

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF LINN COUNTY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF LEBANON,
10 *Respondent.*

11
12 LUBA No. 2003-045

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Lebanon.

18
19 Ian Simpson, Portland, filed the petition for review and argued on behalf of
20 petitioner.

21
22 Thomas A. McHill, Lebanon, filed the response brief and argued on behalf of
23 respondent. With him on the brief was Morley Thomas McHill & Phillips, LLC.

24
25 BRIGGS, Board Member; BASSHAM; Board Chair; and HOLSTUN, Board
26 Member, participated in the decision.

27
28 REMANDED

08/22/2003

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner challenges a city decision to annex two parcels and right-of-way to the city and to zone one parcel Residential Mixed Density (RM) and the other Residential Low Density (RL).

FACTS

The 2.61-acre territory annexed by the challenged decision includes two parcels and the right-of-way located between those parcels. The first parcel, tax lot 1400, is developed with a single-family dwelling. The dwelling is served by a domestic well and on-site sewage disposal. However, there is evidence that the on-site sewage disposal system is failing and that annexation of this property is necessary to connect the dwelling to the city's community sewer system. The second parcel, tax lot 2000, is undeveloped. No development proposal was submitted in conjunction with the annexation request, however, it is anticipated that tax lot 2000 will be developed for residential uses in accordance with the RL designation. The right-of-way is known as Cascade Drive, and is a designated city collector. The segment is improved to county road standards. No improvements to Cascade Drive are proposed.

The west property line of tax lot 1400 borders city limits. Tax lot 2000 lies across Cascade Drive from tax lot 1400. None of the properties adjacent to tax lot 2000 lie within city limits. The subject property is zoned Urban Growth Area, Urban Growth Management, 10-acre minimum (UGA-UGM-10), a county zoning designation. In conjunction with the annexation, tax lot 1400 was zoned RM, and tax lot 2000 was zoned RL.

The city initially approved the annexation and zoning designation on August 14, 2002. Petitioner appealed the city's decision to LUBA, but joined with the city in stipulating to a voluntary remand of the decision. The city adopted its amended decision affirming its initial annexation decision on February 26, 2003. This appeal followed.

1 **DECISION**

2 **A. Introduction**

3 This appeal is one of a series of appeals that petitioner and James Just have filed
4 challenging city annexation and rezoning decisions. We issue final opinions in five of those
5 appeals today. *Just v. City of Lebanon*, __ Or LUBA __ (LUBA No. 2003-044, August 22,
6 2003) (*Just I*); *Just v. City of Lebanon*, __ Or LUBA __ (LUBA No. 2003-043, August 22,
7 2003); *Just v. City of Lebanon*, __ Or LUBA __ (LUBA No. 2003-066, August 22, 2003);
8 and *Just v. City of Lebanon*, __ Or LUBA __ (LUBA No. 2003-067, August 22, 2003).

9 As we explained in *Just I*, annexations to the city are evaluated pursuant to policies
10 set out in Resolution 11 (1982) (Annexation Policies). In addition, the city must find that the
11 annexation is consistent with Lebanon Comprehensive Plan (LCP) policies pertaining to
12 annexations. The petition for review includes one assignment of error; however, that one
13 assignment of error includes eleven subassignments of error. Most of the subassignments of
14 error challenge city council interpretations of Annexation Policies and LCP policies. The
15 subassignments of error also challenge findings the city adopted to support its decision and
16 the evidentiary basis for those findings. Where our disposition of petitioner’s arguments in
17 this appeal is the same as our disposition of the arguments in *Just I*, we will refer to our
18 decision in *Just I*, and will not repeat our analysis here.

19 **B. Compliance with Annexation Procedures**

20 Petitioner argues that more than half of the subject property is comprised of the
21 Cascade Drive right-of-way. Petitioner contends that it is not clear from the record (1) who
22 owns the Cascade Drive right-of-way; (2) whether the owner of the Cascade Drive right-of-
23 way consented to the annexation as required by ORS 222.120; or (3) whether that owner will
24 consent to any dedication of rights-of-way that may be necessary to ensure the safe
25 movement of traffic, bicycles and pedestrians when the annexed parcels are developed.
26 Petitioner argues that if the Cascade Drive right-of-way is deleted from the annexation

1 request, tax lot 2000 must be deleted from the annexation request as well, because the only
2 connection between tax lot 2000 and city limits is via Cascade Drive.

