

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

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

CITY OF HAPPY VALLEY,
Petitioner,

vs.

CITY OF DAMASCUS,
Respondent.

LUBA No. 2005-085

FINAL OPINION
AND ORDER

Appeal from City of Damascus.

Pamela J. Beery, Portland, represented petitioner.

Eileen Eakins, Portland, represented respondent.

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

DISMISSED 07/07/2005

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

Holstun, Board Member.

NATURE OF THE DECISION

Petitioner City of Happy Valley (Happy Valley) appeals a City of Damascus (Damascus) resolution that initiates annexation of certain contiguous properties.

JURISDICTION

A. Introduction

As relevant here, LUBA’s jurisdiction is limited to land use decisions.¹ As defined by ORS 197.015(10), a land use decision must be a final decision.² Damascus moves to dismiss this appeal, arguing that the appealed resolution is not a final city decision to annex property. For the reasons explained below, we agree with Damascus, and therefore we dismiss this appeal.

All parties appear to agree that an annexation proposal that requires voter approval before it can take effect is properly viewed as a two-step or two-decision process. One of those steps or decisions is a land use decision that is reviewable by LUBA. The other step or decision is not a land use decision. *Heritage Enterprises v. City of Corvallis*, 300 Or 168, 708 P2d 601 (1985).

¹ ORS 197.825(1) provides, in part:

“Except as provided in ORS 197.320 and subsections (2) and (3) of [ORS 197.825], the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision * * * of a local government, * * * in the manner provided in ORS 197.830 to 197.845.”

² 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 Typically, the land use decision is the first step. During this step the city must determine
2 whether the proposed annexation is consistent with applicable comprehensive plan and land use
3 regulation provisions or, if there are no applicable comprehensive plan or land use regulation
4 provisions, whether the proposed annexation decision is consistent with the statewide planning
5 goals. In either event, the city’s decision to annex property is governed by one or more of the land
6 use standards set out at ORS 197.015(10)(a). *See* n 2. Because the city must apply one or more
7 of the land use standards set out at ORS 197.015(10)(a), the city’s annexation decision is a land
8 use decision that is reviewable by LUBA. *Cape v. City of Beaverton*, 187 Or App 463, 68 P3d
9 261 (2003).

10 In annexations that require voter approval, a vote by the electors of the city or the electors
11 in the target annexation area or the electors in both the city and the target annexation area is
12 required before the annexation can become effective. ORS 222.150; 222.160. In annexations that
13 require voter approval the election is typically the second step or decision. The vote of the electors
14 to approve or reject the annexation is not a land use decision. *Heritage Enterprises*, 300 Or at
15 174-75.

16 The jurisdictional question in this appeal is whether the appealed resolution is the city’s *final*
17 decision concerning approval of the annexation, subject to voter approval. In other words, the
18 jurisdictional question is whether the resolution is the city’s final decision concerning the first step.
19 We turn to that question.

20 **B. Resolution 05-22**

21 Resolution 05-22 was adopted to initiate annexation proceedings under ORS 222.111(2).³
22 With some specified exceptions in the statute, once an annexation is initiated under ORS

³ ORS 222.111(2) provides:

“A proposal for annexation of territory to a city may be initiated by the legislative body of the city, on its own motion, or by a petition to the legislative body of the city by owners of real property in the territory to be annexed.”

1 222.111(2), the electors within the territory to be annexed and the electors in the annexing city must
2 both vote to approve the annexation before the annexation can take effect.⁴ One of the specified
3 exceptions in the statute allows the city to dispense with an election in the city. ORS 222.120.
4 Pursuant to ORS 222.120(2), the city can dispense with an election on the annexation question
5 within the city and instead schedule “a public hearing before the legislative body at which time the
6 electors of the city may appear and be heard on the question of annexation.” As explained below,
7 resolution 05-22 initiates an annexation under ORS 222.111(2) and selects the exception provided
8 by ORS 222.120(2).

9 Resolution 05-22 includes a narrative, map and legal description of the properties to be
10 annexed. The resolution provides that “[t]he question of annexation shall be submitted to the
11 electors within the Affected Territory at the regularly scheduled election to be held on September
12 20, 2005.”⁵ Record 5. The resolution also provides that the city “dispenses with submitting the
13 proposed annexation to the voters within the City, and fixes the date of Monday, July 11, 2005, for
14 a public hearing on the proposed annexation.” Record 6.

