

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

JAN 6 2 37 PM '89

OF THE STATE OF OREGON

VANCOUVER FEDERAL SAVINGS )  
BANK, ELPH ENTERPRISES and )  
MILL-MAPLE PROPERTIES, INC., )

LUBA No. 88-084

Petitioners, )

vs. )

FINAL OPINION  
AND ORDER OF DISMISSAL

CITY OF OREGON CITY, )

Respondent. )

Appeal from the City of Oregon City.

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HOLSTUN, Chief Referee; SHERTON, Referee.

DISMISSED 01/06/89

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

1 Opinion by Holstun.

2 NATURE OF DECISION

3 Petitioners appeal Oregon City Resolution 88-061 which  
4 initiates proceedings for annexation of certain lands to the  
5 city by requesting that the Portland Metropolitan Area Local  
6 Government Boundary Commission (boundary commission) approve  
7 the annexation.

8 INTRODUCTION

9 Oregon City is located in Clackamas County and, therefore,  
10 is subject to the jurisdiction of the boundary commission.  
11 ORS 199.425(1). The boundary commission has jurisdiction to  
12 consider requests for minor boundary changes.<sup>1</sup>

13 A request for annexation may be initiated by a resolution  
14 of the city council of the affected city.

15 ORS 199.490(1)(a).<sup>2</sup> After a city resolution requesting  
16 annexation under ORS 199.490(1)(a) is filed with the boundary  
17 commission, the boundary commission generally must take action  
18 on the requested annexation within 90 days. ORS 199.490(7).  
19 If the boundary commission approves the annexation, its  
20 decision becomes effective 45 days after adoption or at a later  
21 date specified in its decision. ORS 199.505(1). However,  
22 the boundary commission's decision does not become effective  
23 "unless it is also approved by the electors if within  
24 45 days after the date of the adoption of the order:

25 "(a) Written objections to the change signed by  
26 not less than 10% or 100, whichever number  
is lessor, of the electors in the affected  
territory are filed with the commission; or

1           "(b) A resolution objecting to the change adopted  
2           by the city council of the affected city or  
3           district board of the affected district is  
            filed with the commission." ORS 199.505(1).

4   MOTION TO DISMISS

5           Respondent City of Oregon City moves for dismissal of this  
6   review proceeding on the ground that the decision at issue,  
7   Resolution 88-061, is not a final land use decision over which  
8   the Board has jurisdiction. According to respondent,  
9   Resolution 88-061 simply initiates proceedings for annexation  
10  of certain territory to the city, and requests that the  
11  boundary commission approve the annexation.

12          Respondent argues ORS 197.825(1) limits this Board's  
13  jurisdiction to review of land use decisions. A land use  
14  decision is defined in ORS 197.015(10)(a)(A) as

15          "[a] final decision or determination made by a local  
16          government or special district that concerns the  
            adoption, amendment or application of:

17                "(i)     The goals;

18                "(ii)    A comprehensive plan provision;

19                "(iii)   A land use regulation; or

20                "(iv)    A new land use regulation; \* \* \*"

21          Respondent argues that the city's resolution is not a final  
22  decision, because a final decision on an annexation may only be  
23  made by the boundary commission. Respondent notes decisions of  
24  the boundary commission are not appealable to LUBA, but rather  
25  to the Court of Appeals under ORS 199.461(4). That statute  
26  provides, in part,

1 "[j]urisdiction for judicial review of such an order  
2 [approving or disapproving a proposed boundary change]  
is conferred upon the Court of Appeals."

3 Respondent correctly notes that cities located within the  
4 territory of the boundary commission have no authority to annex  
5 land. ORS 199.460(1). Under ORS 199.490(1)(a), such cities  
6 may request the boundary commission to review and act upon a  
7 city initiated request for annexation. Respondent posits that  
8 Resolution 88-061 simply requests such a review and  
9 annexation. Ehlen v. City of Portland, 1 Or LUBA 134 (1980).

10 Petitioners assert Resolution 88-061 is a "final decision  
11 or determination" by the city about the proposed annexation.

12 Petitioners argue

13 "In adopting the resolution, the City determined,  
14 presumably, that the annexation complies with its  
comprehensive plan and that it would request approval  
15 from the Boundary Commission." Memorandum in  
Opposition to Motion to Dismiss at 2-3.

