

NATURE OF THE DECISION

Petitioner City of Happy Valley (hereafter Happy Valley) appeals an ordinance that annexes territory that lies between Happy Valley and the City of Damascus (hereafter Damascus).

INTRODUCTION

This appeal is one of three related LUBA appeals concerning two city annexation ordinances. One annexation ordinance was adopted by Damascus, and one annexation ordinance was adopted by Happy Valley. The areas that were annexed by those ordinances partially overlap. Three tax lots have been annexed by both cities.

Each city’s annexation ordinance is the subject of a separate LUBA appeal. In this appeal (LUBA No. 2005-118), Happy Valley challenges the Damascus annexation ordinance. In LUBA No. 2005-125, Damascus challenges the Happy Valley annexation ordinance. In addition to appealing the Damascus annexation ordinance directly to LUBA, Happy Valley also appealed the Damascus annexation ordinance to the Metro Boundary Appeals Commission (MBAC). The MBAC ultimately denied the City of Damascus annexation ordinance.¹ In LUBA No. 2005-154, Damascus challenges the MBAC decision. We issue final opinions in all three appeals this date.

Although oral argument in the three appeals was scheduled for the same date and the final opinions in all three appeals are being issued on the same date, the three appeals were filed on different dates, have different records and have not been formally consolidated under OAR 661-010-0055.

¹ Under the Metro Code, the MBAC has two options when it considers a contested case challenging a boundary change. It can affirm or deny the boundary change; it cannot remand the boundary change for further proceedings.

1 **MOTION TO DISMISS**

2 On August 25, 2005, Damascus moved to dismiss this appeal, arguing that its
3 annexation ordinance is not yet final. In an order dated September 15, 2005 we declined to
4 rule on that motion, citing uncertainty regarding the relevant statutes and Metro Code (MC)
5 provisions. For the reasons explained below, we now conclude that we do not have
6 jurisdiction to review the Damascus annexation ordinance, and we therefore dismiss this
7 appeal.

8 Pursuant to statutory authority, Metro has adopted a procedure for reviewing
9 annexations and other boundary changes. We discuss that procedure briefly below before
10 turning to the jurisdictional question presented in Damascus’s motion to dismiss.

11 **A. Statutory Delegation of Authority to Metro**

12 Although a number of statutes grant Metro general and specific powers, the statutes
13 that most specifically address Metro’s authority to adopt a system for reviewing boundary
14 changes are ORS 268.351 and ORS 268.354(1). ORS 268.351 provides definitions of
15 “boundary change” and “contested case.”² ORS 268.354(1) provides as follows:

16 “In addition to the requirements established by ORS chapters 198, 221 and
17 222 for boundary changes, *boundary changes within a metropolitan service*
18 *district are subject to the requirements established by the district.* The
19 requirements established by a metropolitan service district shall be developed
20 in consultation with the Metro Policy Advisory Committee and the district
21 council. The requirements established by a district shall include the
22 following:

² ORS 268.351 provides:

“As used in ORS 268.354 and section 11, chapter 516, Oregon Laws 1997, unless the context requires otherwise:

- “(1) ‘Boundary change’ means a major boundary change or a minor boundary change, as those terms are defined in ORS 199.415.
- “(2) ‘Contested case’ means a boundary change decision that is contested or otherwise challenged by a city, county or special district.”

1 “(a) Boundary changes shall be subject to a uniform hearing and
2 notification process adopted by the district.

3 “(b) The district shall establish an expedited process for uncontested
4 boundary changes.

5 “(c) Contested cases shall be subject to appeal to a three-person
6 commission established by the district with further appeals as provided
7 by law. The district council shall appoint the members of the
8 commission from a list of nominees provided by Clackamas,
9 Multnomah and Washington Counties, with one member appointed
10 from the nominees provided by each county.

11 “(d) All boundary change decisions shall be subject to clear and objective
12 criteria established by the district including, but not limited to,
13 compliance with the adopted regional urban growth goals and
14 objectives, functional plans, cooperative and urban service agreements
15 adopted pursuant to ORS chapter 195 and the regional framework plan
16 of the district.”

17 ORS 268.354(1) makes boundary changes within the area subject to Metro’s
18 jurisdiction “subject to the requirements of [Metro].” That is a very broad statutory grant of
19 authority. Subsections (a) and (b) mandate that Metro’s requirements include certain things
20 (a uniform hearing and notification process and an expedited process for uncontested cases).
21 Subsection (c) mandates that Metro provide a right of appeal to a three person commission
22 for contested cases. Subsection (d) sets out a nonexclusive list of criteria that Metro must
23 apply to boundary changes. Other than the requirements set out in ORS 268.354(1)(a)
24 through (d), ORS 268.354(1) imposes no limits on Metro’s authority to adopt “requirements”
25 for “boundary changes.” We turn to the relevant boundary change requirements that Metro
26 has adopted.

