However, the supreme
23 court's reasoning in determining the city council's decision
24 constitutes the land use decision has relevance here:

25 "The separate decision of the electorate whether
26 to annex, as opposed to the [city council]
27 determination whether the proposed annexation

1 would comply with the comprehensive plan, was not
2 a 'land use decision' within the meaning of ORS
3 chapter 197. The question referred to the voters
4 was not whether the proposal could be adopted
5 under the applicable land use law, but whether
6 this proposal should be adopted at that time. The
7 city council, not the voters, made the final
8 determination of compliance with the comprehensive
9 plan and land use laws. * * * (Emphases in
10 original.) Heritage Enterprises, supra, 300 Or
11 at 172-73.

12 ORS ch 222 generally deals with the processes for
13 determining whether an annexation proposal should be
14 adopted, not with whether the annexation could be adopted
15 under the applicable land use law. In this regard, the 1985
16 legislation adopting ORS 222.125 reflects a determination
17 that no election or public hearing is necessary to allow
18 electors to have input into the decision of whether an
19 annexation should be adopted, where the owners of the
20 property and at least half the resident electors have given
21 their written consent to the annexation. The 1985
22 legislation does nothing to alter the requirement of
23 ORS 197.175(1) that the annexation must be determined to be
24 consistent with applicable land use requirements, or the
25 recognized procedural requirements for such quasi-judicial
26 land use decision making.⁴

27 Based on the above, we conclude the challenged

⁴Additionally, the parties point to nothing in the legislative history of Oregon Laws 1985, chapter 702, section 3, indicating it was intended to eliminate the requirement of ORS 197.175(1) that this particular type of annexation be made in accordance with applicable land use standards.

1 resolution is a land use decision subject to review by this
2 Board.

3 **ASSIGNMENTS OF ERROR**

4 Petitioners contend the city erred by not treating the
5 proposed annexation as a quasi-judicial land use decision,
6 and specifically by not providing any notice of its
7 annexation proceedings or any opportunity for interested
8 parties to submit evidence concerning whether the proposed
9 annexation complies with applicable land use standards.
10 Petitioners further contend the city erred by not adopting
11 any findings to demonstrate compliance of the proposed
12 annexation with applicable provisions of the statewide
13 planning goals and the city comprehensive plan. We agree
14 with petitioners.

15 The assignments of error are sustained.

16 The city's decision is remanded.