

NATURE OF THE DECISION

Petitioners appeal a city ordinance determining that a proposed island annexation complies with all applicable land use criteria.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address an issue of waiver raised in the response brief. There is no opposition to the motion, and it is allowed.

FACTS

The annexation territory consists of 97 parcels totaling approximately 300 acres, located within the city urban growth boundary. The subject area is located on a bend of the Calapooia River, and is bordered by the river on the north and west, and existing city limits on the south and east. Approximately 210 acres of the territory are within the Calapooia River floodplain, and are generally used for farm or forest uses, with some scattered dwellings. The area within the floodplain is designated Open Space (OS) on the city’s comprehensive plan, and carries a county exclusive farm use (EFU) zoning designation. The remaining 90 acres is on a bench above the floodplain, and is largely developed with single-family dwellings. The 90-acre area above the floodplain carries Low Density Residential, Urban Residential Reserve and Public/Semi-Public city plan designations, and corresponding county zoning designations.

On April 28, 2004, the city council authorized city staff to begin proceedings to annex the subject area pursuant to ORS 222.750, which allows annexation of lands surrounded by a city or by a city and a body of water without consent of the owners of property within the annexed territory.¹

¹ ORS 222.750 provides:

“When territory not within a city is surrounded by the corporate boundaries of the city, or by the corporate boundaries of the city and the ocean shore or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. However, this section does not apply when the territory not within a city is surrounded entirely by water.

1 After a public hearing on July 28, 2004, the city council voted to forward the question of
2 annexation to the voters, in Resolution 5007. Petitioners appealed Resolution No. 5007 to LUBA,
3 arguing among other things that the city erred in failing to determine whether the proposed
4 annexation complied with applicable land use standards prior to submitting it to the voters for
5 approval. Three weeks after petitioners filed the appeal, the city council adopted Resolution 5045.
6 Resolution 5045 specifies that, if the city voters approve the proposed annexation in the November
7 2004 election, the city will conduct a hearing to determine whether the annexation complies with
8 applicable land use criteria. The appeal of Resolution 5007 was ultimately dismissed as untimely
9 filed. *Cutsforth v. City of Albany*, 48 Or LUBA 304 (2004), *aff'd* 199 Or App 442, ___ P3d
10 ___ (2005).

11 The city electorate approved the annexation in November 2004. Pursuant to Resolution
12 5045, the city council held a public hearing to address applicable land use criteria. On February 23,
13 2005, the city council adopted the decision at issue in this appeal, Ordinance 5611, which
14 determines that the proposed annexation complies with applicable criteria, and proclaims the
15 annexation.² This appeal followed.

Unless otherwise required by its charter, annexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory.”

² At oral argument, the city suggested that Ordinance 5611 simply proclaims the annexation, and that the city determined that the annexation complies with applicable criteria in a *separate* unappealed decision that was adopted on the same date during the same proceeding. Because petitioners appealed only Ordinance 5611, we understand the city to argue, LUBA has no jurisdiction over the separate decision addressing the applicable criteria, which renders most of the assignments of error in this appeal moot. However, the city does not identify what document that separate decision is embodied in, and as far as we can tell from the record the city council treated the entire proceeding as resulting in a single decision. Even if we agreed that there were two decisions—Ordinance 5611 and whatever decision addressed the applicable criteria—the notice of intent to appeal can be read to challenge both the ordinance and the decision addressing the applicable criteria. Under such circumstances, our rules provide an opportunity for the petitioner to either elect to appeal only one decision or file a separate notice of intent to appeal. OAR 661-010-0015(1)(c). Given the extremely late timing of the city’s objection to our scope of review, we would likely allow petitioners an opportunity to file a separate notice of intent to appeal, rather than limit our scope of review to Ordinance 5611. In any case, because the city has not established that the city council in fact adopted two separate decisions, we will resolve the assignments of error under the assumption that there is a single decision that both addresses applicable criteria and proclaims the annexation.

1 **FIRST ASSIGNMENT OF ERROR**

2 The city’s annexation criteria require a finding that “an adequate level of urban services and
3 infrastructure is available, or will be made available in a timely manner.”³ The annexation criteria
4 define the term “be made available in a timely manner” to mean improvements “will be provided in a
5 logical, economical and efficient manner.” See n 3.