3 Property may be annexed to a city without an affirmative vote of a majority of the
4 electors within the city if the city follows the process set out in ORS 222.120, and holds a
5 public hearing in lieu of an election. ORS 222.120(1) and (2). ORS 222.125 permits a city to
6 annex territory without an election within the city, and without an election in the territory to
7 be annexed, if all of the property owners in the annexed territory, comprising at least half of
8 the electors in the annexed territory, consent in writing to the annexation.¹ ORS 222.170
9 permits the city to annex territory without an election in the territory to be annexed, if at least
10 half of the electors in that territory, owning at least one half of the property within that
11 territory, valued at at least half of the assessed value of the territory consent in writing to the
12 annexation. The required percentages set out in ORS 222.170 do not include land that is
13 publicly owned, unless the owner of the publicly owned property files a consent to
14 annexation or an objection to annexation prior to the time the hearing required by ORS
15 222.120(2) is held. ORS 222.170(4). The annexation process set out at ORS 222.170 does
16 not relieve the city of the obligation to hold an election within city limits, or hold a public
17 hearing in lieu of an election pursuant to ORS 222.120.

18 Here, it is fairly clear from the face of the ordinance that the city followed the process
19 set out at ORS 222.170 to annex the subject property. Therefore, the determination that at
20 least half of the electors, owning at least half of the property within the territory to be
21 annexed, which includes at least half of the assessed value within the territory is based on
22 lands owned by private persons. There is no evidence that the owner of the Cascade Drive
23 right-of-way is a private landowner. The owner of the right-of-way did not consent or object

¹ We held in *Cape v. City of Beaverton*, 43 Or LUBA 301 (2202), *aff'd* 187 Or App 463, 68 P3d 261 (2003) that the written consent of all property owners is necessary if a city chooses to use the process set out at ORS 222.125 to dispense with an election of the electors within the city *and* to dispense with an election of the electors located within the territory to be annexed.

1 to the annexation. However, the failure to obtain the written consent to annexation of the
2 owner of Cascade Drive does not bar the annexation of the subject property under ORS
3 222.170.

4 The second subassignment of error is denied, in part.

5 **C. Specific Development Proposal (LCP Annexation Policy 3)**

6 Petitioner argues that the challenged decision is not consistent with LCP Annexation
7 Policy 3, which requires that a “specific development proposal” be provided at the same time
8 a petition for annexation is submitted to the city. According to petitioner, the city cannot
9 “waive” that requirement with respect to tax lot 2000.

10 For the same reasons we set out in *Just I*, we agree with petitioner that the city may
11 not consider a request to annex undeveloped property without a specific development
12 proposal for the property. *See Just I*, __ Or LUBA __, slip op 14 (hereafter *Just I*, slip op __.)

13 The eighth subassignment of error is sustained.

14 **D. Consistency with Annexation Policies**

15 Petitioner alleges that the challenged decision does not establish that the disputed
16 annexation complies with the city’s five annexation policies, because it does not establish
17 that (1) the property must be annexed in order to satisfy a public need for additional
18 residential land; (2) adequate public facilities are available to serve the annexed property if
19 the property is developed as zoned; (3) if public facilities are not available, that adequate
20 public facilities to serve proposed uses of the property will be provided; and (4) the
21 annexation is consistent with LCP policies.²

² The five annexation policies provide:

“[1.] The City of Lebanon shall require proof that urban services are available or can be made available to serve the property considered for annexation and that the additional demands that would be placed on those services will not overburden their present capacities.

1 For the reasons explained in *Just I*, we agree with petitioner that the city erred in
2 concluding that the challenged decision is consistent with the city’s annexation policies. *Just*
3 *I*, slip op 18.

4 The first, third, fourth and fifth subassignments of error are sustained. The second
5 subassignment of error is sustained in part.

