

I. PETITIONERS' STANDING

1 Petitioners Citizens Against Annexation is an Association of individual residents who own
2 property adjacent to or near the land use decision challenged herein, and this Association has
3 members who are both adversely affected and aggrieved by the challenged land use action.
4 Individual Petitioners Debby Todd, Lea Patten and Robert Christian are all members of the
5 association Petitioners Citizens Against Annexation who own property adjacent to or near the land
6 use decision challenged herein, and who are adversely affected and aggrieved by the challenged land
7 use action

8 Petitioners Citizens For Florence is also an Association of individual residents who own
9 property adjacent to or near the land use decision challenged herein, and this Association also has
10 members who are both adversely affected and aggrieved by the challenged land use action.
11 Individual Petitioner Debby Todd is a member of Citizens For Florence who is also adversely
12 affected and aggrieved by the challenged land use action.

13 Members of Citizens Against Annexation (“CAA”) and members of Citizens For Florence
14 (“CFF”) reside within sight and sound of the proposed development, and these Associations, and its
15 individual members, are both collectively and individually impacted and adversely affected by this
16 proposed land use decision.

17 Petitioners timely presented written and verbal testimony to both the Florence Planning
18 Commission, and to the Florence City Council, at all stages of the local government proceedings of
19 the challenged land use matter. *See e.g. Rec. 240-248 (Todd) (member of both Citizens Against*
20 *Annexation and Citizens For Florence), Rec. 233 (Stotter, CAA), Rec. 235-236 (Curtis, CAA), Rec.*
21 *238-239 (Patten, CAA), Rec 217 (Hursh, CAA), Rec. 218 (Chestler, CAA), Rec. 219 (Norton,*
22 *CAA), Rec. 141-143 (Todd), Rec. 167-173 (Todd), Rec. 139 (Stotter, CAA), Rec. 133 (Hursh,*
23 *CAA), Rec. 159-166 (Chestler, CAA), 130 (Chestler and Hursh (CAA).*

II. STATEMENT OF THE CASE

A. NATURE OF CHALLENGED DECISION AND RELIEF REQUESTED

24 Petitioners jointly challenge Respondent City of Florence’s final land use decision entitled
25 “City of Florence Ordinance No. 10, Series 200, *see* Rec. 4-6 which is a final land use decision by
26

the Florence City Council to zone certain lands located outside of the City of Florence's boundary and jurisdiction. *Id.*

Petitioner seeks to have this land use decision reversed and/or remanded pursuant to OAR 661-010-071(2)(a), OAR 661-010-071(2)(b), OAR 661-010-071(2)(d) and ORS 197.835, on the grounds that Respondent has issued a decision without providing timely or legally adequate notice, without legally sufficient findings as to the applicable land use approval criteria, and have made a decision that is otherwise unlawful and outside of the jurisdiction and statutory land use authority of the City of Florence.

B. SUMMARY OF ARGUMENTS

1. Respondent City of Florence clearly erred by failing to provide timely public notice of the public land use hearings listing the applicable land use criteria for the final land use action as required by Florence Code 10-1-1-5.

2. Respondent City of Florence erred by issuing a decision that was not supported by adequate findings as to the applicable approval criteria of Florence Code 10-1-1-5E and the Florence Comprehensive Plan.

3. Respondent City of Florence issued a land use decision for zoning land that is clearly outside of its jurisdiction in that its zoning was made effective prior the City's annexation of the subject property.

C. SUMMARY OF MATERIAL FACTS

On December 19, 2006 the City of Florence Planning Commission held a public hearing to consider, *inter alia*, a request to for a zone change of approximately 37.06 acres of property located outside of the City of Florence that was concurrently proposed for annexation by the City of Florence. Rec. 304 - 311. The City of Florence Planning Commission received written testimony from Petitioner Debby Todd (a member of both Citizens Against Annexation and Citizens For Florence). Rec. 304. The Planning Commission also received verbal testimony at their December 19, 2006 public hearing from Citizens Against Annexation members Bob Hursh, Lea Patten, Suzanne Curtis and Stephanie Chestler. Rec. 308-309.

1 On March 9, 2007 the City of Florence Planning Commission approved a resolution
2 recommending, *inter alia*, that the Florence City Council assign a new zoning designation of “Restricted
3 residential” zoning for approximately 37.06 acres of property located outside of the City of Florence that
4 was concurrently proposed for annexation by the City of Florence. Rec. 312.

