BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM CAPE,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent,

and

POLYGON NORTHWEST COMPANY,
Intervenor-Respondent.

LUBA No. 2004-010

FINAL OPINION
AND ORDER

Appeal from the City of Beaverton.

Jim Cape, Beaverton, filed the petition for review and argued on his own behalf.

Theodore R. Naemura, Assistant City Attorney, Beaverton, and Timothy J. Sercombe, Portland, filed a joint brief for respondent and intervenor-respondent. With them on the brief was Preston Gates and Ellis, LLP. Theodore R. Naemura argued on behalf of respondent, and Timothy J. Sercombe argued on behalf of intervenor-respondent.

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

AFFIRMED 04/27/2004

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals an ordinance that approves an expedited annexation for approximately 109 acres.

FACTS

In 2003, the owner of two undeveloped parcels totaling approximately 109 acres submitted a request for an expedited annexation to the City of Beaverton. On January 12, 2004, the city council approved the annexation pursuant to Metro Code (MC) 3.09.045. MC 3.09.045 allows for expedited annexations without a public hearing when all of the owners and more than 50 percent of the electors consent to the annexation, and a request is made to expedite the annexation. On December 16, 2003, the city council sent notice to interested persons that it would consider the annexation request at its January 5, 2004 city council meeting.[1] On January 5, 2004, petitioner, a property owner in unincorporated Washington County, sent a letter to the city requesting that the city hold a public hearing to prior to considering the annexation request.[2] At the January 5, 2004 meeting, the council considered the annexation proposal, and allowed the ordinance approving the annexation to be read without holding the requested hearing. On January 12, 2004, the city council adopted the annexation ordinance without discussion. This appeal followed.

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[1] Petitioner is not included on the list of interested persons to whom notice was sent. Record 101-102.

[2] Petitioner's letter states, in pertinent part:

> "There are concerns about [the proposed annexation.] A hearing is requested. Please include this request in the public record.
>
> "Of special concern is the bribe/kickback (reduction of developer fees.) A much smaller development by the Peterkort[s] a few years ago was disclosed to have been an $83K or something bribe to annex. Instead of bribing a developer to annex, the funds could be better used to assist the Cedar Mill Community Library which will serv[e] the new residents of the proposed development." Record 96.

STANDING

ORS 197.830(2)(b) provides that a person may file an appeal with LUBA if that person "[a]ppeared before the local government * * * orally or in writing." In *Cape v. City of Beaverton*, 40 Or LUBA 78, 83-84 (2001)(*Cape I*), the city argued that ORS 197.830(3) governs standing before LUBA because the city did not hold a hearing before adopting its decision in that case.[3] The city further argued that because the petitioner failed to establish he was adversely affected by the annexation decision, LUBA should dismiss the appeal because the petitioner did not establish he had standing to appeal under ORS 197.830(3). We rejected that argument, saying

> "There is no dispute that petitioner submitted a letter to the city, prior to its decision, in which petitioner opposed the ordinance. That letter is sufficient to constitute an appearance 'in writing,' within the meaning of ORS 197.830(2). The city argues that because it held no hearing before adopting the challenged ordinance, the criteria governing petitioner's standing are set forth at ORS 197.830(3) rather than ORS 197.830(2). * * * Respondent misreads the statute. While ORS 197.830(2) applies in circumstances where a local government conducts a hearing, it is not expressly limited to cases where a hearing is provided. Where the local government does not conduct a hearing, but provides an opportunity for written appearances, we see no reason why ORS 197.830(2) should not apply and provide standing to appeal based on such written appearances. We reject respondent's standing challenge." 40 Or LUBA at 83-84. (Footnote omitted.)

The city asks that we reconsider our conclusion in *Cape I*, again arguing that ORS 197.830(3) applies and that petitioner has failed to establish that he is adversely affected by the challenged annexation.

We decline to reconsider our earlier conclusion. Here, as in *Cape I*, the city provided notice of the pending annexation decision to interested parties, informing them of the date and time the city council would consider the annexation petition. Petitioner submitted a letter to the city council, asking the council to hold a hearing before approving the annexation. That submittal is sufficient to

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[3] ORS 197.830(3) provides an exception to the requirement set out in ORS 197.830(2) that a petitioner at LUBA must have appeared before the local government. Under ORS 197.830(3), a person who is not entitled to notice of a hearing may file an appeal with LUBA notwithstanding that person's failure to appear before the local government if that person is "adversely affected" by the challenged decision.

constitute an appearance for the purposes of ORS 197.830(2) and, therefore, petitioner has standing to appeal the city's annexation decision.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city erred in using the expedited annexation process set out in MC 3.09.045. According to petitioner, that process may only be used to approve "minor boundary changes." Petitioner contends that the annexation of almost 110 acres is not a "minor" boundary change.

The city and Polygon Northwest Company (respondents) explain that there are two kinds of annexations under the annexation scheme set out in MC Chapter 3.09: "major" boundary changes and "minor" boundary changes.[4] Respondents argue that parcel size is irrelevant to the question of which process is to be used to annex property. Respondents argue that, as defined, *all* annexations are "minor" boundary changes.

