

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

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JOHN S. CARLSON, )  
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Petitioner, )  
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and )  
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ROBERT ANDERSON, )  
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Intervenor-Petitioner, )  
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vs. )  
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CITY OF DUNE CITY, )  
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Respondent, )  
 )  
and )  
 )  
HARRY R. WILKES and SCOTT B. )  
ROBBINS, )  
 )  
Intervenors-Respondent. )

LUBA No. 95-020

FINAL

OPINION

AND ORDER

WILLIAM A. PARSHALL, )  
 )  
Petitioner, )  
 )  
and )  
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ROBERT ANDERSON, )  
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Intervenor-Petitioner, )  
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vs. )  
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CITY OF DUNE CITY, )  
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Respondent, )  
 )  
and )

LUBA No. 95-023

1 )  
2 HARRY R. WILKES and SCOTT B. )  
3 ROBBINS, )  
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5 Intervenor-Respondent. )  
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8 Appeal from City of Dune City.  
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10 William A. Parshall, Eugene, filed a petition for  
11 review and argued on his own behalf.  
12

13 John S. Carlson, Westlake, filed a petition for review  
14 on his own behalf.  
15

16 Robert Anderson, Florence, filed a petition for review  
17 and argued on his own behalf.  
18

19 No appearance by respondent, Dune City.  
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21 Paul V. Vaughan, Eugene, filed a response brief and  
22 argued on behalf of intervenor-respondent Wilkes. With him  
23 on the brief was Hersher, Hunter, Moulton, Andrews & Neill.  
24

25 Joseph J. Leahy, Springfield, filed a response brief  
26 and argued on behalf of intervenor-respondent Robbins. With  
27 him on the brief was Harold & Leahy.  
28

29 HANNA, Referee; LIVINGSTON, Chief Referee, participated  
30 in the decision.  
31

32 REMANDED 10/25/95  
33

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners in this consolidated case appeal a limited  
4 land use decision of the city council approving a tentative  
5 plan for a subdivision.

6 **MOTION TO INTERVENE**

7 Robert Anderson moves to intervene on the side of  
8 petitioners. There is no opposition to the motion and it is  
9 allowed.<sup>1</sup>

10 Harry R. Wilkes (Wilkes) and Scott B. Robbins  
11 (Robbins), the applicants below, move to intervene on the  
12 side of the respondent.<sup>2</sup> There is no opposition to the  
13 motion and it is allowed.

14 **FACTS**

15 On May 12, 1994, Wilkes applied for tentative approval  
16 of a subdivision on the subject property.<sup>3</sup> The property is  
17 not included within the current comprehensive plan  
18 delineation of the city limits and the urban growth  
19 boundary.

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<sup>1</sup>References to petitioners include both petitioners and intervenor-petitioner.

<sup>2</sup>Wilkes and Robbins filed separate briefs. Robbins structured his brief to "focus on three basic allegation themes" and did not respond directly to the assignments of error. Intervenor-Respondent's Brief (Robbins) 1. However, Robbins's arguments are congruent with those of Wilkes.

<sup>3</sup>Petitioners assert that in 1992, Wilkes filed an application with the city to annex the subject property to Dunes City.

1           Nevertheless, on January 12, 1995, the city council  
2 approved a tentative plan for the subdivision. The city  
3 council relied on a review of its ordinance history, which  
4 showed that on February 7, 1966, the then-city council  
5 adopted Ordinance 14, which initiated an annexation by  
6 consent of 223 acres in four parcels, including the 54-acre  
7 parcel which is the subject of this appeal. On March 7,  
8 1966, the then-city council adopted Ordinance 15, which  
9 purported to annex the subject property. Ordinance 15,  
10 among other things, required the city recorder to file a  
11 copy of Ordinances 14 and 15 with the Secretary of State,  
12 the Lane County Director of Records and Elections, the Lane  
13 County Assessor and the Lane County Surveyor. Recordation  
14 of at least Ordinance 15 was statutorily required.<sup>4</sup>

15           Whether or not either Ordinance 14 or 15 was recorded  
16 in any of the specified offices is disputed by the parties.  
17 Prior to consideration of the subdivision application, the  
18 city made inquiries of the Lane County Clerk's office, the

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<sup>4</sup>ORS 222.010 (1966 Edition) provides, in relevant part:

"Every city, through its recorder, shall report to the county clerk and county assessor of the county within which the city is located all changes in the boundaries or limits of the city.  
\* \* \* \* \*"

ORS 222.180 (1966 Edition) provides, in relevant part:

The annexation shall be complete from the date of filing with the Secretary of State of any abstract as provided in ORS 222.150, 222.160 and 222.170. \* \* \* \* \*

1 Secretary of State, the Lane County Assessor, and the Lane  
2 County Surveyor, asking whether Ordinances 14 and 15 had  
3 been recorded. All of these offices responded that they had  
4 no record of the ordinances. Even the mayor of the city  
5 admitted in a letter that the city had no evidence that the  
6 filing was actually done.