5 On May 9, 2007, the City of Florence issued a Notice of their May 25, 2007 Public Hearing for,
6 *inter alia*, the challenged land use decision’s a new zoning designation of “Restricted residential” for
7 approximately 37.06 acres of property located outside of the City of Florence. Rec. 325.

8 On May 19, 2007, the City of Florence caused to be published in the Siuslaw News newspaper a
9 Notice of the May 25, 2007 Public Hearing for, *inter alia*, the challenged land use decision’s a new
10 zoning designation of “Restricted residential” for approximately 37.06 acres of property located outside
11 of the City of Florence. Rec. 325.

12 On May 20-21, 2007 the City of Florence caused to be published in the Register Guard
13 newspaper a Notice of a May 25, 2007 Public Hearing for, *inter alia*, the challenged land use decision’s
14 a new zoning designation of “Restricted residential” for approximately 37.06 acres of property located
15 outside of the City of Florence. Rec. 323

16 On May 21, 2007, a public hearing was held before the City of Florence City Council on, *inter*
17 *alia*, the challenged land use decision’s a new zoning designation of “Restricted residential” for
18 approximately 37.06 acres of property located outside of the City of Florence. Rec. 251, 253-254. The
19 City of Florence received written testimony from Debby Todd Rec. 240-248 (a member of both Citizens
20 Against Annexation and Citizens For Florence) and also received written testimony and evidence from
21 Citizens Against Annexation members Daniel Stotter, Rec. 233, Suzanne Curtis, Rec. 235-236, and Lea
22 Patten. Rec. 238-239. In addition, the Florence City Council also received verbal testimony and
23 evidence from Citizens Against Annexation members Bob Hursh, Rec. 217, Stephanie Chestler, Rec.
24 218, Don Norton, Rec. 219 at the May 21, 2007 public hearing in this matter. The Public hearing in this
25 matter was continued to June 4, 2007 for both verbal and written testimony. Rec. 219.

26 On May 25, 2007, the City of Florence, the City of Florence issued a revised Notice of Public
Hearing for the June 4, 2007 continued public hearings regarding proposed annexation and the new
zoning of property in the area proposed to be annexed. Rec. 202.

The revised Notice of Public Hearing for the June 4, 2007 hearing in this matter listed significantly different land use criteria for this land use action than the prior May 9, 2007 Notice of Public Hearing for this land use action. Cf. May 9, 2007 Notice of Public Hearing (Rec. 325) and May 25, 2007 Notice of Public Hearing (Rec. 202).

On June 4, 2007, the Florence City Council held a continuation of the land use public hearing regarding the proposed annexation and the new zoning of property in the area proposed to be annexed. Written testimony was received from Petitioners Todd, Rec. 141-143, 167-173, Stotter, Rec. 139, Hursh, Rec. 133, and Chestler. Rec. 159-166. In addition, verbal testimony was also presented by members of Petitioners Citizens Against Annexation Chestler (Rec. 130), and Hursh (Rec. 130). *See also* Supp Rec. 50. Following the public hearing on this date, the City Council moved to close the public hearing for verbal testimony, and allowed the written comment period to be continued for a period of 7 days, to June 11, 2007. Supp Rec. 51.

On June 18, 2007, the Florence City Council held its final deliberations regarding, *inter alia*, the challenged land use decision, and ultimately approved City of Florence Resolution No. 8, Series 200, Supp. Rec. 10-13, the land use zoning decision that is challenged by Petitioners in this land use appeal.

Petitioners timely filed their Notice of Appeals with the Land Use Board challenging this final local government land use decision by the City of Florence on June 9, 2007.

D. JURISDICTION

The challenged decision by the City of Florence to zone property is clearly a statutory “land use decision” subject to the jurisdiction of this Board pursuant to ORS 197 .015(11), as it clearly concerns the application of the City of Florence’s land use regulations. *See e.g. Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004) (describing LUBA’s jurisdictional requirement for a statutory land use decision).

Petitioners timely appealed this land use action to the Land Use Board pursuant to ORS 197.830(3) by filing their Notice of Appeals on June 9, 2007, within 21 days of the final land use decision that is challenged herein.

III. ASSIGNMENTS OF ERROR

First Assignment of Error:

The City of Florence Erred By Failing To Provide Timely or Sufficient Legal Notice For This Land Use Action As Required by the Florence Land Use Code

In the challenged land use decision, the City of Florence clearly failed to provide timely or legally adequate public notice of the hearings and as to the applicable land use criteria for the final land use action challenged herein as expressly required by Florence Code 10-1-1-5.

