BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT PATTERSON
and GERALDINE PATTERSON,
Petitioners,

vs.

CITY OF INDEPENDENCE,
Respondent.

LUBA No. 2004-035

FINAL OPINION
AND ORDER

Appeal from City of Independence.

Wallace W. Lien, Salem, filed the petition for review. With him on the brief was Wallace W. Lien, P.C. Daniel B. Atchison argued on behalf of petitioners.

Richard D. Rodeman, Corvallis, filed the response brief and argued on behalf of respondent.

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

REMANDED 10/20/2004

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners Robert Patterson and Geraldine Patterson (petitioners) appeal the city's adoption of a resolution annexing a portion of a road bordering their property.

MOTION TO FILE REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new issues raised in the response brief. There is no opposition to the motion, and it is allowed.

FACTS

In the fall of 2003, the city council conducted a hearing to consider annexing approximately 20 parcels, in three different areas, because those properties were considered by the city to be "islands" of unincorporated territory within the city. Record 86. Petitioners' property is one of those properties. Upon review, it was discovered that petitioners' property is not an island because a section of Stryker Road, which runs along the western and northern boundaries of petitioners' property, lies outside the corporate limits of the city. Record 35. Consequently, petitioners' property was not annexed as part of those "island annexations." Record 35-36.

On January 13, 2004, the city council conducted a public hearing to consider the annexation of Stryker Road. The staff report that was prepared for that meeting included proposed findings of fact in support of the city council's adoption of the proposed annexation. Record 46-49. Petitioners appeared, orally and in writing, at the hearing, asserting that the primary reason for annexing Stryker Road was to make their property an "island" and thereby allow "forcible annexation." Record 34-40. Following the hearing, a supplemental staff report was prepared to respond to public comments and propose additional findings responding to the legal arguments presented by petitioners. Record 18-21. The staff report recommended that the annexation of Stryker Road be approved. Record 20.[1]

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[1] The staff report included sample motions. The sample motion for approval read:

On February 10, 2004, the council conducted a hearing to discuss the staff report and the annexation decision for Stryker Road. Record 9. The council reviewed the findings in the staff report. Record 10. One councilor moved to "approve the annexation as recommended by staff." Record 11. The motion was approved, and the final resolution was signed. Record 11, 14. This appeal followed.

MOTION TO STRIKE

As noted above in our description of the facts, petitioners believe the city annexed Stryker Road to encircle their property and thereby set the stage for a future city decision to annex petitioners' property over their objections. Petitioners suggest that because the city failed to take action on the initial proposal to annex their property, that proposal remains pending before the city. The city responds to that suggestion as follows:

> "There is nothing in the record to suggest that there is a pending proposal to annex the petitioner's property. *That is a complete factual fabrication, and a deliberate misrepresentation/oversight in the Petitioner's brief.* Petitioner cited the record at C-4 (minutes of the October 14, 2003 Independence Council meeting) for their factual support. Nothing in that section concludes that there is 'pending' or 'forthcoming' any annexation proposal for Petitioner's Property. The Council explicitly decided to the contrary. (R. 10-11). There are no other processes for annexation of the Patterson property pending." Respondent's Brief 12 (emphasis added).

Petitioners move to strike the emphasized sentence as a "sham allegation * * * made as a personal attack on petitioner[s'] attorney in an attempt to harm said attorney's credibility and reputation before this Board." Combined Motion to Allow Reply Brief, Precautionary Motion to Transfer, and Motion to Strike 2.

"A motion to approve L-01-2004/A-01-04:

"1. As recommended by staff; or

"2. As further amended by the City Council (stating any revisions)." Record 21.

As far as we can tell, the city has taken no affirmative action to put to rest petitioners' concerns that the city retains a desire to annex their property through an island annexation in the future. Stated differently, there appears to be a factual basis for that concern. The current status of the original proposal to annex petitioners' property is not entirely clear. It may remain pending, as petitioners contend, or it may no longer be pending, as the city suggests. Whatever the status of the original proposal to annex petitioners' property, we do not agree with respondent that petitioners have fabricated or misrepresented facts. The motion to strike is granted.

JURISDICTION

The city argues that the challenged decision is not a land use decision subject to our jurisdiction. Petitioner counters that this Board and the Court of Appeals have made it clear that annexations such as this one, that involve the application of the comprehensive plan or statewide planning goals, are land use decisions. *See Cape v. City of Beaverton*, 43 Or LUBA 301 (2002), *aff'd* 187 Or App 463, 68 P3d 261 (2003); *see also Bear Creek Valley Sanitary v. City of Medford*, 130 Or App 24 (1994) (the decision that proposes an annexation is an act of planning; the subsequent acts under ORS chapter 222, generally involving a popular vote, are not land use decisions); *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999) (where process is not bifurcated, and one decision involves both land use and potentially non-land use issues, the decision is a land use decision that we may review).

We reject the city's contentions that the challenged decision is not a land use decision.[2]

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error urges remand of the challenged decision because it lacks the necessary findings. Petitioners argue that the challenged decision is a quasi-judicial land use decision that requires findings pursuant to *Fasano v. Washington Co. Comm.*, 264 Or 574,

[2] Petitioners filed a Precautionary Motion to Transfer to Polk County Circuit Court in the event we determine that we do not have jurisdiction to review the challenged decision. Based on our resolution of the jurisdictional challenge, this motion is denied.