6 Petitioners contend that the city failed to demonstrate that an adequate level of urban
7 services and infrastructure is available or will be made available in a timely manner. According to
8 petitioners, the city failed to provide any detailed analysis or evidence of how the annexation area

³ The city’s annexation criteria are set out in an uncodified ordinance, Ordinance 5366, which provides in relevant part:

“Timeliness Criteria. The City shall determine that it is timely to annex property based on the following criteria:

- “1. An adequate level of urban services and infrastructure is available, or will be made available in a timely manner.
 - “a. ‘Adequate level’ means conforms to adopted plans and ordinances.
 - “b. ‘Urban services’ means police, fire, and other City-provided services.
 - “c. ‘Infrastructure’ means sanitary sewer, water, storm drainage, and streets.
 - “d. ‘Be made available in a timely manner’ means that improvements needed for an adequate level of urban services and infrastructure will be provided in a logical, economical, and efficient manner. * * *
- “2. Sufficient planning and engineering data have been provided, and all necessary studies and reviews have been completed such that there are no unresolved issues regarding appropriate Comprehensive Plan and implementing ordinances. It may not be timely to annex property if the appropriateness of the proposed use could be altered by plans or studies that are underway, or are needed, to update, clarify, or provide additional specificity to the Comprehensive Plan, background reports and studies. Examples of needed studies may include public infrastructure plans, buildable lands inventories, area refinement plans, or any task in an approved work program for Periodic Review.
- “3. The City shall attempt to discourage islands or enclaves of unincorporated territory surrounded on all sides by the City.
- “4. The City may consider, in its discretion, any other factor which affects the timeliness or wisdom of any particular annexation petition.” Petition for Review App 2.

1 would be served with sewer and storm drainage, or how the city would provide adequate
2 transportation facilities to support development in the annexed area. While the city relies in part on
3 its comprehensive plan and facilities plans, petitioners argue that those plans are too general to
4 demonstrate that urban services are available or can be provided in a logical, economical and
5 efficient manner.

6 The city responds that the timeliness criterion of Ordinance 5366 does not require detailed
7 development plans as a precondition to annexation, or that the city demonstrate exactly how the city
8 will provide urban services to the annexation area. According to the city, it adopted adequate
9 findings, supported by substantial evidence, concluding that urban services can be readily extended
10 into the annexation territory, as development occurs.⁴

⁴ The city's findings include the following:

- “B1. Several persons testified that the City has not provided detailed plans for the annexation territory. In particular, they asked for detailed plans to extend sewers, upgrade streets, and improve the quality of storm water runoff.
- “B2. [The planning director] in her written statement cites a number of important planning documents that were entered into the record at the January 26, 2005 public hearing. These plans show that the annexation territory has been considered in all of the City's infrastructure and natural resource plans relevant to that portion of the community. In turn, these plans have been used to update the Comprehensive Plan and Development Code with their associated maps. These plans have been used to determine which areas are suitable for development and which are more appropriately conserved for open space purposes.
- “B3. [The planning director] notes in her statement that the annexation territory adjoins an older neighborhood of Albany * * * . An extensive network of City infrastructure is already in place.
- “B4. [The city engineer] also notes in his written statement that all of the City's infrastructure master plans include the proposed annexation territory. The residential neighborhoods which adjoin the annexation territory are served with water, sewer and storm drainage, and these systems could be readily extended to accommodate the annexation territory.
- “B5. Police, fire and other City-provided services are available to serve the area proposed for annexation.

“* * * * *

1 We agree with the city that its findings are sufficient to demonstrate compliance with the
2 timeliness criterion. That criterion does not, as petitioners argue, require that the city provide
3 detailed analysis or plans showing exactly how the city will extend urban services to the area. The
4 cases petitioners cite to as imposing that requirement, such as *Just v. City of Lebanon*, 45 Or
5 LUBA 162 (2003), *aff'd* 193 Or App 121, 88 P3d 307 (2004), all involve criteria with very
6 different language than that set out in the city's timeliness criterion. As the findings explain, the area
7 has long been planned for incorporation, and the only question under the timeliness criterion is the
8 timing of annexation. The city found that the annexation area is adjacent to a long-developed urban
9 neighborhood with full public services that can be "readily extended" into the annexed territory.
10 Petitioners have not demonstrated that the city's timeliness criterion requires more.

