

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

1000 FRIENDS OF OREGON and)
COALITION FOR A LIVABLE FUTURE,)

Petitioners,)

LUBA No. 99-013

vs.)

METRO,)

Respondent,)

and)

JIM STANDRING, and HOMEBUILDERS)
ASSOCIATION OF METROPOLITAN)
PORTLAND,)

Intervenors-Respondent.)

FINAL OPINION
AND ORDER

OREGON DEPARTMENT OF)
AGRICULTURE and DEPARTMENT OF)
LAND CONSERVATION AND)
DEVELOPMENT,)

Petitioners,)

LUBA No. 99-005

vs.)

METRO,)

Respondent,)

and)

JIM STANDRING, and HOMEBUILDERS)
ASSOCIATION OF METROPOLITAN)
PORTLAND,)

Intervenors-Respondent.)

WASHINGTON COUNTY FARM BUREAU)
and OREGON FARM BUREAU,)

1)
2 Petitioners,) LUBA No. 99-019
3)
4 vs.)
5)
6 METRO,)
7)
8 Respondent,)
9 and)
10)
11 JIM STANDRING, and HOMEBUILDERS)
12 ASSOCIATION OF METROPOLITAN)
13 PORTLAND,)
14)
15 Intervenors-Respondent.)
16)
17)

18 Appeal from Metro.

19
20 Mary Kyle McCurdy, Portland, represented petitioners, 1000 Friends of Oregon and
21 Coalition for a Livable Future.

22
23 Celeste J. Doyle, Assistant Attorney General, Salem, and Richard M. Whitman,
24 Assistant Attorney General, Salem, represented petitioners, Department of Agriculture and
25 Department of Land Conservation and Development.

26
27 Steven Claus, Portland, represented petitioners, Washington County Farm Bureau and
28 Oregon Farm Bureau.

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30 Lawrence S. Shaw, Senior Assistant Counsel, and Kenneth D. Helm, Assistant
31 Counsel, Portland, represented Metro.

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33 Mark J. Greenfield, Portland, represented intervenor-respondent Jim Standing.

34
35 Robert L. Engle, Woodburn, represented intervenor-respondent Homebuilders
36 Association of Metropolitan Portland.

37
38 GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

39
40 DISMISSED 02/26/99

41
42 You are entitled to judicial review of this Order. Judicial review is governed by the
43 provisions of ORS 197.850.

44

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal Metro's resolution expressing its intent to amend the urban growth
4 boundary to include lands in urban reserve areas.

5 **MOTIONS TO INTERVENE**

6 Jim Standring and Homebuilders Association of Metropolitan Portland move to
7 intervene on the side of respondent. There is no opposition to these motions, and they are
8 allowed.

9 **JURISDICTION**

10 Metro moves to dismiss these consolidated appeals on the ground that the decision
11 challenged is not a final decision or determination and thus not a decision over which LUBA
12 has jurisdiction. ORS 197.015(10)(a); 197.825(1).

13 The challenged decision, Resolution 98-2729C, was adopted by the Metro Council on
14 December 17th, 1998, and is entitled "For the Purpose of Expressing Council Intent to
15 Amend the Urban Growth Boundary to Add Urban Reserve Areas 39, 41, 42, 62 and 63 in
16 the West Metro Subregion." Attached to the challenged resolution is Exhibit B, a 47-page
17 staff report that makes a number of findings regarding criteria applicable to the proposed
18 urban growth boundary (UGB) amendments. In pertinent part, the decision resolves:

19 "1. That the Metro Council, based on the process indicated in Exhibit B,
20 attached herein, hereby expresses its intent to adopt an ordinance
21 amending the Urban Growth Boundary to add land in Urban Reserve
22 Areas 39 plus seven acres to the west of 39, 41, 42, 62 and 63 * * *
23 within 30 calendar days of receiving notification that the property
24 outside [Metro's] jurisdictional boundary has been annexed to Metro,
25 provided such notification is received within six (6) months of the date
26 on which the resolution is adopted.

