BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITY OF DAMASCUS,
Petitioner,

vs.

CITY OF HAPPY VALLEY,
Respondent.

LUBA No. 2005-125

FINAL OPINION
AND ORDER

Appeal from City of Happy Valley.

Eileen G. Eakins, Lake Oswego, filed the petition for review. With her on the brief was Jordan Schrader, PC. Harlan E. Jones argued on behalf of petitioner.

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

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

REMANDED 01/26/2006

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

Opinion by Holstun.

NATURE OF THE DECISION

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

INTRODUCTION

This appeal is one of three related LUBA appeals concerning two city annexation ordinances. One annexation ordinance was adopted by Happy Valley, and one annexation ordinance was adopted by Damascus. 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. 2005-125), Damascus challenges the Happy Valley annexation ordinance. In LUBA No. 2005-118, Happy Valley challenges the Damascus annexation ordinance. In addition to appealing the Damascus annexation ordinance directly to LUBA, Happy Valley also appealed that 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.

REPLY BRIEF

Damascus moves for permission to file a reply brief. The motion is granted.

FACTS

We separately describe the Happy Valley and Damascus annexations in more detail below.

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[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.

A. The Happy Valley Annexation

Many of the relevant facts concerning the Happy Valley annexation are set out in Happy Valley's response brief:

> "Happy Valley entered into an Urban Growth Management Agreement ('UGMA') with Clackamas County in June of 2001. * * * The UGMA designates an area generally to the east of Happy Valley as Happy Valley's 'Area of Interest' and authorizes annexation within that Area by Happy Valley. The territories annexed to Happy Valley by the challenged ordinance 315 are all within Happy Valley's Area of Interest.
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> "Happy Valley next sought and received from its electorate authorization to annex within its 'Area of Interest' as that area is defined and used in the UGMA in November of 2002. * * * Happy Valley's Charter would normally require any annexation be submitted to the City voters for approval. However, the 2002 authorization approved a five-year voter approval for an area that encompasses all of the annexation areas at issue in this case. Pursuant to its voter authorization and UGMA with Clackamas County, Happy Valley has annexed areas within its Area of Interest in the past, including the challenged annexation, and continues to do so.
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> "[P]ursuant to its UGMA with Clackamas County and the voter authorization received in 2002 Happy Valley mailed annexation petition forms to several property owners within its Area of Interest and received signed annexation petitions from [20] property owners dated between May 5[, 2005] and June 21, 2005." Respondent's Brief 3-4 (footnote and record citation omitted).

After it received the petitions, the Happy Valley planning commission considered the proposed annexations at a regularly scheduled meeting on August 9, 2005. The proposed annexations include 115 acres in eight separate areas, for a total of 20 tax lots. A Damascus city councilor appeared at the August 9, 2005 meeting and opposed the annexations. The planning commission recommended that the city council approve the annexations.

The proposed annexations came before the city council at its regular meeting on August 16, 2005. The proposed annexation was processed under the expedited decision making process that is authorized by Metro Code (MC) 3.09.045. Under MC 3.09.045(a) where 100 percent of the property owners and at least 50 percent of the voters in the proposed annexation area consent, the area may be annexed without a public hearing. In addition, such expedited annexations are not subject to appeal the MBAC. The city council adopted Ordinance 315, which approves the

proposed annexation, at its August 16, 2005 meeting. On August 17, 2005 notice of Ordinance 315 was mailed to the Secretary of State.

B. The Damascus Annexation

While the above-described Happy Valley annexation effort was underway, Damascus initiated annexation of eleven areas by resolution on May 16, 2005. Nineteen of the 20 petitions by which the property owners gave consent in the Happy Valley annexation are dated after May 16, 2005. Record 146, 147.[2] On July 18, 2005, Damascus adopted an ordinance annexing the eleven areas, subject to voter approval in an election to be held in those eleven areas on September 20, 2005. In that September 20, 2005 election, the voters in six areas voted to approve annexation. The three tax lots that have been annexed by both cities are located in two of those six areas.

STANDING

Happy Valley assumes that Damascus's notice of intent to appeal was filed under ORS 197.830(3), which requires that a petitioner show that it is "adversely affected."[3] Happy Valley argues that Damascus is not adversely affected by Ordinance 315, because under MC 3.09.070(c), the contested case challenging the Damascus annexation ordinance at the MBAC had the legal effect of delaying the effective date of the Damascus annexation. Happy Valley argues that because the MBAC has now denied the Damascus annexation, that annexation will never become final.