"B7. The area is presently served by County streets. The City has a network of urban standard streets adjacent to this property to the east and south. Annexation would allow future upgrades to an urban standard (curb, gutter and sidewalk).

"* * * * *

"CONCLUSIONS

"B1. The decision to consider this area for annexation began in the late 1970s when the urban growth boundary was drawn. The urban growth boundary encompasses the area that the City intends to annex over time. With the adoption of the urban growth boundary in 1980, it became certain that the City would annex this territory some day. The only question becomes the timing of annexation. The City Council has determined that it is now time to annex islands of unincorporated territory created by earlier annexations, based on its timeliness criterion.

"* * * * *

"B4. The decision to annex land is based in part on whether sufficient planning has been conducted for the annexation territory. Albany's annexation procedure does not rely on detailed development plans as a basis for annexation. Instead, the question of 'sufficient planning' refers to the adequacy of broader plan documents to guide decisions about the annexation territory. The Comprehensive Plan provides the policy framework for decisions about land uses and its resources. * * * Public facilities plans provide the framework for sewer, water, drainage, and street systems. These are 'big picture' plans that show how the entire system works. Based on these plans, the territory is usually ready for annexation.

"B5. These plans do not show details such as future homes, buildings, sewer connections, or even street extensions. Those decisions are made at the time of development just prior to construction. * * *" Record 25-27.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 During the proceedings below, the city council discussed whether to apply a city Open
4 Space (OS) zone to the 210-acre portion of the annexation area that is within the floodplain.
5 However, the city council ultimately decided to defer the question of city zoning to a later decision,
6 and in the interim leave county EFU zoning in place.⁵

7 Petitioners argue that the OS zone is insufficient to ensure compliance with Goal 5.
8 Petitioners cite to evidence that threatened western pond turtles are found within the floodplain, and
9 contend that the OS zone and the city's existing comprehensive plan Goal 5 inventory and program
10 are inadequate to preserve the turtle's habitat. For example, petitioners argue, while the
11 comprehensive plan includes the floodplain in the Natural Vegetation and Wildlife Habitat inventory,
12 the inventory does not provide an analysis of the economic, social, environmental and energy
13 consequences that could result from annexation of the area.

14 The city responds, and we agree, that petitioners' Goal 5 challenges do not provide a basis
15 to reverse or remand the challenged decision. The city's decision does not rezone the annexation
16 territory, amend the plan designation, or otherwise affect the uses allowed in the territory or the
17 protection of open space and natural resources. While the city's decision includes findings
18 addressing petitioners' Goal 5 concerns, the city was not required to demonstrate, in this annexation
19 decision, that application of the OS zone or the existing comprehensive plan Goal 5 inventory is
20 sufficient to ensure compliance with Goal 5. *See* OAR 660-023-0250(3) (local governments are
21 not required to apply Goal 5 in consideration of a post-acknowledgment plan amendment unless the
22 amendment affects a Goal 5 resource, *i.e.*, the amendment amends the program to protect Goal 5
23 resources, allows new uses that could conflict with resource sites, or amends a UGB to include a
24 resource site).

⁵ The city advises us that it subsequently adopted a decision that applies city zoning to the annexation area. Petitioners have not appealed that decision to LUBA.

1 The second assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 The city adopted the following finding addressing Statewide Planning Goal 12
4 (Transportation):

5 “The annexation territory has been included in Goal 12 planning for the Albany
6 Comprehensive Plan. Albany’s Transportation System Plan (1997) is a
7 comprehensive analysis of transportation needs for build-out of the Albany Urban
8 Growth Boundary. The transportation needs of the annexation territory were
9 factored into the Plan. The Plan presents a strategy for prioritizing and funding key
10 system improvements needed by 2015. The Plan does not identify any needed
11 projects within the annexation territory. Extension of local streets will occur as
12 needed in the course of development. A copy of the Plan is included in the record
13 for Council deliberations. Residents in the annexation territory already benefit from
14 an interconnected street system that seamlessly transports them from their homes to
15 nearby places of employment, shopping, schools, and parks.” Record 35.

