BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL HAMMONS,
Petitioner,

vs.

CITY OF HAPPY VALLEY,
Respondent.

LUBA No. 2004-117

FINAL OPINION
AND ORDER

Appeal from Benton County.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Reeve Kearns, PC.

Pamela J. Beery, Portland, filed the response brief and argued on behalf of respondent. With her on the brief were David F. Doughman, Spencer Q. Parsons and Beery, Elsner and Hammond, LLP.

DAVIES, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 03/10/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioner appeals a city decision annexing 170 parcels, totaling 891.06 acres, to the City of Happy Valley (city).

MOTION TO TAKE OFFICIAL NOTICE

The city requests that we take official notice of the following documents: (1) Clackamas County Order No. 2004-162, (2) City of Happy Valley Ordinance No. 301, and (3) Clackamas County Map of City of Damascus Boundary.[1] Petitioner requests that we take official notice of City Measure 385 and Metro Ordinance No. 02-969B.[2] *See* Petition for Review 5 n 2, 3. There is no objection to our consideration of those documents, and we will consider them.

FACTS

In 2002, the property that is the subject of the annexation challenged in this appeal was included in the Metro Urban Growth Boundary by Metro Ordinance No. 02-969B. The challenged decision annexes property to the south and east of the existing boundaries of the city and essentially determines the boundary lines between the city and the new City of Damascus, which lies directly to the east. The city lies west of the recently incorporated City of Damascus. We take the following additional relevant facts from the city's brief:

> "Petitioner challenges Ordinance No. 288 adopted by the City, which approved the annexation consisting of 891.06 acres and 170 properties generally east of the City. Happy Valley annexations ordinarily must be submitted to the City voters for approval, but in 2002 the City electorate approved a five-year voter approval exemption for all areas at issue in this case.

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[1] Clackamas County Order No. 2004-162 approves the petition and election for incorporation of the City of Damascus. City of Happy Valley Ordinance No. 301 is an ordinance amending the official zoning map of the City of Happy Valley. The Clackamas County Map of City of Damascus Boundary is a map depicting the proposed zoning of the property to be annexed through the challenged decision.

[2] Measure 3-85 is a ballot measure, approved by the voters of the City of Happy Valley, seeking a waiver of the City Charter requirement that city voters separately approve annexations of property to the city for property located east of the city's current boundaries. Metro Ordinance No. 02-969B amended the Metro Urban Growth Boundary.

> "On November 14, 2003, the City mailed petitions for annexation to approximately 597 property owners, all within the City's urban growth boundary, and 170 signed petitions requesting annexation were returned. The territory annexed is comprised of parcels in ten different locations adjacent to the former City boundary and within the City's urban growth boundary. The annexation boundaries were drawn up to include only those properties where the property owners signed petitions supporting annexation.
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> "A hearing on the proposed annexation was scheduled and held on June 28, 2004 at the Happy Valley City Hall. A staff report was made available to the public seven days before the June 28 hearing, and notice of the hearing was duly posted. Petitioner appeared at the hearing and provided written and oral testimony." Respondent's Brief 1-2 (citations omitted).

At the hearing, the city council declined petitioner's request that it delay issuing a decision and unanimously approved the annexation. The city council incorporated by reference the findings of the staff report as its own.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city failed to follow applicable procedures in several different respects. First, he argues that the city was required to make the staff report available fifteen days prior to the June 28, 2004 hearing, and that it erred in making it available only seven days prior to that hearing. He also argues that the staff report omitted required information that should have been included. Finally, petitioner argues that the city erred when it denied his request "for additional time to review and rebut the staff report." Petition for Review 7. These procedural errors, petitioner asserts, prejudiced his substantial rights because he did not have enough time to review and respond to the staff report and that, if afforded the required fifteen days, he "would have provided more specific information and argument about Metro's requirements for this annexation, including Metro Ordinance No. 02-969B." *Id*. at 8.