The Florence Zoning Code expressly requires a notice of hearing for a zone change to be issued at least “twenty (20) days prior to a quasi judicial hearing” to the applicant and to all owners of property within 300 feet of the subject property, *see* Florence City Code 10-1-1-5(1), and also expressly requires that for zone change actions, notice of the public hearing also be published “three (3) times in a newspaper of general circulation, the last not more than ten (10) days prior to the date of the hearing. *See* Florence City Code 10-1-1-5(B)(2). In addition, the City of Florence expressly requires that all such notices of public land use hearings must list the applicable approval criteria. *See* Florence City Code 10-1-1-5(C)(1)(b).

In the present land use action, it cannot be disputed that Respondent City of Florence clearly failed to provide the legal public notice required by Florence City Code 10-1-1-5. The City of Florence’s initial Public Notice for the May 25, 2007 public hearing was issued on May 9, 2007, only 16 days before the public hearing, *see* Rec. 202, and consequently, clearly did not provide the twenty days required by Florence Code 10-1-1-5(1). The City of Florence’s second Public Notice for the June 4, 2007 hearing was issued on May 25, 2007, and provided only eleven days notice before that public hearing (not the 20 days required by the local Code).

Moreover, the May 25, 2007 Notice of Hearing also substantially changed the applicable land use criteria listed for this land use action from the original Notice of Public Hearing that had been issued on May 9, 2007. *Cf* May 9, 2007 Notice (rec. 325) and subsequent May 25, 2007 Notice of Public hearing (rec. 202). Consequently, the public was given less than 20 days before the June 4, 2007 public hearing to address this revised list of applicable approval criteria for the challenged land use decision.

1 Moreover, it is also clear that the City of Florence also did not provide the legally required
2 publication of notice three times “in a newspaper of general circulation” for this zoning decision. *See*
3 Florence City Code 10-1-1-5(B)(2). Instead, the City of Florence published just one Notice of this
4 public hearing in the local Siuslaw News on May 19, 2007, see Rec. 324, and then published two
5 consecutive Notices in the Register Guard on May 20 and May 20, 2007. *See* Rec. 323. These
6 separate Notice publications to two different newspapers clearly does meet the express procedural
7 requirements mandated by the Florence Code for the challenged decision to be published at least
8 “three times in newspaper of general circulation.” *See* Florence City Code 10-1-1-5(B)(2).

9 Petitioners repeatedly and timely raised multiple objections to the inadequate notice to the
10 public provided for this land use decision and the failure of the City of Florence to provide at least 20
11 days notice as required by the Florence Code, and also noted the significant prejudice to Petitioners,
12 and other members of the public, by the City of Florence not providing sufficient notice even though
13 it had significantly changed the applicable approval criteria for this decision in its second Notice of
14 Public Hearing that was issued only eleven days notice before the June 4, 2007 public hearing. *See*
15 *e.g.* Rec. 141-142 (Todd), Rec. 139 (Stotter), Rec. 233 (Stotter, Rec. 238 (Patten), *see also* Rec. 240
16 & 242 (Todd).

17 In light of the City of Florence’s significant violations of the notice procedures expressly
18 mandated by the Florence Code, and the clear prejudice to Petitioners (and other members of the
19 public) resulting from these procedural violations, this decision should be reversed or remanded
20 pursuant to OAR 661-010-071(2)(a) to address these procedural violations of the Florence Code.

21 **Second Assignment of Error:**
22 **The City of Florence Erred By Issuing A Land Use Decision That Is Not Supported By**
23 **Adequate Findings As To The Applicable land Use Criteria For This Zoning Decision**

24 Respondent City of Florence has also erred in approving the challenged land use decision
25 without providing sufficient findings as to the applicable land use criteria for its zoning decision set
26 forth in City of Florence Ordinance No. 10, Series 2007. *See* Rec. 4-6. In the challenged land use
decision, Respondent provides no detailed or non-conclusory findings that address the applicable
zone change decision criteria in the challenged land use decision set forth in Ordinance No. 10, Series
2007. *Id.*

1 Although the City's Staff informed the City's decision-makers that the applicable land use
2 criteria for the zoning decision that must be considered is consistency "with the objectives of the
3 Florence Comprehensive Plan and Zoning Code" *see* Rec. 253, and although the Notice of Public
4 Hearing sent to the public expressly lists the applicable land use criteria as being the 2000/2020
5 Comprehensive Plan, Chapter 14 (Policy 1) and Chapter 2, and Florence Code Zoning Regulations
6 10-1-5-E-3, 10-1-1-5-E-3 and 10-1-3-B4, *see* Rec. 202, a review of the City's final land use decision
7 challenged herein does not set forth adequate findings that address **any** of these applicable land use
8 criteria. *See* Rec. 4-5 (Ordinance No. 10).

