BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALTAMONT HOMEOWNERS' ASSOCIATION, INC.,
Petitioner,

vs.

CITY OF HAPPY VALLEY,
Respondent,

and

PRESTIGE CARE, INC.,
Intervenor-Respondent.

LUBA No. 2015-070

FINAL OPINION
AND ORDER

Appeal from City of Happy Valley.

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

No appearance by City of Happy Valley.

Kelly S. Hossaini, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Miller Nash Graham & Dunn LLP.

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

REMANDED 03/11/2016

You are entitled to judicial review of this Order. Judicial review is

governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a city ordinance that annexes a vacant 7.04-acre parcel and a portion of SE Johnson Creek Boulevard into the city and applies city plan and zoning map designations to the vacant parcel.

FACTS

Intervenor-respondent Prestige Care, Inc. (intervenor) owns a 7.04-acre property located in the Altamont planned unit development, which was approved by Clackamas County and developed in the 1990s. The Altamont planned unit development is included in the Happy Valley Urban Planning Area (HVUPA), an area that includes certain unincorporated areas within the county that are located within the Metro urban growth boundary. Growth in the HVUPA is regulated pursuant to an Urban Growth Management Agreement between the city and the county.[1]

Intervenor applied to the city for annexation of its parcel into the city, and for a zone change from the county's Low Density Residential (R-15) designation to the city's Mixed Use Commercial (MUC) designation, to allow development of a senior care facility. The annexation application also sought annexation of an approximately 70-foot-wide by 1,230-foot-long portion of SE Johnson Creek Boulevard from the city limits to the point where it adjoins

[1] The UGMA is appended to the response brief, and intervenor asks LUBA to take official notice of the UGMA pursuant to OEC 202(7). Petitioner does not object to the motion and we take official notice of the UGMA.

intervenor's property. Record 586. That portion of SE Johnson Creek Boulevard is owned by Clackamas County and is unimproved.[2]

The planning commission held a public hearing on the applications and recommended approval of the applications to the city council. The city council held a public hearing on the applications and voted to approve the applications. The city council subsequently adopted Ordinance 480. This appeal followed.

FIRST ASSIGNMENT OF ERROR

We understand petitioner's first assignment of error to contain two separate subassignments of error, although not delineated as such. First, we understand petitioner to argue that the city's findings that were adopted in support of Ordinance 480 are inadequate. Second, we understand petitioner to argue that the city erred in (1) failing to apply city plan and zoning designations to the annexed portion of SE Johnson Creek Boulevard; and (2) failing to zone intervenor's parcel to a city zone that corresponds to the county's Low Density Residential zone, the zone that applied prior to annexation. We address each argument in turn.

A. The City's Findings

Adequate findings are required to support quasi-judicial land use decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977). Generally, findings must: (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and

[2] The annexation is a type that the parties refer to as a "cherry stem annexation," which refers to annexation of a non-contiguous parcel (the "cherry"), together with the territory between that parcel and the city (the "stem"), that is necessary to make the parcel and the city contiguous as required by ORS 222.111(1).

(3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

Section 3 of Ordinance 480 provides:

> "The City Council adopts the subject annexation application * * * and associated Staff Report to the City Council, including Findings of Fact dated September 15, 2015. The City Council adopts the Supplemental Findings [from intervenor's attorney] dated September 3, 2015." Record 10.

The September 15, 2015 staff report includes "Exhibits," (Exhibits A through N), "Exhibits from Planning Commission Hearing" (Exhibits O through U), and "Exhibits Submitted for City Council Hearing" (Exhibits V through II). Record 84-85. Some of the exhibits are letters and statements in support of the request and others are in opposition to the annexation request.