It is not obvious to us that Damascus's standing in this appeal must be analyzed under ORS 197.830(3). ORS 197.830 (2) establishes only two requirements for standing to appeal to LUBA:

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[2] The petition that appears at Record 146 is dated May 5, 2005. The petition that appears at record 147 is dated May 16, 2005, the same date as the Damascus resolution. Neither of those petition concerns one of the three tax lots that have been annexed by both cities.

[3] As relevant, ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

(1) a timely filed notice of intent to appeal, and (2) an appearance before the local government. Damascus alleges that it appeared before the planning commission in this matter and Happy Valley does not dispute that allegation. Petition for Review 1. That would appear to be sufficient to establish that Damascus has standing to bring this appeal.

` Even if Damascus must show that it is adversely affected by Ordinance 315, it has done so. In our decision in *City of Damascus v. Metro*, ___ Or LUBA ___ (LUBA No. 2005-154, January 26, 2005), we remand the MBAC decision. Therefore it remains possible that the Damascus annexation will be approved and become final. Regardless of the ultimate outcome of that appeal, as this appeal now stands, Damascus contends that Happy Valley Ordinance 315 wrongly annexes three of the tax lots that have been annexed by Damascus. Both cities cannot annex those tax lots, and Happy Valley's attempt to do so in Ordinance 315 adversely affects the interests of Damascus. Damascus has standing to bring this appeal.

FIRST ASSIGNMENT OF ERROR

Damascus argues that it was first to initiate annexation and that "Happy Valley Ordinance No. 315 was void *ab initio*, and should be reversed." Petition for Review 5. Both parties rely on the same Oregon Supreme Court cases in arguing that their respective annexation proceedings were "instituted" first.[4] A fairly detailed discussion of those cases is necessary to understand what it means to "institute" annexation. We discuss each of those cases separately below.

A. *Landis v. City of Roseburg*

Landis v. City of Roseburg, 243 Or 44, 411 P2d 282 (1966), concerned an attempt to incorporate a new City of Edenbower in an area adjacent to the City of Roseburg (Roseburg). While the new city incorporation attempt was proceeding, Roseburg received petitions for annexation from property owners in two areas that also lay wholly within the area proposed for incorporation. The city annexed the two areas. Thereafter, the voters rejected the proposed incorporation. After the city annexation and after the incorporation was rejected in the election, a

[4] The cases use the terms "institute" and "initiate" somewhat interchangeably.

suit was filed to void the city annexations. We set out the key events in these competing efforts below, as described in the Supreme Court's decision in *Landis*.

Jan. 24, 1964	Petition filed with the Douglas County Court to incorporate the City of Edenbower.
Feb. 5, 1964	The County Court, by order, sets May 15, 1964 as the date for an election on the proposed incorporation.
Feb. 18, 1964	Pursuant to ORS 222.170, consents for annexation were filed with Roseburg. Those consents were filed by two-thirds of the property owners owning two-thirds of the property with two-thirds of the value.[5]
Feb. 18, 1964	Roseburg adopts two ordinances, which according to the Supreme Court "initiated the two respective annexation proceedings and called for public hearings on the matter." 243 Or at 47.
Mar. 10, 1964	Roseburg holds a hearing and adopts ordinances that annex the two areas.
Mar. 11, 1964	Roseburg files transcripts of the annexation proceedings with the Secretary of State.
May 15, 1964	A majority of the voters in the proposed incorporation area vote against incorporation.
July 1, 1964	A declaratory judgment action is filed to declare the Roseburg annexation void.

Both the circuit court and the Supreme Court concluded that the incorporation was initiated on February 5, 1964, when the county court by order called the election, and that the annexation was initiated on February 18, 1964, when Roseburg adopted ordinances calling for public hearings. Although it does not appear to have been disputed, both courts found the incorporation was initiated first. The circuit court found the annexation was void because it was instituted after the incorporation proceedings had been initiated.

The Supreme Court agreed with the circuit court that Roseburg improperly instituted annexation proceedings while the incorporation proceeding was pending:

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[5] Under the so-called triple majority method of annexation authorized by ORS 222.170, territory may be annexed without an election in the area to be annexed.