9 The Oregon Supreme Court has explained that, to be adequate, "findings must (1) identify the
10 relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the
11 conclusion that the request satisfies the approval standards." *Sunnyside Neighborhood v. Clackamas*
12 *Co. Comm.*, 280 Or 3, 21, 569 P.2d 1063 (1977). *See also 1000 Friends of Oregon v. Metro*, 164 Or.
13 *App* 406, 411, 26 P.3d 151 (2001); *Turrell v. Harney County*, 34 Or LUBA 445, 448 (1998); *Le Roux*
14 *v. Malheur County*, 30 Or LUBA 268, 271 (1995).

15 The City of Florence's challenged decision certainly does not meet the above described
16 standards for the adequacy of findings as to **any** of the above described applicable approval criteria
17 for its zoning decision challenged herein. While the City of Florence may argue that its Fifth through
18 Ninth "Whereas" paragraphs in Ordinance No. 10 are its "findings" for this zoning decision, *see* Rec.
19 4-5, those findings are so generalized and so conclusory in nature that they certainly do not meet the
20 above required standards for adequacy of land use findings as articulated by this Board and the
21 Oregon Courts.

22 The City's land use decision challenged herein does not adequately describe the basis for
23 finding that this specific zoning decision is consistent with the Comprehensive Plan, or whether the
24 requirements of State law (ie; State Land Use Goal 14) have been met pursuant to Florence Code 10-
25 1-1-5-E(2) (App-7) and also fails to provide adequate findings that a "public need" exists for the
26 proposed zoning or that this need will be best served by zoning the subject properties per Florence
Code 10-1-1-5-E(3) (App-7).

1 Petitioners provided fair notice that the City of Florence’s findings for this challenged decision
2 were inadequate, *see* Rec. 139 ((Stotter) and having alerted Respondent to this issue, Petitioners have
3 adequately raised this issue for purposes of appeal per ORS 197.8351. *See Boldt v. Clackamas Count,*
4 *107 Or App 619, 624-625 (1991); see e.g. Coquille Citizens For Responsible Growth v. City of*
5 *Coquille* (LUBA No. 2007-04 (10/08/07) (Final Opinion and Order). Petitioners are certainly not
6 required to provide the City of Florence with their own Draft Findings, or provide legal counsel as to
7 how to correct its insufficient findings - having raised the adequacy of findings issue it was incumbent
8 upon Respondent to prepare adequate findings to address the applicable approval criteria for this land
9 use decision. *Id.*

10 Moreover, as the adequacy of challenged findings in the final decision were not (and could
11 not) be known to the Petitioners until **after** the record was closed and Respondent had issued its final
12 land use decision, Petitioners cannot be expected to “crystal ball” as to the precise inadequacy of
13 specific findings that had not yet been issued or even determined by the decision-maker.

14 At the time that the record was open to Petitioners, based upon the Staff’s specific direction
15 described above regarding the applicable approval criteria, and based upon the statements contained
16 in the City’s Public Notice for this decision, Petitioners had no way to know that Respondent City of
17 Florence would elect to simply ignore its Staff directions or its own Public Notice listing the
18 applicable criteria, and fail to address these criteria with adequate findings in its final decision.

19 Consequently, as the City of Florence decision challenged herein is clearly not supported by
20 adequate evidence addressing *any* of the applicable approval criteria for its zoning decision, the
21 challenged land use decision should be reversed or remanded on this basis pursuant to ORS
22 197.835(9)(a) and OAR 661-010-071(2)(d).

23 **Third Assignment of Error:**
24 **The City of Florence Erred By Making A Land Use Decision That Exceeds Its Jurisdiction**

25 The City of Florence zoning decision challenged herein exceeds the City’s zoning authority by
26 prematurely issuing a final zoning decision for property undisputably outside of the City’s current
legal boundaries, and which consequently clearly exceeds its statutory authority. Respondent cannot,
as a matter of law, make a final zoning decision for properties outside of its legal boundaries. *See*
ORS 221.720.