27 "2. That the Metro Council approves and endorses the request by the
28 owners of the land and electors residing on the land that the subject
29 property be annexed to Metro."

1 In its motion to dismiss, Metro explains that Resolution 98-2729C involves land
2 currently outside Metro's jurisdictional boundaries that the Metro Council has determined
3 should be brought within the Metro UGB, and accordingly, the Metro Council followed the
4 procedures at Metro Code (MC) 3.01.015(h)(5). MC 3.01.015(h)(5) provides:

5 "When the council acts to approve a legislative amendment including land
6 outside the district:

7 "(A) Initial action shall be by resolution expressing intent to amend the
8 UGB if and when the affected property is annexed to the district
9 within six months of the date of adoption of the resolution; or

10 "(B) The district may initiate a district boundary annexation concurrent
11 with a proposed UGB amendment;

12 "(C) The council shall take final action, within 30 calendar days of notice
13 that annexation to the district has been approved." (Emphasis added).

14 Metro explains that the challenged decision is the "initial action" described in
15 MC 3.01.015(h)(5) and that the Metro council did not choose to initiate a district boundary
16 annexation pursuant to MC 3.01.015(h)(5)(B), but instead chose to endorse a petition to be
17 filed by the property owners with the relevant county. According to Metro, any further
18 action by Metro is contingent on at least two subsequent steps: (1) the affected property
19 owners file a petition with the relevant county to annex the affected property into Metro's
20 boundaries; and (2) the county approves that petition within six months of the date of the
21 challenged resolution. Metro states that, assuming those contingencies occur, the council
22 will then take "final action" pursuant to MC 3.01.015(h)(5)(C). According to Metro,

23 "[t]here is no guarantee in this process that 'final action' after the resolution of
24 intent and annexation to the district will be approval of the UGB amendment.
25 [MC 3.01.015(h)(5)(C)] does not state that approval will be, or must be,
26 granted if annexation to Metro is timely approved. This part of the process
27 only commits Metro to take 'final action' within 30 days. That 'final action'
28 may or may not be adoption of an ordinance to amend the UGB. If so, that
29 would be a final land use action subject to the Board's jurisdiction." Motion
30 to Dismiss 4.

1 Metro contends that the challenged resolution is not a "final" land use decision
2 because it is merely the "initial action" in a prescribed three step process. An "initial action"
3 under MC 3.01.015(h)(5)(A), Metro argues, cannot constitute a final land use decision
4 because it is expressly contingent on events beyond Metro's control, and because
5 MC 3.01.015(h)(5)(C) requires a subsequent "final action" at which Metro is committed only
6 to making a decision regarding the proposed UGB amendment. Metro represents that the
7 Metro Council is not obligated by the resolution adopted under MC 3.01.015(h)(5)(A) to
8 approve that amendment.

9 Petitioners oppose Metro's motion, arguing that the challenged decision is a "final"
10 land use decision because it is Metro's last word with respect to the second stage of the
11 process, the county's decision to annex land within Metro's boundary. Further, petitioners
12 contend that Metro's resolution is the last pertinent decision substantively addressing the
13 statewide planning goals before land is annexed into Metro's boundaries because, petitioners
14 argue, under the applicable procedures the county has no discretion but to approve the
15 annexation once Metro has endorsed it. In support of this last point, petitioners cite to
16 MC 3.09.050, which sets out requirements for addressing proposed boundary changes for
17 entities within Metro's jurisdiction, including Metro's boundaries. MC 3.09.050(e)(4)
18 provides that

19 "If the proposed boundary change is for annexation of territory to Metro, a
20 determination by the Metro Council that the territory should be included in the
21 Urban Growth Boundary shall be the primary criteria [sic] for approval."

22 Petitioners contend that the challenged resolution is essentially Metro's determination
23 that the territory should be included in the Urban Growth Boundary, and argue that, pursuant
24 to MC 3.09.050(e)(4), the county addressing any subsequent petition for annexation must
25 apply Metro's prior determination as its "primary" criterion. Under these circumstances,
26 petitioners contend, the county's decision is largely pro forma. Petitioners submit that
27 "where Metro [pre]approves the annexation, or states its intent to add the identified lands to

1 the UGB, Metro has made [the] final and appealable land use decision, at least as to the
2 annexation." Response to Motion to Dismiss 8.