Petitioner argues that the challenged decision is governed by ORS 197.763 and Metro Code (MC) 3.09.050(b). As relevant, ORS 197.763(4)(b) requires a staff report to be made

available at least seven days prior to a hearing governed by that statute.[3] Any participant may also request an opportunity to present additional evidence, arguments or testimony regarding the application. ORS 197.763(6).[4] MC 3.09.050(b) requires the staff report for a "boundary change" decision to be made available to the public no later than 15 days before the date set for the decision and identifies certain information that must be included in the staff report.[5]

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[3] ORS 197.763(4)(b) provides:

> "Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. Any continuance or extension of the record requested by an applicant shall result in a corresponding extension of the time limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179."

[4] ORS 197.763(6) provides, in part:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
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> "(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.
>
> "(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

[5] MC 3.09.050 provides, in relevant part:

> "Uniform Hearing and Decision Requirements for Final Decisions Other Than Expedited Decisions
>
> "(a) The following minimum requirements for hearings on boundary change decisions operate in addition to all procedural requirements for boundary changes provided for under ORS chapters 198, 221 and 222. * * *

The city argues first that ORS 197.763 does not apply to the challenged decision because the annexation on appeal is a legislative, not a quasi-judicial land use decision.[6] At oral argument, petitioner conceded that ORS 197.763 applies only to quasi-judicial decisions and does not apply directly to the challenged decision, which he also concedes is legislative.

A. Timeliness of Staff Report

The city argues that the provision of MC 3.09.050(b) requiring that the staff report be made available 15 days prior to the hearing does not apply. *See* n 5. In support of its argument that the 15-day requirement does not apply, the city points to MC 3.09.050(a), which provides that the procedural requirements set forth in MC 3.09.050(b) "operate in addition to all procedural requirements for boundary changes provided for under ORS Chapter 198, 221 and 222." Because MC 3.09.050(a) does not also mention ORS Chapter 197, the city argues, MC 3.09.050(b) does not apply to add procedural requirements beyond those in ORS Chapter 197. Respondent's Brief 9. The city's argument seems to be that because MC 3.09.050(a) provides that the procedural

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"(b) Not later than 15 days prior to the date set for a boundary change decision, the approving entity shall make available to the public a report that addresses the criteria in subsections (d) and (g) below, and that includes at a minimum the following:

"(1) The extent to which urban services presently are available to serve the affected territory including any extra territorial extensions of service;

"(2) A description of how the proposed boundary change complies with any urban service provider agreements adopted pursuant to ORS 195.065 between the affected entity and all necessary parties;

"(3) A description of how the proposed boundary change is consistent with the comprehensive land use plan, public facility plans, regional framework and functional plans, regional urban growth goals and objectives, urban planning agreements and similar agreements of the affected entity and of all necessary parties;

"(4) Whether the proposed boundary change will result in the withdrawal of the affected territory from the legal boundary of any necessary party; and

"(5) The proposed effective date of the decision."

[6] It is well-established that the procedural requirements of ORS 197.763 apply only to quasi-judicial, not legislative land use decisions. *Parmenter v. Wallowa County*, 21 Or LUBA 490, 492 (1991).

requirements in subsection (b) are intended to be in addition to other statutory requirements that do not include ORS Chapter 197, then those MC 3.09.050(b) procedural requirements that are similar to those imposed by ORS Chapter 197 cannot be applied. According to the city, only the procedural requirements in 3.09.050 that are in addition to those listed in ORS 198, 221 and 222 apply.[7]

The city's argument is untenable. First, as discussed earlier in this opinion, ORS 197.763 does not apply because the challenged decision is legislative. MC 3.09.050(a) provides that the hearing requirements set forth in MC 3.09.050(b) through (g) are in addition to the procedural requirements for boundary changes in ORS chapters 198, 221 and 222. We fail to see how the fact that MC 3.09.050(a) does not list ORS chapter 197 means that the hearing requirements in MC 3.09.050(b) do not apply to the challenged decision. Such an interpretation would render the 15-day requirement in MC 3.09.050(b) meaningless. The decision on appeal is a "boundary change decision" and MC 3.09.050(b), providing the procedures for boundary change decisions, clearly applies. The city was required to make its staff report available no less than 15 days prior to the June 28, 2004 hearing, and the city's failure to make it available within the required timeframe was error.

