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

KEN D.LODGE, MARSHA SEYMOUR,)
CHRIS BROWN and CURTIS HUNTER,)
)
Petitioners,)
)
vs.)
)
CITY OF WEST LINN,)
)
Respondent,)
)
and)
)
WEST LINN-WILSONVILLE SCHOOL)
DISTRICT 3JT,)
)
Intervenor-Respondent.)

LUBA No. 98-019
FINAL OPINION
AND ORDER

Appeal from City of West Linn.

John T. Gibbon, Tigard, and Jeffrey S. Seymour, Lake Oswego, filed petition for review. John T. Gibbon argued on behalf of petitioners Lodge, Seymour and Brown. Jeffrey S. Seymour argued on behalf of petitioner Hunter.

No appearance by respondent.

Peter R. Mersereau, Portland, filed response brief and argued on behalf of intervenor-respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

AFFIRMED 08/11/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's approval of a zone change,
4 conditional use permit and design review.

5 **MOTION TO INTERVENE**

6 West Linn-Wilsonville School District 3JT (intervenor)
7 moves to intervene on the side of respondent. There is no
8 opposition to the motion, and it is allowed.

9 **FACTS**

10 Intervenor applied to the city for a zone change,
11 conditional use permit and design review in order to construct
12 a new middle school on the subject property.¹ The subject
13 property is currently outside the city limits and straddles
14 the urban growth boundary. The property is subject to the
15 Tanner Basin Master Plan (TBMP), which was adopted by the city
16 as an amendment to its comprehensive plan in 1991. The TBMP
17 designates the entire subject property as "potential middle
18 school site." Supp Record 67-70; see also Supp Record 39, 40,
19 242. The subject property is also subject to an
20 intergovernmental agreement between the city and Clackamas
21 County for regulation of the Tanner Basin. That
22 intergovernmental agreement was established in 1992 and
23 amended in 1995. Record 214-221, 222-224, 225.

¹The conditional use permit and design review applications were filed separate from and before the zone change application. The applications were, however, consolidated for the city's review, and resulted in a single decision, which is challenged through this appeal.

1 Following hearings before the city planning commission,
2 the planning commission approved the applications with a
3 single finding of fact, followed by numerous conditions of
4 approval.² On appeal by petitioners, the city council
5 conducted a hearing on the record of the planning commission
6 and upheld the planning commission's approval, adopting its
7 own findings of fact and conditions.

8 Petitioners appeal the city council's decision.

9 **ASSIGNMENTS OF ERROR (Lodge, Seymour and Brown)**³

10 Although petitioners Lodge, Seymour and Brown
11 (petitioners) do not specifically assign error to the city's
12 decision, they make two arguments from which we can discern
13 the error alleged.⁴

14 First, petitioners argue that the TBMP must be amended
15 before a middle school can be sited on the subject property.
16 Petitioners argue that the TBMP designates the subject

²The city council's decision on appeal notes that the planning commission's decision was intended to but did not incorporate findings of fact contained in the staff report. Record 26.

³Although all petitioners jointly filed this appeal, petitioner Hunter makes separate assignments of error.

⁴OAR 661-10-030(3)(d) (1995 edition) requires that each assignment of error be presented under a separate heading. Although petitioners do not specifically assign the errors they allege the city committed, or the legal bases for relief, they present their two arguments under separate headings. While we find these headings sufficient for purposes of OAR 661-10-030(3)(d), petitioners' failure to assign the legal error for each of their arguments, i.e. the legal basis for relief, renders review difficult. It is petitioners' obligation to establish how deficiencies in the city's decision provide petitioners legal bases for relief. We address petitioners' arguments to the extent the legal bases are apparent. However, we will not otherwise attempt to determine the possible intended scope of their arguments, or attempt to fashion legal bases for their arguments that are not discernible from their petition.

1 property as merely a "future middle school site." Petition
2 for Review 4. Because of that "future" designation,
3 petitioners assert the TBMP "excludes the middle school site
4 from the plan." Petition for Review 13. Petitioners assert
5 that the city's failure to require a comprehensive plan
6 amendment prior to actual development of the school is a
7 "clearly wrong" interpretation of the TBMP in violation of ORS
8 197.829(1)(a)-(c).⁵

9 Intervenor clarifies that the TBMP consistently
10 designates the subject property as a "potential" middle school
11 site. The TBMP does not, by its terms, "exclude" the site as
12 a school site, and petitioners have provided no legal or
13 factual authority to support their conclusion that the TBMP
14 intends such an exclusion. We find no "clearly wrong
15 interpretation" in the city's "failure" to either interpret
16 its code to find that the TBMP "excludes" the site as a
17 school, or to require a comprehensive plan amendment to allow
18 development of the site as a school at this time. To the
19 extent the city made an implicit interpretation of its plan
20 upon which it based its conclusion that the TBMP's designation
21 of the subject property as a "potential middle school" allows
22 development of the property as a middle school, that

⁵Petitioners also allege that the city's violation of ORS 197.829(1)(a)-(c) "at a minimum requires a remand for a complete explanation of how the clear implications of the TBMP's express exclusion of the middle school can be ignored." Petition for Review 13. It is unclear whether petitioners allege the city made an incorrect interpretation or that the decision should be remanded for the city's failure to make a necessary interpretation.