16 We understand petitioners to believe that because the  
17 resolution (1) expresses the city's views on compliance of the  
18 annexation with its acknowledged comprehensive plan, and (2)  
19 constitutes the final act the city is authorized to perform  
20 concerning the annexation, the resolution falls within the  
21 definition of "land use decision" found in ORS 197.015(10)(a).  
22 These two arguments are addressed separately below, together  
23 with petitioners' third argument based on public policy  
24 considerations.

25 A. Boundary Commission Obligation to Consider the  
26 Acknowledged Comprehensive Plan

1       Petitioners first argue that under ORS 199.462(1), the  
2 boundary commission's review of an annexation request does not  
3 include consideration of policies in the city's comprehensive  
4 plan. Petitioners acknowledge that the boundary commission is  
5 required to consider statewide planning goals, but argue that  
6 once the city's comprehensive plan is acknowledged

7       "it is the local government, not the Boundary  
8 Commission, that has the responsibility and expertise  
9 to apply it to annexation proposals." Memorandum in  
Opposition to Motion to Dismiss at 3.

10       Petitioners' point seems to be that the city's  
11 comprehensive plan need not be considered by the boundary  
12 commission, and therefore must be considered by the local  
13 government. That is, petitioners argue the city was obliged to  
14 determine the compliance of the proposed annexation with the  
15 policies of its comprehensive plan before requesting approval  
16 from the boundary commission. See ORS 197.175(1). Because the  
17 boundary commission, according to petitioners, is not obliged  
18 to consider the city's comprehensive plan in acting on the  
19 city's request for annexation,

20       "affected property owners must raise the issue [of  
21 compliance with the comprehensive plan] before LUBA at  
22 this time or risk losing their right to ever have it  
reviewed." Memorandum in Opposition to Motion to  
Dismiss at 4.

23       In sum, petitioners argue Resolution 88-061 is the final  
24 determination by any unit of government that the requested  
25 annexation is in compliance with the city's comprehensive  
26 plan. As such, the city's determination should be reviewable

1 by LUBA. Without our review, petitioners say the proposed  
2 annexation will escape review for conformity with relevant  
3 provisions of the comprehensive plan.

4 We disagree with petitioners' understanding that the  
5 boundary commission has no responsibility to consider relevant  
6 comprehensive plan provisions. ORS 199.462(1) provides in  
7 pertinent part:

8 "In order to carry out the purposes described by  
9 ORS 199.410 when reviewing a petition for a boundary  
10 commission shall consider \* \* \* prospective physical  
11 development of land that would directly or indirectly  
12 be affected by the proposed boundary change \* \* \* and  
13 the goals adopted under ORS 197.225 when applicable  
14 under ORS 199.410(2)(d)."

15 ORS 199.462(1) refers to the goals, but does not explicitly  
16 mention the relevant comprehensive plan.<sup>3</sup>

17 However, ORS 199.410(2)(d) clearly expresses the  
18 legislative purpose that the boundary commission consider local  
19 comprehensive planning:

20 "(2) The purposes of ORS 199.410 to 199.519 are to:

21 \* \* \* \* \*

22 "(d) provide that boundary determinations are  
23 consistent with local comprehensive planning  
24 \* \* \*."

25 More importantly, ORS 197.180 provides in pertinent part:

26 "(1) Except as provided in ORS 197.277 or unless  
expressly exempted by another statute from any of  
the requirements of this section, state agencies  
shall carry out their planning duties, powers and  
responsibilities and take actions that are  
authorized by law with respect to programs  
affecting land use:

1           "(a) in compliance with goals adopted or amended  
2           pursuant to ORS Chapter 196 and 197; and

3           "(b) \* \* \* in a manner compatible with:

4                 "(A) comprehensive plans and land use  
5                 regulations initially acknowledged  
6                 under ORS 197.251; and

7                 "(B) amendments to acknowledged  
8                 comprehensive plans or land use  
9                 regulations or new land use regulations  
10                acknowledged under ORS 197.625."

11           We find nothing in ORS 199.410 to 199.519 expressly  
12           exempting the boundary commission from the provisions of  
13           ORS 197.180. The boundary commission is a state agency.  
14           ORS 199.432(2). We do not understand petitioners to argue the  
15           boundary commission's annexation decision is not an action with  
16           respect to a program affecting land use. See Peterson v.  
17           Klamath Falls, 279 Or 249, 253-254, 566 P2d 1193 (1977); Cf.  
18           ORS 197.175(1); 45 Op Att'y Gen 98 (1986). Therefore, the  
19           boundary commission is required by ORS 197.180(1) to assure  
20           annexations are compatible with the relevant acknowledged  
21           comprehensive plan(s). The boundary commission's determination  
22           on that issue is subject to review by the Court of Appeals.<sup>4</sup>  
23           Accordingly, our review of the city's resolution is not  
24           required to assure that the proposed annexation is properly  
25           determined to be compatible with the acknowledged comprehensive  
26           plan.

