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

F. CARTER KERNS and
LOU LEVY,

Petitioners,

vs.

CITY OF PENDLETON,
FREDRICK S. HILL and
MARY ANN HILL,

Respondents.

LUBA No. 81-127

FINAL OPINION
AND ORDER

Appeal from the City of Pendleton.

Thomas R. Page and Stephen T. Janik, Portland, filed the
Petition for Review and Thomas R. Page argued the case on
behalf of Petitioners.

Rudy M. Murgo and William J. Storie, filed the brief and
argued the cause on behalf of Respondents.

COX, Referee; REYNOLDS, Chief Referee; BAGG, Referee;
participated in this decision.

Reversed.

3/18/82

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF DECISION

3 Petitioners contest the annexation of 12.36 acres of land
4 into the City of Pendleton and the zoning of that land R-1.
5 The contested annexation was accomplished by City Ordinance
6 3192 which became final on October 20, 1981.

7 ALLEGATIONS OF ERROR

8 Petitioners set forth nine assignments of error which
9 include assertions that the city violated Statewide Planning
10 Goals 2, 3, 5, 7 and 14. Petitioners also assert that the city
11 failed to comply with OAR 660-01-315 which requires that prior
12 to acknowledgment of its comprehensive plan and urban growth
13 boundary, the city must review all annexation requests pursuant
14 to specific criteria. We only address the petitioners'
15 allegations regarding OAR 660-01-315 Their remaining
16 allegations of error will undoubtedly be dealt with during the
17 acknowledgment process.

18 FACTS

19 Pendleton Ordinance No. 3192 annexes 12.36 acres of land
20 owned by Respondents Hill (hereinafter Hill property) to the
21 City of Pendleton and rezones the property R-1 (Low Density
22 Residential). Pendleton's comprehensive plan has not been
23 acknowledged by LCDC as being in compliance with the statewide
24 goals. The city council, by Ordinance 3192 adopted as its
25 findings of fact and conclusions of law the Pendleton Planning
26 Commission's findings and conclusions.

1 The subject property is surrounded by city limits on three
2 sides with two recently annexed parcels, Cory (6 acres) and
3 Mills-Barnett (24 acres) located to the southeast and east.
4 Grandview Heights and NW Ingram-NW Johns Neighborhoods are
5 located on the west and the Livermor's first and second
6 additions on the south of the subject property. To the
7 northeast of the property lies the Wheatland Subdivision
8 consisting of 20 small acreage lots (1 1/2 to 2 acres in size)
9 which is served by a 12 inch diameter city waterline. As of
10 the date of the decision only one home had been constructed in
11 phase 1 of the Wheatland Development and six of the ten lots in
12 that phase had been sold.

13 The record indicates that the Mills-Barnett Addition was
14 annexed by the city on October 2, 1979 and contains an 85-lot
15 subdivision (Owen Subdivision). The Owen Subdivision had
16 received only preliminary plat approval at the time the
17 contested decision was made. Further, prerequisites to
18 development had not been finalized due in part to this Hill
19 property litigation which has prevented development of access
20 alternatives to the Owen Subdivision. The most direct and
21 logical access to the Mills-Barnett Addition is via an
22 extension of North Main Street. North Main runs by
23 petitioners' property and that fact appears to be the source of
24 most of petitioners' concerns, i.e. increased traffic and use
25 of the street which is presently dead end. The city also has
26 placed a condition on the Mills-Barnett Annexation that

1 building permits can not be obtained until construction contracts
2 are issued to improve either North Main or Lee Street to city
3 standards so they could serve the property. That condition had not
4 been met when the contested decision was made. Furthermore, the
5 economic climate has dampened any immediate demand for development.

6 The city council summarized its beliefs about the Hill property
7 annexation when it stated:

8 "When considering the commitment of the city to allow the
9 extension of a 12-inch waterline along the north side of
10 the Hill property, and the extensive planning effort that
11 has occurred at both the city and county levels to co-
12 ordinate the development of the Wheatland and Owens Sub-
13 divisions and Hill annexation, it is obvious that this
14 request does encourage an orderly growth of the city.
15 The Hill annexation would be an 'infilling' of a vacant
16 area that is surrounded by developed, developing, and
17 readily developable properties."

14 DECISION

15 This is the third time this case has been before the Land Use
16 Board of Appeals. At the first hearing before this Board, the
17 property known as the Mills-Barnett Addition had not been form-
18 ally annexed by the city. In addition, subsequent to this
19 Board's opinion in that proceeding, Kerns v. Pendleton, 1 Or LUBA
20 1 (1980), the above described 12-inch waterline along the north
21 boundary of the Hill property was added. Except for those
22 changes, there has been little actual change in the character of
23 the land and city limits since our original reversal decision.

24 Viewing the Hill property in its relationship to the
25 existing city limits and Pendleton's commercial core, we have
26 little doubt the property will eventually be annexed into the

1 City of Pendleton and be developed as proposed by the Hills.
2 The problem that we find in this case and the reason for our
3 reversal is that the city has failed to comply with the
4 dictates of the annexation rule. The wisdom and applicability
5 of the annexation rule to a situation such as the one in which
6 the Hills find themselves is undoubtedly frustrating to not
7 only them but the city as well. However, respondents can not
8 ignore the clear and well-defined standards which must be met
9 in order for them to annex the property prior to the city
10 having its comprehensive plan acknowledged.

