

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 BENJAMIN D. KNAUPP, DWIGHT OBERG,
5 MICHELLE WARREN, TERRY PETERS,
6 MARVIN VANAKEN, DOHN COWLES
7 and LINDA MONTE,
8 *Petitioners,*

9
10 vs.

11
12 CITY OF FOREST GROVE,
13 *Respondent.*

14
15 LUBA No. 2013-020

16
17 FINAL OPINION
18 AND ORDER

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20 Appeal from City of Forest Grove.

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22 Benjamin D. Knaupp, Hillsboro, filed the petition for review and argued on behalf of
23 petitioners. With him on the brief was Garland Griffiths Knaupp, Attorneys.

24
25 Christopher D. Crean, Portland, filed the response brief and argued on behalf of
26 respondent. With him on the brief was Beery, Elsner & Hammond LLP.

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28 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
29 participated in the decision.

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31 AFFIRMED

06/13/2013

32
33 You are entitled to judicial review of this Order. Judicial review is governed by the
34 provisions of ORS 197.850.
35

NATURE OF THE DECISION

Petitioners appeal an annexation ordinance passed by the city council of the City of Forest Grove.

FACTS

The ordinance that is the subject of this appeal annexes 109 separate properties. Those properties are grouped into 29 different noncontiguous areas. All of those 29 areas are surrounded by property that is already part of the city. Petitioners are the owners of some of the annexed properties. In annexing the properties, the city relied on ORS 222.175, which authorizes cities to annex unincorporated territory that is surrounded by the city without an election (generally referred to as island annexation). The ordinance was adopted on February 11, 2013, and took effect 30 days later, on March 13, 2013. In a separate order, which was not appealed to LUBA, the city applied city zoning to replace the county zoning that formerly applied to the annexed properties.

In their first assignment of error, petitioners argue the city was required by ORS 222.750(5) to delay the effective date of the annexation ordinance for at least three years, and erred by failing to do so. In their second assignment of error, petitioners contend the annexation is inconsistent with the city’s comprehensive plan and the Metro Code.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the effective date of the annexation, 30 days from the date of approval, violates ORS 222.750(5). Under that statute, “[f]or property that is zoned for, and in, residential use when annexation is initiated by the city,” the effective date of the annexation must be delayed for at least three years.¹ At the time annexation was initiated,

¹ ORS 222.750(5) provides in relevant part:

1 there is no dispute that many of the annexed properties, including those owned by petitioners,
2 were “in” “residential use.” The dispute in the first assignment of error is limited to whether
3 the properties were also “zoned for * * * residential use.” If they were, ORS 222.750(5)
4 requires that the city delay the effective date for three years.

5 The meaning of “zoned for * * * residential use,” as those words are used in ORS
6 222.750(5), is ambiguous because most zoning districts allow some residential use. The
7 statute does not specify whether the “zoned for * * * residential use” requirement is satisfied
8 if the applicable zone authorizes “any” residential use (petitioners’ position) or whether the
9 zone must “primarily” authorize residential uses (the city’s position). There are problems
10 with both petitioners’ and the city’s position. Under petitioners’ understanding of the statute,
11 even industrial zones that may allow limited residential use and the statutory exclusive farm
12 use (EFU) zone, which allows very limited residential use, would satisfy the “zoned for * * *
13 residential use” requirement. We seriously doubt the legislature considers industrial and
14 EFU-zoned property as property that is “zoned for * * * residential use.” But the city’s
15 interpretation also has problems. First, it arguably inserts a word of limitation (primarily)
16 into the statute that is simply not there, in contravention of ORS 174.010.² Second, deciding
17 whether a zoning district “primarily” allows residential uses would almost certainly be a
18 highly subjective exercise for which the statutory language provides essentially no guidance.

19 The legislative history of HB 2760, which was enacted in 2007 and adopted the
20 language now codified at ORS 222.750(5), sheds no light on the legislature’s intended

“For property that is zoned for, and in, residential use when annexation is initiated by the city under this section, the city shall specify an effective date for the annexation that is at least three years and not more than 10 years after the date the city proclaims the annexation approved.”

² ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

1 meaning of the words “zoned for * * * residential use.” Although both petitioners’ and the
2 city’s interpretations have problems, we believe petitioners’ interpretation has the advantages
3 of being far more certain in its application and more consistent with the actual language of
4 the statute. We therefore conclude that under ORS 222.750(5), a property is “zoned for * * *
5 residential use” if it is located in a zone that allows dwellings or residences as a permitted
6 use.

7 As noted earlier, at the time annexation was initiated, the subject properties were
8 subject to *county* zoning. All of the annexed properties were designated Future Development
9 10 Acre District (FD-10) by Washington County. The “Intent and Purpose” of the FD-10
10 zone is set out at Washington County Community Development Code (CDC) 309-1, which
11 provides:

12 “The FD-10 District applies to the unincorporated portions of some city active
13 planning areas where these cities are the only available source of urban
14 services. *The FD-10 District is in limited agricultural, forest, or residential*
15 *use.* The FD-10 District recognizes the desirability of encouraging and
16 retaining limited interim uses until a need for more intensive urban land use
17 activities develops and such lands are annexed to a city.” (Emphasis added.)

18 Petitioners contend the CDC 309-1 reference to “residential use” is sufficient to establish that
19 their FD-10 zoned properties are “zoned for * * * residential use.”

20 We agreed above with petitioners that ORS 222.750(5) is correctly interpreted to
21 provide that property that is zoned to allow residential use as a permitted use in the zone is
22 property that is “zoned for * * * residential use.” However, we do not agree that the CDC
23 309-1 reference to “residential use” is sufficient to establish that their FD-10 zoned properties
24 are “zoned for * * * residential use.” CDC 309-1 describes the “Intent and Purposes” of the
25 FD-10 zone. CDC 309-1 simply states that the properties in the FD-10 zone are “in limited
26 agricultural, forest, or residential use.” That recognition of uses that already exist in FD-10
27 zones is not sufficient to establish that properties that are zoned FD-10 are “zoned for * * *
28 residential use.” To determine if the FD-10 zone permits any residential use, the list of

1 permitted uses must be considered. The only potentially applicable permitted use that any
2 party identifies is set out at CDC 309-2.4, which lists the following as a permitted use:

3 “Detached Dwelling Unit (one) only in areas designated for residential use by
4 the applicable city * * *.”

5 The city contends that FD-10 zoned properties are in a zone that serves as a holding
6 zone until FD-10 zoned properties are annexed in the future and rezoned by the city. The city
7 contends that the FD-10 zoned properties that were annexed by the appealed ordinance were
8 not “zoned for * * * residential use.”

9 “[W]ith respect to the residential use in the FD-10 District, the district
10 specifically allows only ‘(one)’ dwelling and ‘only in areas designated for
11 residential use by the applicable city.’ [CDC] 309-2.4. Here, the ‘applicable
12 city’ is the City of Forest Grove and the subject properties were not
13 ‘designated for residential use’ by the City until *after* the City annexed the
14 properties and applied the City zones. * * * In other words, Petitioners’
15 properties were not ‘in an area designated for residential use by the applicable
16 city’ for purposes of the FD-10 zone. Therefore, because the city zoning did
17 not allow for residential use of the subject property at the time the annexation
18 was initiated, the properties were not ‘zoned for’ residential use under the
19 specific terms of the FD-10 zone.” Respondent’s Brief 6 (emphasis in
20 original).

21 Petitioners did not argue in their petition for review that the annexed residentially developed
22 properties were in “areas designated for residential use by” Forest Grove at the time they
23 were annexed. Neither did they respond to the city’s contention in its brief that they were not
24 so designated by the city at the time of annexation. We therefore assume the annexed areas
25 were not “designated for residential use by” the City of Forest Grove at the time the
26 properties were annexed, as the city argues. Therefore, the subject FD-10 zoned annexed
27 properties were not “zoned for * * * residential use” at the time they were annexed, and ORS
28 222.750(5) therefore does not apply to the appealed ordinance.