16 Petitioners contend that the city’s Transportation System Plan (TSP) does not address
17 several potential problems that might arise when parts of the annexation territory are developed
18 further, as allowed under proposed city residential zoning. Petitioners also note findings indicating
19 that jurisdiction over existing roads in the annexation area will remain with the county, until the city
20 and county enter into an agreement for the city to accept jurisdiction.⁶ Until that agreement is
21 entered into, petitioners argue, the city’s TSP does not apply to the annexation territory. Because
22 the city lacks jurisdiction to address transportation issues in the annexation territory, we understand
23 petitioners to argue, the challenged decision is inconsistent with Goal 12.

⁶ Petitioners cite to the following finding, addressing Goal 14:

“[The city engineer] refers in his written statement to testimony at the January 26, 2005, public hearing regarding a possible change in road jurisdiction from the county to the City. He notes that annexation will not cause a change in jurisdiction. Roads which are presently in county jurisdiction will remain in county jurisdiction after annexation. The City will only acquire jurisdictional control if an agreement is reached between the City and county transferring such jurisdiction. It has been the practice of Albany and Linn County to negotiate such agreements only when the county first improves the road to county urban standards, at county expense, or makes a similar financial arrangement with the City so that the existing property owners are not required to pay for the road improvements.” Record 36.

1 Again, the challenged decision does not apply city zoning to the annexation territory, or
2 otherwise affect the uses allowed in that area. Petitioners’ arguments that the city has failed to
3 demonstrate that the contemplated city zoning is consistent with Goal 12 are misdirected. As the
4 above-quoted findings indicate, the city’s acknowledged TSP includes a “comprehensive analysis of
5 transportation needs for build-out of the Albany Urban Growth Boundary,” including the annexation
6 territory. The TSP is acknowledged to comply with Goal 12, and petitioners do not explain why
7 any alleged inadequacy therein is subject to challenge in this appeal.

8 The fact that the county temporarily retains jurisdiction over the existing roads within the
9 annexation territory does not mean that the TSP does not apply to the area. As explained above,
10 the TSP governs the annexation territory. Petitioners do not explain why the county’s continued
11 responsibility to maintain existing roads (until the city and the county agree otherwise) is inconsistent
12 with Goal 12, and we do not see that it is.

13 The third assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 Petitioners contend that the city failed to demonstrate that the urbanization of the annexation
16 territory under the proposed zoning is consistent with Statewide Planning Goal 14 (Urbanization).⁷

⁷ Goal 14 provides, in relevant part:

“Land within the boundaries separating urbanizable land from rural land shall be considered available over time for urban uses. Conversion of urbanizable land to urban uses shall be based on consideration of:

- “(1) Orderly, economic provision for public facilities and services;
- “(2) Availability of sufficient land for the various uses to insure choices in the market place;
- “(3) LCDC goals or the acknowledged comprehensive plan; and,
- “(4) Encouragement of development within urban areas before conversion of urbanizable areas.”

1 Again, petitioners attack a decision not before us. The challenged decision simply annexes
2 territory; it does not rezone any property, or otherwise convert urbanizable land to urban land, for
3 purposes of Goal 14. To the extent Goal 14 is applicable at all to a decision that simply annexes
4 land, petitioners have failed to demonstrate any error in the city’s conclusion that the annexation is
5 consistent with Goal 14.

6 The fourth assignment of error is denied.

7 **FIFTH ASSIGNMENT OF ERROR**

8 Petitioners argue that annexation of the 210 acres of floodplain is not “reasonable” under
9 *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). According to
10 petitioners, the 210 acres have little or no development potential for urban uses. The only
11 conceivable purpose in annexing the land, petitioners argue, is for the city to obtain additional tax
12 revenues.

13 The city acknowledges that the floodplain areas are unlikely to be developed with intensive
14 uses, but argues that the main purposes of the annexation are to reduce jurisdictional confusion and
15 eliminate perceived tax inequities, and not to increase development potential in the city.⁸ The city

⁸ The city cites to the following findings addressing the “reasonableness” standard.

“FINDINGS OF FACT

“* * * * *

“D4. A primary reason for this island annexation is to create logical city limit lines for fire, ambulance and law enforcement response.

“D5. Much of the territory is developed with large single-family homes. In some cases, one side of the street is in the city, the other is in the unincorporated county. In other cases, part of the street is in, part out. In all cases, however, the territory is either surrounded by established residential areas inside the city limits or by open space bordering the Calapooia River.

“D6. This territory is largely developed as single-family residential or is open space.

“D7. Virtually all the existing households in the territory currently receive City water service.

