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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WEST SIDE RURAL FIRE
PROTECTION DISTRICT,
Petitioner,

vs.

CITY OF HOOD RIVER,
Respondent.

LUBA No. 2003-074

FINAL OPINION
AND ORDER

Appeal from City of Hood River.

Gary F. Firestone, Portland, filed the petition for review and argued on behalf of petitioner.
With him on the brief was Ramis Crew Corrigan & Bachrach LLP.

Pamela J. Beery, Portland, filed the response brief and argued on behalf of respondent.
With her on the brief was Beery & Elsner LLP.

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

AFFIRMED

02/17/2004

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

NATURE OF THE DECISION

Petitioner challenges a city decision to annex 55 acres to the city and to withdraw that property from petitioner’s service district.

FACTS

This is the second time this matter is before us. In *West Side Rural F.P.D. v. City of Hood River*, 43 Or LUBA 546, 547 (2003) (*West Side I*), we set out the following relevant facts:

“In January 2002, the city initiated a process to annex approximately 475 acres of land into the city using quasi-judicial land use hearing procedures. During the proceedings before the planning commission and the city council, the number of acres under consideration was reduced until only 55 acres, [a Y-shaped territory which includes a] segment of Interstate 84 and [a] segment of U.S. Highway 30 [(the I-84 Territory)] remained. On April 8, 2002, the city adopted Ordinance No. 1823, annexing the [I-84 Territory.]”

Hood River Zoning Code (HRZC) Chapter 17.15 sets out a quasi-judicial process for evaluating annexations, and requires that the city adopt findings that address annexation criteria. In *West Side I*, we remanded Ordinance 1823 primarily because the city did not adopt findings in support of Ordinance 1823 until after Ordinance 1823 was adopted. 43 Or LUBA at 556.

On April 28, 2003, the city adopted Ordinance 1842. Ordinance 1842 includes findings to support the city’s decision in Ordinance 1823, and adopts findings that respond to our decision in *West Side I*. Petitioner now challenges Ordinance 1842.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to arguments that the city made in its brief that an interpretation it made regarding HRZC 17.15.050.E is subject to deference under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524-525, 69 P3d 759

1 (2003).¹ An argument in a response brief that alleges that our standard of review has been modified
2 is a “new matter” and therefore petitioner’s reply brief is allowed.

3 **POST-ORAL ARGUMENT SUBMITTALS**

4 After oral argument, petitioner filed a memorandum that includes additional argument in
5 support of its premise that the city erred in finding that the proposed annexation will have a positive
6 fiscal impact, as is required by HRZC 17.15.070.A. The city objects to the memorandum,
7 contending that petitioner should not be able to expand upon its remarks at oral argument without
8 express leave of the Board. In addition, the city argues, the additional argument is not necessary to
9 resolve petitioner’s assignments of error.

10 The additional argument included in petitioner’s post-oral argument memorandum does not
11 respond to legal issues or case law identified by the parties for the first time at oral argument. Nor
12 does the memorandum provide legal argument and analysis that is necessary for resolution of
13 petitioner’s assignments of error. Therefore, we do not consider petitioner’s post-oral argument
14 memorandum. *Friends of Marion County v. City of Keizer*, 45 Or LUBA __ (LUBA No. 2003-
15 036, August 29, 2003) slip op 3.

16 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

17 HRZC 17.15.050 provides, in relevant part:

¹ ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 “EVALUATION CRITERIA – DEVELOPED LAND

2 “Prior to approving a proposed annexation of developed land, affirmative findings
3 shall be made relative to the following criteria:

4 “* * * * *

5 “B. *The annexation represents the natural extension of the existing City*
6 *boundary to accommodate urban growth[.]*” (Capitalization in original,
7 italics added.)

8 **A. Findings Challenge**

9 Petitioner argues in the third assignment of error that the city’s findings are inadequate to
10 explain why the city believes that HRZC 17.15.050.B is met. According to petitioner, the fact that
11 the Y-shaped territory is located within the UGB

12 “is not sufficient to show that it is a natural extension. An annexation that extends far
13 from the City’s current boundaries [and] leaves more developed areas adjacent to
14 the City outside the City is not a natural extension.” Petition for Review 7.