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[7] The city compares the language in MC 3.09.050, which references only ORS chapters 198, 221 and 222, with MC 3.09.030(a), which does reference ORS chapter 197:

"Uniform Notice Requirements for Final Decisions

> "The following minimum requirements apply to all boundary change decisions by an approving entity. Approving entities may choose to provide more notice than required. These procedures are in addition to and do not supersede the applicable requirements of ORS Chapters 197, 198, 221 and 222 and any city or county charter for boundary changes. * * *"

MC 3.09.0530(a) specifically mentions ORS Chapter 197 and clarifies that the procedural code requirements do not supercede the ORS 197 requirements. The city's argument seems to be that the 15-day requirement in MC 3.09.050(b) does not apply because ORS Chapter 197 is not referenced in MC 3.09.050(a)

B. Expedited Decision

The city also argues that the challenged decision is an "expedited decision" pursuant to MC 3.09.045.[8] Under the expedited procedures provided for under MC 3.09.045, there is no requirement for a public hearing and a staff report need only be made available to the public seven days prior to the date of the decision. MC 3.09.045(c). Petitioner argues that (1) the notice of hearing makes no mention that the city processed the subject application as an expedited decision pursuant to MC 3.09.045, (2) the city in fact did not process it as an expedited decision, and (3) the city cannot now rely on those provisions to avoid the requirements of MC 3.09.050(b).[9] We agree with petitioner.

C. Substantial Prejudice

The city contends that even if it did commit procedural error in failing to make the staff report available 15 days prior to the hearing, petitioner has not demonstrated that his substantial rights have been prejudiced in any way. The city asserts that a petitioner "must demonstrate a relationship between the [procedural] defect and the result in order to establish that the defect prejudiced his substantial rights." *Thomas v. Wasco County*, 30 Or LUBA 142, 145 (1995). The

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[8] MC 3.09.045 provides, in relevant part:

> "(a) Approving entities may establish an expedited decision process that does not require a public hearing consistent with this section. Expedited decisions are not subject to the requirements of Sections 3.09.030(b) and 3.09.050(a), (b), (c), (e) or (f). The expedited decision process may only be utilized for minor boundary changes where the petition initiating the minor boundary change is accompanied by the written consent of one hundred percent (100%) of the property owners and at least fifty percent (50%) of the electors, if any, within the affected territory.
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> "* * * * *
>
> "(c) At least seven days prior to the date of decision the approving entity shall make available to the public a brief report that addresses the factors listed in Section 3.09.050(b). The decision record shall demonstrate compliance with the criteria contained in Sections 3.09.050(d) and (g)."

[9] The staff report cites to MC 3.09.050, not MC 3.09.045, as the relevant code provision. Record 304.

city cites to *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001), in support of its argument that the untimeliness of the staff report did not prejudice petitioner's substantial rights.

In *Crowley*, although the staff report was required to be made available to the public 15 days prior to the planning commission hearing, the city made it available only seven days before the hearing. Despite the error, the petitioners submitted three sets of written comments to the planning commission, which contained detailed analysis and argument regarding the applicable criteria. The petitioners subsequently appealed the planning commission decision to the city council, where they again submitted written testimony and testified orally. We found in that case that any prejudice to the petitioners' substantial rights that might have occurred before the planning commission was cured by their opportunity to present testimony to the city council. *Id*. at 104.

In this case, the proposal involves 170 parcels, totaling 891.06 acres, and the final decision was rendered seven days after the staff report became available. Petitioner submitted only one page of written testimony.[10] The minutes of the June 28, 2004 hearing reflect that petitioner requested that the decision on the annexation be delayed, commented that the staff report was required to be made available 15 days prior to the hearing, and that city boundaries should follow natural features. That was the extent of petitioner's testimony. Unlike *Crowley*, there was no local appeal where the city's procedural error could be cured.