1 also argues that “[i]t is difficult to imagine how it could ever be objectively unreasonable for a city *
2 * * to consolidate its corporate boundaries by eliminating islands of unincorporated territory within
3 the City limits.” Respondent’s Brief 24.

4 We tend to agree with the city that an island annexation will almost invariably satisfy the
5 *Portland Gen. Elec. Co.* “reasonableness” test. In any case, the reasons cited for annexing the
6 territory are more than sufficient to demonstrate that the annexation is “reasonable” under *Portland*
7 *Gen. Elec. Co.* It is reasonable for a city to annex an island of unincorporated territory to reduce

“D8. Residents of the territory currently benefit from City investments such as parks, streets, and land use planning. Unlike their neighbors, the residents of the territory are not currently sharing the tax burden necessary to pay for these services.

“* * * * *

“CONCLUSIONS

“D1. The territory is an ‘island’ as defined by state law.

“D2. The current confusion on who (City or County) is the appropriate emergency provider will be remedied by annexation.

“D3. Annexation will not change the development pattern in the territory.

“D4. The existing residents of the territory proposed to be annexed already benefit from many City services. Annexation would put them on an equal taxation basis with their neighbors, which will promote fundamental fairness.

“* * * * *

“D6. City taxpayers are currently subsidizing residents in the Rural Fire Protection District. Annexation of the West Albany island would restore full cost recovery through City property taxes and eliminate the subsidy to residents in the West Albany island.

“D7. The Albany Fire Department has planned for a network of fire hydrants out to the urban growth boundary. The residents of the West Albany island already benefit from this urban service and should be annexed in recognition of this benefit.

“* * * * *

“D9. Annexation of the adjacent unincorporated properties will reduce any potential confusion regarding which law enforcement agency should respond.

“D10. Annexation of islands within the City sets consistent standards for law enforcement practices within a neighborhood.” Record 40-41.

1 jurisdictional confusion, and to ensure that those who benefit from city services share the cost of
2 such services.

3 The fifth assignment of error is denied.

4 **SIXTH ASSIGNMENT OF ERROR**

5 Petitioners argue that the city erred in conducting the city election to approve the proposed
6 annexation, *prior to* adopting the challenged decision determining that the proposed annexation
7 complies with applicable land use and non-land use standards. According to petitioners, where an
8 annexation requires an election, the election must be preceded by a city decision that the proposed
9 annexation complies with all applicable criteria. *See Cape v. City of Beaverton*, 43 Or LUBA
10 301, 307-08 (2002), *aff'd* 187 Or App 463, 68 P3d 261 (2003) (the land use decision that
11 addresses relevant land use criteria must be adopted and become final prior to or at the same time
12 that the annexation becomes final).

13 The city responds in relevant part that the decision to go forward with the election without
14 first determining whether the annexation complies with applicable land use criteria was made when
15 the city adopted Resolution 5007 on July 28, 2004.⁹ As noted above, Resolution 5007 was
16 appealed to LUBA, but that appeal was dismissed. Therefore, the city argues, petitioners'
17 arguments are essentially impermissible collateral attacks on Resolution 5007, a decision not before
18 LUBA.

19 Petitioners may well be correct that the city erred in conducting the election without first
20 determining whether the annexation complies with applicable criteria. *See Cape*, 43 Or LUBA at
21 307 (where an annexation requires an election, the election is logically the last event). However, the
22 city made the decision to proceed in that manner in Resolution 5007, which is not before us. The
23 issue raised in this assignment of error was a prominent issue in petitioners' appeal of Resolution

⁹ Initially, the city argues that this issue was not raised during the proceedings below, and thus is waived. ORS 197.763(1). However, the reply brief cites several instances where the issue was fairly raised below, and we agree with petitioners that the issue was not waived.

1 5007, but that appeal was dismissed. Petitioners do not explain why the same issue can now be
2 raised in the appeal of the present decision. *See Butte Conservancy v. City of Gresham*, 47 Or
3 LUBA 282, 291, *aff'd* 195 Or App 763, 100 P3d 218 (2004) (assignments of error that
4 collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or
5 remand). We agree with the city that this assignment of error is essentially a collateral attack on a
6 decision not before us, and therefore does not provide a basis to reverse or remand the challenged
7 decision.

8 The sixth assignment of error is denied.

9 The city's decision is affirmed.