

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ROBERT PATTERSON
5 and GERALDINE PATTERSON,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF INDEPENDENCE,
11 *Respondent.*

12
13 LUBA No. 2004-220

14
15 FINAL OPINION
16 AND ORDER

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18 Appeal from City of Independence.

19
20 Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioners.

21
22 Richard D. Rodeman, Corvallis, filed the response brief and argued on behalf of
23 respondent.

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

27
28 AFFIRMED

07/21/2005

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

Petitioners appeal a city decision proclaiming an annexation of a portion of a road.

FACTS

The annexed territory is an L-shaped area encompassing a portion of the Stryker Road right of way. Stryker Road south of the annexed portion is within the city limits. The annexed portion of Stryker Road runs north briefly and then curves east to connect with a state highway that is within the city limits. Petitioners own property south and east of Stryker Road, within a “peninsula” of unincorporated territory bordered on three sides by incorporated areas. As a result of the annexation, the peninsula will become an “island” of unincorporated territory surrounded by the city.

The challenged decision is on remand from this Board. *Patterson v. City of Independence*, 48 Or LUBA 155 (2004). During the initial proceedings, the city conducted a public hearing on the annexation, at which petitioners appeared and testified in opposition. We remanded the city’s initial decision for the city to adopt findings addressing (1) land use standards applicable to the challenged annexation and (2) the “reasonableness” standard described in *Portland General Electric Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). On remand, the city scheduled a hearing on November 23, 2004, and provided written notice of that hearing to petitioners on November 1, 2004. The city conducted the hearing, at which petitioners testified, and on December 14, 2004, voted to adopt the challenged decision, supported by additional findings. This appeal followed.

FIRST ASSIGNMENT OF ERROR

OAR 660-014-0060, entitled “Annexations of Lands Subject to an Acknowledged Comprehensive Plan,” provides:

“A city annexation made in compliance with a comprehensive plan acknowledged pursuant to ORS 197.251(1) or 197.625 shall be considered by the commission to have been made in accordance with the goals unless the acknowledged comprehensive plan and implementing ordinances do not control the annexation.”

1 The city’s decision addressed comprehensive plan goals and policies that implement Statewide
2 Planning Goals 14 (Urbanization) and 12 (Transportation), and determined that the annexation is
3 consistent with those plan goals and policies. With respect to the comprehensive plan Urbanization
4 goal and policies, the city found that annexation of Stryker Road would “provide for an orderly and
5 efficient transition from rural to urban land” and would have no impact on public facilities and
6 services, because the city already maintains the annexed portion of the road.¹ With respect to the
7 comprehensive plan Transportation goal and policies, the city found that the proposed annexation
8 will encourage a safe, convenient and economic transportation system.²

¹ The city’s findings state, in relevant part:

“The [comprehensive plan] Urbanization goal is ‘To provide for an orderly and efficient transition from rural to urban land.’ There are two policies from this goal that apply to the proposed annexation: Policy Two and Policy Five. Policy Two states: ‘Independence shall provide public notice of any proposed annexation or land use action and shall provide to the public an assessment of potential impacts to public facilities and services.’ Policy Five states: ‘Independence shall coordinate with Polk County when considering any annexation and shall utilize the policies contained within the intergovernmental agreement between city and county regarding the management of the urbanizable area prior to any annexation or other development action.’

“The proposed annexation complies with the urbanization goal: it is orderly and efficient. The proposed annexation is orderly in that it connects important parts of the city’s transportation network together and it promotes efficiencies in the city’s transportation network by connecting a city street to a state highway (Highway 51). Stryker Road provides an important connection between Hoffman Road and Highway 51, particularly for residents of the Independence Airpark, located west of Stryker Road and businesses located on the east side of Stryker Road. Highway 51 provides an important transportation route to and from Independence and provides connections with Highway 22 for those who are traveling to or from Salem or Dallas or to more distant destinations. The Council finds that the proposed annexation complies with the urbanization goal and is orderly and efficient.

