BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM CAPE,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2001-190

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, Beaverton, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 03/19/2002

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 challenges the city's annexation of five parcels of land and associated rights of way to the City of Beaverton.

FACTS

As part of an ongoing series of annexations,[1] the city undertook to annex five parcels of land, totaling 41.3 acres, in unincorporated areas of Washington County. These parcels included the William Walker Elementary School and Cedar Park Middle School, both owned by the Beaverton School District; Cedar Hills Park and Cedar Hills Recreation Center, both owned by the Tualatin Hills Parks and Recreation District (THPRD); rights of way associated with those properties; and other rights of way, including a portion of Sunset Highway. Record 2.

The challenged annexation was adopted pursuant to Metro Code (MC) 3.09.045.[2] MC 3.09.045 authorizes expedited annexation without a public hearing, if 100 percent of the

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[1]Petitioner challenged previous city annexations in *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

[2]MC 3.09.045 provides, in relevant part:

> "(a) Approving entities may establish an expedited [boundary change] decision process that does not require a public hearing consistent with this section. * * * The expedited decision process 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. * * *
>
> "(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 [MC] 3.09.050(b). The decision record shall demonstrate compliance with the criteria contained in [MC] 3.09.050(d) and (g)."

As defined by MC 3.09.020(j) a "necessary party" includes:

owners of the property and at least 50 percent of the electors within the annexation area consent to the annexation.[3] The record establishes that the owners of four of the disputed parcels, Washington County, the Beaverton School District, and THPRD, consented to the annexations.[4] None of the properties have resident electors.

On October 16, 2001, the city issued a "Notice of Proposed Annexation to the City of Beaverton – Expedited," which stated that the city council would consider annexation of the subject properties on November 5, 2001. Record 39. The city attached to the notice a map of the proposed annexation area. The notice was mailed to the property owners, the affected neighborhood association and citizen participation organizations, Metro, and affected special districts and county service districts. Record 13, 38, 41-42.

The notice of proposed annexation stated that any member of the public could request a hearing on the annexation petition.[5] Petitioner filed a request for a hearing with the city

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> "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."

MC 3.09.050(d) sets forth a number of criteria for expedited boundary changes, including a requirement that the city find the boundary change complies with any directly applicable urban service provider agreement or annexation plan, comprehensive plan or public service plan.

[3]MC 3.09.045 apparently implements ORS 222.125, which provides:

> "The legislative body of a city need not call or hold an election in the city or any contiguous territory proposed to be annexed or hold the hearing otherwise required under ORS 222.120 when all of the owners of land in that territory and not less than 50 percent of the electors, if any, residing in the territory consent in writing to the annexation of the land in the territory and file a statement of their consent with the legislative body. Upon receiving written consent to annexation by owners and electors under this section, the legislative body of the city, by resolution or ordinance, may set the final boundaries of the area to be annexed by a legal description and proclaim the annexation."

[4]Respondent points out that the record does not include written consent by the Oregon Department of Transportation for the annexed segment of the state-owned Sunset Highway. Respondent's Brief 3 n 5. However, as respondent correctly notes, petitioner does not assign error based on this omission.

[5]The precise language reads:

recorder on November 5, 2001. Record 37. At its meeting that evening, which petitioner did not attend, the city council considered petitioner's request for a public hearing. The city attorney commented that the proposed annexation was based on ORS 222.125, and under this statute no public hearing was required. Record 29. The community development director indicated that even though the city was no longer required to hold public hearings on expedited annexations, the standard notice the city had been using for expedited annexations had not changed and still contained the language allowing requests for hearings. Record 30. Based on the city attorney's and community development director's explanations, the city council did not grant petitioner's request for a hearing. The city council completed the first reading of the proposed annexation ordinance on November 5, 2001.

The annexation ordinance was read for the second time on November 19, 2001. Petitioner attended this meeting, and under the "Citizen Communication" portion of the agenda petitioner was given an opportunity to address the city council. Record 16-19. The city council approved the annexation ordinance without granting petitioner's request for a public hearing. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner asserts that the record in this case is deficient in a number of particulars, including "Incomplete Council Minutes, Lack of Annexation Value, Lack of Written Testimony from County Commissioner Leeper, and Map Enforcement." Petition for Review 2.