> "It is also the rule that where two authoritative bodies are granted concurrent powers to establish municipal authority over an area, the authorized body which first institutes proceedings acquires exclusive jurisdiction of the subject area and may proceed to final conclusion unfettered by subsequent proceedings of another authorized body. 1 McQuillin, Municipal Corporations, 3rd ed., p. 547, § 3.20." 243 Or at 48-49.

But the Supreme Court clarified that it did not use the term "jurisdiction" in the sense of subject matter jurisdiction or jurisdiction over the parties, or power to render a particular judgment. Rather, in this context the term jurisdiction refers to the "lawful right to proceed further with a cause or to render a valid judgment." 243 Or at 51. Therefore, the body that first institutes proceedings in this context, when faced with another body who subsequently institutes proceedings "may have the other enjoined or ousted via quo warranto proceedings while its proceedings are pending." *Id*. The Supreme Court then reversed the circuit court judgment that the disputed city annexations were void:

> "[S]ince the proposed organizers of the City of Edenbower did not directly attack the city of Roseburg's proceedings by a suit for injunction on the basis of priority at a time when its priority existed, and that priority has now been lost through failure to complete incorporation due to the result of the election, it clearly appears that no wrong is now threatened and that issue is now moot." 243 Or at 52-53 (citation omitted).

The findings and holding in *Landis* that are potentially relevant in this appeal are as follows: (1) the finding that the Edenbower incorporation proceeding was instituted when the county adopted its order calling for an election; (2) the finding that the Roseburg annexation proceeding was instituted by the city when it adopted ordinances calling for public hearings on the proposed annexation; and (3) the court's holding that where incorporation and annexation proceedings concerning the same territory are allowed to be completed and the annexation is successful, but incorporation is not, the annexation will not be held void solely for the reason that it was instituted second in time.

We turn to the second decision that the parties cite.

B. *City of Tualatin v. City of Durham*

City of Tualatin v. City of Durham, 249 Or 536, 439 P2d 624 (1968) involved attempts by the City of Tualatin (Tualatin) and the City of Durham (Durham) to annex areas that included the same section of Interstate Highway 5 (I-5). As we did above with *Landis*, we set out below the key events and the dates those events occurred. We have simplified the facts slightly.

> July 25, 1966 Tualatin adopts a resolution that accepts property owner consents and requests to annex Tract 1, which is made up of a number of separate lots and parcels. The resolution calls for an election in the city and in the area to be annexed. Tract 1 includes a section of I-5.
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> July 29, 1966. Durham "started proceedings to annex Tract 2, * * * which included the same [I-5] fragment that was in Tract 1." 249 Or 538.[6]
>
> Aug. 26, 1966 Voters in the city and voters in the proposed annexation area both approve the Tualatin proposal to annex Tract 1.
>
> Sep. 12, 1966 Durham adopts an ordinance that annexes Tract 2.
>
> Sep. 13, 1966 Tualatin adopts an ordinance that annexes Tract 1.

Citing its decision in *Landis*, the court held that Tualatin was the first to institute annexation proceedings:

> "The city 'which first institutes proceedings acquires exclusive jurisdiction of the subject area and may proceed to final conclusion unfettered by subsequent proceedings' of the other. * * * Tualatin instituted the first proceedings by its Resolution of July 25, 1966." *Id*. at 539.

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[6] The court does not explain how Durham "started" its annexation proceeding. Durham's annexation was an ORS 222.170 triple majority annexation. From the court's opinion, it appears the Durham annexation postdated receipt of consents to annexation:

> "Durham's attempted annexation was completed by Ordinance No. 7, passed September 12, 1966. No election was required because over two-thirds of the residents of the populated area of Tract 2 consented to annexation. ORS 222.170." 249 Or at 538-39.

We assume the start date identified by the court is the date the city took action to provide notice of the hearing that would have been required under ORS 222.120.

The court then held that Tualatin's annexation of Tract 1 was "valid, and Durham's annexation of Tract 2 is invalid." 249 Or at 541.

The findings and holding in *Tualatin v. Durham* that are potentially relevant in this appeal are as follows: (1) the finding that Tualatin's resolution that accepted property owner consents to annexation and set the date for an election on the annexation instituted the Tualatin annexation, (2) the Durham annexation was instituted sometime following receipt of consents to annex, and (3) where two cities annex the same territory the annexation of the city that instituted the annexation first is valid and the annexation of the city that instituted annexation second is invalid.

C. Dates the Damascus and Happy Valley Annexations were Instituted

We now turn to the Damascus and Happy Valley annexations to determine which of the two cities first instituted annexation proceedings.