In addition, the City has complied with both applicable urbanization policies. * * * No impacts to public facilities and services are anticipated because the City is already responsible for maintenance of the road. In addition, the City coordinated with Polk County on annexation of the road. Several years ago, the City obtained jurisdiction and responsibility for maintenance over Stryker Road from Polk County. The proposed annexation will include all of Stryker Road within the city limits instead of just a portion of the road. Polk County has indicated support for the proposed annexation.” Record 27-28.

² The city’s findings state:

“The [comprehensive plan] Transportation goal is ‘To provide and encourage a safe, convenient and economic transportation system.’ Policy One is applicable to this application.

1 However, petitioners contend that the city was required to directly address the statewide
2 planning goals, notwithstanding OAR 660-014-0060. According to petitioners, the city’s
3 acknowledged comprehensive plan and implementing ordinances do not provide specific standards
4 or procedures for annexing territory such as Stryker Road, and therefore the plan and ordinances
5 do not “control the annexation” within the meaning of OAR 660-014-0060. Therefore, petitioners
6 argue, OAR 660-014-0070 directs the city to apply “all appropriate [statewide planning] goals,”
7 including Goal 14.³

Policy One states, ‘Independence shall develop a coordinated street network which facilitates the mobility and accessibility of community residents.’

“As discussed above, the City assumed jurisdiction over Stryker Road several years ago, but only the southern portion of the street is within the Independence city limits. The City does not have enforcement authority over the portion of Stryker Road that is outside city limits. For traffic safety, a continuous enforcement corridor is a way to encourage safe transportation. This annexation will enable the City to ensure that traffic laws are handled through the municipal court system with city police officers. This will make the enforcement system more convenient for drivers, who will not have to go to the Polk County offices in Dallas for traffic offenses.

“Annexation of the northern portion of Stryker Road will allow a more coordinated street network with the jurisdiction and maintenance responsibilities and location consolidated under the same local government.

“The Council finds that the proposed annexation will help provide and encourage a safe, convenient and economic transportation system and will help the City develop and maintain a coordinated street network which facilitates the mobility and accessibility of community residents.” Record 28.

³ OAR 660-014-0070, which is entitled “Annexations of Lands not Subject to an Acknowledged Comprehensive Plan,” provides in relevant part:

- “(1) All appropriate goals must be applied during annexation by the city. * * *
- “(2) For the annexation of lands not subject to an acknowledged plan, the requirements of Goal 14 (Urbanization) shall be considered satisfied only if the city or local government boundary commission, after notice to the county and an opportunity for it to comment, finds that adequate public facilities and services can be reasonably made available; and:
 - “(a) The lands are physically developed for urban uses or are within an area physically developed for urban uses; or
 - “(b) The lands are clearly and demonstrably needed for an urban use prior to acknowledgment of the appropriate plan and circumstances exist which make

1 The city responds, and we agree, that OAR 660-014-0070 does not apply to the
2 challenged annexation. That rule applies only to “[a]nnexations of Lands not Subject to an
3 Acknowledged Comprehensive Plan.” The annexed portion of Stryker Road is within the
4 acknowledged urban growth boundary, subject to the city’s acknowledged comprehensive plan.

5 The more difficult question is whether the goals and policies applied in the city’s decision are
6 sufficient to “control the annexation” for purposes of OAR 660-014-0060, or whether, as
7 petitioners argue, only comprehensive plan provisions and land use regulations that provide specific
8 standards and procedures for annexations are sufficient to “control the annexation.”

9 The city addressed petitioners’ arguments, and concluded that the cited comprehensive plan
10 goals and policies, as well as intergovernmental agreements with Polk County, are sufficient to
11 “control the annexation,” for purposes of OAR 660-014-0060.⁴ For the following reasons, we
12 agree with the city that its comprehensive plan and implementing ordinances sufficiently “control the
13 annexation,” and thus the city did not err in failing to apply the statewide planning goals directly.

14 We observe initially that both OAR 660-014-0060 and 660-014-0070 were first adopted
15 in 1978, at a time when few cities or counties had comprehensive plans or urban growth boundaries
16 that were acknowledged to comply with the goals. In addition, it is likely, given the evolving nature
17 of the goals and the acknowledgment process during that time, that some of the few acknowledged

it clear that the lands in question will be within an urban growth boundary
when the boundary is adopted in accordance with the goals.

