BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM CAPE,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2002-102

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

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

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

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

REMANDED 11/18/2002

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 appeals a city ordinance that annexes school property and a right of way that connects that school property to the existing city boundary.[1]

FACTS

The disputed ordinance annexes Meadow Park Middle School, which is owned by the Beaverton School District, and a portion of the Butner Road right of way, which is owned by Washington County. The annexed right of way connects the school to Murray Boulevard. At its intersection with Butner Road, Murray Boulevard is located within the City of Beaverton. The record includes a planning staff report, which explains that a separate ordinance will be adopted to change the existing county comprehensive plan and zoning map designations for the annexed properties to city comprehensive plan and zoning map designations.

MOTION TO DISMISS

As relevant here, our jurisdiction is limited to land use decisions. As we explained in *Anderson v. City of Gates*, 29 Or LUBA 320, 321-22 (1995), LUBA has jurisdiction if the appealed decision

> "satisfies either (1) the statutory definition in ORS 197.015(10); or (2) the significant impacts test established by *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982). *Billington v. Polk County*, 299 Or 471, 479, 703 P2d 232 (1985). * * *"

For the reasons set out at pages 4-5 of the city's brief, we agree with the city that the challenged annexation decision does not qualify as a significant impacts test land use decision. We reject petitioner's arguments to the contrary.

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[1] This is the third annexation decision that petitioner has appealed to LUBA. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002); *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

1 The city also argues that the city was not required to apply the statewide planning
2 goals and that there are no comprehensive plan or land use regulation criteria governing
3 annexation decisions in the city's acknowledged comprehensive plan and land use
4 regulations. Therefore, the city argues, the challenged decision is not a "land use decision,"
5 as that term is defined by ORS 197.015(10).[2]

6 The challenged annexation decision is an expedited annexation under ORS 222.125
7 and Metro Code (MC) 3.09.045.[3] Such annexations must comply with MC 3.09.050(d)(3),
8 which requires the city to demonstrate that the annexation is consistent "with specific
9 directly applicable standards or criteria for boundary changes contained in comprehensive
10 land use plans and public facility plans[.]" In this case the city's findings addressing MC
11 3.09.050 conclude that:

12 "There are no specific directly applicable standards or criteria for
13 [annexations] in Beaverton's Comprehensive Plan or Public Facilities Plan
14 and, therefore, this criterion is not applicable." Record 9.

15 Petitioner does not assign error to the above finding and does not allege that any city land use
16 regulation applies to the challenged decision. If no comprehensive plan or land use
17 regulation provision applies to the challenged annexation decision, it does not qualify as a
18 land use decision under ORS 197.015(10)(a)(A)(ii) or (iii). *See* n 2. We next consider

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[2] As relevant, ORS 197.015(10) provides the following definition of 'land use decision':

"'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 [statewide planning] goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation [.]"

[3] We set out and discuss the statute and code language later in this opinion.

1 whether the statewide planning goals apply directly to the challenged annexation decision,
2 making it a land use decision under ORS 197.015(10)(a)(A)(i).

3 Although petitioner does not cite the statute, ORS 197.175(1) expressly provides that

> 4 "[c]ities * * * shall exercise their planning and zoning responsibilities,
> 5 including, but not limited to, a city * * * boundary change which shall mean
> 6 [among other things] the annexation of unincorporated territory by a city * * *
> 7 in accordance with [the statewide planning] goals[.]"

8 Generally, after a city's comprehensive plan and land use regulations are acknowledged, the
9 statewide planning goals no longer apply directly to city land use decisions and the
10 acknowledged comprehensive plan and land use regulations apply as approval criteria in
11 place of the statewide planning goals. ORS 197.175(2)(d); 197.835(5); *Byrd v. Stringer*, 295
12 Or 311, 316-17, 666 P2d 1332 (1983). However, the Land Conservation and Development
13 Commission (LCDC) has adopted an administrative rule that expressly addresses how the
14 statewide planning goals apply to annexation decisions. OAR 660-001-0300 to 660-001-
15 0315. OAR 660-001-0300 explains the purpose of the rule:

> 16 "The purpose of this rule is to clarify existing goals and provide guidance to
> 17 local governments and local government boundary commissions regarding
> 18 annexations of land to cities under the goals. This rule specifies the
> 19 satisfactory method of applying the Statewide Goals and Guidelines, during
> 20 annexation proceedings."

21 OAR 660-001-0315 sets out how the goals must be considered where the annexed land is
22 "not [s]ubject to an [a]cknowledged [c]omprehensive [p]lan." Because both the City of
23 Beaverton and Washington County have acknowledged comprehensive plans, OAR 660-001-
24 0315 does not apply. OAR 660-001-0310 addresses annexation decisions that are "[s]ubject
25 to an [a]cknowledged [c]omprehensive [p]lan."

