

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

OCT 18 12 46 PM '84

3	HERITAGE ENTERPRISES, a)	
	partnership of DAVID F.)	
4	WAGNER and CHARLES F.)	
	KINGSLEY,)	LUBA No. 84-050
5)	
	Petitioner,)	FINAL OPINION
6)	AND ORDER
	vs.)	
7)	
	THE CITY OF CORVALLIS,)	
8)	
	Respondent.)	

10 Appeal from the City of Corvallis.

11 Allen L. Johnson, Eugene, filed the Petition for Review and
12 argued the cause on behalf of petitioner. With him on the
brief were Johnson and Kloos.

13 Richard D. Rodeman, Corvallis, filed a response brief and
14 argued the cause on behalf of Respondent City.

15 KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee,
participated in the decision.

16 DISMISSED 10/18/84

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

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1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioner seeks review of the May 15, 1984 decision of the
4 voters of Corvallis rejecting a proposed annexation of
5 approximately 358 acres bordering the city. Petitioner seeks
6 reversal of the electorate's decision. Alternatively
7 petitioner seeks a declaration that the vote was ineffective to
8 overturn the city council's previous approval of the
9 annexation.

10 FACTS

11 The land in question is immediately west of the Corvallis
12 city limits and lies within the city's acknowledged urban
13 growth boundary.¹ It is planned and zoned principally for
14 low density residential use and open space/agriculture.

15 In October, 1983, petitioner and representatives of Oregon
16 State University jointly proposed annexation and rezoning of
17 the property. The proposal included a research-technology
18 center, housing and 58 acres of open space.

19 The annexation proposal was processed by the city in
20 accordance with Section 115.03.01 et. seq. of the Land
21 Development Code. Pursuant to the code, the city's Community
22 Development Department reviewed the application and issued a
23 favorable recommendation (with conditions) in December 1983.
24 The planning commission concurred in the recommendation and the
25 proposed conditions of approval in January, 1984. Thereafter,
26 the city council also granted approval by resolution dated

1 February 22, 1984. As the code required, the council's
2 resolution adopted findings that the proposal satisfied the
3 applicable state and local legal requirements, including the
4 applicable land use policies and standards. In conjunction
5 with its action, the council also ordered the matter placed on
6 the May 15, 1984 ballot, pursuant to Section 88 of the city
7 charter.² However, the measure was voted down. This appeal
8 followed.

9 JURISDICTION

10 The city contends the electorate's rejection of the
11 Heritage/OSU Annexation proposal is not a reviewable "land use
12 decision" under ORS 197.015(10). We agree and therefore
13 dismiss the appeal.

14 The jurisdictional question is not whether,³ but when,
15 the challenged annexation became subject to review by this
16 Board. In the city's view, the reviewable land use decision
17 was made when, pursuant to the city code, the governing body
18 determined the proposal was consistent with the applicable land
19 use laws and was therefore eligible for placement on the
20 May 15, 1984 ballot. The city describes the subsequent action
21 of the electorate (the action challenged here) as a separate
22 political decision. The May, 1984 vote was not a "land use
23 decision," according to the city because it did not concern the
24 relationship of the land use laws to the proposal.

25 By contrast, we understand petitioner to contend the
26 electorate's action constituted a reviewable land use decision

1 under ORS 197.015(10) (a) (A) because it was the final event in
2 the annexation decisionmaking process and because the result
3 was in conflict with certain statutory land use requirements
4 and the city's comprehensive plan.

5 The problems associated with reviewing the land use
6 planning aspects of decisions concerning the expansion of
7 municipal boundaries are not new. In a number of cases, the
8 courts and this Board have been called on to hold that land use
9 law requires abandonment, or at least modification, of the
10 traditional understanding that boundary changes are legislative
11 in nature and are therefore appropriate for decisionmaking by
12 the electorate. See Petersen v. Klamath Falls, 279 Or 249, 566
13 P2d 1193 (1977); Stewart v. City of Corvallis, 48 Or App 709,
14 617 P2d 921 (1980) rev den 290 Or 491 (1981); Homebuilders v.
15 City of Corvallis, 49 Or App 576, 620 P2d 67 (1980), affirming
16 1 Or LUBA 14 (1980). We believe the distinction made in these
17 cases between initial and final decisionmaking on annexation
18 proposals supports the city's position that the electorate's
19 action at issue here is beyond our jurisdiction.