6 **E. Consistency with LCP Urbanization Element, Annexation Policy 2 (LCP**
7 **Annexation Policy 2)**

8 LCP Annexation Policy 2 provides:

9 “The city shall give priority to annexation of built-up residential areas
10 adjacent to the city that are in need of public facilities, services, and utilities
11 to prevent potential health and safety hazards to residents.”

12 With respect to LCP Annexation Policy 2, the city found:

13 “The proposed annexation complies with the Urbanization Element of the
14 Comprehensive Plan, Annexation Policy #2, in that the proposed annexation
15 will allow for the inclusion of built-up residential areas adjacent to the city
16 that are in need of public facilities, services, and utilities to prevent potential
17 health and safety hazards to residents. Specifically, the proposed annexation
18 allows for the inclusion of a parcel in need of sewer services [that] are readily
19 available due to the fact that the annexation area is nearly surrounded by
20 property within the city limits. By approving the proposed annexation, the city
21 is preventing the potential public health hazards inherent in a failing septic
22 system.” Record 12C.

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- “[2.] Public rights-of-way necessary for the safe and efficient movement of traffic, bicycles and pedestrians shall be provided with the annexation and without obligation to the City of Lebanon.
 - “[3.] Parties involved in seeking the annexation or who may be included in the annexation shall initiate a program to upgrade any urban services and/or public facilities within the area considered for annexation that do not meet standards as may be established by the City of Lebanon.
 - “[4.] No annexation shall be considered that does not conform with the Lebanon Comprehensive Plan and its goals and policies.
 - “[5.] It shall be the burden of proof of the applicant that a public need exists for the proposed annexation and that the annexation is in the public’s interest.

1 Petitioner argues that a failing septic system is the county’s concern, not the city’s,
2 and contends that the city’s actions in annexing tax lot 1400 is “inappropriate and [in
3 violation of] state and local law.” Petition for Review 33. Petitioner argues that the city has a
4 process to allow extraterritorial sewer extensions and, therefore, the city is mistaken that
5 annexation is required to remedy the potential health hazard. Petitioner also challenges the
6 city’s conclusion that the property is bordered on three sides by city limits, arguing that there
7 is intervening unincorporated territory bordering the property on three sides. Finally,
8 petitioner argues that even if the city is justified in annexing tax lot 1400 because of that
9 parcel’s failing septic system, that same justification cannot be made for the Cascade Drive
10 right-of-way or tax lot 2000.

11 Petitioner has not demonstrated that any local ordinance or state statute would be
12 violated by a city’s decision to annex property because potential health hazards arising from
13 or related to failing septic systems located on the property to be annexed. Whether the city
14 has other means to address the health hazard is unrelated to the policy’s purpose, which is to
15 allow the city to give “priority” annexation status to those properties that need city services
16 in order to prevent or alleviate a potential health or safety hazard. In addition, petitioner has
17 not demonstrated that LCP Annexation Policy 2 or any other city policy prohibits the
18 annexation of nonpriority territory in conjunction with a petition to annex priority territory.³

19 The tenth subassignment of error is denied.

³ It may be that the city would have to establish an alternative basis for annexing nonpriority territory; however that issue has no bearing on whether the city may combine priority territory with nonpriority territory.

1 **F. Consistency with Other LCP Policies (LCP Urbanization Element,**
2 **Phased Growth Policy 1 (LCP Phased Growth Policy 1); LCP Public**
3 **Facilities Element, General Policy 2 (LCP Public Facilities Policy 2), and**
4 **LCP Urbanization Element, Annexation Policy 1 (LCP Annexation Policy**
5 **1)⁴**

6 Petitioner argues that the city erred in concluding that the challenged decision is
7 consistent with LCP Phased Growth Policy 1 because the property to be annexed is only
8 contiguous to the city where Cascade Drive and the developed parcel border city limits.
9 According to petitioner, tax lot 2000 is only contiguous to city limits because it abuts the
10 remainder of the annexed property. Petitioner argues that, in fact, tax lot 2000 will not
11 maintain a “compact growth pattern” because, as a result of this decision, the parcel would
12 be zoned RL, and would be surrounded on three sides by unincorporated territory. Finally,
13 petitioner argues that even if the proposed annexation would result in a logical extension of
14 city limits within the city’s public facility capabilities, the challenged decision has not
15 established that the property is needed to address a shortage of available, developable
16 residential land.