11 OAR 660-01-315 (the annexation rule) requires that an
12 annexation of land to a municipality prior to acknowledgment of
13 the municipality's comprehensive plan must comply with specific
14 criteria or it shall not be allowed. The annexation rule
15 states:

16 "For annexation of lands not subject to an
17 acknowledged plan, the requirements of Goal No. 3
18 (Agricultural Lands) and Goal No. 14 (Urbanization),
19 OAR 660-10-060 shall be considered satisfied only if
the city or local government boundary commission,
after notice to the county and an opportunity for it
to comment, finds that adequate public facilities and
services can be reasonably made available; and:

20 "(a) The lands are physically developed for urban uses
21 or are within an area physically developed for
urban uses; or

22 "(b) The lands are clearly and demonstrably needed for
23 an urban use prior to acknowledgment of the
24 appropriate plan and circumstances exist which
25 make it clear that the lands in question will be
within an urban growth boundary when the boundary
is adopted in accordance with the goals.

1 "Lands for which the findings above can not be
2 made, shall not be annexed until acknowledgment of an
3 urban growth boundary by LCDC as part of the
4 appropriate comprehensive plan." (Emphasis added)

5 The annexation rule requires the city to find, based on
6 substantial evidence that, (1) adequate public facilities and
7 services can be reasonably made available to the Hill property;
8 and (2) the Hill property was either physically developed for
9 urban uses or is within an area physically developed for urban
10 uses; or (3) the Hill property was clearly and demonstrably
11 needed for an urban use prior to acknowledgment of the city's
12 comprehensive plan and it is clear that the Hill property will
13 be within an urban growth boundary when the boundary is adopted
14 in accordance with the goals. We find that the city has failed
15 to comply with items 2 and 3 of the test. The applicant failed
16 to show that the Hill property is either physically developed
17 or within an area physically developed for urban uses. In
18 addition the Hills failed to show in the alternative that the
19 property was clearly and demonstrably needed for an urban use
20 prior to acknowledgment of the comprehensive plan. The Hills
21 have adequately shown that the land will undoubtedly be within
22 the city's urban growth boundary when the boundary is adopted
23 in accordance with the goals.

24 The city found that adequate public facilities and services
25 can be reasonably made available to the Hill property. There
26 is substantial evidence in the record to support that finding.
The city was unable to find that the Hill property was at this

1 time physically developed for urban uses. It found at Finding
2 8C that "the subject property is not developed at this time * *
3 * *" The city, therefore, addressed whether the property was
4 "within an area physically developed for urban uses." It
5 concluded that the property was within such an area. The
6 record does not, however, support such a conclusion. The mere
7 fact that the Hill property is surrounded by city limits does
8 not mean that it is within an area physically developed for
9 urban uses. The record is clear that a majority of the
10 property surrounding the Hill land consists of undeveloped
11 subdivisions some of which have reached, at best, the
12 preliminary plat stage. While the surrounding properties may
13 well be physically developed in the future, they are at this
14 point only planned for development. At the time of oral
15 argument, Applicants argued that their property was within an
16 area physically "developable" for urban uses. However,
17 developability is not the test, the test requires that
18 development have already occurred.

19 In the alternative, the test requires that the property be
20 clearly and demonstrably needed for an urban use prior to
21 acknowledgment of the appropriate plan. There is much
22 discussion and many findings in the record regarding the
23 question of need for this property to be developed for
24 residential purposes. Without addressing whether the findings
25 of need are sufficient to meet the annexation test, we note
26 that the city made no finding that the property was needed for

1 residential development "prior to acknowledgment of the
2 appropriate plan." There is no finding to indicate when
3 acknowledgment of the city's comprehensive plan is
4 anticipated. Without such consideration, the city is hard
5 pressed to know whether the Hill land is needed for an urban
6 use prior to that acknowledgment. Furthermore, given the fact
7 that there are numerous platted but undeveloped lots in the
8 vicinity of the Hill property, no urgency seems to exist for
9 development of this property. In Friends of Linn County v.
10 Lebanon, 1 Or LUBA 50, 70 (1980), the City of Lebanon was not
11 fully aware of when it would receive acknowledgment of its
12 comprehensive plan. However, in that case, Lebanon had found,
13 based on substantial evidence, that if it was to insure that
14 Tektronix Corporation would become part of its economic base,
15 it needed to move quickly to annex the property upon which
16 Tektronix would be able to locate. The City of Pendleton in
17 this case has expressed no such urgency and, in fact, the
18 record would not support such a finding if it were made.

19 Given the foregoing, this Board has no option but to
20 reverse the city's decision for as is stated in the annexation
21 rule "lands for which the findings above can not be made shall
22 not be annexed until acknowledgment of an urban growth boundary
23 by LCDC as part of the appropriate comprehensive plan."

24 Reversed.

25

26



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 2/22/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: KERNS V. PENDLETON
LUBA NO. 81-127

Enclosed for your review is the Board's proposed opinion and order in the above captioned appeal.

This case brings before the commission application of the Annexation Rule, OAR 660-01-315. We find the city failed to properly apply the rule and, therefore, reverse its decision approving annexation of 12.36 acres of land. The city erred in its conclusion that the "within an area physically developed for urban uses" standard was met by the existence of undeveloped but annexed land around the property. Also, the city failed to find in the alternative that the land was "clearly and demonstrably needed for an urban use prior to acknowledgment of the appropriate plan."

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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