15 Petitioner further argues that if the aim of the city is to ensure that commercial development will
16 occur pursuant to city standards, then the “natural extension” described in HRZC 17.15.050.B must
17 include the commercial territory itself. Petitioner contends the city cannot conclude that the
18 annexation of the I-84 Territory alone, which is already developed with transportation facilities that
19 will serve the commercial areas and the city with or without annexation, is a natural extension of city
20 limits.

21 With respect to HRZC 17.15.050.B, the city relied on findings that addressed other
22 approval criteria to find that HRZC 17.15.050.B has been met.²

² Those findings state, in relevant part:

“[1.] Every urban area in the state has worked with its county to draw an imaginary line outside and some distance away from its city limits. The land inside the boundary is where a city will grow—maybe not right away, but someday. How to develop this ‘urban fringe’ has been contemplated in City and County planning documents since 1958. In 1980, the County adopted an Urban Growth Boundary, which was also adopted by the City in 1983. * * *

1 The findings are adequate to explain why the city considers the annexation of the I-84
2 Territory to be necessary to achieve the city’s ultimate goal of providing a unified development

“The City is responsible for providing urban services within this area and has a high stake in seeing that this ‘urban fringe’ is developed in an orderly, compatible and efficient way. Haphazard placement of utilities and streets ultimately will cost the taxpayer more. Because of the continuing pressure for development requiring urban services, the City believes the [urban growth area (UGA)] needs to be brought into * * * city limits to carry out its responsibility as the urban service provider and this is a step in that direction.

“[2.] The I-84 territory is adjacent to property in City limits that is already developed to an urban level, which in most cases is commercial development, and is adjacent to undeveloped commercial properties in the UGA. Development of these commercial properties represents the natural extension of the commercial development in West Hood River. The I-84 Territory supports existing and will support new commercial development.” Record 13.

“[3.] [T]he I-84 Territory is integral to the commercial development of the commercial properties that it serves and will serve. The I-84 Territory does, therefore, represent growth of the City beyond City limits because it is contiguous to or only separated by a public right of way from the City’s most intensive commercial area, whether already developed as in some cases, or planned for commercial development as in the cases of those other properties in the urban growth area. When those properties in the urban growth area are developed, they will seek a City sewer connection at a minimum, which connection will not be granted unless the property is annexed * * * to the city. Annexation of the I-84 Territory will create contiguity with almost all of the undeveloped commercial property in the Urban Growth Area and, therefore, allow annexation and development of those properties. It is in the City’s best interest to control this commercial development, which control is not available under the Urban Growth Management Agreement, even though the intent of the Agreement is for City standards to apply [to] development. This is because adoption of City standards by the County is a legislative process and because the County does not have to interpret and apply the standards in the same way the City does. Moreover, the Agreement does not preclude the City from annexing land in the Urban Growth Area in order to obtain development control, or for any other reason.

“In addition, commercial development of these commercial properties needs the full range of urban services that the City is capable of providing. As the record makes clear, Ice Fountain Water District and West Side Rural Fire Protection District do not have the ability to the extent the City does to serve commercial development at the level contemplated (i.e., Wal-Mart, Home Depot, etc.)” Record 11.

“CONCLUSION: The City Council finds that based on the above findings of fact, the annexation represents a natural extension of the City boundary to accommodate urban growth.” Record 15.

The findings in support of HRZC 17.15.050.B also cite to other findings that conclude that annexation of unincorporated land located within the UGB is *per se* a reasonable extension of city limits, because the UGB established the area that would need to be brought into the city at some point during the comprehensive plan’s 20-year planning horizon. Record 22.

1 program for the commercial areas located within the city and its environs, and those findings are
2 adequate to demonstrate that the annexation of the disputed 55 acres is a “natural extension” of the
3 city limits within the meaning of HRZC 17.15.050.B. Contrary to petitioner’s argument, HRZC
4 17.15.050.B does not require that the city’s ultimate goal be achieved in one annexation. The city
5 could conclude, as it did, that the annexation of the I-84 Territory provides the necessary contiguity
6 with city limits that is needed for commercial properties located outside of city limits to be annexed
7 to the city at the time urban services are provided to them.