29 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioners next argue that when the city failed to annex the local access roads
3 adjacent to the island properties at the time of the annexation, while simultaneously
4 withdrawing the roads from the Washington County Urban Road Maintenance District, it did
5 not comply with certain comprehensive plan transportation goals or with the requirements of
6 the Metro Code.

7 As an initial point, although it does not affect our disposition of this appeal, it appears
8 that the city did annex the local access roads that petitioners believe were not annexed.
9 Those local access roads are now located within the city as far as we can tell from the record.
10 What the city has not yet done is accept jurisdiction over those roads or responsibility for
11 maintaining those roads. We understand petitioners to assign error to the city’s failure to
12 contemporaneously accept jurisdiction and road maintenance responsibility, while removing
13 the roads from the Washington County Urban Road Maintenance District.

14 **A. Forest Grove Comprehensive Plan**

15 Petitioners believe that because the annexation ordinance withdraws the local access
16 roads from the Washington County Urban Road Maintenance District, Washington County
17 will not maintain these roads, and the citizens of the island properties will be left with neither
18 the city nor the county responsible for street maintenance. Petitioners assert that Section
19 10.2.770.B of the Forest Grove Land Development Ordinance (LDO) requires the city to
20 determine that the annexation ordinance is consistent with relevant provisions of the city’s
21 comprehensive plan,³ arguing specifically that the ordinance does not comply with two goals
22 relating to transportation infrastructure maintenance.⁴ However, LDO 10.2.770.B provides

³ Section 10.2.770, Review Criteria, provides, in part:

“B. The zone change is consistent with relevant goals and policies of the Comprehensive Plan, as identified by the Director.”

⁴ The comprehensive plan transportation goals cited by petitioners provide as follows:

1 standards and criteria that must be satisfied *when amending the zoning map*. LDO 10.2.750.⁵
2 Petitioners did not appeal the order that approved the zoning map amendments. Therefore,
3 petitioners’ arguments under LDO 10.2.770.B provide no basis for reversal or remand of the
4 annexation ordinance.

5 Although LDO 10.2.770.B does not apply to the annexation ordinance, the city
6 contends that the annexation is nevertheless consistent with the cited transportation policies.
7 The city points out that under ORS 373.270 annexation of the disputed areas is a necessary
8 step for the city to assume jurisdiction over the annexed roads.⁶ Under ORS 373.270, city
9 assumption of jurisdiction, and responsibility for street maintenance, is a separate notice and
10 hearing process before the county and city. The city points to the following city findings:

11 “The City of Forest Grove maintains streets under the City’s jurisdiction
12 through the Forest Grove Public Works Department. Annexation of the
13 subject territory does not automatically transfer road jurisdiction from
14 Washington County to the City of Forest Grove. Separate City Council action
15 is required to accept jurisdictional control of streets. Annexation does provide
16 an opportunity for property owners to work with the City [to] help fund road
17 improvements when jurisdictional control is transferred.” Record 209.

18 The city also points out that in a city council work session the issue of street maintenance and
19 improvement for the annexed roads was specifically addressed:

20 “In response to various Council inquires pertaining to street-improvement-
21 related concerns, [city senior planner] Riordan advised there is no schedule
22 nor is the City guaranteeing affected property owners that the City will
23 improve the streets upon annexation; however, there would be greater
24 likelihood that concerns about street conditions could be addressed through

“1. PROVIDE FOR BALANCED, EFFICIENT, AND SAFE TRANSPORTATION OF PEOPLE AND GOODS WITHIN AND THROUGH THE CITY.”

“5. ENSURE THAT A HIGH PRIORITY BE GIVEN TO IMPROVEMENT OF THE EXISTING STREET SYSTEM.”

⁵ LDO 10.2.750 provides in part “[LDO section 10.2] provides standards and criteria for amending the Zoning Map.”

⁶ ORS 373.270 provides, in part: “Jurisdiction over a county road within a city may be transferred under this section * * *.”

1 LID [local improvement districts]. [Community Development Director]
2 Holan and Riordan stressed it is important to note that annexation does not
3 automatically transfer County Roadway jurisdiction to the City, noting in the
4 future, if and when the roadways fall under City jurisdiction, the adjacent
5 property owners would have an opportunity to form an LID. Mayor Truax
6 stressed the importance of the County and City working jointly to address
7 street improvements and transferring roadway jurisdiction. * * *” Record 327.