507 P2d 23 (1973) (providing that quasi-judicial decisions require certain procedural safeguards, including adequate findings). *See also* ORS 227.173(3).[3] They assert that the city followed the procedures applicable to quasi-judicial zoning matters and that the decision satisfies the test set forth in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), for determining whether a proceeding is quasi-judicial rather than legislative in nature. The city asserts that the challenged decision is legislative, not quasi-judicial, and that findings were therefore not required.[4] *See Andrews v. City of Brookings*, 27 Or LUBA 39, 41 (1994) (there is no legal requirement that local governments adopt findings in support of legislative land use decisions).

The city asserts that the staff report, which included draft findings, was before the city council and that the motion was to "approve the annexation as recommended by staff." Record 11. The city appears to be arguing that the motion to approve the annexation *as recommended by staff* somehow made those findings part of the final decision. The draft findings, however, were never specifically incorporated by the city council. Further, we understood the city to concede at oral

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[3] ORS 227.173(3) provides:

> "Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

The local code apparently also requires findings for "land use actions." IZC 11.030(e). The city did not address that provision in its decision or in its brief; however, it conceded at oral argument that if the challenged decision were considered quasi-judicial, findings are required, and remand would be proper.

[4] The quasi-judicial/legislative distinction is also generally relevant to the procedures that must be followed to adopt a decision. However, in this case, the parties do not dispute that quasi-judicial procedures were followed, and petitioners do not argue that there were procedures that were not followed that should have been.

The city also argues that petitioners did not raise the "quasi-judicial" issue below. Respondent's Brief 9. Petitioners' argument that the challenged decision is quasi-judicial is merely the legal rationale for requiring findings. Petitioners identified below the substance of the findings that they now assert were required; *i.e.*, the decision must include findings explaining how the annexation complies with the reasonableness requirement imposed by *Portland General Electric Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). *See* discussion under second assignment of error.

argument that if the decision is quasi-judicial, then findings were required and remand would be appropriate because no findings were adopted or incorporated as part of the challenged decision.

We turn, then, to the question of whether the challenged decision is legislative or quasi-judicial in nature. In making that determination, we consider the three-part inquiry in *Strawberry Hill 4 Wheelers*, which we have summarized as follows:

> "1. Is 'the process bound to result in a decision?'
>
> "2. Is 'the decision bound to apply preexisting criteria to concrete facts?'
>
> "3. Is the action 'directed at a closely circumscribed factual situation or a relatively small number of persons?'" *Leonard v. Union County*, 24 Or LUBA 362, 368 (1992).

The more definitively those questions are answered in the negative, the more likely the decision is to be legislative. *Miner v. Clatsop County*, 46 Or LUBA 467, 476 (2004).

Petitioners concede that, regarding the first part of the inquiry, the city was not required to adopt a decision in this case. Reply Brief 3. However, according to petitioners, the answers to the remaining two questions suggest the decision is quasi-judicial. As petitioners correctly note, we have recognized that applying pre-existing criteria to concrete facts is required "to some extent in nearly all land use decisions." *Valerio v. Union County*, 33 Or LUBA 604, 607 (1997). That is certainly true here. The city was bound to apply the statewide planning goals or any applicable comprehensive plan or land use regulation provisions to the challenged decision. *See Cape v. City of Beaverton*, 43 Or LUBA at 305 (either criteria in comprehensive plan or land use regulations that govern annexation decisions apply or the statewide planning goals apply to annexation decisions).

Turning to the final question, we have held that "annexations found to be quasi-judicial in nature have been focused on very circumscribed proposals." *Miner*, 46 Or LUBA at 477 (annexation of 125 acres, including over 60 property owners and expanding sewer district by 25 percent is legislative), *citing Neuberger v. City of Portland*, 288 Or 155, 603 P2d 771 (1979) (three landowners); *Petersen v. City of Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977) (four

landowners); and *Concerned Citizens v. Jackson County*, 33 Or LUBA 70, 80 (1997) (single development proposal). The challenged decision annexes a single property with one owner. As petitioners note, "this annexation could not be more closely circumscribed." Reply Brief 4.

We agree with petitioners that the decision is quasi-judicial.[5] Accordingly, we also agree with petitioners that the city was required to adopt findings in support of the challenged decision. The city concedes that it did not do so.

Petitioners' first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that, for several reasons, the annexation is unreasonable under *Portland General Electric Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952) (annexation decisions must be made reasonably and not arbitrarily). Because we sustain petitioners' first assignment of error, and remand the challenged decision for adequate findings, we do not address that issue here. The city will have an opportunity to do so on remand.

The city's decision is remanded.

[5] Petitioners also argue that because the city treated the challenged decision as quasi-judicial and gave the required quasi-judicial notice and announcement, the decision is quasi-judicial. *See West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 546 (2003) (A decision that annexes property into city limits using quasi-judicial land use processes set out in the local code for such annexation decisions is reviewable as a quasi-judicial land use decision.). Because we conclude that the decision is quasi-judicial under the test set forth in *Strawberry Hill 4 Wheelers*, we do not address that argument.