BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM CAPE,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2001-044

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

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

Ted R. Naemura, Assistant City Attorney, Beaverton, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 05/29/2001

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city ordinance that annexes 8.5 acres of land. The ordinance also applies city zoning and comprehensive plan map designations to part of the annexed property.

FACTS

The annexed property includes two parks and a portion of Sunset Highway. The city previously entered an Urban Planning Area Agreement (UPAA) with Washington County.[1] According to the city, the UPAA requires that when the city annexes unincorporated county land, the city must apply the city comprehensive plan and zoning map designations that are most similar to the county's. Respondent's Brief 3 n 4. The challenged ordinance, in addition to annexing the property, applies city planning and zoning map designations to the two parks. The city did not adopt comprehensive plan and zoning map designations for the annexed portion of Sunset Highway, because the city does not apply planning and zoning map designations to road rights-of-way. Record 23. With the annexed property, the city is close to surrounding a large unincorporated area of Washington County.[2] Record 90.

The challenged annexation was adopted pursuant to Metro Code 3.09.045, which authorizes expedited annexation without a public hearing, if 100 percent of the owners of the property and at least 50 percent of the electors within the annexation area consent to the annexation.[3] On December 19, 2000, the city provided notice of its intent to approve the

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[1]The UPAA is an element of the city's comprehensive plan. Record 20.

[2]Petitioner speculates that the real purpose of the challenged annexation is to allow the city to completely encircle this unincorporated area and thereby facilitate annexation of the large unincorporated area. Petition for Review 1.

[3]Metro Code 3.09.045 provides:

> "(a) Approving entities may establish an expedited decision process that does not require a public hearing consistent with this section. * * * The expedited decision process

annexation and the comprehensive plan and zoning map amendments.[4] That notice specifically states that "[p]rior to the [January 8, 2001] meeting, any person may request that a hearing be called by the City Council on any or all of the items for consideration." Record 89. The notice also states that a staff report concerning the proposed annexation "will be available after December 19, 2000." *Id.* On January 8, 2001, petitioner delivered a letter opposing the annexation and requesting a hearing. Petitioner did not appear at the city council's January 8, 2001 meeting, and no hearing was held in this matter on January 8, 2001, or thereafter. Following first and second readings at subsequent city council meetings, the challenged ordinance was approved on February 14, 2001.

JURISDICTION

The petition for review does not "[s]tate why the challenged decision is a land use decision," and therefore does not comply with OAR 661-010-0030(4)(c). Nevertheless, we

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> may only be utilized for minor boundary changes where the petition initiating the minor boundary change is accompanied by the written consent of one hundred percent (100%) of the property owners and at least fifty percent (50%) of the electors, if any, within the affected territory.
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> "(b) The expedited decision process must provide for a minimum of 20 days notice to all interested parties. The notice shall state that the petition is subject to the expedited process. The expedited process may not be utilized if a necessary party gives written notice of its intent to contest the decision prior to the date of the decision. * * *
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> "(c) At least seven days prior to the date of decision the approving entity shall make available to the public a brief report that addresses the factors listed in section 3.09.050(b). The decision record shall demonstrate compliance with the criteria contained in sections 3.09.050(d) and (g).
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> "* * * * *"

As defined by Metro Code 3.09.020(j) a "necessary party" includes "any county, city or district whose jurisdictional boundary or adopted urban service area includes any part of the affected territory or who provides any urban service to any portion of the affected territory, Metro, and any other unit of local government, as defined in ORS 190.003, that is a party to any agreement for provision of an urban service to the affected territory." Metro Code 3.09.050(d) sets forth a variety of criteria for expedited annexations, including a requirement that the city find the annexation complies with any directly applicable urban service provider agreement, or annexation plan, comprehensive plan or public service plan provisions.

[4]The city provided notice by publication, mailing to interested parties and posting the property. Petitioner does not claim that he failed to receive notice.

conclude the challenged ordinance is a "land use decision," as ORS 197.015(10) defines that term.[5] At the very least, the challenged ordinance "concerns the adoption of" comprehensive plan map and zoning map designations and applies what appear to be discretionary comprehensive plan amendment criteria as well as at least one statewide planning goal. Respondent contends, incorrectly, that petitioner's challenge is limited to the annexation.[6] As noted later in this opinion, petitioner challenges the city's application of its comprehensive plan amendment criteria. The challenged decision is a land use decision.[7]

Respondent next argues that petitioner failed to exhaust administrative remedies. However, petitioner submitted a written request for hearing and opposition to the proposal.