In its first subassignment of error, petitioner argues that the findings that the city council adopted are inadequate as a matter of law because the September 15, 2015 staff report includes multiple exhibits, some of which support and others of which oppose the annexation application. However, when the list of documents the city council adopted as findings in section 3 of Ordinance 480 is read in context, it is reasonably clear that (1) the exhibits that are listed on the first and second pages of the staff report are intended to be summary lists of documents entered into the record as of the date of the staff report; and (2) the city council intended to adopt as findings the "Findings of Fact" section of the staff report, and not the entire staff report. Section 3 specifically refers to the "Findings of Fact" section of the staff report. More importantly, petitioner does not point to any specific findings that it alleges are inadequate to explain why the city council concluded that the annexation request should be approved. Absent a more developed challenge to the city's

findings, this subassignment of error provides no basis for reversal or remand of the decision.

B. Happy Valley Land Development Code (LDC) 16.67.070

Happy Valley Land Development Code (LDC) 16.67.070 provides in relevant part:

> "Except as provided in subsection B of this section, when a property or area is annexed to the City from unincorporated Clackamas County with an accompanying Clackamas County Comprehensive Plan designation and zone, the action by the City Council to annex the property or area shall include an ordinance to amend the City's Comprehensive Plan map/zoning map to reflect the conversion from the County designation/zone to a corresponding City designation/zone, as shown in Table 16.67.070-1 below."

As described above, intervenor submitted applications to annex its parcel and a portion of SE Johnson Creek Boulevard into the city and to change the plan and zone designations to MUC. In an argument under the first assignment of error, petitioner argues that the city erred in failing to apply city plan and zoning designations to the annexed portion of SE Johnson Creek Boulevard. Intervenor responds that petitioner failed to raise that issue during the proceedings below and may not now raise it for the first time on appeal to LUBA. Petitioner has not responded to intervenor's waiver argument. We agree with intervenor that petitioner has waived the issue regarding the city's failure to apply city plan and zoning designations to the annexed portion of SE Johnson Creek Boulevard. ORS 197.763(1); ORS 197.835(3).[3]

[3] Under ORS 197.763(1), a petitioner must raise an issue which may be the basis for an appeal to LUBA no later than the close of the record at or following the final evidentiary hearing on the proposal. ORS 197.835(3) limits

Intervenor also responds that even if the issue was not waived, nothing in LDC 16.67.070 obligated the city to apply city plan and zoning designations to SE Johnson Creek Boulevard because the annexed portion of the road did not have a county plan and zoning designation prior to annexation. We agree with intervenor on the merits as well.

In another argument under the first assignment of error, petitioner argues that the city erred in failing to first apply a city zoning designation that more closely corresponds to the county's Low Density Residential zone, as petitioner argues that LDC 16.67.070 and Table 16.67.070-1 require, before considering intervenor's concurrent application to change the zoning of the property to MUC. As we understand the argument, it is that the city improperly construed LDC 16.67.070 in failing to apply a low density residential zone to the newly annexed properties and instead approving intervenor's requested plan and zone change applications. Intervenor responds that LDC 16.67.030 and 16.67.070 allow an applicant for an annexation to submit a concurrent application to change the zoning of the property to a different designation than would otherwise be required by Table 16.67.070-1.[4]

LUBA's scope of review to issues that have been raised in accordance with ORS 197.763.

[4] LDC 16.67.030(C) provides:

> "Criteria for Quasi-Judicial Amendments. A recommendation or a decision to approve, approve with conditions or to deny an application for a quasi-judicial amendment shall be based on all of the following criteria:
>
> "1. Approval of the request is consistent with the Statewide Planning Goals;

The city adopted findings that interpret relevant provisions of the LDC and conclude:

> "LDC 16.67.030 and 16.67.070 do not prohibit concurrent annexation and zone change applications. Together these code sections require that an applicant for annexation submit a zone change application if the applicant desires a zoning designation that is different from the designation that would otherwise be required pursuant to Table 16.67.070-1. Because the applicant desires a different zoning designation, i.e. a change from County R-15 to City MUC, the applicant has submitted the appropriate zone change application." Record 440.