Petitioner raises these challenges to the record for the first time in his petition for review. OAR 661-010-0026(2) requires that an objection to the record must be "filed with

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"Prior to the meeting, any person may request a hearing be called by the City Council on the expedited annexation petition. Written requests and/or testimony can be submitted by delivering the information to the Beaverton City Recorder at City Hall during regular business hours on or before November 5, 2001." Record 39.

the Board within 14 days of the date appearing on the notice of record transmittal sent to the parties by the Board."

For obvious reasons, the record must be settled before the parties prepare their briefs. Because petitioner's record objections are presented for the first time in the petition for review, they are rejected as untimely filed. *Bates v. Josephine County*, 28 Or LUBA 21, 24 (1994); *Westgate Neighborhood v. School Dist. 4J*, 5 Or LUBA 63, 76, *rev'd and rem'd on other grounds* 58 Or App 154, 647 P2d 962 (1982).[6]

Petitioner's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner next challenges the sufficiency of the city's notice of proposed annexation. Petitioner asserts that the city failed to (1) publish public notice, (2) notify adjacent property owners, (3) post a notice on the properties, (4) notify property owners within created "service islands," or (5) notify the community in time for this issue to be included on public agendas to be discussed. Petition for Review 4.

Petitioner cites no legal requirement for the kinds of notice that he alleges the city failed to give.[7] Furthermore, if the city's notice were in fact defective in some way, this would warrant remand only if the defects resulted in prejudice to petitioner's substantial

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[6]Two of petitioner's four record objections are not really record objections. In one of those objections petitioner complains that the city's November 26, 2001 notice of decision lists the "Assessed Real Market Value" of the properties as zero. Record 1. Petitioner suggests the annexed properties may be worth as much as $20 million. Petition for Review 3. While petitioner is likely correct that the properties have at least some fair market value, the disputed figure in the notice likely reflects that these publicly owned properties are not assessed for property tax purposes. In any event, petitioner neither identifies a legal requirement that the notice of decision specify the assessed real market value of the annexed properties nor explains why including an erroneous assessed real market value would provide a basis for reversal or remand. In the other objection, petitioner objects to the city's action to amend city maps to include the annexed properties while this appeal remains pending. As respondent correctly notes, although the city's decision is subject to reversal or remand by LUBA, it is nevertheless effective while this appeal is pending because no stay of the appealed decision has been sought or granted under ORS 197.845 and OAR 661-010-0068. In addition, we fail to see how the city's decision to proceed with map changes prior to final resolution of this appeal could possibly provide an independent basis for reversal or remand of the challenged decision.

[7]We noted earlier in our discussion of the facts the persons and organizations to whom notice was given. Record 41 indicates that notice was posted on the site.

rights. ORS 197.835(9)(a)(B); *Donnell v. Union County*, 39 Or LUBA 419, 422-23 (2001). Petitioner offers no such argument.

Petitioner's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Finally, citing to the October 16, 2001 notice that stated "any person may request a hearing be called by the city council on the expedited annexation petition," petitioner asserts that the city erred in failing to grant his request for a public hearing on the proposed expedited annexation. Respondent first counters that this provision is not a legal requirement, and, as the city attorney and director of community development observed, was erroneously included in the notice. Second, respondent suggests that the city council's consideration of petitioner's comments at the city council meeting on November 19, 2001 cured any error in the mailed notice.

We agree with respondent that both ORS 222.125 and MC 3.09.045 authorize the city to approve annexations in circumstances described in the statute and code, without providing a public hearing. However, our agreement with respondent on that point does not entirely resolve petitioner's arguments concerning the city's October 16, 2001 notice that persons could request a hearing and the city's subsequent failure to provide a hearing after petitioner requested a hearing.