“(3) Lands for which the findings in section (2) of this rule cannot be made shall not be
annexed until acknowledgment of an urban growth boundary by the commission as
part of the appropriate comprehensive plan.”

⁴ The city’s findings state:

“The City of Independence finds that the proposed annexation area (Stryker Road) has been
within the Urban Growth Boundary acknowledged in the Comprehensive Plan by LCDC [Land
Conservation and Development Commission]. Further, the urban fringe agreement with Polk
County, as well as the identified policies in the January 2004 hearings have always pertained to
and ‘controlled’ the annexation, in the sense of being relevant to consideration of the
annexation. No annexations are ‘controlled’ by comprehensive plan provisions, in that the
ultimate decision whether to annex property is within the discretion of elected officials,
utilizing political, fiscal, and intergovernmental factors * * *” Record 31.

1 comprehensive plans had no provisions at all that would apply to or govern annexations. That
2 historical understanding suggests that OAR 660-014-0060 and 660-014-0070 have a much more
3 limited role in the present highly regulated environment than they did in 1978.

4 We also observe that ORS chapter 222 sets out the procedures that govern annexations.
5 While a local government may presumably adopt additional local procedures consistent with
6 ORS chapter 222, we do not see that a local government *must* do so, in order to “control the
7 annexation” for purposes of OAR 660-014-0060. In other words, the reference to the
8 “acknowledged comprehensive plan and implementing ordinances” that “control the annexation” is a
9 reference to substantive standards or other applicable policies or provisions that guide a city’s
10 determination whether or not to annex land. OAR 660-014-0060 does not require local
11 governments to adopt procedures specific to annexations.

12 Further, what substantive standards or applicable provisions will govern a particular
13 annexation will depend in part on the nature of the annexation. For example, the considerations that
14 govern annexation of a small stretch of city-maintained right-of-way such as Stryker Road may well
15 differ from those that govern annexation of a large parcel for industrial, commercial or residential
16 uses. Annexations of different lands for different purposes will potentially trigger different
17 comprehensive plan and land use ordinance provisions, just as different annexations may require
18 review under some statewide planning goals, but not others.

19 Here, the city identified comprehensive plan policies that implement the statewide
20 urbanization and transportation goals. Petitioners’ brief does not identify which statewide planning
21 goals they believe apply directly to the challenged annexation, but we understand petitioners to
22 argue that at least Goal 14 applies. The comprehensive plan urbanization goal that the city applied
23 is apparently identical to Goal 14 itself.⁵ See n 1. Nothing in Goal 14 refers to annexations or

⁵ Goal 14 is “[t]o provide for an orderly and efficient transition from rural to urban land use.” There is no reference in Goal 14 to annexations, although the goal provides standards for converting “urbanizable land” to “urban land.” As those terms are defined in the goals, it seems likely that the annexed portion of Stryker Road would be characterized as “urban land” rather than “urbanizable land.”

1 provides specific standards governing annexations, much less standards governing annexation of a
2 right-of-way. In contrast, the city comprehensive plan urbanization policy that the city relied upon
3 refers to annexations and appears to provide relevant guidance with respect to annexations.

4 Even if we were inclined to agree with petitioners that the cited plan goal and policies are
5 not specific enough to “control the annexation,” petitioners do not explain what purpose would be
6 served by remanding the decision to the city to directly apply the general language of Goal 14,
7 rather than the more specific language in the city policies implementing Goal 14. Petitioners do not
8 argue that findings addressing whether the proposed annexation of Stryker Road complies with
9 Goal 14 would be any different than findings addressing the city goal and policies, and we do not
10 see that they would. Petitioners do not challenge the adequacy of the city’s findings addressing the
11 plan goals and policies. As far as petitioners have shown, those findings would seem entirely
12 adequate to demonstrate that the challenged annexation is also consistent with Goal 14.