> "2. Approval of the request is consistent with the applicable goals and policies of the City's Comprehensive Plan;
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> "3. The property and affected area is presently provided with adequate public facilities, services and transportation networks to support the use, or such facilities, services and transportation networks are planned to be provided in the planning period; and
>
> "4. The change is in the public interest with regard to neighborhood or community conditions, or corrects a mistake or inconsistency in the Comprehensive Plan or land use district map regarding the property which is the subject of the application; and
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> "5. When an application includes a proposed Comprehensive Plan map amendment/land use district map amendment, the proposal shall be reviewed to determine whether it conforms to Oregon Administrative Rule (OAR) 660-012-0060 (the Transportation Planning Rule – TPR). If a master plan that requires a full traffic impact analysis is required for a Comprehensive Plan map amendment/land use district map, a subsequent master plan may satisfy this provision, as determined by the Planning Official."

Petitioner does not recognize or acknowledge the city council's interpretation or otherwise address it. Absent any acknowledgment of or challenge to the city's interpretation, petitioner's argument provides no basis for reversal or remand of the decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Introduction

Petitioner's second assignment of error includes two subassignments of error. In its first subassignment of error, we understand petitioner to argue that the city failed to follow statutory and LDC procedures that apply to the annexation application and that failure amounts to a procedural error. ORS 197.835(9)(a)(B).[5] Petition for Review 23-24.

A. First Subassignment of Error

1. ORS 222.125

If a "double majority" consisting of (1) all the owners of land in the territory to be annexed and (2) not less than 50 percent of the electors in that territory consent to a proposal to annex contiguous territory, no election is required in either the city or the territory to be annexed, and no public hearing is required. ORS 222.125.[6] The city considered the challenged annexation as a

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[5] ORS 197.835(9)(a)(B) provides that provides that LUBA "shall reverse or remand" a land use decision if LUBA finds that a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

[6] ORS 222.125 provides:

double majority ORS 222.125 annexation, but also elected to hold a public hearing on the combined annexation, comprehensive plan amendment and zone change applications.[7]

In its first subassignment of error, we understand petitioner to allege that the city erred in failing to obtain the consent in writing to the annexation of a portion of SE Johnson Creek Boulevard from Clackamas County, the owner, that petitioner alleges is required by the applicable statutes governing annexations.[8]

Intervenor responds initially that petitioner waived the issues that are raised in the portion of its second assignment of error that alleges procedural errors by failing to raise the issues below. *See* n 3. According to intervenor, petitioner did not raise any of the issues it raises in the first subassignment of

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> "The legislative body of a city need not call or hold an election in the city or in any contiguous territory proposed to be annexed or hold the hearing otherwise required under ORS 222.120 when all of the owners of land in that territory and not less than 50 percent of the electors, if any, residing in the territory consent in writing to the annexation of the land in the territory and file a statement of their consent with the legislative body. Upon receiving written consent to annexation by owners and electors under this section, the legislative body of the city, by resolution or ordinance, may set the final boundaries of the area to be annexed by a legal description and proclaim the annexation."

[7] The challenged decision recites that the annexation was approved under ORS 222.125. Record 9 ("* * * pursuant to ORS 222.125 the City of Happy Valley received petitions signed by 100 percent of the owners of 100 percent of the properties with 100 percent of the assessed value of territory requesting annexation").

[8] In its brief, petitioner cites "ORS 222.111 *et seq*" in support of its argument. Petition for Review 20, 21.

error prior to the close of the record and may not raise them for the first time at LUBA.

Petitioner responds by citing ORS 197.835(4)(b), which allows new issues to be raised for the first time at LUBA if the city "made a land use decision * * * which is different from the proposal described in the notice [of hearing] to such a degree that the notice of the proposed action did not reasonably describe the local government's final action." Petitioner argues that the city's notice of public hearing on the annexation application failed to include any reference to or description of the portion of SE Johnson Creek Boulevard that intervenor sought to annex to the city, and therefore petitioner is not precluded from raising the issues raised in its first subassignment of error.