> 26 "A city annexation made in compliance with a comprehensive plan
> 27 acknowledged pursuant to ORS 197.251(1) shall be considered by Land
> 28 Conservation and Development Commission to have been made in accordance
> 29 with the [statewide planning] goals *unless the acknowledged comprehensive*
> 30 *plan and implementing ordinances do not control the annexation*." (Emphasis
> 31 added.)

1 Although the intended meaning of the language emphasized above is not entirely
2 clear, the most logical inference is that where the city's "acknowledged comprehensive plan
3 and implementing ordinances do not control the annexation," the statewide planning goals
4 apply directly to such annexation proposals. The combined effect of ORS 197.175(1) and
5 OAR 660-001-0300 and 660-001-0310 is to make all city annexation decisions land use
6 decisions. Either (1) the city's comprehensive plan or land use regulations have criteria that
7 govern the annexation, in which case the annexation decision is a land use decision under
8 ORS 197.015(10)(a)(A)(ii) or (iii), or (2) the comprehensive plan and land use regulations do
9 not have criteria that govern annexation decisions, in which case under ORS 197.175(1) and
10 OAR 660-001-0310 the statewide planning goals continue to apply directly and make the
11 annexation decision a land use decision under ORS 197.015(10)(a)(A)(i). In either case, the
12 city's annexation decision is a land use decision. Because the challenged decision is clearly
13 a land use decision, the city's motion to dismiss is denied.

14 Before turning to petitioner's assignments of error, we note that in *Johnson v. City of*
15 *La Grande*, 37 Or LUBA 380, 385 (1999), we concluded that the city annexation decision at
16 issue in that case was a land use decision because it applied a comprehensive plan provision,
17 in addition to parts of ORS chapter 222. However, that decision also explained:

> 18 "We do not mean to foreclose the possibility that a local government might
> 19 establish a process that bifurcates any application of its land use plan or land
> 20 use regulations from the statutory annexation requirements of ORS chapter
> 21 222, and make separate decisions as to each. In that situation, LUBA would
> 22 not have jurisdiction to review the separate decision concerning the
> 23 application of the annexation statutes. However, in cases such as the one
> 24 here, where a city applies its plan and land use regulations in the same
> 25 decision that addresses the annexation statutory requirements, LUBA has
> 26 jurisdiction to review the entire decision."

27 We continue to see no reason why a city could not pursue a bifurcated decision making
28 process and perform its obligation to address statewide planning goals or comprehensive plan
29 or land use regulation annexation criteria in one decision and perform its obligation to
30 address other statutory annexation criteria and other relevant non-land use requirements in a

1 separate decision. In fact, bifurcation of an annexation decision into (1) a land use decision
2 and (2) a political or legislative decision is unavoidable where relevant statutes or local law
3 requires that an annexation proposal be approved by a vote of the electorate. *Heritage*
4 *Enterprises v. City of Corvallis*, 300 Or 168, 174-75, 708 P2d 601 (1985). Even where the
5 proposed annexation is to be accomplished without an election, as is the case here, we see no
6 reason why the annexation decision could not be bifurcated into a land use decision (that
7 addresses the statewide planning goals and any local land use standards that govern a
8 decision to annex) and a separate (non-land use) decision that addresses any non-land use
9 criteria in ORS chapter 222 or elsewhere.[4] *See Bear Creek Valley Sanitary v. City of*
10 *Medford*, 130 Or App 24, 28-29, 880 P2d 486 (1994) (describing the separate function
11 served by the land use laws and annexation laws and describing the decision "that proposes
12 an annexation [as] an act of planning" but describing both annexation elections and the
13 consent procedure that may obviate the need for an election as "a second mechanism by
14 which final public action on a proposed annexation can occur").
15 Where an annexation requires an election, the election is logically the last event and
16 no question about whether the land use decision must precede the election is likely to be
17 presented. However, where no election is contemplated, and a bifurcated decision making
18 process is employed, the timing of the land use decision and the non-land use decision could
19 become an issue. In view of our conclusion above that relevant statutory and LCDC
20 administrative rules make a final annexation decision subject to the statewide planning goals,
21 or local land use criteria that were adopted in place of the statewide planning goals to govern
22 annexations, the land use decision that addresses relevant land use criteria must be adopted
23 and become final prior to or at the same time that any separate decision that addresses ORS

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[4] Of course there also is no reason why an annexation decision that does not require an election could not be accomplished by a single land use decision that addresses all applicable approval criteria, whether those be land use criteria or non-land use criteria. That was the approach that was employed by the city in *Johnson.*

1 chapter 222 and any other relevant non-land use standards is adopted and the annexation

2 becomes final.[5] Otherwise the annexation could become an accomplished fact before the

3 city establishes that the decision to annex is consistent with the relevant land use criteria that

4 govern the decision to annex.