The city argues that petitioner's substantial rights have not been prejudiced because, in the seven months since the hearing, he has been unable to expand on the arguments he made at that

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[10] The written material submitted by petitioner provides:

> "Please include this in the written record.
>
> "It is my opinion that the City of Happy Valley will be in violation of various Metro Ordinances if indeed you approve this application.
>
> "Ordinance 3.09.050(b)
>
> "Ordinance 02-969B exhibit M section 2, A, numbers 3 and 4
>
> "Your consideration would be greatly appreciated." Record 333.

hearing. The city's attorney also commented at oral argument that it does not make any "raise it or waive it" arguments to the issues raised in the petition for review. We understand the city to argue that petitioner's substantial rights are not prejudiced because he was allowed to raise at LUBA issues that he might not have raised below.

While the city is correct that some of petitioner's assignments of error are not significantly more developed in this appeal than they were at the local hearing, petitioner raises two issues, the issues raised in his third and fourth assignments of error, that were not even mentioned in his limited testimony below. Petitioner has a substantial right to an adequate opportunity to prepare and submit his case and the right to a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). That right refers to petitioner's participation at the *local* level. The city's choice not to challenge petitioner's ability to raise issues in this appeal because they were not raised below does not cure the city's error.[11] Petitioner had a right to participate fully in the local hearing, and given the complexity of the subject application and the short time provided to petitioner to review the information and prepare responses, the city's procedural error prejudiced that substantial right.

Petitioner's substantial rights were prejudiced because he was precluded, due to the short time the staff report was available prior to the hearing, from adequately presenting his arguments before the decision maker at the local level.[12]

Petitioner's first assignment of error is sustained, in part.

Although we remand on this procedural issue, we address the merits of petitioner's remaining assignments of error in the interests of allowing a complete resolution of this matter on remand.

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[11] We note that the city's choice not to invoke the waiver doctrine is somewhat meaningless because, as we have already noted, this appeal concerns a legislative land use decision, and the ORS 197.835(3) waiver doctrine therefore does not apply.

[12] Because we remand based on this procedural error, we need not address petitioner's arguments that the city erred in refusing his request that the record remain open and in preparing a deficient staff report.

SECOND ASSIGNMENT OF ERROR

Metro Ordinance 02-969B, which brought the subject property within the Metro UGB, imposes specific planning requirements on local jurisdictions. Exhibit M to Metro Ordinance 02-969B requires that the city boundary follow the natural features of the landscape.[13] In approving the proposed annexation, petitioner argues, the city was fixing Happy Valley's eastern and southern boundary and, by default, the western boundary of Damascus. The city erred, petitioner contends, by failing to comply with or even address the requirement that the boundary follow the natural features of the landscape.

The city argues that the requirements cited by petitioner do not apply to the city. It asserts that the provisions impose duties only on Clackamas County and Multnomah County, but do not impose any obligations on the city. *See* underscoring added in n 13. The city also argues that Clackamas County specifically approved the location of the Happy Valley/Damascus boundary

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[13] Exhibit M to Metro Ordinance 02-969B imposes the following conditions:

"**II. Specific Conditions for Particular Areas**

"A. Study Areas * * *

"* * * * *

"3. In the planning required by Title 11, Clackamas County shall ensure, through phasing or staging urbanization of the study areas and the timing of extension of urban services to the areas, that the Town Center of Damascus, as shown on the 2040 Growth Concept Map (Exhibit N) or comprehensive plan maps amended pursuant to Title 1 of the UGMFP, section 3.07.130, becomes the commercial service center of Study Areas 10 and 11 and appropriate portions of Study Areas 12, 13, 14, 17 and 19. *Appropriate portions of these study areas shall be considered intended for governance by a new City of Damascus. The Damascus Town Center shall include the majority of these areas' commercial retail services and commercial office space. Title 11 planning for these areas shall ensure that the timing of urbanization of the remainder of these areas contributes to the success of the town center.*

"4. In the planning required by Title 11, Clackamas and Multnomah Counties shall provide for separation between the Damascus Town Center and other town centers and neighborhoods centers designated in Title 11 planning or other measures in order to preserve the emerging and intended identities of the centers *using, to the extent practicable, the natural features of the landscape features in the study areas.*" Metro Ordinance No. 02-969B, II(A)(3)&(4)." (Italics added by petitioner; underscoring added by the city).

when it incorporated the City of Damascus. That decision, the city asserts, was consistent with a previously adopted Urban Growth Management Agreement, and petitioner cannot collaterally attack that decision by raising the issue in this appeal of the city's annexation decision. Finally, the city argues that the boundary approved in the challenged decision does consider the natural features of the area, and petitioner has not pointed to any evidence that it does not.