8 The third assignment of error is denied.

9 **B. Evidentiary Challenge**

10 In the first assignment of error, petitioner challenges the evidentiary support for the city’s
11 findings with respect to HRZC 17.15.050.B. According to petitioner, there is no evidence in the
12 record that shows that the I-84 Territory, by itself, is a natural extension of the city’s boundaries.
13 Petitioner argues that the only evidence relating to HRZC 17.15.050.B refers to the inclusion of
14 commercially-zoned land in conjunction with the I-84 Territory, and how the annexation of the
15 commercially zoned properties will result in a “natural extension.” Petitioner argues that in the
16 absence of evidence that the I-84 Territory by itself is a “natural extension of city limits,” the city’s
17 conclusion that HRZC 17.15.050.B is met is not supported by substantial evidence.

18 The city responds that HRZC 17.15.050.B should not be read to be limited to the territory
19 that was actually annexed to the city as the result of the adoption of Ordinance 1823. Rather, the
20 city argues, there is evidence that it is necessary to annex the I-84 Territory in order to facilitate the
21 eventual annexation of commercially zoned properties that are also located within the UGB. The city
22 contends that the record includes maps showing that the I-84 Territory is contiguous to the city
23 limits, in located within the UGB, and provides a connection to commercially zoned property within
24 the UGB. According to the city, that evidence is sufficient to support a conclusion that the I-84
25 Territory is a “natural extension of the existing City boundary” within the meaning of HRZC
26 17.15.050.B. We agree.

1 The first assignment of error is denied.

2 **SECOND AND FOURTH ASSIGNMENTS OF ERROR**

3 HRZC 17.15.050 provides, in relevant part:

4 “Prior to approving a proposed annexation of developed land, affirmative findings
5 shall be made relative to the following criteria:

6 “* * * * *

7 “E. The fiscal impact of the annexation is favorable, as determined by the City
8 of Hood River because of existing development [based on the fiscal
9 considerations set out at HRZC 17.15.070.]”

10 HRZC 17.15.070 provides:

11 “The following factors are to be taken into consideration when determining fiscal
12 impact for both developed and undeveloped land and may include, but are not
13 limited to:

14 “A. The additional revenues, if any, available to the City as a result of the
15 annexation.

16 “B. Whether any unusual or excessive costs will be incurred as a result of the
17 annexation.

18 “C. The impact on the City’s tax base, if any, as a result of the annexation.”

19 With respect to HRZC 17.15.050.E and 17.15.070, the county found:

20 “1. The I-84 Territory is currently improved as a public road. Additional
21 improvements include those associated with anticipated commercial
22 development and maintenance and improvement of the Historic Highway.

23 “2. Service needs to the I-84 Territory will include storm drainage cleaning;
24 pothole repair, sweeping and snow plowing of streets; along with a minimal
25 increase in demand on fire, police, and public inquiries in general.

26 “3. In commenting on the initial proposed annexation of over 400 acres, the
27 City Police and Fire Departments state that they could continue to provide a
28 level of service consistent with community needs and their department’s
29 financial capabilities. The City also had the capability of providing water and
30 sewer service to the original annexation area. The I-84 Territory is
31 considerably smaller and will not itself require water or sewer service. Fire
32 and Police service would be limited to road related incidents.

- 1 “4. The additional burden on City services would be minimal.
- 2 “[5.] [The] City Council finds that based on the above findings of fact, that the
3 annexation would not unreasonably limit the ability of the City to provide a
4 level of services to city residents consistent with community needs and the
5 financial capabilities of the City[; or] * * * cause the City to pledge
6 extension of services beyond its resources so as to result in a deficit
7 operation of services.” Record 13-14.
- 8 “[6.] A favorable fiscal impact [as that term is used in HRZC 17.15.050.E]
9 means that the fiscal impact cannot be negative to the extent that the City
10 cannot continue to provide the same level of services to existing City
11 residents or cannot do so without operating at a deficit.
- 12 “[7.] The I-84 Territory is developed as a state and local highway.
- 13 “[8.] * * * [A]nnexation of the I-84 Territory will not cause the City to reduce
14 the level of services it provides or cause the services to be provided at a
15 deficit.
- 16 “[9.] In addition, annexation of the I-84 Territory will allow annexation of
17 contiguous territories that will have a positive revenue effect for the City
18 (see Staff Report to Planning Commission [found at LUBA No. 2002-055
19 Record 326-328.]” Record 16.