5 **ASSIGNMENTS OF ERROR**

6 The challenged annexation was approved under ORS 222.125, which authorizes

7 annexations without providing a public hearing and without an election, if the owners of all

8 the annexed property consent to the annexation.[6] The Metro Code (MC) also includes

9 provisions for what it refers to as expedited annexation decisions. MC 3.09.045.[7]

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[5] Actually, there are at least four analytically distinct decisions, some of which could be combined, that a city may adopt in annexing land. First, as we have already explained, any decision to annex property must be consistent with the statewide planning goals or with comprehensive plan or land use regulations that the city may have adopted to govern annexation decisions. This requirement necessitates a land use decision. A second separate decision could be adopted to address ORS chapter 222 or any other non-land use annexation criteria. Absent some specific legal requirement to the contrary these two decisions could be adopted as a single land use decision. A separate election decision, where necessary, is potentially a third decision. As previously noted, the decision of the electorate in an annexation election is not a land use decision. Finally, the city will need to replace the county comprehensive plan and zoning designations that apply to the property. We see no reason why this decision could not be included in the land use decision that addresses annexation land use criteria, but it need not be included in that decision. Where the city does not adopt city comprehensive plan and zoning designations to replace county designations as part of the annexation decision, the county designations will continue to apply to the annexed property until the city adopts a post-annexation decision to change those designations. ORS 215.130(2)(a).

[6] ORS 222.125 provides:

> "The legislative body of a city need not call or hold an election in the city or in 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."

[7] MC 3.09.045(a) provides:

> "Approving entities may establish an expedited 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."

1 **A. Lack of Consent**

2 Petitioner argues the challenged ordinance must be remanded because the ordinance
3 relies on ORS 222.125 and MC 3.09.045 to annex the Butner Road right of way, which is
4 owned by Washington County, yet the record includes no written consent to the annexation
5 from the county.

6 The city offers a number of responses, however, none of those responses merit
7 extended discussion.[8] The city does not argue that it actually obtained "written consent"
8 from Washington County, as ORS 222.125 requires.[9] It is clear that the annexed right of
9 way is owned by Washington County. Record 5. The expedited procedure employed by the
10 city, which as we have noted obviates the need for elections or public hearings, requires the
11 county's written consent. The challenged decision does not include a finding that the city
12 has received written consent from Washington County.[10] Even if it included such a finding
13 or such a finding could be inferred from the ordinance whereas clauses, as the city argues,
14 such a finding would not be supported by substantial evidence. There simply is no evidence
15 that Washington County ever gave the city "written consent" to annex Butner Road.[11]

16 If Washington County in fact gave the city written consent for the disputed
17 annexation, the city should have included that written consent in the record. If the city has

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[8] For example, the legal description attached to the challenged ordinance describes the annexed portion of Butner Road as being "held in fee by Washington County, for roadway purposes[.]" Record 5. In its brief, the city argues that "[r]ight of way belongs to the public and has no owner." Respondent's Brief 8 n 6. We reject the city's argument.

[9] To the extent the first paragraph on page 8 of the city's brief can be read to suggest the city might have obtained written consent for the annexation from the county, but merely failed to include it in the record, the suggestion is too obscure.

[10] For that matter, the challenged decision does not include a finding that the city has the written consent of the Beaverton School District. However, we understand the city to be relying on a June 29, 2000 letter where the Beaverton School District Administrator states "[t]he District has no objection to the City's planned annexations" as the School District's consent. Record 11. Petitioner does not challenge the adequacy of this consent.

[11] The city appears to suggest that because certain county personnel were given notice of the proposal and did not object, we can assume the required written consent was given by the county. We reject the suggestion.

1 not obtained written consent from the county to annex the Butner Road right of way, it must
2 do so before it annexes that property under ORS 222.125 and MC 3.09.045.

3 This assignment of error is sustained.

4 **B. Failure to Notify Interested Persons**

5 Petitioner argues the city's decision should be remanded because the city failed to
6 provide notice to "interested parties," as required by MC 3.09.045.[12] Petitioner argues the
7 city should have provided notice to "adjacent property owners," any person who is connected
8 to the water and sewer lines in the annexed right of way, "community users of the
9 road/school/fields," to petitioner as a regular user of the community properties and to the
10 "publicly elected [l]ocal [s]chool [c]ommittee." Petition for Review 3.