We agree with the city that paragraph 3 of Exhibit M is directed at Clackamas County and paragraph 4 of Exhibit M is directed at Clackamas County and Multnomah County. If Metro had intended to direct the planning requirements of Exhibit M at the City of Happy Valley or other Metro area cities, it easily could have done so. Because Metro did not do so, the arguments advanced by petitioner under this assignment of error provide no basis for reversal or remand.

Petitioner's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As explained earlier in this opinion, a 2002 ordinance, Measure 385, provided that certain annexations could be approved by the city council without a vote of the people. Petitioner argues that that ordinance only provided the city council with authority to annex territory east of the city. A portion of the territory annexed by the challenged decision is south of the city. Accordingly, petitioner contends, only that territory east of the city could be annexed without voter approval. All other territory required voter approval.

In response, the city provides the maps that accompanied Measure 385. It explains that the map that accompanied Measure 385 shows all of the property subject to the challenged annexation as land affected by the voter-approval exemption created by Measure 385. The city appends that map to its appendices of its brief. The map makes clear that all of the property proposed to be annexed was exempted from the requirement for voter approval through Measure 385. Accordingly, none of the property subject to the challenged annexation required voter approval.

Petitioner's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city's conclusion that the challenged decision complies with Happy Valley City Code (HVCC) 16.50.080 misapplies applicable law and is unsupported by adequate findings or substantial evidence. HVCC 16.40.080 provides:

> "Whenever any property or area is annexed to the city, the action by the city council to annex the property or area shall also include an ordinance to amend official map no. 11 to an appropriate designation of the City of Happy Valley."

Petitioner argues that HVCC 16.40.080 provides a mandatory requirement that, concurrent with annexation, the city must adopt an ordinance amending its zoning map to designate the annexed property to a city zoning designation. Because the city failed to adopt a zoning map amendment at the same time it approved the challenged decision and because it failed to amend the map to designate the annexed property with a city zoning designation, it failed to comply with HVCC 16.40.080.

The city argues that it is currently in the process of adopting an amendment to the city's official zoning map, and petitioner's fourth assignment of error is therefore moot. Respondent's Brief 27. Petitioner counters that the proposed zoning map applies county zoning, not city zoning, and therefore fails to comply with HVCC 16.40.080. According to petitioner, an "appropriate designation of the City of Happy Valley" requires a city zoning designation. The city argues that it interpreted HVCC 16.40.080 to allow the city to amend the official zoning map to an "appropriate" designation, and that a county designation is the appropriate zoning, under the circumstances of this case. The city cites the following finding from the staff report, which was adopted by the city:

> "The properties proposed for annexation will retain the rural zoning designations until completion of the concept planning process which is anticipated to be completed in December of 2005. At that time, the City will develop a comprehensive plan for the newly annexed areas and will assign urban level zoning designations." Record 314.

The city accurately notes that LUBA may review a local government's implicit interpretation of its own code and that such implicit interpretation is entitled to deference. However, we do not

see that the language quoted above, or any other language of the challenged decision that has been cited to us, provides a reviewable interpretation. The challenged decision does not address the meaning of HVCC 16.40.080 at all. Accordingly, there is no interpretation to which we may defer, and the challenged decision lacks adequate findings. On remand, the city must explain how it interprets HVCC 16.40.080.[14]

Petitioner's fourth assignment of error is sustained.

The city's decision is remanded.

[14] Although we do not reach the issue here, it appears that petitioner's interpretation provides the more natural reading of HVCC 16.40.080. While the city may have compelling practical reasons to delay applying city zoning to the annexed property, we doubt whether such practical considerations are a sufficient basis for the interpretation the city provides in its brief.