7 Although the city acknowledged in the challenged  
8 decision that until present city officials reviewed the city  
9 ordinance files, they were unaware of the 1966 annexation of  
10 the subject property, the city nonetheless concluded that  
11 the 1966 annexation met the legal requirements for  
12 annexation of property by the city. The city council then  
13 approved the subdivision that is the subject of petitioners'  
14 appeal to this Board.

15 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR (CARLSON)**  
16 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (PARSHALL)**  
17 **FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR (ANDERSON)**

18 Petitioners contend that the property is not within the  
19 city limits, having not been properly annexed, and that  
20 therefore, the city has no jurisdiction over it.  
21 Petitioners further contend that because Ordinance 15 was  
22 not filed with the Secretary of State until December 20,  
23 1993, it is not valid for purposes of the subdivision  
24 approval at issue. Petitioners acknowledge that the  
25 ordinance was adopted in 1966, but they maintain that it was  
26 kept by the city in its files to have available in case  
27 federal action was taken to make the subject property part

1 of a national park. In that instance, petitioners contend,  
2 the property owner could have arranged with the city to have  
3 the annexation completed by filing the ordinance with the  
4 Secretary of State. Annexation would have precluded the  
5 inclusion of the subject property in a national park.

6 Petitioners point to numerous defects in the procedures  
7 taken in 1966. They challenge the procedures followed by  
8 the city in giving notice of the present subdivision  
9 application. They argue the city had no authority to zone  
10 the subject property as residential, alleging it is beyond  
11 the city limits. See Record 96-205. Petitioners refer to  
12 plan diagrams and maps prepared by the city between 1966 and  
13 the present that show the subject property to be outside the  
14 city limits.

15 The city responds, inter alia, that there is no proof  
16 that Ordinance 15 was not properly filed. More importantly,  
17 the city contends that ORS 12.270 requires recognition of  
18 the validity of Ordinance 15, regardless of whether or not  
19 it was properly filed.

20 ORS 12.270 provides that a boundary alteration  
21 initiated and purported to be effective is conclusively  
22 presumed effective one year after the purported effective  
23 date.<sup>5</sup> Therefore, notwithstanding any procedural defects

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<sup>5</sup>ORS 12.270 provides, in relevant part:

"On September 13, 1975, any proceeding which establishes or alters the boundaries of a governmental subdivision previously

1 which may have occurred, as discussed by petitioners in  
2 their briefs, ORS 12.270 precludes any conclusion other than  
3 that the annexation was effective on March 7, 1966. See  
4 Perkins v. City of Rashneeshpuram, 300 Or 1, 7, 706 P2d 949  
5 (1985).

6 These assignments of error are denied.

7 **SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR (CARLSON)**

8 **A. Insufficient Findings to Support Tentative Plan**  
9 **Approval for Subdivision**

10 Petitioner John S. Carlson (Carlson) argues that the  
11 findings made by the city do not support the approval of the  
12 tentative plan for the subdivision. Wilkes "concedes that  
13 the city council's findings regarding compliance with the  
14 specific subdivision criteria are inadequate and that the  
15 case should be remanded for findings on those criteria."  
16 Respondent's Brief (Wilkes) 37. We do not consider this  
17 subassignment of error further.

18 This subassignment of error is sustained.

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or hereafter initiated and purported to be effected in  
accordance with applicable legal requirements shall be  
conclusively presumed valid for all purposes one year after the  
purported effective date of the action. No direct or  
collateral attack on the action may thereafter be commenced.  
This statute of limitations includes but is not limited to the  
following proceedings:

\*\* \* \* \* \*

"(5) Annexations under ORS 222.111 to 222.180, 222.750 and  
222.840 to 222.915." (Emphasis added)

1           **B. Evidentiary Challenges**

2           Carlson asserts, both directly and indirectly, that the  
3 challenged decision is not supported by substantial  
4 evidence. Because the county's findings are inadequate, no  
5 purpose would be served by addressing Carlson's substantial  
6 evidence challenge. DLCD v. Columbia County, 16 Or LUBA  
7 467, 471 (1988); DLCD v. Columbia County, 15 Or LUBA 302,  
8 305 (1987); McNulty v. City of Lake Oswego, 14 Or LUBA 366,  
9 373 (1986).

10           This assignment of error is sustained, in part.

11           **FIRST ASSIGNMENT OF ERROR (CARLSON)**

12           Carlson contends that the Dunes City Subdivision  
13 Ordinance (DCSO) is not valid and that, accordingly, the  
14 challenged decision applying the DCSO is not valid. Wilkes  
15 argues that the issue was not raised in the hearing below  
16 and, consequently, petitioners have waived their right to  
17 raise the issue before us.

18           Carlson may not raise an issue on appeal that was not  
19 raised below. ORS 197.835(2). Carlson does not identify  
20 where in the record the issue was raised, and we do not see  
21 that it was. Consequently, we will not consider the issue.  
22 Davenport v. City of Tigard, 27 Or LUBA 243 (1994).

23           This assignment of error is denied.

24           The city's decision is remanded.