27           One other point merits comment. If the boundary commission  
28           could simply rely on findings or conclusions in Resolution  
29           88-061, in the sense that the city's findings or conclusions

1 that the proposed annexation is compatible with the city's  
2 comprehensive plan could be relied on by the boundary  
3 commission, and those findings or conclusions could not be  
4 challenged in an appeal of the boundary commission's decision  
5 to approve the annexation, our view of Resolution 88-061 would  
6 be different. However, we do not believe that to be the case.  
7 We note that a boundary commission decision on a requested  
8 annexation is not listed as a permit under OAR 660-31-012.  
9 Accordingly, we are aware of no authority allowing the boundary  
10 commission simply to rely on the city's determinations of plan  
11 compatibility in Resolution 88-061 to establish compatibility  
12 with the comprehensive plan. ORS 197.180(9); OAR 660-31-035.  
13 Compare Schreiner's Garden v. DEQ, 71 Or App 381, 386-388, 692  
14 P2d 660 (1984); Hudson v. City of Baker, 15 Or LUBA 650,  
15 652-653 (1987). In addition, there is nothing in the boundary  
16 commission's state agency coordination program, approved by the  
17 Land Conservation and Development Commission (LCDC) in 1978,  
18 that would excuse the boundary commission from independently  
19 determining whether the proposed annexation is compatible with  
20 the city's comprehensive plan.<sup>5</sup>

21 B. Similarity to Annexation Resolutions Found to Be  
22 Land Use Decisions

23 Petitioners compare the city resolution and later boundary  
24 commission annexation decision to the two step annexation  
25 procedure used by the City of Corvallis, a city not subject to  
26 boundary commission jurisdiction. See Heritage Enterprises v.

1 City of Corvallis, 300 Or 168, 708 P2d 601 (1985).

2 In Heritage Enterprises, supra, the first step was the city  
3 council decision to refer an annexation to the voters; the  
4 second was the vote of the electorate. The first act was  
5 determined by the court to be a "land use decision" subject to  
6 review by this Board for conformity with the applicable  
7 comprehensive plan and land use regulations. The Supreme Court  
8 explained:

9 "In the present case, the city exercised its planning  
10 responsibilities when it determined that a proposed  
11 annexation would be allowed under its comprehensive  
12 plan and referring the measure to the local  
13 electorate. This decision concerned the 'application  
14 of \* \* \* [a] comprehensive plan provision.'  
15 ORS 197.015(10)(a)(A)(ii). It was the last such  
16 decision in the sequence of decisions culminating the  
17 rejection of the proposed annexation at the polls.

18 \* \* \* \* \*

19 "The separate decision of the electorate whether to  
20 annex, as opposed to the determination whether the  
21 proposed annexation would comply with the  
22 comprehensive plan, was not a 'land use decision'  
23 within the meaning of ORS Chapter 197. The question  
24 referred to the voters was not whether the proposal  
25 could be adopted under the applicable land use law,  
26 but whether this proposal should be adopted at that  
time. The city council, not the voters, made the  
final determination of compliance with the  
comprehensive plan and land use laws." (Emphasis  
added.) 300 Or at 172.

27 ORS 199.410 to 199.519, summarized supra, establish  
28 procedures for annexation that may, but need not, result in an  
29 election. Although we agree the annexation process reviewed in  
30 Heritage Enterprises is sufficiently analogous to the  
31 procedures established in ORS 199.410 to 199.519 for boundary

1 commissions that the Supreme Court's analysis in that case  
2 should apply, petitioners incorrectly identify the analogous  
3 decisions.

4 In our view, the city's decision in Heritage Enterprises  
5 concluding its proposed annexation was consistent with the  
6 comprehensive plan and referring that decision to the voters is  
7 comparable to the boundary commission's decision in the  
8 annexation at issue in this appeal. The boundary commission's  
9 decision is the final decision in a multi-step process in which  
10 the city's comprehensive plan must be applied. In Heritage  
11 Enterprises the election was the ultimate legislative decision  
12 whether the annexation should be approved. An election is also  
13 possible in this proceeding. ORS 199.505.