Other than petitioner's bare assertion that an annexation request that will add 109 acres to the city *must* be a major boundary change, petitioner does not explain why he believes such is the case. An annexation is not one of the four actions described in MC 3.09.020(h) as a "major boundary change," and is one of the actions included in the definition of "minor boundary change." MC 3.09.020(i). The city did not err in concluding that the challenged decision involves a "minor boundary change."

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[4] MC 3.09.020 defines the following terms:

> "(d) 'Boundary change' means a major or minor boundary change, involving affected territory lying within the jurisdictional boundaries of Metro and the urban reserves designated by Metro prior to June 30, 1997.
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> "* * * * *
>
> "(h) 'Major boundary change' means the formation, merger, consolidation or dissolution of a city or district.
>
> "(i) 'Minor boundary change' means an annexation or withdrawal of territory to or from a city or district or from a city-county to a city. 'Minor boundary change' also means an extraterritorial extension of water or sewer service by a city or district."

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues:

> "Oregonians have substantial rights in land use actions. While a public hearing is not required, it is not banned. A non-public hearing, going through the Planning Committee, or some other process is needed. The city's refusal to create a civic mechanism to acknowledge the substantial rights of concerned citizens in expedited annexations does not excuse [it] from the requirement. Scheduling witnesses, creating exhibits, arranging time off from work, transportation to and from the city, child care and other issues must all be coordinated for a proper exercise of substantial rights. The county commissioner and the community chair person were not requesting a hearing just for themselves * * * but on behalf of the community.[5] Petitioner's substantial rights were denied." Petition for Review 2-3 (footnote added).

We understand petitioner to argue that some unspecified state law requires the city to hold a public hearing or otherwise provide an opportunity for public input if a citizen requests such a hearing or opportunity for input. We also understand petitioner to argue that even if those state laws do not impose such an obligation on the city in response to an individual's request, those same unspecified laws obligate the city to hold a public hearing on an annexation petition when one or more public officials requests such a hearing on behalf of one or more citizens.

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[5] Petitioner cites to a letter from a Washington County Commissioner at Record 97 to support his contention that both a county commissioner and a community chairperson requested a hearing on the annexation. Record 97. The county commissioner's letter states, in relevant part:

> "As the District 2 County Commissioner, I request that the City of Beaverton utilize State of Oregon annexation and land use requirements in lieu of Metro's 'expedited' annexation procedures for the annexation of the [subject] property * * *. Specifically, I request a hearing with appropriate public notices pursuant to state law and Metro requirements, to be held and that this letter be included in the public record for this annexation proceeding.
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> "I appreciate comments made to me and Mr. Bruce Bartlett, Chair of CPO1 about your assurances that CPO1 will be closely involved in the planning for the development of the * * * property. Conducting a hearing on annexation of this property appears to be a reasonable start to this process."

Respondents argue, and we agree, that petitioner's first argument was answered in *Cape v. City of Beaverton*, 43 Or LUBA 301, 312 (2002), *aff'd* 187 Or App 463, 68 P3d 261 (2003), where we said:

> "Petitioner fails to recognize that our authority to remand city annexation decisions for procedural errors is qualified by the statutory requirement that such failures must prejudice a petitioner's substantial rights. ORS 197.835(9)(a)(B). If petitioner's substantial rights are not prejudiced by any procedural errors the city may commit in annexing property, and no other person whose substantial rights are prejudiced by any such procedural errors appeals to LUBA, such procedural errors simply provide no basis for reversal or remand. To the extent petitioner's objection is that ORS 222.125 and MC 3.09.045 should not allow the city to annex the property of consenting property owners without a public hearing or election, that objection must be addressed to the legislative bodies that enacted the statute and the MC."

Neither MC 3.09.045 nor any other state or local law that we are aware of requires that the city hold a hearing on an expedited annexation. Therefore, the city did not err when it declined to hold a hearing despite petitioner's request. If the city did not err, then there is no basis for reversal or remand, because we may only remand if a "procedural *error*" violated petitioner's substantial rights.

As for petitioner's second argument, the commissioner's letter is nothing more than a plea for the city to provide more public input than is required by MC 3.09.045.[6] Assuming without deciding that the county commissioner's letter serves as a request for hearing by both the commissioner and the community chairperson, the fact that those persons may make such a request in their representative capacity does not impose an obligation on the city to hold a hearing in response to that request.[7] Accordingly, the city did not err when it adopted a decision without holding a hearing.

The second assignment of error is denied.

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[6] The expedited annexation process may not be used if a necessary party, which includes counties in certain circumstances, contests the annexation. MC 3.09.045(a). We do *not* understand petitioner to argue that the county commissioner's letter is a contest of an annexation under MC 3.09.050(c).

[7] The city may, pursuant to MC 3.09.045(a), provide additional opportunities for involvement by interested parties on its own or in response to a request for additional public involvement, but it is not *required* to do so.

The city's decision is affirmed.