20 The leading case is Petersen v. Klamath Falls, supra.
21 There, petitioners challenged an ordinance annexing 141 acres
22 to the City of Klamath Falls. The challenge was predicated on
23 the claim the decision involved the exercise of the city's
24 planning and zoning responsibilities and therefore was required
25 to conform to the applicable statewide goals. The city
26 disputed plaintiff's characterization of the decision as well

1 the related argument that quasi-judicial procedures were
2 required (e.g., that findings with respect to the statewide
3 goals should have accompanied the ordinance). The Court of
4 Appeals agreed with the city and dismissed the appeal.
5 Petersen v. Klamath Falls, 27 Or App 225, 555 P2d 801 (1976).

6 On further appeal, however, the Supreme Court rejected the
7 city's position. The Court concluded (1) the annexation
8 constituted an exercise of the city's planning responsibilities
9 under ORS 197.175(1) and (2) the required goal analysis called
10 for the use of quasi-judicial procedures by the governing
11 body. At the same time, however, the Court was careful to
12 point out that its holding did not alter the legislative
13 character of the final decision on the annexation. The two
14 stages of decisionmaking were described as follows:

15 "Moreover, since the consideration of these statewide
16 goals and the determination that a particular
17 annexation proposal does or does not comply with those
18 goals necessarily involves the application of general
19 standards to a specific situation and to specific
20 individuals, we conclude that such a decision is
21 quasi-judicial in nature. Of course, we recognize
22 that the broader issues involved in reaching final
23 decisions on whether the land proposed for annexation
24 should, in fact, be annexed to the city, and at what
25 point that action should be taken, may cloak those
26 ultimate decisions with a character which is more
27 legislative than judicial. However, we believe that
28 the initial, threshold determination to be made -
29 whether the proposed annexation is consistent with the
30 statewide planning goals - is a determination which is
31 quasi-judicial in nature." 279 Or at 256 (citations
32 omitted).

33 A similar point was made a few years later in Stewart v.
34 City of Corvallis, supra. There, as here, petitioner

1 challenged the voters' rejection of an annexation proposal
2 initially found acceptable by the city council. Petitioner
3 contended, among other things, that the electorate's decision
4 should be nullified because it was not the product of a
5 quasi-judicial procedure. Relying on Petersen v. Klamath
6 Falls, supra, the Court of Appeals rejected this contention.
7 As the Court interpreted the city code, two steps were involved
8 in the annexation process: (1) An initial, quasi-judicial
9 decision concerning whether the land could be annexed
10 consistent with land use law and (2) a final, legislative
11 decision by the voters concerning whether the land should be
12 annexed. See also Homebuilders v. City of Corvallis, supra,
13 (affirming without opinion LUBA's rejection of a claim that due
14 process is denied by submission of annexation proposals to
15 voters).

16 The foregoing authorities have significance in terms of the
17 jurisdictional question presented here. They suggest the
18 reviewable "land use decision" with respect to the annexation
19 in issue was made by the Corvallis City Council in February,
20 1984, not by the voters in the subsequent election. As
21 required by the city code, the council's decision evaluated the
22 proposal in terms of conformance with the governing land use
23 plan and regulations. The evaluation resulted in an initial
24 determination, to use the terminology used in Petersen and
25 Stewart, that the property could be annexed consistent with
26 land use law. That quasi-judicial determination clearly fell

1 within the statutory definition of "land use decision" in ORS
2 197.015(10)(a)(A), i.e., it concerned the application of the
3 city's comprehensive plan and the Land Development Code. In
4 contrast, the action by the voters in May, 1984 (the action
5 challenged here) involved only a final, legislative decision as
6 to whether the land should be annexed. The electorate's action
7 did not apply the city's plan or land use regulations to the
8 proposal. Accordingly, it was not a land use decision
9 reviewable by this Board.

10 We find additional support for our analysis of the
11 jurisdictional issue in two cases involving challenges to the
12 incorporation of the City of Rajneeshpuram, 1000 Friends of
13 Oregon v. Wasco County Court, 62 Or App 75, 659 P2d 1001
14 (1983), rev den 295 Or 259 (1983); 1000 Friends of Oregon v.
15 Wasco County Court, 64 Or App 3, 666 P2d 299 (1983). At issue
16 in the first appeal was the order of the Wasco County Court
17 granting a petition for incorporation of the city. Respondents
18 contended the order did not constitute a reviewable land use
19 decision under ORS 197.015(10). In their view, the order was
20 not a "final" land use decision because it did not itself
21 incorporate a city or change land use policy but was instead
22 contingent on a subsequent event (the election). This argument
23 was rejected. The Court stated:

24 "Respondents argue that the county's decision is not a
25 'final' decision, because it does not itself
26 incorporate a city or change a land use policy and
because its impact, if any, is contingent on the
election. Although it is true that the county's