1 interpretation is clearly within the city's discretion.
2 Petitioners' first argument provides no legal basis for
3 relief.

4 Petitioners' second argument is denoted "Argument
5 Regarding Failure To Demonstrate That Conditional Use Criteria
6 is Met By Use of Conditions." Petition for Review 14. As we
7 understand their argument, petitioners assert that the city
8 imposed a condition requiring intervenor to conform to an
9 extra-territorial water service resolution without first
10 finding compliance with or feasibility of compliance with an
11 ordinance regarding adequacy of water. Petitioners have not,
12 however, cited to the ordinance for which feasibility
13 allegedly has not been established, or in any other respect
14 specified what the unidentified ordinance requires. We cannot
15 assess petitioners' claim that the county has established
16 compliance with an ordinance when petitioners fail to identify
17 the ordinance or establish what that ordinance requires.
18 Petitioners' argument is insufficiently developed to allow
19 review.

20 Even if petitioners' reference to a requirement that the
21 city establish "adequacy of water" could be read to identify a
22 legal standard sufficient for our review, we disagree that the
23 city has failed to find such generally defined "adequacy."
24 The city's findings include a detailed discussion of the
25 adequacy of water. Record 22-23. In addition, intervenor
26 refers to numerous places in the record that provide

1 evidentiary support for the city's conclusion. Thus, we
2 reject petitioners' general factual assertion that the city
3 failed to establish an adequate supply of water or the
4 feasibility of providing an adequate supply of water prior to
5 imposing a condition regarding provision of water.

6 Petitioners' assignments of error are denied.

7 **FIRST ASSIGNMENT OF ERROR (Hunter)**

8 Petitioner Hunter (Hunter) contends, essentially, that
9 the city lacked the legal authority to process the zone
10 change, conditional use permit and design review applications
11 prior to the subject property's annexation into the city.⁶

12 Hunter argues:

13 "On this issue, the ordinances, codes, acknowledged
14 plans and agreements are clear and not in conflict.
15 If the city wants to apply and enforce its zoning
16 standards to the property, it must first annex it
17 into the City. City zoning standards can be applied
18 to the property upon the effective date of
19 annexation. After the new City zoning standards are
20 effective, but not before then, applications for
21 land use approval may be submitted for approval
22 based on the new City criteria." Petition for
23 Review 15.

24 To support his argument, Hunter relies on our opinion in
25 Recht v. City of Newport, 26 Or LUBA 316 (1993), where we held

⁶Hunter alleges that the city "misconstrued the applicable law, failed to make adequate findings and made a decision not supported by substantial evidence by applying city zoning standards to the property" and approving the conditional use permit and design review based on those standards. However, Hunter does not attempt to establish the inadequacy of the findings or the alleged lack of substantial evidence. With regard to the alleged misconstruction of law, the substance of Hunter's argument is not that the city erred in applying its own standards (or that the city should have applied county standards) but that, because the subject property is outside the city limits, the city lacked legal authority to process the applications at all.

1 that ORS 215.130(2) does not provide authority for the city to
2 adopt contingent permit decisions, based upon contingent plan
3 amendments and zone changes. However, we also recognized that
4 under ORS 215.130(2) cities can adopt comprehensive plan
5 amendments and zone changes contingent upon annexation, so
6 long as they do not become effective until annexation.⁷

7 The city responds, and we agree, that our opinion in
8 Recht does not preclude the city from processing and
9 contingently approving the challenged decision. First, the
10 challenged decision is expressly conditioned upon the city
11 annexing the subject property.⁸ Thus, as we stated in Recht,
12 ORS 215.130(2) specifically authorizes the city to process and
13 approve the zone change. Secondly, and significantly, while
14 ORS 215.130(2) does not provide the authority for the city to
15 process and approve the conditional use permit and design
16 review, neither does it prohibit the city's authority to do

⁷ORS 215.130(2)(a) provides:

"An ordinance designed to carry out a county comprehensive plan shall apply to:

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

⁸Condition 22 of the challenged decision states:

"The conditional Use Permit, Design Review and Zone change approval shall be subject to obtaining annexation approval. No permits, public improvement agreements, or certificates of occupancy will be issued until a final order from the Portland Area Boundary Commission is received by the Planning Director." Record 17.