The challenged decision annexed intervenor's parcel and an approximately 1,230-foot-long portion of SE Johnson Creek Boulevard that is owned and operated by Clackamas County, from its location adjacent to intervenor's property to the city limits. Record 9. The notice of public hearing that the city provided describes the application for annexation as including only intervenor's parcel, and does not mention or reference in any way the portion of SE Johnson Creek Boulevard that was proposed in the application to be annexed, and that the ordinance actually annexed. Record 692. We agree with petitioner that the notice of public hearing does not reasonably describe the city's final action, where the notice does not reference or mention annexation of a portion of SE Johnson Creek Boulevard as part of the annexation request. Accordingly, ORS 197.835(4)(b) allows petitioner to raise the issues raised in the first subassignment of error.

On the merits, intervenor responds that Clackamas County has previously provided its written consent to the annexation of SE Johnson Creek Boulevard by entering into the UGMA with the city, and points to provisions in the UGMA that (1) require prior notice to the county of all public hearings on proposed annexations and (2) provide that the city will assume jurisdiction of any County roads within or abutting an area that is annexed to the city. Response Brief 15-17; App. B 3. According to intervenor, the city's compliance with the provisions of the UGMA that require notice to the county satisfies any applicable statutory requirement for written consent to the annexation.

We disagree with intervenor. The UGMA does not contain any provision that specifically provides that the county's status as a party to the UGMA satisfies any statutory obligation of the city to seek and receive written consent to future annexation requests. Rather, it seems to us that if the county intended its participation in the UGMA to constitute written consent to all future annexation proposals of county property, the UGMA would not require at least 20 days *prior* written notice of public hearings on annexation requests to be provided to the county. If the city has not obtained written consent from the county to annex SE Johnson Creek Boulevard, it must do so in order to annex that property under ORS 222.125. *Cape v. City of Beaverton*, 43 Or LUBA 301, 309 (2002), *aff'd* 187 Or App 463, 68 P3d 261 (2003).

This subassignment of error is sustained.

2. LDC 16.61.040(D)(1)(a)(i) Notice of Hearing

As relevant here, LDC 16.61.040(D)(1)(a)(i) requires that notice of the public hearing on the annexation request be given to "[a]ll property owners of record within three hundred (300) feet of the site[.]" In a portion of its first

subassignment of error, we understand petitioner to argue that the city committed a procedural error when it failed to provide notice of the public hearing required by LDC 16.61.040(D)(1)(a)(i) to property owners of record within 300 feet of the portion of SE Johnson Creek Boulevard that was eventually annexed.

Intervenor responds that the city provided notice of the application to all property owners within 300 feet of SE Johnson Creek Boulevard, and cites Record 693-695, which include a list of approximately 65 individual addresses to which notice of the application was sent. Petitioner does not argue that the addresses that appear at Record 693-695 are not addresses of owners of record within 300 feet of SE Johnson Creek Boulevard. Therefore if the city provided notice of the public hearing to those addresses, and we do not understand petitioner to dispute that the city did, the city's notice satisfies LDC 16.61.040(D)(1)(a)(i). Accordingly, we agree with intervenor that the city complied with LDC 16.61.040(D)(1)(a)(i).

Finally, in a portion of the first subassignment of error, we also understand petitioner to argue that in failing to include intervenor's proposal to annex a portion of SE Johnson Creek Boulevard in the notice, the city committed a procedural error that prejudiced petitioner's substantial rights. That is so, we understand petitioner to argue, because petitioner was unaware that the proposal included SE Johnson Creek Boulevard and petitioner was therefore unable to gather and present evidence in opposition to that part of the proposal from adjacent neighbors. Petition for Review 25.

