

Northwest Real Estate Forum

Carter Kerns v. City of Pendleton: The First Case Decided by the Land Use Board of Appeals of Oregon

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Kerns v. Pendleton marks a historic step for Oregon and the nation. In 1979, the Oregon Legislature created the Land Use Board of Appeals (LUBA) as an administrative body, which had “exclusive jurisdiction” over most land use decisions of local governments. Until this time, Oregon and other states gave that role to local trial courts. However, with the passage of a coordinated state system of land use planning and regulation in 1973, courts were less familiar with the bevy of rules and statutes that were now applicable to local planning. Moreover, those courts were also faced with giving priority to speedy trials in criminal cases, particularly for defendants who were incarcerated. Additionally, the development community pressed for a system that was speedy and more certain.

LUBA’s creation was a four-year trial of a new system in which persons dissatisfied by a local government (and sometimes a state agency) land use decision was required to appeal that decision in 30 days, unlike the 60 days that had been the previous timeline. Unlike trial courts, LUBA had time limits to decide appeals and its decisions were appealable to the Oregon Court of Appeals. The original members of the Board were Michael Reynolds, a former Assistant Attorney General and previous counsel to the Land Conservation and Development Commission (LCDC), John Bagg, a former local government attorney, and William Cox, who had represented development interests in private practice.

Carter Kerns was one of three neighbors (together “Petitioners”) who appealed Pendleton’s decision to annex and rezone a 22-lot subdivision on 12.36 acres on several grounds: violation of the statewide planning goals, unlawful procedures and violation of an administrative rule adopted by LCDC that limited annexations of land prior to acknowledgment of the City’s plan (i. e. certification that its plan and land use regulations complied with the statewide planning goals).

LUBA found that Petitioners had standing (that is a sufficient interest in the outcome of the case to allow the matter to be heard) and proceeded to examine eleven assignments of error alleged by Petitioners through their counsel, Stephen Janik, a prominent Portland attorney. The controversy was over property owned by Fritz and Hill that was outside the City and may have required city services to develop. However, when this case was filed, Pendleton did not

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have an acknowledged plan and was thus required to comply with LCDC's annexation rule in order to bring the property into the City. However, LUBA found the City's findings in support of the annexation (including other necessary findings on goal compliance and justification of the need for the annexation) for the most part to be "conclusory" and insufficient to show compliance with those criteria and lacking evidentiary support as well.

For example, there was no discussion as to whether the existing sewer lines had the capacity to deal with the additional loads that would be anticipated from development. LUBA also found insufficient the City findings on development in the surrounding area, as they did not show that the area was "physically developed for urban use" as required by the annexation rule or that the subject land could not be farmed. That the land was included within the City's *draft* urban growth boundary was not at all convincing to LUBA, as that process had yet to be completed in accordance with state law. (The rule was drafted to prevent "preemptive strikes" on rural land by urbanizing the same before acknowledgement, when a city must justify the total amount of urban land against its demonstrated needs for various uses.) LUBA concluded that the City did not comply with the annexation rule and thus the annexation (as well as the rezoning) was invalid. To bolster its decision, LUBA also declared that, even if the annexation were valid, the City was in violation of Goal 14 (urbanization) requirements because it could not justify a need to rezone the land for residential uses. The City's decision was thus reversed.

There would be other controversies between Carter Kerns and the City; however, *Kerns v. City of Pendleton*, 1 Or. LUBA 1 (1979) was well-written, legally correct, and an auspicious start for Oregon's leading role in changing the way that local land use decisions are reviewed.

Tags: Kerns v. Pendleton, LUBA, Oregon Legislature