

117
LAND USE
BOARD OF APPEALS

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

AUG 29 4 37 PM '83

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3 THOMAS H. TONGUE,)
4) Petitioner,)
5) vs.) LUBA NO. 83-050
6 CITY OF SALEM and SALEM)
7 DEVELOPMENT, INC.,) FINAL OPINION
8) Respondents.) AND ORDER

8 Appeal from City of Salem.

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16 Bagg, Board Member.

17 Dismissed. 8/29/83

18 You are entitled to judicial review of this Order.
19 Judicial review is governed by the provisions of Oregon Laws
20 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.
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1 BAGG, Board Member.

2 This matter is before the Board on motion of Respondent
3 Salem Development, Inc., for an order of dismissal. Respondent
4 seeks the order of dismissal on the ground the "annexation
5 agreement" which is the subject of this appeal has been
6 rescinded; and, therefore, the appeal is moot.

7 The annexation agreement under review is an agreement
8 between the City of Salem and Salem Development, Inc. Salem
9 Development, Inc. is the applicant for a proposed planned unit
10 development outside the Salem city limits and in Marion
11 County.¹ The annexation agreement says, among other things:
12 the city will annex property upon which the PUD is to be
13 constructed; it will be zoned in a particular fashion; it will
14 be developed according to relevant Marion County standards;
15 and, certain provisions of the city's urban growth management
16 ordinances will not apply.

17 Petitioner opposes the motion. Petitioner does not
18 challenge the assertion the annexation agreement has been
19 rescinded, but states

- 20 "1. On the filing of this appeal the City lost
21 jurisdiction and had no power to rescind the
'annexation agreement'.
- 22 "2. LUBA cannot properly consider matters occurring
23 [sic] after the filing of a Notice of Appeal and
not part of the record on appeal.
- 24 "3. Recission [sic] of the 'Annexation Agreement'
25 does not render this case moot because the
underlying proceeding is still pending before the
26 city and there are still rights that may be
affected by its final determination by the City.

1 "4. Petitioner is entitled to a LUBA decision on the
2 invalidity of the annexation agreement, not
3 merely to be the unwitting beneficiary of a deal
with the City and Company.

4 "5. Rescission of the Annexation Agreement does not
5 render this case 'moot' because other issues are
also presented in this appeal.

6 "6. Even if the validity of this 'annexation
7 agreement' is no longer an issue between these
8 parties, because the validity of such an
9 agreement presents an issue of public importance,
which is 'capable of repetition', that issue
should be decided 'for the guidance' of cities
and counties."

10 At the conference call held on August 10, 1983, the city
11 and Salem Development, Inc. agreed the annexation agreement was
12 not effective to short cut any part of the process necessary to
13 annex property. No part of the agreement was effective to
14 control the conduct of any hearing or city proceeding, and no
15 part of the agreement was effective to preclude full
16 consideration of all the issues which might be addressed during
17 any stage of an annexation proceeding, according to both
18 respondents. Further, Salem Development, Inc. argued that any
19 annexation decision made would be reviewable as a land use
20 decision by the Land Use Board of Appeals. This review power
21 would exist notwithstanding the existence or non-existence of
22 the earlier "annexation agreement." The Board's review would
23 in no way be limited or controlled by the agreement, claim both
24 respondents.

25 The Board holds the agreement is not effective to control,
26 short cut or otherwise influence the normal process of

1 annexation that might be undertaken by the City of Salem.
2 Annexation is, of course, an act that may only be performed by
3 the city council pursuant to the requirements of the city's
4 charter and Oregon law. There can be no contract for the
5 ordinance necessary to annex property. See ORS 222.008 to ORS
6 222.310; 2 E. McQuillin, The Law of Municipal Corporations, Sec
7 7.13 (3d ed. 1979), [hereinafter cited as "McQuillin"] 10
8 McQuillin, Sec 29.92 (3d ed. 1981). Had this agreement not
9 been rescinded and the city tried to assert it as somehow
10 precluding a full review of the issues in an annexation
11 proceeding, the agreement could be ignored.²

12 The Board is not persuaded by petitioner's argument that
13 the city cannot rescind the agreement and the Board cannot
14 consider this rescission. Petitioner misconstrues what has
15 occurred. The agreement is at best a contract between the city
16 and the developer. As the city and the developer are the only
17 parties, the city and the developer alone are entitled to
18 rescind the agreement. 10 McQuillin, Sec 29.120 (3d. ed,
19 1981). The city's decision, it must be remembered, was not
20 made through any quasi-judicial process but was made in the
21 same manner the city might make any contract. It is not,
22 therefore, subject to any prohibition against "reconsider-
23 ation." See 3 R. Anderson, American Law of Zoning, Sec 20.50
24 (2d. ed. 1977).

25 Petitioner's argument that LUBA may not consider matters
26 after filing of the "Notice of Intent to Appeal" is also

1 mistaken. LUBA conducts review proceedings on the record made
2 by the city, but that does not mean LUBA is without power to
3 consider an act making LUBA's review proceeding moot. When
4 there is no longer a decision to review, for whatever the
5 reason, LUBA has no function to perform. Fujimoto v Land Use
6 Board of Appeals, 52 Or App 875, 630 P2d 364, rev den, 291 Or
7 662 (1981).

8 Lastly, whether or not the city has started proceedings to
9 annex the subject property is of no matter at this time. As
10 stated above, the annexation agreement controls nothing. It is
11 a nullity. Any annexation proceeding undertaken by the city
12 may be appealed, when completed, on its own merits. The
13 contested annexation agreement is irrelevant to those
14 proceedings.³

15 The Board has before it, then, two valid reasons to dismiss
16 this matter. First, the subject of the appeal is a nullity.
17 As a nullity, it has no power to control the use of land. It
18 is therefore not a "final decision or determination" with any
19 effect within the City of Salem. See Peterson v Klamath Falls,
20 279 Or 249, 566 P2d 1193 (1977). Second, even if the agreement
21 were to have some effect, the agreement has been rescinded. In
22 either case, there is nothing for LUBA to review.

23 This matter is dismissed.

FOOTNOTES

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4 In Tongue v. Marion County, _____ Or LUBA _____ (LUBA No.
5 83-029, 1983), LUBA remanded county approval of this planned
6 unit development for various reasons.

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8 On June 29, 1983, the Board denied a motion to dismiss this
9 appeal. The motion was made on the ground the agreement to
10 annex was not a land use decision within the meaning of ORS
11 197.015(10). The Board made its decision on its understanding
12 the agreement was an attempt to commit the city to the
13 annexation, rezoning and permission to construct the PUD
14 project. As such, while the Board had "strong reservations
15 about whether the 'agreement' is worth the paper its [sic]
16 written upon," the Board held it to be a final decision or
17 determination that was effective to change the use of land.
18 The parties did not argue whether the agreement had any power,
19 but rather assumed it had the power contained in its terms.
20 Thus, the issue of whether a city could contract away its
21 legislative and quasi-judicial powers was not before this Board.

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23 The Board's holding today declares the agreement to be a
24 nullity. A nullity is not a "final decision or determination"
25 within the meaning of ORS 197.015(10). The Board will not
26 review a nullity. To the extent the Board's order of June 29,
1983 suggested otherwise, that order is modified.

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28 No one has suggested the annexation agreement is a "consent
29 to annexation" under ORS 222.170.
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