17 The relevant findings state:

18 “* * * The proposed annexation complies with [LCP Phased Growth Policy 1]
19 in that it would be an orderly and efficient expansion of city limits within city
20 capabilities. As noted earlier, the proposed annexation area is nearly

⁴ LCP Phased Growth Policy 1 provides:

“* * * [T]he city shall maintain a compact growth pattern that expands the city limits incrementally in an orderly and efficient manner within the service capabilities of the city.”

LCP Public Facilities Policy 2 provides:

“The city shall consider impacts on community facilities before building, rezoning, or annexation requests are approved.”

LCP Annexation Policy 1 provides:

“The city shall annex land only within the Urban Growth Boundary on the basis of findings that support the need for additional developable land in order to maintain an orderly compact growth pattern within the city’s service capability.”

1 surrounded by city land, or land within the city limits. Annexation of such
2 properties is an orderly and efficient expansion of city limits. Further, there
3 are public improvements underway to serve the annexation area, making it
4 within city capabilities to annex the area. Finally, the annexation area is very
5 miniscule in comparison with the size of the City and will have minimal or no
6 impact upon city services.” Record 12B.

7 “* * * The proposed annexation complies with [Public Facilities Policy 2] in
8 that annexation will not result in an adverse impact on community facilities.
9 As stated in other findings, there are city service extensions under
10 construction to serve the area adjacent to the annexation area. Further, the size
11 of the annexation area is very minuscule compared to the overall size of the
12 city. The existing storm sewer system is adequate to serve the annexation
13 area. When these factors are combined, the overall impact on community
14 facilities is non-existent or negligible.” Record 12B-12C.

15 “* * * The proposed annexation complies with [LCP Annexation Policy 1], in
16 that the annexation property is within the Urban Growth Boundary, [is] within
17 the city’s service capability, and will avail housing development opportunities
18 in proximity to a nearby public school, park, retail shopping facilities and
19 professional services.” Record 12C.

20 The findings focus on the proximity of the subject property to city limits and the
21 negligible increase in demand that is likely to be generated by the annexed property. It does
22 not address, as the policies require, all of the public facilities that will be needed to serve a
23 particular development proposal. Neither do those findings address petitioner’s other points:
24 that the creation of a bulge in the city limits that is surrounded by unincorporated territory
25 and includes undeveloped residential land is neither needed to address a particular public
26 need, nor will result in a “compact growth pattern.” The findings are not adequate to
27 demonstrate that the proposed annexation is consistent with LCP Phased Growth Policy 1,
28 LCP Public Facilities Policy 2 or LCP Annexation Policy 1.

29 The sixth, seventh and ninth subassignments of error are sustained.

30 **G. Compliance with City Zoning Map Amendment Processes**

31 The subject property is designated Mixed Density Residential on the city’s
32 comprehensive plan map. In the eleventh subassignment of error, petitioner argues that the
33 city erred in failing to require that the applicant submit a zoning map amendment application

1 pursuant to Lebanon Zoning Ordinance (LZO) 9.010 in addition to the annexation petition.⁵
2 Petitioner makes the same argument as the petitioner in *Just I* did. As we decided there, the
3 fact that the city did not require a separate zoning map amendment application did not
4 provide a basis for reversal or remand. However, we nonetheless sustained the assignment of
5 error, concluding that because the annexation decision had to be remanded, it was
6 appropriate to remand the zoning designation decision as well. For the same reasons, we
7 conclude that it is also appropriate to remand the city’s zoning decision pertaining the parcels
8 at issue in this appeal.

9 The eleventh subassignment of error is sustained.

10 The city’s decision is remanded.

⁵ LZO 9.010 provides, in relevant part:

“An amendment to the text of [the LZO] may be initiated * * * by application of a property owner. The request by a property owner for an amendment shall be accomplished by filing an application with the Planning Official using [prescribed forms.] A filing fee * * * shall accompany [the property owner’s application.]”