

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JOHN BOWLER,
5 *Petitioner,*

6
7 and

8
9 HOLGER T. SOMMER,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 CITY OF CAVE JUNCTION,
15 *Respondent.*

16
17 LUBA No. 2007-220

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19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Cave Junction.

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24 John Bowler, Kerby, filed the petition for review and argued on his own behalf.

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26 Holger T. Sommer, Merlin, represented himself.

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28 No appearance by City of Cave Junction.

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30 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
31 participated in the decision.

32
33 REMANDED

02/14/2008

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision by the city annexing approximately 6.5 acres of land into the city and amending the zoning map designation for the property.

MOTION TO INTERVENE

Holger T. Sommer moves to intervene on the side of petitioner in this appeal. There is no opposition to the motion, and it is granted.

FACTS

In June, 2007, the owner of the subject property applied to have the property annexed into the city and to change the zoning map designation from Rural Residential 5 to Single Family Residential. The city council held public hearings on the annexation and the city council voted to approve the annexation and zoning map change. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner argues that the city’s findings are inadequate because the findings do not address Cave Junction Comprehensive Plan (CJCP) Goal 11 (Public Facilities and Services). CJCP Goal 11 provides in relevant part that the city will not annex property unless all public services are available. One of the public services listed in CJCP Goal 11 is “Police Protection.”

Petitioner argues that the city’s findings are inadequate because they fail to address whether police protection is available. The findings list the CJCP as an applicable approval criterion. The section of the findings entitled “Evidence and Facts” explains that the city’s planning consultant advised the city that the Cave Junction Municipal Code (CJMC) only refers to sewer and water services, and does not mention police services. Although the findings address the availability of sewer and water services, the findings are silent regarding the availability of police services. The findings conclude in relevant part that “[p]ublic

1 utilities and services are adequate to accommodate urban levels of development on the
2 property.” Record 13.

3 To the extent the city concluded that it was not required to determine whether police
4 services are available because police services are not mentioned in the CJMC, we reject that
5 conclusion. The provisions of the CJCP also apply to the proposed annexation, and
6 accordingly the city must address applicable CJCP provisions, including CJCP Goal 11. The
7 city must either find that CJCP Goal 11 is met, specifically, that the listed public services
8 including police protection are available, or explain why those provisions do not apply to the
9 proposed annexation.

10 The first assignment of error is sustained.

11 **SECOND ASSIGNMENT OF ERROR**

12 An intergovernmental agreement between the city and Josephine County (IGA) is
13 incorporated into the CJCP. The IGA provides in relevant part that annexations may be
14 approved only if the city finds that “urban level services” can be provided to the property
15 proposed to be annexed.¹ Petitioner argues that the city’s finding quoted above, that all
16 public utilities and services are adequate to accommodate urban levels of services on the
17 property, is inadequate and is not supported by substantial evidence in the record.

18 According to petitioner, although the IGA does not define the term “urban level
19 services,” the Statewide Planning Goals definition of “Public Facilities and Services”
20 includes facilities that are necessary for public safety. Petitioner also points out that the
21 explanation of “urban facilities and services” found in Goal 11 (Public Facilities) refers to
22 “police protection.”²

¹ Section 1(E) of the IGA provides in relevant part:

“* * * Annexations to the City of Cave Junction shall be approved only upon findings that
urban level services can be provided. * * *”

² The definitions section of the Statewide Planning Goals defines “Public Facilities and Services” as:

1 As noted above, the city’s findings address the availability of water and sewer
2 services to the property, but are silent regarding the availability of police protection. The
3 findings list the IGA as an applicable approval criterion. The city was required to address
4 whether, under Section 1(E) of the IGA, police protection is an “urban level service” that is
5 required to be provided before an annexation can be approved, and if so, whether police
6 protection is available to serve the property.

7 The second assignment of error is sustained.

8 **THIRD ASSIGNMENT OF ERROR**

9 In his third assignment of error, petitioner argues that the decision violates ORS
10 197.752(1). ORS 197.752(1) provides:

11 “Lands within urban growth boundaries shall be available for urban
12 development concurrent with the provision of key urban facilities and services
13 in accordance with locally adopted development standards.”

14 As petitioner correctly points out, we held in *Just v. City of Lebanon*, 45 Or LUBA 179, 187
15 (2003) that ORS 197.752(1) does not mandate that all urban services and facilities are
16 available to a property at the time of annexation. Petitioner does not explain why our
17 decision in *Just* was error, and we see no reason to revisit that decision.

18 The third assignment of error is denied.

19 The city’s decision is remanded.

“Projects, activities and facilities which the planning agency determines to be necessary for the public health, safety and welfare.”

Goal 11 explains that the phrase “urban facilities and services”:

“Refers to key facilities and to appropriate types and levels of at least the following: police protection; sanitary facilities; storm drainage facilities; planning, zoning and subdivision control; health services; recreation facilities and services; energy and communication services; and community governmental services.”