Intervenor responds by pointing to testimony submitted by petitioner's attorney that refutes petitioner's position that petitioner was not aware that intervenor's proposal included annexation of SE Johnson Creek Boulevard and

was therefore unable to gather and present evidence in opposition to that part of the proposal. Record 244 (letter from petitioner's attorney that takes the position that "[t]o accomplish [annexation], [intervenor] has indicated that a stretch of SE Johnson Creek Boulevard should be annexed as well, to make the parcel contiguous"). Given that the record demonstrates that petitioner understood the proposal to include annexation of the right of way, and even urged that the proposal must annex the right of way, petitioner has failed to establish that it was substantially prejudiced by the failure of the initial hearing notice to include the proposal to annex the right of way in the notice.

This portion of the first subassignment of error is denied.

B. Second Subassignment of Error

1. Reasonableness of the Annexation

Petitioner alleges that the disputed annexation violates the "reasonableness" test that was first employed by the Oregon Supreme Court to in *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952) (hereafter *PGE v. Estacada*), and employed by the Court of Appeals in *Morsman v. City of Madras*, 191 Or App 149, 154, 81 P3d 711 (2003).

In *PGE v. Estacada,* the court held that annexation statutes carry with them an implied requirement that "cities must legislate reasonably and not arbitrarily[.]"[9] 194 Or at 159. As clarified in *Morsman*, the reasonableness test

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[9] In *PGE v. Estacada*, the court explained that the reasonableness standard for annexation is imprecise: "[n]o exact yardstick can be laid down as to what is reasonable and what is not." 194 Or at 165. The court then went on to cite with approval the following formulation of its reasonableness standard:

> "That city limits may reasonably and properly be extended so as to take in contiguous lands (1) when they are platted and held for

inures from the predecessor of ORS 222.111(1). *Morsman*, 191 Or App at 152. In *Morsman*, the Court of Appeals clarified that compliance with land use laws is the "largely controlling component of the reasonableness test." *Morsman*, 191 Or App at 155.

The city adopted findings concluding that the annexation is reasonable. Record 10, 441-42. The city found that the annexation complies with the statewide planning goals and applicable provisions of the Metro Code, and that the city's comprehensive plan and the LDC do not contain standards or criteria that apply to annexations. Record 90-103. The city also adopted findings that the parcel's location in the HVUPA, and the provisions of the UGMA that contemplate annexation of parcels located in the HVUPA, support the annexation request. Record 442. The city also found that the property is served with urban level sanitary and storm sewer and water.[10] Record 103. Finally, the

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> sale or use as town lots; (2) whether platted or not, if they are held to be brought on the market, and sold as town property, when they reach a value corresponding with the views of the owner; (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas, or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptibility [sic] for prospective town uses. But the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation if it did not appear that such value was enhanced on account of their adaptibility [sic] to town use (quoting from *Vestal v. City of Little Rock*, 54 Ark 321, 15 SW 891, 16 SW 291, 11 LRA 778 (1891))."

[10] As described in the staff report, "[t]he subject properties are inside of the district boundaries of Clackamas County Service District #1, which provides

city found that the senior housing proposed to be built on the parcel will provide the city with a type of housing identified in the city's comprehensive plan. Record 442.

Petitioner does not recognize or address the city's findings. Rather, petitioner argues that the annexation is unreasonable, for the following reasons:

a. Minimal Separation

Petitioner argues that the annexation is unreasonable because approximately 1,230 feet separate the existing city limits from intervenor's parcel. In *Dept. of Land Conservation v. City of St. Helens*, 138 Or App 222, 227, 907 P2d 259 (1995) (hereafter *City of St. Helens*) the Court of Appeals concluded that territory connected to the city by a 1,500-foot-long public road does not satisfy the "separated by a public right-of-way" element of ORS 222.111(1) because the separation was not by a minimal amount of intervening land. *Id*. at 228-29. However, the language that petitioner relies on in *City of St. Helens* is dicta, because the court proceeded under the assumption that the city did not also annex the intervening public right-of-way. The court then commented that where a city annexes the road as well as the target area, that fact would "seem to * * * make the 'separated by a right-of-way' criterion immaterial." 138 Or App at 228 (footnote omitted).