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[5]As relevant, ORS 197.015(10) provides:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]"

[6]Even if petitioner's challenge were limited to the annexation, that would not mean we lack jurisdiction over the challenged ordinance. Although an annexation decision, viewed alone, might in some circumstances not be a land use decision, as we have already noted the challenged ordinance applies comprehensive plan and zoning map designations to the annexed property as well. Record 25-26. Those aspects of the challenged decision clearly make the ordinance a land use decision, over which we have jurisdiction to review for compliance with applicable law, including applicable annexation law. *Cedar Mill Creek Corr. Comm. v. Washington County*, 38 Or LUBA 333, 342 (2000).

[7]Respondent suggests that the comprehensive plan and zoning map designations in this case were dictated by the UPAA, making those aspects of the challenged ordinance nondiscretionary. Respondent's Brief 3 n 4. If true, that might support an argument that the decision falls outside the statutory definition of "land use decision" under ORS 197.015(10)(b)(A), which specifically excludes decisions that are "made under land use standards which do not require interpretation or the exercise of policy or legal judgment." However, respondent makes no attempt to explain why the comprehensive plan amendment criteria that the city applied in this case, which are noted later in this opinion, constitute nondiscretionary land use standards. *See* n 14. In the absence of such an argument, we do not agree that they are.

Petitioner's failure to appear in person at the January 8, 2001 city council meeting apparently is the reason the city decided not to conduct a public hearing in this matter. Since petitioner does not assign error to the city's failure to schedule and hold a public hearing we need not and do not consider whether that aspect of the city's decision was error. Nevertheless, respondent cites no legal requirement that petitioner must have both submitted written opposition to the proposal and appeared in person at the January 8, 2001 meeting to exhaust available administrative remedies. Without more of an argument to establish why a personal appearance at the January 8, 2001 meeting was legally necessary to exhaust administrative remedies, we reject respondent's suggestion that it was.

STANDING

Under ORS 197.830(2), one of the requirements for standing to appeal a land use decision to LUBA is that the petitioner must have appeared orally or in writing during the local proceedings.[8] 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).[9] Respondent misreads the statute. While ORS 197.830(2) applies in circumstances where a

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[8]As relevant, ORS 197.830(2) provides:

> "[A] person may petition [LUBA] for review of a land use decision or limited land use decision if the person:
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> "(a) Filed a notice of intent to appeal * * *; and
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> "(b) Appeared before the local government, special district or state agency orally or in writing."

[9]Among other things, ORS 197.830(3) requires that persons seeking to establish standing under that statute must demonstrate that they are adversely affected by the appealed decision. Respondent contends petitioner fails to demonstrate that he is adversely affected by the challenged decision.

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.

ASSIGNMENT OF ERROR

A. December 19, 2000 Notice

Petitioner directs his initial arguments at the city's December 19, 2000 notice of proposed action. First, petitioner argues there was no emergency that justified use of the expedited procedure and the city should not have used an expedited process at a time of year when so many people are likely to be distracted by holiday plans and winter weather. Petitioner next complains that the city should have identified the two parks by name. The short answer to both of these arguments is that petitioner identifies no legal requirement that use of the expedited annexation process is limited to emergencies, or that the expedited process cannot be used during certain times of the year, or that parks must be identified by name in notices of proposed annexation. Neither argument provides a basis for remand.

Petitioner also argues the city erred by failing to provide notice to adjacent property owners and the Cedar Hills Homeowners Association. It is somewhat unclear to us whether the city actually failed to provide the December 19, 2000 notice to any adjacent property owners.[10] In any event, assuming written notice to the homeowners association or adjoining property owners was legally required and not provided, that might allow such persons to file an appeal more than 21 days after the challenged ordinance was adopted, under ORS

[10]The staff report indicates that "property owners" were given written notice, although that reference is probably to the owners of the property being annexed, rather than to the owners of properties that adjoin the annexed property. Record 24. The record includes four pages that appear to list the persons who were given written notice. Record 91-94. One of those entries states "Owner info on 100 ft labels." Record 92. We don't know what that entry means. It might mean that owners of property within 100 feet of the annexed property were given written notice, but the parties do not provide any assistance on this question.

197.830(3).[11] Such petitioners could argue that the city's failure to provide any legally required notice prejudiced *their* substantial rights.[12] However, as respondent correctly notes, petitioner does not argue that he was legally entitled to written notice or that any failure to provide notice to adjacent property owners or the homeowners association prejudiced *his* substantial rights. Any such procedural error on the city's part did not prejudice petitioner's substantial rights and, therefore, provides no basis for reversal or remand. *Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000).