1 decision does not implment incorporation or land use
2 changes, it is the final quasi-judicial, discretionary
3 decision that the county can make on application of
4 the goals to incorporation and as to incorporation
5 itself. It initiates the process by which a final
6 'legislative' decision is made by the voters. See
7 Stewart v. City of Corvallis, 48 Or App 709, 617 P2d
8 921 (1980), rev den 290 Or 491 (1981). What is final
9 for purposes of LUBA review (and ours) is not
10 necessarily the act that completes the process; it is,
11 rather, LUBA's concern as the last decision that
12 concerns a local government's application of the
13 goals, ORS 197.015(10)(a), i.e., the county's decision
14 to authorize an incorporation election."
15 62 Or App at 80-81 (emphasis added, footnote omitted).

16 We interpret the above to support the conclusion that, for
17 purposes of our statutory jurisdiction, the final land use
18 decision concerning the Heritage/OSU annexation proposal took
19 the form of the Corvallis City Council's resolution of February
20 22, 1984. That the subsequent action of the electorate is
21 outside our jurisdiction is made clear by the second Wasco
22 County case cited above. There, petitioner sought our review
23 of a county court's order proclaiming the incorporation of the
24 City of Rajneeshpuram. The order was entered 10 days after the
25 election on the incorporation proposal, as required by ORS
26 221.050(2). We dismissed the appeal on jurisdictional
27 grounds. 1000 Friends of Oregon v. Wasco County Court, 6 Or
28 LUBA 225 (1982). In affirming the dismissal, the Court of
29 Appeals stated:

30 "LUBA's dismissal of the petition for review is
31 affirmed, because the order sought to be reviewed, the
32 proclamation of incorporation of the city, is not the
33 final order involving a land use decision in the
34 incorporation process. The order authorizing an
35 incorporation election is the order reviewable by
36 LUBA. 1000 Friends of Ore. v. Wasco Co. Court, 62 Or

1 App 75, 659 P2d 1001, rev den 295 Or 259 (1983)." 64
Or App at 4 (emphasis added).

2 We conclude the decision in question is not a reviewable
3 land use decision under ORS 197.015(10). Accordingly, the
4 appeal must be dismissed.⁴
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FOOTNOTES

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1 A " Research Technology Center" overlay designation applies to a portion of the site.

2 Section 88 of the Corvallis Charter reads:

"Vote on Annexation. Unless mandated by state law, annexation, delayed or otherwise, to the City of Corvallis, may only be approved by a prior majority vote among the electorate."

The council's resolution of February 22, 1984 designated the proposed annexation as Measure 53 on the May 15, 1984 ballot and described the measure as follows:

"53 A MEASURE RELATING TO THE PROPOSED OSU AND CITIZENS/HERITAGE ANNEXATION

"Shall the real property commonly known as the OSU and Citizens Heritage Annexation be annexed to the City of Corvallis?" Record at 17.

3 By classifying the annexation of unincorporated territory by a city as an exercise of "planning and zoning responsibilities", ORS 197.175(1), the legislature has subjected annexations to the statewide goals. It follows that annexations are "land use decisions" as that phrase is defined in ORS 197.015(10). They are within our review jurisdiction under ORS 197.825(1).

As noted in our opinion, the difficulty in the present case lies in determining which of two decisions concerning the annexation is reviewable by the Board: the city council's initial decision to put the matter on the ballot or the electorate's ultimate rejection of the measure. We read the relevant case law to classify only the former as a reviewable land use decision.

4 We do not intend our opinion to stand for the general proposition that local initiative or referendum elections involving land use can never constitute reviewable land use

1 decisions. Indeed, the legislature has made it clear our
2 review authority extends over land use decisions made by a
3 local government, not merely those of the governing body of a
4 local government. ORS 197.015(10) and (12). Pursuant to that
5 statute, we have reviewed at least one land use measure enacted
6 by local voters. See State of Oregon v. City of Forest
7 Grove, ___ Or LUBA ___, LUBA No. 82-101 (September 28, 1983)
8 (partially invalidating initiative charter amendment imposing
9 special restrictions on federally-assisted housing). In the
10 present case, however, the two-stage annexation procedure
11 employed by the city (governing body makes initial
12 determination whether annexation is consistent with land use
13 law, electorate renders final, legislative decision) justifies
14 the approach we have taken to the jurisdiction question. 1000
15 Friends of Oregon v. Wasco County Court, 64 Or App 3, 666 P2d
16 299 (1983).

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