1 Although the challenged decision provides that the “zoning map assignment shall be effective
2 on the date of the annexation as approved by the Lane County Boundary Commission,” see Rec. 5,
3 the City of Florence has nonetheless attempted to prematurely make a final zoning decision for
4 property outside of its City boundary, and which is consequently outside of its jurisdiction per ORS
5 221.720. Although the assignment of the zoning map is deferred until the property may be added to
6 the City by the lane County Boundary Commission, Respondent has nonetheless attempted to issue a
7 final land use zoning decision by changing the zoning for property that is clearly outside of its
8 jurisdiction. Thus, Respondent has effectively “jumped the gun” by issuing an *ultra vires* decision
9 purporting to zone property **before the land in question is within the boundaries and land use**
10 **zoning jurisdiction of the City of Florence.** The City of Florence can no more attempt to zone
11 property outside of its boundaries in Lane County then can it otherwise attempt to zone property in
12 Alaska or Hawaii or in the Ukraine. ORS 221.720 sets clear statutory boundaries to a City’s right to
13 zone property, and that limit is the boundary limits of the City for purposes zoning jurisdiction.

14 In the local government proceedings, Petitioners had incorrectly assumed that the City of
15 Florence would understand the clear statutory limits of its zoning authority, and would consequently
16 not attempt to make its decision final or effective until **AFTER** the Lane County Boundary
17 Commission had provided for the annexation of the property at issue in this zoning decision.

18 Consequently, Petitioners had no way to “crystal ball” that the City of Florence would at the
19 eleventh hour change its proposed decision, **after the close of the record in this matter**, to add a
20 new handwritten section to its zoning decision stating that this extra-territorial zoning as now
21 “effective 30 days after adoption.” See Rec. 5. Petitioners were provided no opportunity whatsoever
22 to raise this issue to the City of Florence’s revised decision document, or to otherwise inform the City
23 that such action was and is clearly *ultra vires* and in violation of its statutory jurisdiction per ORS
24 221.720.

25 Therefore, although Petitioners did not raise this issue in the proceedings below, there was no
26 opportunity for Petitioners to know that the City of Florence would add a new hand-written provision
to its decision making a zoning of property outside of its jurisdiction effective within 30 days. Under
these circumstances, Petitioners cannot be held to have somehow predicted that Respondent would

1 add a new handwritten change to its proposed land use decision that patently ignores state law and
2 the jurisdictional limits of the City's zoning authority. Respondent cannot be allowed to violate state
3 law with immunity by substantially changing the effective date of its land use decisions after the close
4 of public review and public input.

5 As the City of Florence's attempt to issue an effective date for its zoning decision before it has
6 jurisdiction of the land it purports to zone is clearly inconsistent with state law, , the challenged land
7 use decision should be reversed or remanded on this basis.

8 **IV. CONCLUSION**

9 Therefore, for all of the reasons set forth above, the Land Use Board should reverse or remand
10 the challenged land use decision of Respondent City of Florence pursuant to OAR 661-010-071(2)(a),
11 OAR 661-010-071(2)(b), OAR 661-010-071(2)(d) and ORS 197.835.

12 Respectfully submitted this 15th day of October, 2007.

13 _____
14 Daniel J. Stotter, OSB #91109
15 Attorney for Petitioners Citizens Against Annexation, Lea Patten and Robert Christian

16 _____
17 Jannett Wilson, OSB #965561
18 Attorney for Petitioners Debby Todd and Citizens For Florence

CERTIFICATE OF FILING AND SERVICE

1 I certify that on the 6th day of August, 2007, I filed the original and four copies of
2 **PETITIONERS BRIEF** with the Land Use Board of Appeals, 550 Capitol Street NE, Suite 235,
3 Salem, OR 97301, by causing the same to be deposited in the United States Mail at Eugene, Oregon,
4 enclosed in a sealed envelope with postage prepaid.

5 I further certify that on said date, I served a true and correct copy of said document on the
6 other party or parties listed below, by causing the same to be deposited in the United States Mail at
7 Eugene, Oregon, enclosed in a sealed envelope with postage prepaid, and addressed to:

8 John B. Trew
9 Trew Cyphers & Meynink
10 P.O. Box 158
Coquille, OR 97423
Attorney for Respondent City of Coquille

11 Daniel Terrell
12 Law Office of Bill Kloos, PC
13 375 W. 4th Street, Suite 204
Eugene, OR 97401
Attorney for Intervenor-Respondent James Smejkal

14 DATED this 6th day of August, 2007.

15
16 _____
17 Daniel J. Stotter, OSB #91109
18 Attorney for Petitioner
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APPENDIX

1 City of Coquille Final Order and Findings of Fact (Rec. 7- 34)

2 Excerpts of City of Coquille Municipal Code (App 1-4)

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