14 Had there been a separate initiating decision in Heritage  
15 Enterprises preceeding the city's final decision that the  
16 annexation complied with the comprehensive plan and should be  
17 referred to the voters, that prior decision would be analogous  
18 to Resolution 88-061. Like Resolution 88-061, such a decision  
19 would not have been a final decision subject to our review  
20 under ORS 197.015 and 197.825.

21 Petitioners add that the boundary commission would not have  
22 considered and approved this annexation without Oregon City  
23 first initiating it by adopting the resolution. Petitioners  
24 claim that the city's action was not, therefore, merely  
25 advisory, but like the city's action in Heritage Enterprises,  
26 was a legal necessity to effectuate the annexation. See

1 Kasch's Garden Centers v. City of Milwaukie, 14 Or LUBA 406,  
2 414 (1986) (suggesting a city resolution that endorsed highway  
3 improvements proposed by the Metropolitan Service District  
4 might be a land use decision if the resolution was "legally  
5 required" or had any "legal effect.").

6 As we have already explained, we do not view the city's  
7 resolution in this case to be analogous to the city's  
8 resolution in Heritage Enterprises. In addition, we do not  
9 view the city's resolution as a legal necessity. There are  
10 several ways to initiate boundary commission annexations. See  
11 ORS 199.487, ORS 199.490(1) and (2). In Ehlen v. City of  
12 Portland, supra, we concluded a city resolution initiating an  
13 annexation under ORS 199.490 was not a land use decision  
14 subject to our review. In that case, as in this case, the  
15 resolution was "legally required" or had "legal effect" only in  
16 the sense it initiated a proceeding where the decision maker  
17 would later reach a decision subject to review for compliance  
18 with applicable land use standards. Id. at 135. Despite our  
19 suggestion in Kasch's Garden v. City of Milwaukie, supra, that  
20 an otherwise advisory action might be viewed as a land use  
21 decision if it had legal effect or was legally required, we see  
22 no reason to depart from our prior holding in Ehlen.

23 As noted earlier in this opinion, petitioners' primary  
24 concern, and the primary reason given by petitioner to  
25 distinguish Ehlen, is that the boundary commission need not  
26 apply the comprehensive plan and thus, but for this appeal, the

1 annexation would never be reviewed for compliance with the  
2 comprehensive plan. As we have already explained, the boundary  
3 commission is required to consider the comprehensive plan in  
4 its decision on the requested annexation and the boundary  
5 commission's decision is subject to review by the Court of  
6 Appeals. Petitioners' concerns therefore are not well taken.

7 C. Public Policy Argument

8 Finally, petitioners argue that LUBA should have  
9 jurisdiction over the city's resolution to provide an expedited  
10 review of the city's determination of compliance with its  
11 comprehensive plan. Without this review, petitioners argue the  
12 policy expressed in Simon v. Bd. of County Commissioners of  
13 Marion County, 91 Or App 487, 755 P2d 741 (1988) would be  
14 thwarted. In Simon, the Court of Appeals expressed this policy  
15 as follows:

16 "By creating LUBA and giving it exclusive  
17 jurisdiction, the legislature created a body with  
18 particular expertise to review land use decisions and  
19 channeled such decisions to that body. Quick  
20 disposition of disputed issues is also central to the  
21 statutory scheme. ORS 197.805 provides that 'it is  
22 the policy of the Legislative Assembly that time is of  
the essence in reaching final decisions in matters  
involving land use'; this policy is implemented by  
short deadlines for decision and appeal throughout the  
entire process, including expedited review by this  
court." Simon v. Marion County, 91 Or App at 490.

23 Despite petitioners' public policy argument and the Court  
24 of Appeals decision in Simon v. Bd. of County Commissioners of  
25 Marion County, supra, we find no basis upon which to assert  
26 jurisdiction over the city's resolution initiating the

1 annexation process. As we have explained earlier in this  
2 opinion, the legislature clearly provided that the boundary  
3 commission, upon receipt of a request by the city for  
4 annexation, must consider whether the annexation is compatible  
5 with the local comprehensive plan. The legislature has also  
6 provided in ORS 197.825(2)(d) and 199.461(4) that the boundary  
7 commission's decision on the requested annexation shall be  
8 reviewable by the Court of Appeals. As we read the relevant  
9 statutes, the legislature has simply determined that the policy  
10 favoring LUBA review of decisions concerning land use is  
11 outweighed by a public policy favoring direct review of  
12 boundary commission annexation decisions by the Court of  
13 Appeals.