15 If Resolution 05-22 had initiated this annexation and submitted it for a vote of both the
16 electors of the city and the electors of the territory to be annexed, Resolution 05-22 likely would
17 have been the final decision necessary to complete the first step of the proposed annexation, and for
18 that reason it would almost certainly be a land use decision. However, that is not what occurred
19 here. Under the statutory option that the city has selected, the next step is for the city to hold a

⁴ ORS 222.111(5) provides:

“The legislative body of the city shall submit, except when not required under ORS 222.120, 222.170 and 222.840 to 222.915 to do so, the proposal for annexation to the electors of the territory proposed for annexation and, except when permitted under ORS 222.120 or 222.840 to 222.915 to dispense with submitting the proposal for annexation to the electors of the city, the legislative body of the city shall submit such proposal to the electors of the city. The proposal for annexation may be voted upon at a general election or at a special election to be held for that purpose.”

⁵ The Affected Territory includes all of the properties that now lie outside the city but are proposed for annexation in Resolution 05-22.

1 public hearing on July 11, 2005. Following that public hearing, the city must take some additional
2 action or the annexation cannot take effect. ORS 222.120(4) sets out the city’s options:

3 “After the hearing, the city legislative body may, by an ordinance containing a legal
4 description of the territory in question:

5 “(a) Declare that the territory is annexed to the city upon the condition that the
6 majority of the votes cast in the territory is in favor of annexation;

7 “(b) Declare that the territory is annexed to the city where electors or
8 landowners in the contiguous territory consented in writing to such
9 annexation, as provided in ORS 222.125 or 222.170, prior to the public
10 hearing held under subsection (2) of this section; or

11 “(c) Declare that the territory is annexed to the city where the Department of
12 Human Services, prior to the public hearing held under subsection (1) of this
13 section, has issued a finding that a danger to public health exists because of
14 conditions within the territory as provided by ORS 222.840 to 222.915.”

15 The health hazard annexation provision in ORS 222.120(4)(c) does not appear to be
16 relevant here. Under ORS 222.120(4)(a) or (b), the next required step following the public hearing
17 on July 11, 2005 will be for the city to adopt an ordinance declaring that the territory is annexed.
18 That ordinance either will be conditioned on voter approval in the territory to be annexed, or it will
19 not be conditioned on voter approval in the territory to be annexed, if sufficient consents to
20 annexation are obtained in the territory to be annexed. In either event, the annexation cannot go
21 forward without a city ordinance to declare the territory annexed. We understand the city to argue
22 that this ordinance will be the city’s final decision regarding the annexation (concluding the first step)
23 and set the stage for the anticipated election in the annexed area (the second step).

24 We agree with the city. Although ORS 222.120(4) does not expressly provide that the city
25 has the option to terminate the annexation proposal after the public hearing by adopting an
26 ordinance to that effect or simply failing to adopt an ordinance that declares the annexation, there
27 would seem to be little purpose for the statutory requirement for the public hearing if the city does
28 not have that option. ORS 222.120(4) provides that the city “may” adopt an ordinance to declare
29 that the territory is annexed; it does not *require* that the city adopt an ordinance to declare the

1 annexation after the public hearing. If the city elects to proceed with the annexation, it must adopt
2 an ordinance to declare the property annexed. That ordinance would be the city's final decision
3 necessary to complete the annexation, if the city were proceeding under the one-step annexation
4 method authorized by ORS 222.120(4)(b) and (c). As noted, the city is proceeding under a two-
5 step process in this case, so the ordinance that the city will adopt following the July 11, 2005 public
6 hearing will be the city's final decision concerning the first step and will be contingent on a second
7 step—voter approval in the territory to be annexed under ORS 222.120(4)(a). The annexations
8 that the city initiated by adopting Resolution 05-22 will only go forward for voter approval and
9 completion of the second step, if the city adopts an ordinance to do so under ORS 222.120(4)(a).
10 That ordinance will be the city's land use decision in this matter. Resolution 05-22, which initiates
11 the annexation process, is not the city's final decision concerning the first step of the proposed
12 annexation. Because it is not the city's final decision concerning the first step, it is not a land use
13 decision.

14 The motion to dismiss is granted. This appeal is dismissed.⁶

⁶ Happy Valley separately appealed Resolution 05-22 to the Metro Policy Advisory Committee. Damascus argues that this pending appeal at Metro means Happy Valley has not exhausted all available administrative remedies and that this appeal should be dismissed for that reason as well. We need not and do not consider the legal effect, if any, of Happy Valley's pending appeal of the disputed proposed annexations before the Metro Policy Advisory Committee. There are also two other pending matters that we need not resolve. On June 29, 2005, Happy Valley requested that the deadline for objecting to the record be suspended, and we granted that motion on June 30, 2005 without allowing Damascus an opportunity to object. Damascus objected to Happy Valley's request on July 1, 2005. Given our disposition of the jurisdictional question, it is not necessary that we reconsider our June 30, 2005 order. In addition, because we conclude that we lack jurisdiction to review Resolution 05-22, we lack jurisdiction to consider Happy Valley's June 27, 2005 motion in which they request that we stay Resolution 05-22 pursuant to ORS 197.845, pending LUBA review.