20 In the fourth assignment of error, petitioner argues that none of the findings address HRZC
21 17.15.070.A or C, or explain why the annexation of 55 acres of state-owned highway will result in
22 a “favorable fiscal impact” as is required by HRZC 17.15.050.E. In the second assignment of error,
23 petitioner argues that to the extent those findings are adequate, they are not supported by substantial
24 evidence, because they are based on a financial analysis that estimates that the amount of additional
25 tax revenues that would be generated from the original 400-acre annexation territory, and assumes
26 those revenues would be available to fund the services that will be needed to be extended to the
27 400 acres. Petitioner argues that that fiscal analysis does not consider the annexed 55 acres by
28 itself, as we required in *West Side I*. 43 Or LUBA at 556 (because the annexation is limited to the
29 55 acres, city must adopt findings that address the benefits and consequences of annexing only that
30 property). Petitioner also contends that there is no evidence to support a finding that there is a

1 favorable fiscal impact that will result from annexing tax-exempt property that will nevertheless
2 require some city services.

3 The city responds that HRZC 17.15.050.E specifically grants the city the authority to
4 determine how fiscal impact is measured. In addition, the city argues that the factors set out at
5 HRZC 17.15.070 are not exclusive, and do not require a demonstration that an annexation result in
6 a *substantial* favorable impact. The city argues that the city council interprets HRZC 17.15.050.E
7 to require only that an annexation not be detrimental to existing city services or cause the city to
8 operate at a deficit in order to provide services to the annexed territory. According to the city, there
9 is evidence in the record to support a finding that the annexation of the I-84 Territory would not add
10 a substantial burden to city services, or shift city services from existing recipients to the annexation
11 territory. Based on that evidence, the city argues, the city could find that HRZC 17.15.050.E is met.

12 We do not agree with the city that the deference afforded the city council under ORS
13 197.829(1) would extend to allow the city to interpret a provision such as HRZC 17.15.050.E to
14 allow annexations if there is a negative financial impact, even if that impact is negligible. However,
15 contrary to petitioner's assertions, the city did adopt findings that the annexation of the I84
16 Territory will have a positive fiscal impact because it will allow for the eventual annexation of
17 territory that will provide taxable income to the city. *See* Finding 9, above. Petitioner does not
18 challenge that finding. Therefore, even if petitioner is correct that the city's interpretation of HRZC
19 17.15.050.E is inconsistent with its text, it does not provide a basis for reversal or remand, because
20 the city adopted other unchallenged findings that conclude that the annexation of the I-84 Territory
21 will ultimately have a positive fiscal impact.

22 With respect to the city's findings regarding HRZC 17.15.070, findings addressing HRZC
23 17.15.070.A and C are necessary only if there are additional revenues that will become available or
24 there will be an impact on the city's tax base as a result of the annexation. The city relied on
25 evidence presented in the fiscal analysis to find that while the current annexation is revenue neutral,
26 the annexation will allow for additional land to be included in the city's tax base, contributing to

1 additional revenue in the form of property taxes and service hook-up fees. Those findings are
2 adequate to show that the city considered the factors set out at HRZC 17.15.070.

3 As for petitioner's evidentiary challenge, petitioner does not assert that the evidence of the
4 potential tax revenue and systems development charges that could be accrued by the eventual
5 annexation of commercial territories is not accurate. Nor does petitioner argue that the evidence
6 does not show that the I-84 Territory provides a connection between existing city limits and the
7 commercial areas. Rather, petitioner argues that the evidence is insufficient to show that the
8 annexation of the I-84 Territory, by itself, will generate the revenue estimated in the city manager's
9 revenue projection, because the I-84 Territory is comprised of tax-exempt land. Given that
10 petitioner does not challenge the premise for which that evidence is used, *viz.*, that the annexation
11 challenged in this decision will provide an opportunity for the city to annex revenue-generating
12 territory in the future, petitioner's evidentiary challenge also does not provide a basis for reversal or
13 remand.

14 The second and fourth assignments of error are denied.

15 The city's decision is affirmed.