11 The city responds that in view of Metro's failure to define "interested parties," the
12 city carried forward its past practice for providing notice in annexations such as the one at
13 issue here, and provided notice to the applicable neighborhood association committee and
14 citizen participation organization. The city argues that the much broader notice that
15 petitioner suggests the city should have given is simply not legally required.

16 The term "interested parties" is both subjective and ambiguous. Petitioner's view of
17 its meaning and scope is as expansive as the city's is narrow. The city adopted findings that
18 take the position that Metro simply intended the words to recognize that the city may have its
19 own annexation notice provisions that dictate notice to persons beyond the "necessary

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[12] MC 3.09.045(b) provides:

> "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. A necessary party may not contest a minor boundary change where the minor boundary change is explicitly authorized by an urban services agreement adopted pursuant to ORS 195.065." (Emphases added.)

MC 3.09.020(j) defines "necessary party" as including affected counties, cities and special districts and other local governments that provide urban services. There is no dispute that notice was given to all necessary parties. The sole dispute concerns notice to "interested parties," a term that is not defined in the MC.

parties" mentioned in MC 3.09.045(b). Petitioner does not challenge those findings or base his argument under this assignment of error on an alleged failure to give notice to "interested parties" that must be given notice of annexation proceedings under city annexation procedures. With one exception, we are inclined to accept the city's view of who is entitled to written notice of the proposed annexation decision under MC 3.09.045(b), primarily because the undefined term "interested parties" is so subjective and ambiguous. The one exception is the city's apparent refusal to provide petitioner notice of the proposed annexation, despite petitioner's written request to the city that he be provided such notice and his offer to pay the cost of sending that notice if necessary. Record 55. Given that written request and offer to pay the cost of notice, it is difficult to see why the city would do anything other than send petitioner the requested notices.

We need not and do not decide here whether MC 3.09.045(b) required that the city send petitioner or other persons prior written notice of the proposed annexation as "interested parties." That is because any such notice failure is a procedural error. Petitioner does not claim that he was not aware of the proposed annexation, and indeed he submitted written opposition to the proposed annexation, and that written opposition was received by the city. Record 52-54. The record includes a memorandum that the Community Development Director prepared to respond to petitioner's written comments. It is clear that any procedural error the city may have committed by failing to provide petitioner written notice did not prejudice petitioner's substantial rights and, therefore, would provide no basis for reversal or remand under ORS 197.835(9)(a)(B). *Donnell v. Union County*, 39 Or LUBA 419, 422-23 (2001). To the extent petitioner is attempting to argue the challenged decision should be remanded because others who may be entitled to notice as "interested persons" were not provided the notice required by MC 3.09.045(b), we previously explained in one of petitioner's prior appeals that "[p]etitioner may not assert possible prejudice to the rights of *other persons* as a basis for reversal or remand in this appeal." *Cape v. City of Beaverton*, 41

Or LUBA 515, 523 (2002) (emphasis in original) (citing *Bauer v. City of Portland*, 38 Or LUBA 432, 439 (2000)).

This assignment of error is denied.

C. Remaining Assignments of Error

In his remaining assignments of error petitioner advances a number of complaints, many of which repeat complaints that he has expressed in his prior appeals. Petitioner's chief complaint is that the city should seek broader public input, which petitioner believes would lead others to oppose the city's annexations. Petitioner also believes that his comments regarding the disputed annexation were dismissed without adequate consideration. Petitioner further believes the proposal should have been considered by the planning commission, but was not. Petitioner also suggests certain city findings are inadequate, but does not develop an argument in support of that suggestion or explain why the challenged findings are critical to the decision.

Petitioner fails to recognize that our authority to remand city annexation decisions for procedural errors is qualified by the statutory requirement that such failures must prejudice a petitioner's substantial rights. ORS 197.835(9)(a)(B). If petitioner's substantial rights are not prejudiced by any procedural errors the city may commit in annexing property, and no other person whose substantial rights are prejudiced by any such procedural errors appeals to LUBA, such procedural errors simply provide no basis for reversal or remand. To the extent petitioner's objection is that ORS 222.125 and MC 3.09.045 should not allow the city to annex the property of consenting property owners without a public hearing or election, that objection must be addressed to the legislative bodies that enacted the statute and the MC.

Petitioner's remaining arguments fail to demonstrate any additional legal error that would provide any additional basis for remand.

The city's decision is remanded to obtain Washington County's written consent to annex its property under ORS 222.125 and MC 3.09.045(a).