13 In any case, given the limited nature of the challenged annexation, we agree with the city that
14 the cited comprehensive plan goals and policies are sufficient to “control the annexation,” for
15 purposes of OAR 660-014-0060. Therefore, the city did not err in not applying the statewide
16 planning goals directly.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioners contend that the city failed to provide proper notice of the November 23, 2004
20 hearing, causing prejudice to petitioners’ substantial rights.

21 On November 1, 2004, the city provided petitioners with the following notice of the
22 November 23, 2004 hearing:

23 “[LUBA] has remanded back to the City of Independence for further review [of the
24 city’s] decision granting approval of the annexation of Stryker Road in file A-01-
25 2004. LUBA has agreed with the [petitioners] that certain findings for Resolution
26 No. 04-1120 did not support the City’s final decision. In particular, the City is to
27 determine to what extent the proposed annexation of Stryker Road is ‘reasonable’
28 under the applicable Policy of the Independence Comprehensive Plan

1 (Urbanization) and (Transportation Pol. 1), ORS Chapter 222 and PGE v. City of
2 Estacada.

3 “This remand will not include a public hearing, as the only parties to this continued
4 proceeding are the [petitioners] (and through their counsel). The Council will
5 consider the existing testimony within the record and new testimony from the parties
6 and staff. The parties may present written argument, which will be limited to the
7 issues remanded by LUBA specified above. Argument must be received by the
8 City by 12:00 p.m. Friday, Nov. 19, 2004 in accordance with City Council policy.
9 The Council will consider the existing testimony and evidence in the record. * * *”
10 Petition for Review, Exhibit B.

11 Petitioners first fault the city for not providing a “public hearing,” *i.e.*, for providing notice
12 only to petitioners and allowing only the parties from the initial proceeding to testify, rather than
13 members of the general public. However, even if the city erred in that respect, which we do not
14 decide, that procedural error would not assist petitioners. Failure to follow applicable procedures is
15 a basis for reversal or remand only if the error “prejudiced the substantial rights of the *petitioner*.”
16 ORS 197.835(9)(a)(B) (emphasis added). Prejudice to persons other than the petitioner is not a
17 basis for reversal or remand. *Cape v. City of Beaverton*, 41 Or LUBA 515, 523 (2002).

18 Petitioners next argue that the notice erroneously limited the testimony and issues considered
19 at the hearing to the “reasonableness” standard in *Portland General Elect. Co*. Given proper
20 notice of the scope of the hearing, petitioners contend, they could have prepared testimony on other
21 issues, including compliance with applicable statewide planning goals. Relatedly, petitioners fault the
22 notice for failing to list the statewide planning goals as applicable criteria.

23 Finally, petitioners argue that at the November 23, 2004 hearing the city attorney stated, in
24 response to a question from a city councilor as to whether “new evidence” would be received, that
25 everything submitted at the hearing was “evidence, so yes.” Record 33. According to petitioners,
26 that statement converted the nature of the hearing from one limited to argument only on discrete
27 issues to an open-ended evidentiary proceeding. Petitioners fault the city for failing to provide
28 adequate notice that the character of the hearing would change to an evidentiary proceeding.

1 Contrary to petitioner’s argument, the notice does not limit the scope of the hearing to the
2 “reasonableness” standard. Even if it could be so construed, petitioners presented oral and written
3 testimony, including affidavits, that dealt with issues beyond the reasonableness standard. The city
4 accepted that testimony and evidence, and adopted responsive findings, including findings
5 addressing petitioners’ contention that the statewide planning goals applied. Petitioners have not
6 established that the city erroneously narrowed the scope of the hearing.

7 With respect to providing notice of the statewide planning goals, the city has taken the
8 position throughout the initial and the remand proceeding that the statewide planning goals do not
9 apply directly. We affirmed that position under the first assignment of error. Failure to provide
10 notice of standards that the city does not believe apply and that in fact do not apply is not error. In
11 any case, the only cited source of the obligation for the city to provide notice of the goals is
12 ORS 197.763(3). That statute requires that the notice list only the “applicable criteria from the
13 ordinance and plan * * *.”