27 **B. MC Chapter 3.09**

28 Metro’s requirements for local government boundary changes are set out at MC
29 Chapter 3.09. In our decision in *City of Damascus v. Metro*, ___ Or LUBA ___ (LUBA No.
30 2005-154, January 26, 2005), we discuss those procedures in some length. We include a
31 shorter description here.

1 As Metro uses the term, the Damascus annexation ordinance is not an “expedited
2 decision.”³ MC 3.09.050 sets out uniform hearing and decision making requirements for
3 “Final Decisions Other Than Expedited Decisions.” Subsection (b) requires that the body
4 proposing a boundary change prepare and make a report before the boundary change is
5 adopted.⁴ Subsection (c) sets out certain minimum requirements for standing to appeal a
6 boundary change to the MBAC. Subsection (d) sets out approval criteria for boundary
7 changes. Subsection (e) sets out factors that must be considered in certain circumstances. In
8 short, MC 3.09.050 establishes a number of requirements that Damascus was required to
9 follow in adopting its annexation ordinance and that interested parties must satisfy to gain
10 standing to appeal the city’s boundary change ordinance.

11 MC 3.09.060 establishes the MBAC, which is the three-person commission required
12 by ORS 268.354(1)(c). MC 3.09.070 is entitled “How Contested Cases Filed.” MC
13 3.09.070(c) is a particularly important requirement, which provides a right of appeal to
14 necessary parties and delays the date that boundary change decision becomes final.⁵ MC
15 3.09.090 sets out how the MBAC conducts hearings when contested cases are filed. MC
16 3.09.090(f) requires that the MBAC adopt findings addressing the same approval criteria that
17 the body adopting the boundary change must address under MC 3.09.050(d). As previously
18 noted, MC 3.09.090(g) limits the MBAC’s authority to affirming or denying the boundary
19 change.

³ Apparently the Happy Valley annexation was an expedited decision. MC 3.09 provides no right to appeal expedited decisions to the MBAC, and the Happy Valley annexation ordinance was not appealed to the MBAC.

⁴ As we explain in *City of Damascus v. Metro*, those criteria address a number of specific topics and include a requirement for “[c]onsistency with other applicable criteria for the boundary change in question under state and local law.” MC 3.09.050(d)(7).

⁵ MC 3.09.070(c) provides:

“A contested case is a remedy available by right to a necessary party. When a notice of appeal is filed, a boundary change decision shall not be final until resolution of the contested case by the [MBAC].”

1 In summary, the Metro requirements for boundary changes impose certain substantive
2 and procedural requirements that apply at the time a body adopts a boundary change. The
3 Metro requirements for boundary changes also provide a right to necessary parties to appeal
4 certain boundary changes to the MBAC. The right of appeal to the MBAC is limited to
5 necessary parties, but has some similarities to the LUBA appeal process.

6 **C. LUBA’s Jurisdiction**

7 As relevant here, LUBA’s jurisdiction is limited to land use decisions and limited
8 land use decisions. ORS 197.825(1).⁶ ORS 197.825(2) requires that a petitioner exhaust “all
9 remedies available by right before [appealing to LUBA.]” And as we have also explained on
10 numerous occasions, the statutory definition of “land use decision” itself also imposes a
11 limitation on our jurisdiction. As defined by ORS 197.015(10)(a), a land use decision must
12 be a “final” decision.⁷ *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752,
13 *aff’d* 93 Or App 73, 761 P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA
14 399, 405 n 7 (1988). We do not understand Damascus to dispute that its annexation

⁶ ORS 197.825(1) provides:

“Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.”

⁷ ORS 197.015(10) provides, in part:

“‘Land use decision’:

“(a) Includes:

“(A) A *final* decision or determination made by a local government * * * that concerns the adoption, amendment or application of:

- “(i) The [statewide planning] goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]” (Emphasis added.)

1 ordinance is a land use decision if: (1) it is properly viewed as a final decision and (2) all
2 remedies available by right to a local appeal of that decision have been exhausted.

3 Based on MC 3.09.070(c), we conclude that the Damascus annexation ordinance is
4 not final. Happy Valley is a “necessary party” as MC 3.09.070(c) uses that term. Its appeal
5 to the MBAC is a contested case. MC 3.09.070(c) expressly provides that the Damascus
6 annexation ordinance will not be final until there is “resolution” of Happy Valley’s appeal of
7 that ordinance to the MBAC. In a separate opinion issued this date we remand the MBAC
8 decision that denied the Damascus annexation ordinance. Until there is “resolution” of our
9 remand, the Damascus annexation ordinance is not final. We also lack jurisdiction to review
10 the Damascus annexation ordinance because Happy Valley, a necessary party, has not yet
11 exhausted the local appeal that MC 3.09.070(c) makes available by right.