14 CONCLUSION

15 We conclude that the decision of the City of Oregon City in  
16 Resolution 88-061 is not a final land use decision subject to  
17 our review.

18 REQUEST FOR ATTORNEY FEES

19 Respondent asks the Board to award reasonable attorney fees  
20 and expenses. ORS 197.830(13)(b) authorizes the Board to award  
21 such fees if it finds that the opposing party

22 "presented a position without probable cause to  
23 believe the position was well-founded, and primarily  
24 for a purpose other than to secure appropriate action  
by the Board."

25 Respondent supports its claim by noting that in Zusman v. City  
26 of Tigard, \_\_\_ Or LUBA \_\_\_, (LUBA No. 88-008, April 18, 1988),

1 the same law firm representing petitioners in this appeal moved  
2 to dismiss that appeal on the same grounds as respondent  
3 asserts herein. As a consequence, respondent claims the  
4 petitioners knew or should have known that this Board lacked  
5 jurisdiction to review the city's resolution. Respondent  
6 concludes petitioners presented a position without probable  
7 cause to believe it is well-founded.

8 We reject the claim for attorney fees. The fact that the  
9 law firm representing petitioners presented a contrary position  
10 in another case does not, in itself, mean petitioners' opposite  
11 view in this proceeding was "presented \* \* \* without probable  
12 cause to believe the position was well-founded, and primarily  
13 for a purpose other than to secure appropriate action by the  
14 Board." ORS 197.830(13)(b).

15 Although we interpret the controlling statutes differently  
16 than petitioners, petitioners are entitled to assert a contrary  
17 position. It is not entirely clear given (1) the Supreme  
18 Court's decision in Heritage Enterprises v. City of Corvallis,  
19 supra, and (2) the lack of a clearly stated requirement in  
20 ORS 199.462(1) for the boundary commission to consider the  
21 acknowledged comprehensive plan that Resolution 88-061 could  
22 not be viewed as a land use decision. While we do not find  
23 Resolution 88-061 to be a land use decision, neither do we find  
24 petitioners' arguments so lacking in merit that an award of  
25 attorney fees is warranted. We conclude petitioners' position  
26 represents a reasonable request to secure review by this

1 Board. As a consequence, we find no grounds to award attorney  
2 fees as provided for in ORS 197.830(13).

3 This review proceeding is dismissed, and respondent's  
4 request for an award of attorney fees is denied.

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1 FOOTNOTES

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Under ORS 199.415(13)

4 "Minor boundary change" means an annexation,  
5 withdrawal or transfer of territory to or from a city  
6 or district."

7 2

ORS 199.490(1) provides as follows:

8 "(1) A proceeding for a minor boundary change other  
9 than a transfer of territory may be initiated:

10 "(a) By resolution of the governing body of the  
11 affected city or district;

12 "(b) By petition signed by 10 percent of the  
13 electors registered in the affected  
territory;

14 "(c) By petition signed by the owners of at least  
15 one-half the land area in the affected  
territory; or

16 "(d) By resolution of a boundary commission  
17 having jurisdiction of the affected  
territory."

18 3

19 However, we note that it would seem the boundary commission  
20 would be required to consider the comprehensive plan to  
consider "prospective physical development," as ORS 199.462(1)  
expressly requires.

21 4

22 ORS 197.825(2)(d) provides that this Board does not have  
jurisdiction over land use decisions of a state agency for  
23 which the Court of Appeals has jurisdiction. A local  
government boundary commission is defined as a state agency  
24 under ORS 199.432(2). Jurisdiction for judicial review of  
boundary change decisions by local government boundary  
25 commissions is conferred upon the Court of Appeals.  
ORS 199.461(4).

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In fact, the boundary commission state agency coordination program expressly provides:

"All proposals before the commission are reviewed for compliance with \* \* \* the plans of the involved counties and/or cities." Portland Metropolitan Area Local Government Boundary Commission State Agency Coordination Program Section 2.3(b).

We note the boundary commission state agency coordination program has not yet been certified as provided in ORS 197.180(2)-(5) and OAR 660-30-000 through 660-30-095.