1 so. The Tanner Basin Intergovernmental Agreement between the
2 city and county expressly authorizes the city's actions. As
3 amended by city resolution 95-18, that agreement states, in
4 relevant part:⁹

5 "1. The City of West Linn shall be responsible for
6 developing and applying all implementing
7 regulations to land use actions for lands
8 within the Tanner Basin area where:

9 "a. the land use action would allow
10 development of a public facility or
11 infrastructure; [and]

12 "* * * * *

13 "c. a pre-annexation agreement has been signed
14 and recorded, or the City conditions
15 approval of the land use action if
16 approved to require signing and recording
17 of such an agreement." Record 222-23.

18 This intergovernmental agreement provides the city the
19 legal authority to process and conditionally approve the zone
20 change, conditional use permit and design review applications
21 challenged here.¹⁰

22 Hunter's first assignment of error is denied.

⁹Resolution 95-18 is entitled:

"A Resolution of the City of West Linn, Oregon amending the intergovernmental agreement between the City of West Linn and Clackamas County transferring the authority for land use actions in the unincorporated area known as Tanner Basin to the City of West Linn." Record 222.

¹⁰We recognize that the intergovernmental agreement requires either a pre-annexation agreement or a condition requiring such an agreement. To the extent the city may have erred in conditioning the approvals on actual annexation, rather than merely on a pre-annexation agreement, such error is harmless since the city's condition provides greater assurance of annexation than necessitated by the intergovernmental agreement. Moreover, Hunter did not assign error to this issue, or in any respect address the Tanner Basin intergovernmental agreement or its implications on the city's authority.

1 **SECOND ASSIGNMENT OF ERROR (Hunter)**

2 Hunter argues intervenor is not the "owner" of the
3 property, and that therefore the city misconstrued the law and
4 made inadequate findings not supported by substantial evidence
5 in approving the applications. We disagree.

6 The record shows that intervenor obtained title to the
7 subject property through a circuit court condemnation
8 judgment. Hunter moved to intervene in the circuit court
9 proceedings and was denied. Hunter appealed the order denying
10 intervention to the Court of Appeals. The Court of Appeals
11 issued a stay of further circuit court proceedings pending
12 Hunter's appeal on the intervention issue.

13 The West Linn Community Development Code (CDC) 02.030
14 defines "owner" as "[a]ny person, agent, firm or corporation
15 having a legal or equitable interest in the property." Hunter
16 has not established that the stay of further circuit court
17 proceedings in any way invalidates the city's ownership
18 interest so as to preclude it from filing the challenged
19 applications.¹¹

20 Hunter's second assignment of error is denied.

¹¹ORS 35.355 addresses the effect of an appeal of a circuit court condemnation judgment upon use of the property at issue:

"Either party to the action may appeal from the judgment in like manner and with like effect as in ordinance cases, but the appeal shall not stay the proceedings so as to prevent the condemner from taking possession of the property and using it for the purposes for which it is being appropriated. In the event the defendant prevails on an appeal, the costs and disbursements of the defendant, including a reasonable attorney fee to be fixed by the court, shall be taxed by the clerk and recovered from condemnor."

1 **THIRD ASSIGNMENT OF ERROR (Hunter)**

2 Hunter asserts the city misconstrued the law and made
3 inadequate findings not based on substantial evidence because
4 the city council's review "was based on the Planning
5 Commission Final Decision Notice which had only one finding of
6 fact to support 30 conditions of approval, in violation of
7 City code." Record 17.

8 To the extent Hunter argues the planning commission's
9 findings were deficient, we note that the final decision
10 before us is that of the city council, not the planning
11 commission. Any procedural or substantial errors in the
12 planning commission review or decision could have been raised
13 and cured upon appeal to the city council.

14 However, as we understand Hunter's argument, it is not
15 simply that the planning commission decision was deficient,
16 but rather that, because the city council's review was on the
17 record, it was bound by the planning commission's single
18 finding. As Hunter argues:

19 "The City's codes clearly require the City Council
20 review, in its hearing on the Petition for Review of
21 the Planning Commission final decision, was limited
22 to the official record of the commission hearing.
23 There was only one finding to support 30 conditions
24 of approval, and no other evidence of compliance
25 with the code requirements for contents of the Final
26 Decision. Thus, the record must be remanded back to
27 the Commission to complete its statutorily required
28 content of the final decision." Petition for Review
29 17.

30 Hunter does not cite to local ordinance provision or any
31 other authority, and we are unaware of any, that would bind a

1 city council to the planning commission's findings. An on-
2 the-record appeal may limit the city council's consideration
3 of evidence to that evidence contained in the planning
4 commission's record. However, it in no way constrains or
5 compels the city's council's evaluation of the evidence or the
6 findings upon which the city council bases its decision.

7 Any alleged deficiencies in the planning commission's
8 decision provide no grounds for relief from the city council's
9 final decision, which is the subject of this appeal.

10 Hunter's third assignment of error is denied.

11 The city's decision is affirmed.