12 In resisting the motion to dismiss, Happy Valley argues first that Metro lacks
13 authority to delay the date the Damascus Ordinance become final. Happy Valley next argues
14 that MC 3.09.070(c) should be understood to delay the effective date of the Damascus
15 annexation ordinance, but not its “finality.” And last, Happy Valley argues that the ORS
16 197.825(2) requirement to exhaust available remedies before appealing to LUBA only
17 requires that Happy Valley exhaust any remedies it may have before Damascus. Happy
18 Valley contends that ORS 197.825(2) does not make Happy Valley’s appeal to the MBAC a
19 prerequisite to its appeal to LUBA. Rather, Happy Valley argues, LUBA and the MBAC
20 have concurrent jurisdiction.

21 We see no reason why the ORS 268.354(1) grant of statutory authority to Metro to
22 establish requirements for boundary changes, including local appeal requirements, is not
23 broad enough to allow Metro to delay the finality of a boundary change until a contested case
24 challenging that boundary change is resolved. As ORS 268.354(1) is written, Metro and
25 Metro area cities and special districts share decision making authority over boundary
26 changes, with Metro holding the ultimate authority to approve or deny certain boundary

1 changes. Certainly nothing in the text of ORS 268.354(1) supports a conclusion that Metro
2 cannot impose a requirement that delays the date that certain boundary changes become final.
3 And we can think of a number of reasons why Metro might have decided it would be prudent
4 to delay the date an appealed boundary changes become final, so that LUBA and the MBAC
5 would not be put in the position of reviewing the same boundary change decision at the same
6 time.

7 Turning to Happy Valley’s second point, Happy Valley is correct that LUBA’s
8 jurisdiction over a land use decision is not affected by local charters or codes that delay the
9 effective date of an otherwise final decision. *Friends of Clean Living v. Polk County*, 36 Or
10 LUBA 544, 552 (1999); *Club Wholesale v. City of Salem*, 19 Or LUBA 576, 578 (1990);
11 *Hazen Investments, Inc., v. Lane County*, 2 Or LUBA 151, 152 (1980). However, we reject
12 Happy Valley’s suggestion that the words “shall not be *final* until resolution of the contested
13 case by the [MBAC]” in MC 3.09.070(c) should be read to say “shall not be *effective* until
14 resolution of the contested case by the [MBAC].” That would require that we ignore the
15 word that Metro used and substitute a word that Metro did not use. Elsewhere in MC
16 Chapter 3.09, Metro demonstrates that it knows the difference between the words “final” and
17 “effective.”⁸

18 Finally, with regard to Happy Valley’s point that it is somewhat unusual that Happy
19 Valley must exhaust a remedy that is provided by Metro when it apparently has already
20 exhausted all remedies available before Damascus, we agree that requirement is somewhat
21 unusual. However, that remedy is a creature of statute and the MC. In the more typical case,
22 a local government does not share decision making authority over boundary change

⁸ For example, MC 3.09.050(f) provides:

“A final boundary change decision by an approving entity shall state the effective date, which date shall be no earlier than 10 days following the date that the decision is reduced to writing, and mailed to all necessary parties. However, a decision that has not been contested by any necessary party may become effective upon adoption.”

1 decisions, so there could be no remedy before another body to exhaust before the local
2 government's decision became final and appealable to LUBA. ORS 268.354 and MC
3 Chapter 3.09 operate to make this an atypical case. There is simply no way to read ORS
4 268.354(1) and MC 3.09.070 not to provide a remedy that must be exhausted before an
5 appeal to LUBA is available. While we have some question what form that appeal might
6 take after resolution of the pending Happy Valley contested case before the MBAC, that
7 question is not before us.⁹ The only question before us at this time is whether ORS
8 197.825(2) requires that that appeal be exhausted before an appeal to LUBA is possible to
9 contest the city's decision to approve the Damascus annexation ordinance. We conclude that
10 it does, and that this appeal therefore must be dismissed.

11 This appeal is dismissed.

⁹ It is reasonably clear that an appeal of a MBAC decision to deny a boundary change takes the form of an appeal to LUBA of that MBAC decision. But if MBAC ultimately approves the Damascus annexation ordinance, the boundary change will have been approved by both Damascus and the MBAC. Whether any appeal of that decision would take the form of an appeal of the city decision only, both the city's decision and the MBAC decision, or the MBAC decision only is not clear to us under the relevant statutes. Some clarification from Metro and the Legislature on how they wish the appellate process to work after a MBAC decision to approve a boundary change decision may be needed.