In the present case, the city annexed both intervenor's property and SE Johnson Creek Boulevard, and in so doing that annexed territory is now contiguous to the city limits. The "separated by a public right-of-way" element

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sanitary sewer and stormwater management services to Happy Valley and other urbanized areas of Clackamas County. The subject properties are provided water service by Sunrise Water Authority (SWA), one of the City's service providers of potable water." Record 87.

of ORS 222.111(1) does not apply in the circumstances presented in this appeal, and any requirement in it that separation be "minimal" also does not apply. *Link v. City of Florence*, 58 Or LUBA 348, 374 (2009). Petitioner's arguments provide no basis for reversal or remand of the decision.

b. Irregular Shape

Petitioner next argues that the "irregular shape" of the annexed property that includes the "cherry stem" and the "target parcel" raises "an immediate red flag of unreasonableness." Petition for Review 34. However, cherry stem annexations are by their nature somewhat irregularly shaped, and the shape alone does not demonstrate that the annexation is unreasonable. *Rivergate Residents Assn. v. Portland Metro Area*, 70 Or App 205, 211-212, 689 P2d 326 (1984), *rev den* 298 Or 553 (1985); *Mar. Fire Dist. v. Mar. Polk Bndry*, 19 Or App 108, 116-118, 526 P2d 1031 (1974). Petitioner's irregular shape arguments provide no basis for reversal or remand of the decision.

c. Vacant Parcel

In several variations of the same argument, petitioner argues that the annexation is unreasonable because according to petitioner, there is no benefit to the city or to intervenor's property from the annexation. Petitioner points out that the parcel is vacant and that there is no need established for the city to annex the parcel. Petition for Review 35. However, the city's findings, which petitioner does not recognize or address, conclude that annexing the parcel is consistent with the parcel's inclusion in the HVUPA; that it will fulfill an identified need for senior housing; and that because the property is already served by urban level services, it is appropriate for inclusion in the city. Petitioner's vacant parcel arguments do not demonstrate that the annexation is unreasonable.

d. Connectivity Benefits to the City

Petitioner argues that the annexation is unreasonable because the portion of SE Johnson Creek Boulevard that the city annexed is currently unimproved, and argues that annexation of the parcel and the road does not provide connectivity benefits to the city. Intervenor responds by pointing to city findings that respond to petitioner's argument and conclude that nothing in state law or the LDC requires that the annexed territory itself provide improved roadway connectivity, and that the city's Transportation System Plan anticipates that SE Johnson Creek Boulevard will be extended and improved along its annexed portion to and beyond the city limits. Record 296; Response Brief, App D. Petitioner has not demonstrated that the annexation is unreasonable due to the unimproved status of SE Johnson Creek Boulevard.

2. SE Johnson Creek Boulevard Annexation

Finally, petitioner argues that "a remand is warranted for respondent to address compliance with the land use approval criteria as to the 1,300 feet of right of way that is being annexed pursuant to the mandates of the 2004 *Morsman* case, supra." Petition for Review 34. However, the city's findings conclude that the application, which proposed to annex both intervenor's property and SE Johnson Creek Boulevard, complies with the statewide planning goals and applicable Metro Code provisions, and that no provisions of the city's comprehensive plan or the LDC provide standards and criteria that apply to annexation requests. Petitioner does not acknowledge or challenge these findings, or otherwise point to any applicable approval standards or criteria that have not been addressed. Absent any developed argument from petitioner, this subassignment of error provides no basis for reversal or remand.

The city's decision is remanded in order for the city to obtain the written consent of Clackamas County to the city's annexation of SE Johnson Creek Boulevard.