8 The above findings explain that annexation of the 29 areas and local access streets
9 improves the chances that the city will assume jurisdiction over the roads and that an LID can
10 be approved to improve the roads. We understand petitioners to be concerned that
11 withdrawal of the affected local access streets from the Washington County Urban Road
12 Maintenance District, and the current lack of county funding for road maintenance generally,
13 will leave these local access streets as low priority county roads, and likely without funding
14 for maintenance, until jurisdiction is transferred to the city and an LID can be approved.

15 Despite petitioners’ preference to remain in the Washington County Urban Road
16 Maintenance District, we cannot say the annexation ordinance violates the very general cited
17 comprehensive plan transportation policies, assuming they apply to the disputed annexation.
18 The findings explain that the likelihood that the currently substandard roads will be improved
19 is actually increased by the annexation, which is arguably consistent with policy 5. *See* n 4.
20 And the current scarcity of county road maintenance funding does not mean that annexation
21 prior to the city’s assumption of jurisdiction violates policy 1. *See* n 4. Whether the county
22 or the city have jurisdiction over the roads, funding availability can affect the ability of the
23 responsible government to maintain small access roads.

24 This subassignment of error is denied.

25 **B. Metro Code**

26 Petitioners argue that the annexation ordinance does not comply with Chapter 3.09 of
27 the Metro Code (MC): Local Government Boundary Changes.⁷ Petitioners specifically argue

⁷ MC 3.09.050(D) provides:

1 that the annexation ordinance does not comply with MC 3.09.045(D)(2), echoing their earlier
2 argument that the removal of the local access roads from the county’s road maintenance
3 district without bringing them into the city limits leaves residents without a “timely”
4 provision of “public services.” Petition for Review 9-10. As previously discussed, the city
5 has addressed the issue of jurisdiction over local access roads. Additionally, although MC
6 3.09.045(D)(2) only requires the city to “consider” the listed items, the city specifically
7 adopted findings regarding compliance with MC 3.09.045(D)(2):

8 “The proposed annexation promotes and does not interfere with the timely,
9 orderly and economic provision of public facilities and services for the
10 following reasons. Extra-territorial connection to the sanitary sewer system is
11 restricted by City policy including the Forest Grove Municipal Code. As such,
12 timely, orderly and economic provision of public facilities and service is not
13 possible since discontinuous pockets of unincorporated land lacking city
14 services creates an impediment to the extension of sanitary sewer lines in the
15 Forest Grove planning area. Efficient delivery of police protection is also
16 hampered by the presence of discontinuous unincorporated areas since primary
17 responsibility for police protection in these areas falls to the Washington
18 County Sheriff’s office. * * *” Record 205-06

19 Petitioners do not challenge the above-quoted findings, which make it clear that MC
20 3.09.045(D)(2) is concerned with far more than short-term maintenance of local access roads.
21 In findings adopted to address the city urban planning area agreement with Washington
22 County, the city expressly recognizes that Washington County will remain responsible for
23 maintaining the local access streets until jurisdiction is transferred to the city: “Routine street

“To approve a boundary change, the reviewing entity shall apply the criteria and consider the factors set forth in subsections (D) and (E) of section 3.09.045.”

MC 3.09.045(D) provides:

“To approve a boundary change through an expedited process, the city shall:

- “2. Consider whether the boundary change would:
 - “a. Promote the timely, orderly and economic provision of public facilities and services;
 - “b. Affect the quality and quantity of urban services[.]”

1 maintenance will remain the responsibility of the facility owner.” Record 203. That the
2 county may currently have inadequate funding available to adequately maintain all its
3 roadways does not mean the city violated MC 3.09.045(D)(2) in annexing the disputed areas
4 in advance of city assumption of jurisdiction over—and road maintenance responsibility
5 for—those roads.

6 This subassignment of error is denied.

7 The second assignment of error is denied.

8 The city’s decision is affirmed.