Petitioner's final challenge to the notice concerns the city's failure to include a map with the notice. While the December 19, 2000 notice states "[a] map of the property to be annexed is attached," no map was attached to the notice. Record 89. The city points out, apparently correctly, that there is no legal requirement that the city include a map with a notice of proposed expedited annexation. However, we do not believe the city's failure to attach the map is quite so easily dismissed. While it may be true that the notice is not legally required to include a map in all cases, for the reasons explained below, the notice must adequately describe the property being annexed.

The December 19, 2000 notice includes text that describes the general location of the annexed property and provides a tax lot description of the park parcels. Although petitioner is undoubtedly correct that a reference to the parks by name would have significantly improved the notice, we agree with the city that its failure to attach a map of the park parcels is not legal error. The description of the park parcels that is included in the notice is sufficient. However, the failure to attach the map to the December 19, 2000 notice is more significant with regard to the portion of Sunset Highway that was ultimately annexed.

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[11]Under ORS 197.830(3), such persons who are adversely affected by the decision may appeal within 21 days after they receive "actual notice" or "knew or should have known" of the decision.

[12]Under ORS 197.835(9)(a)(B) LUBA is authorized to remand a decision where the local government "[f]ailed to follow procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

Beyond the general description of the vicinity, the only reference to this property is "a portion of Sunset Highway." The city's notice of a proposal to annex property must "describe the affected territory in a manner that allows certainty[.]" Metro Code 3.09.030(c). Similarly, ORS 197.763(3)(c) requires that notice "[s]et forth the street address or other easily understood geographical reference to the subject property[.]" As we have already noted, under ORS 197.830(3) a notice of hearing that does not "reasonably describe the local government's final actions" may allow an appeal to be filed after the 21-day deadline that would otherwise apply under ORS 197.830(9). We doubt that the notice's reference to "a portion of Sunset Highway" is sufficient under any of these standards. *See Bigley v. City of Portland*, 168 Or App 508, 4 P3d 741 (2000) (failure to include reference to temporary parking lot as one of a number of areas affected by decision).

However, as with petitioner's previous notice arguments, any failure on the city's part to describe the Sunset Highway portion of the annexation adequately did not affect *petitioner's* substantial rights. Petitioner found out about the proposal and submitted written opposition to the proposal. Therefore, any failure in the December 19, 2000 notice to provide an adequate description of the property being annexed provides no basis for reversal or remand. Petitioner may not assert an alleged injury to other persons' substantial rights as a basis for reversal or remand in this appeal. *Bauer*, 38 Or LUBA at 436.

B. Staff Report

Petitioner's remaining arguments are directed at the staff report that the city council adopted in support of its decision. Most of petitioner's remaining arguments express disagreement with the decision, but do not link that disagreement to any applicable approval criterion that might provide a basis for reversal or remand.[13] The only approval criteria

[13]Petitioner argues the annexation is gerrymandering and is unsafe and inefficient. Petitioner also argues that while he did not object to the record in this matter, other unspecified "citizen input" should be included in the record.

identified by petitioner are Comprehensive Plan Amendment Criteria 1.3.1.4 through 1.3.1.6.[14] The staff report separately addresses each of the cited criteria and finds that 1.3.1.4 and 1.3.1.5 are satisfied by the proposal and that the public need criterion at 1.3.1.6 does not apply to comprehensive plan amendments for annexed property. For each criterion, the findings cite and rely on the UPAA.

Although petitioner disagrees with these findings, he does not demonstrate that those findings are insufficient to demonstrate compliance with the cited criteria. In particular, petitioner makes no attempt to challenge the city's reliance on the UPAA in concluding that the cited criteria either do not apply or are met.

In this case, petitioner's arguments concerning the staff report are insufficiently developed or related to an approval criterion that might provide a basis for reversal or remand, or they fail to challenge findings that the city adopted to demonstrate compliance with identified approval criteria. Because petitioner's arguments are not sufficient to provide a basis for reversal or remand, they are rejected, and the city's decision must be affirmed. *Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 507, 4 P3d 765 (2000).

The city's decision is affirmed.

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[14]Those policies are as follows:

> "1.3.1.4 Potential effects of the proposed amendment have been evaluated and will not be detrimental to quality of life, including the economy, environment, public health, safety or welfare[.]" Record 26-27.
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> "1.3.1.5 The benefits of the proposed amendment will offset potential adverse impacts on surrounding areas, public facilities and services[.]" Record 27.
>
> "1.3.1.6 There is a demonstrated public need, which will be satisfied by the amendment as compared with other properties with the same designation as the proposed amendment." *Id.*