14 Finally, we disagree with petitioners that the city belatedly converted the hearing into an
15 evidentiary proceeding. The city attorney’s statement that everything submitted at the hearing is
16 “evidence” simply recognizes that the city has limited ability to police the content of testimony. In
17 any case, even if the city opened up the hearing to new evidence, any error in doing so did not
18 prejudice petitioners. Petitioners were the only persons that testified at the hearing. The affidavits
19 and other testimony they submitted included what is probably “new evidence.” *See* Affidavit of
20 Robert Patterson, Record 41-46. Petitioners are in no position to fault the city for expressing a
21 willingness to accept new evidence, when petitioners were the only parties that testified and the only
22 persons to submit new evidence. That the city accepted the new evidence petitioners submitted at
23 the hearing does not obligate the city to provide notice to petitioners that new evidence would be
24 accepted, or provide additional hearings at which petitioners could present additional new evidence.

25 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioners challenge the city’s conclusion that the annexation is “reasonable” under
3 *Portland General Elect. Co.* According to petitioners, the only reason to annex Stryker Road is
4 to create an “island” and thus allow forced annexation of petitioners’ property, pursuant to
5 ORS 222.750. Petitioners dispute the city’s conclusion that annexation of the road will benefit the
6 city, arguing that the city already maintains and patrols the road, and that annexation will change
7 nothing other than to allow the city to annex petitioners’ property.⁶

8 The annexation of a small stretch of road that the city maintains and patrols and that begins
9 and ends within city limits is clearly reasonable under *Portland General Elect. Co.* The city may
10 ultimately wish to annex petitioners’ property, and under existing statutes the challenged annexation
11 may facilitate such an annexation.⁷ However, even if that consideration is the motivating force

⁶ The city’s findings state, in relevant part:

“The City has had jurisdiction and maintenance responsibility over all of Stryker Road for several years. The City discovered in late 2003 that the northern portion of the road was not included within the city limits. The intent of the annexation of Stryker Road was to correct that error. The road is contiguous with the city limits, connecting to the portion of Stryker Road already within city limits. The annexation of a road connection is reasonable under the PGE v. Estacada line of cases. It is reasonable to complete an ‘island’ portion of right of way. It is reasonable to annex it to upgrade the ditches, and perform other maintenance. The annexation of property within a UGB to provide urban maintenance services is eminently reasonable. The City has responsibilities for the road, and it is reasonable for those responsibilities to be exercised within city limits. The annexation is the most practical thing to do, given that the entire road is within the City’s Urban Growth Boundary. Easements for city utilities and for public utilities, as well as the dedication to the public would now flow to the City, not the County upon the City’s annexation, making administration of franchises more economical and clear. This annexation passes the parachute test: if you were to parachute and land on the annexed property, you would be unable to travel along Stryker without encountering another city street. This is a small dependent stretch of right of way that belongs in the City.

“The annexation of Stryker Road is reasonable because it is consistent with the Comprehensive Plan. The City concludes that the annexation was consistent with the agreement with Polk County, and is therefore reasonable. The City concludes that as the City already maintains the road, there would be no fiscal impact upon the City, making it reasonable to proceed with annexation. These factors show the reasonableness of the City’s consideration of this annexation. The Council finds that the proposed annexation of Stryker Road meets the ‘reasonableness’ test of PGE v. Estacada.” Record 15.

⁷ One could argue, of course, that petitioners currently benefit from city maintenance and patrols of the annexed portion of Stryker Road adjoining their property, without paying for those services. It is difficult to fault

1 behind the annexation of Stryker Road, as petitioners allege, the city's findings provide an adequate
2 explanation for why the annexation of Stryker Road is, in itself, reasonable. It is entirely reasonable
3 for a city to annex roads that it maintains or lands it services. *See Kane v. City of Beaverton*, ____
4 Or LUBA ____ (LUBA No. 2005-018, June 17, 2005) slip op 14, *appeal pending* (annexation of
5 unincorporated territory that the city is obligated to provide services to is reasonable, even if city
6 services are no better than county services).

7 The third assignment of error is denied.

8 The city's decision is affirmed.

the city for wanting to annex lands the residents of which benefit from city services, but who do not pay for those services.