3 Both parties rely on Heritage Enterprises v. City of Corvallis, 300 Or 168, 708 P2d
4 601 (1985), and Sensible Transportation v. Metro. Service Dist. (STOP) 100 Or App 564,
5 787 P2d 498 (1990) to support their respective positions. In Heritage Enterprises, the
6 Oregon Supreme Court determined that a city council's decision that a proposed annexation
7 complied with the comprehensive plan and applicable land use laws was a "final" land use
8 decision, notwithstanding that the city council referred the annexation decision to the
9 electorate for approval. 300 Or at 172. In STOP, the Court of Appeals held that a
10 recommendation by Metro to a county was not a final land use decisions, because the
11 recommendation was contingent on a determination by either Metro or the county that the
12 subject of the recommendation will be consistent with the statewide planning goals or plan
13 amendments or goal exceptions necessary to achieve consistency. 100 Or App at 566.
14 Accordingly, the court noted that the challenged decision "cannot lead to land use effects
15 without further appealable land use decisions by Metro or the county." Id. at 570.

16 Petitioners argue that the present case resembles Heritage Enterprises more than
17 STOP, in that Metro's endorsement of the annexation petition will, as a practical matter,
18 constitute the last and only stage at which the proposed annexation will be evaluated for
19 compliance with the statewide planning goals and other applicable criteria, because,
20 according to petitioners, the county will not make an independent evaluation of compliance
21 with those criteria, but simply approve the annexation on the strength of Metro's
22 determination in the challenged decision. Conversely, Metro argues that the present case
23 resembles STOP rather than Heritage Enterprises, because, contrary to petitioners' view, the
24 county will independently evaluate whether the proposed annexation complies with the
25 statewide planning goals and other criteria applicable to annexations. Metro argues that
26 petitioners misread MC 3.09.050(e)(4) as obligating the county to approve an annexation

1 where Metro has determined that the pertinent territory should be included in the Metro
2 UGB. That provision, Metro notes, does not state that Metro's determination is the only
3 criterion. We understand Metro to argue that, notwithstanding whatever weight the county
4 gives Metro's endorsement in making the annexation decision, nothing in MC 3.09.050(e)(4)
5 or elsewhere relieves the county from its obligation to independently apply the statewide
6 planning goals and other applicable criteria in making its decision regarding annexation.

7 We agree with Metro that petitioners have not established that Metro's endorsement
8 constitutes the last stage at which the annexation of territory within Metro's boundaries will
9 be evaluated for compliance with applicable criteria. Whatever role MC 3.09.050(e)(4) plays
10 in annexation decisions, it manifestly does not relieve the county from the independent
11 obligation to apply the statewide planning goals and other applicable criteria to the proposed
12 annexation. Accordingly, we reject the argument advanced by petitioners that Metro's
13 decision is the final land use decision with respect to the annexation of territory into Metro's
14 boundaries.¹ Because the challenged decision is not a final land use decision, we lack
15 jurisdiction over these appeals.

16 These appeals are dismissed.

¹ODA/DLCD do not appear to argue that the challenged decision is a final decision with respect to the proposed UGB amendment. ODA/DLCD appear to concede that Metro's representations regarding the third stage under MC 3.01.015(h)(5)(C) are correct, that Metro is not obligated to approve the UGB amendment merely because its "initial action" under MC 3.01.015(h)(5)(A) expressed its resolution to approve the UGB amendment, or merely because the county approves the annexation petition. We write only to clarify that we also accept Metro's representations. Accordingly, if Metro ultimately takes "final action" under MC 3.01.015(h)(5)(C) with respect to the territory that is the subject of these appeals and amends the UGB, on any appeals of that decision, we will not expect to hear from Metro that we lack jurisdiction because the final appealable land use decision was not that "final action" but an earlier event.