As an initial point, we believe petitioner had a right to comment on the proposed expedited annexations. MC 3.09.045(b) requires 20 days advance notice of an expedited annexation to "interested parties."[8] *See* n 2. MC 3.09.045(c) requires that a report addressing the factors in MC 3.09.050(b) be "made available to the public" "[a]t least seven days prior to the date of the decision." *Id.* Although these code provisions do not require a public hearing, they at least suggest that interested parties and the public have a right to

[8]MC Chapter 3.09 does not define "interested parties."

comment in some way on proposed expedited annexations. Otherwise, the above requirements would serve no apparent purpose. Therefore, assuming petitioner qualifies as an "interested party," or a member of the "public," which we assume he does, he had a right to comment on the proposed annexation.

There are of course a number of ways the city might allow "interested parties" and the "public" to comment, short of providing a public hearing to do so. MC 3.09.045(a) states that the city may establish the "decision process" it will follow for expedited annexation and that such a decision process need not include a public hearing. *See* n 2. The city does not identify any city legislation that establishes the decision process it follows for expedited annexations under MC 3.09.045(a). The only document that we are aware of that explains the process the city follows for expedited annexations is the October 16, 2001 notice. That notice says persons may submit "[w]ritten requests [for a hearing] and/or testimony" "on or before November 5, 2001." An interested party or a member of the public who wished to comment on the proposed annexation could reasonably understand that notice to provide that he or she could request a hearing on November 5, 2001, and at some later date when the city provided the requested hearing, they would be allowed to present their comments in writing or orally. The notice's reference to a "hearing" rather than to a "public hearing" leaves some uncertainty about precisely what kind of hearing the city might be obligated to provide, but we believe it reasonably states that at least some sort of additional notice and a hearing will be provided if a hearing is requested, so that the "interested party" or "person" who requests the hearing can have an opportunity to comment on the proposed annexations.

In this case, we believe petitioner's November 5, 2001 request was sufficient to obligate the city to provide a "hearing" where petitioner would be given an opportunity to present oral or written comments on the proposal. As we have already noted, petitioner could easily have assumed that by filing his request for a hearing on November 5, 2001, it was not necessary that he submit his written comments or testimony on November 5, 2001,

because he would have an opportunity to do so at the requested hearing. Notwithstanding petitioner's request for a hearing, the city did not provide a hearing and simply proceeded with the November 5, 2001 and November 19, 2001 city council meetings at which the first and second readings of the ordinance occurred.

We believe the city committed error in proceeding as it did in response to petitioner's request for a hearing in this matter, after announcing that the "decision process" it would follow would include an opportunity to request a hearing. Nevertheless the city's error is a procedural error, and procedural errors provide no basis for remand unless such errors result in prejudice to petitioner's substantial rights. ORS 197.835(9)(a)(B); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rev'd and rem'd on other grounds sub nom, Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d 529 (1985). As we explained in *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988):

> "* * * Under ORS 197.835[(9)(a)(B)] the 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing."

In using the term "hearing" in *Muller* we simply meant to say that a party has a substantial right in having his or her case fully and fairly considered. The required consideration of a party's case need not invariably include a formal hearing, as long as the party's case is fully and fairly considered in some other way.

Petitioner appeared before the city council on November 19, 2001. Petitioner does not argue that the city's failure to provide advance notice of a hearing on the proposed annexation in response to his November 5, 2001 request, or its failure to provide a more formal "public hearing" on November 19, 2001, when he was allowed to address the city council, resulted in prejudice to his right to present comments on the proposed annexation or any other substantial right. Therefore, the city's procedural error in offering petitioner an

opportunity to request a hearing, and then failing to provide a hearing when petitioner requested one, provides no basis for reversal or remand in this case.

Finally, petitioner suggests elsewhere in the petition for review that the city's failure to provide notice and a hearing in this matter may have prejudiced the rights of other persons to comment on the proposed annexation. Petition for Review 4. We have already rejected petitioner's arguments concerning the adequacy of the city's October 16, 2001 notice of the proposal, and we note that no one but petitioner requested a hearing. Petitioner may not assert possible prejudice to the rights of *other persons* as a basis for reversal or remand in this appeal. *Bauer v. City of Portland*, 38 Or LUBA 432, 439 (2000).

The third assignment of error is denied.

The city's decision is affirmed.