1. Damascus Annexation

Damascus contends that its annexation was instituted on May 16, 2005, when it called for an election in the 11 areas it sought to annex. We do not understand Happy Valley to dispute this contention. That May 16, 2005 resolution is similar in form and effect to the Douglas County Court order in *Landis* and the Tualatin resolution in *Tualatin v. Durham*, which were found to initiate the incorporation and annexation in those cases. Damascus instituted its annexation on May 16, 2005.

2. Happy Valley Annexation

Damascus contends that Happy Valley did not institute annexation until it received petitions for annexation. As we have noted, all but one of those petitions postdates the May 16, 2005 Damascus resolution. Happy Valley contends that its annexation was instituted long before that May 16, 2005 resolution:

> "Happy Valley has, through (1) approval of its [UGMA] with Clackamas County in June, 2001, (2) the vote of its citizens on Measure 3-85 in November, 2002, (3) the mailing of petition forms prior to any annexation action taken by Damascus, (4) the receipt and processing of annexation forms, including the receipt of some petitioners prior to any annexation action taken by Damascus, and (5) its on-going processing of similar such petitions, obtained and retained legal jurisdiction over the disputed area for purposes of annexation." Respondent's Brief 8.

Happy Valley goes on to point out that Section 3(c) of the 2001 UGMA specifically authorizes Happy Valley to annex in its Area of Interest:

> "The City may undertake annexations in the manner otherwise provided for by law. The City annexation proposals shall include adjacent road right-of-ways to properties proposed for annexation. The County shall not oppose such annexations."

Happy Valley also cites Measure 3-85, by which the city voters agreed to waive the city charter's requirement for a city-wide vote on annexation proposals for five years.

While it is not entirely clear, we understand Happy Valley to argue that the above cited efforts, collectively and individually, have instituted annexation proceedings that led to the annexations that were approved by Ordinance 315. Picking the earliest date, that means the disputed annexation proceedings were instituted in 2001 with the UGMA. We turn first to that possibility.

a. The UGMA

Happy Valley's contention that annexation of its area of its entire Area of Interest was "instituted" when it entered the UGMA with Clackamas County is not tenable. As *Landis* and *Tualatin v. Durham* use the term "instituted," once one municipal body institutes proceedings to annex an area, all other municipal bodies are barred from doing so until the first-initiated proceedings are concluded. Admittedly, there is nothing in either *Landis* or *Tualatin v. Durham* that clearly states that an agreement like the UGMA could not initiate annexation proceedings, but we see nothing in those decisions that remotely suggests that the Supreme Court would read such a general, open-ended agreement to "institute" annexation proceedings for the entire Happy Valley Area of Interest.

The events that instituted annexations in *Landis* and *Tualatin v. Durham* were far more circumscribed, both geographically and temporally. We believe the relatively short and definite time frames for the incorporation and annexation proceedings in both *Landis* and *Tualatin v. Durham* are particularly important. The incorporation proceeding in *Landis* terminated at the unsuccessful election. Tualatin's annexation proceeding terminated shortly after the successful annexation

election. Roseburg's annexation was terminated shortly after the required hearing on the triple majority annexation. That also appears to have been the case in Durham's triple majority annexation proceeding, which terminated less than two months after it was initiated. Under Happy Valley's argument its annexation proceedings, once initiated in the UGMA, could continue as long as the UGMA continues, which as far as we can tell is indefinitely.

Finally, we note that UGMA Section 3(c) itself, which Happy Valley relies on and we quoted earlier in this opinion, seems to envision that it sets the stage for Happy Valley to initiate annexation "proposals" in the future and in that event Happy Valley would conduct any such proceedings as "provided by law. We reject Happy Valley's argument that the annexation proceedings that led to Ordinance 315 were instituted in 2001 by the UGMA.

b. Measure 3-85

In approving Measure 3-85 at the November 2, 2002 general election, the voters of Happy Valley approved a five-year waiver of the city charter requirement that all city annexations must be approved by city voters in a city-wide election. Measure 3-85 is only slightly more definite than the UGMA. It waives the election requirement for essentially the same Area of Interest. While Measure 3-85 does carry a five-year time limit, it could just as easily have waived the election requirement for 10 years, and we see no reason why it could not be extended via another measure so that the bar against other city's initiating annexation in the area described in Measure 3-85 could continue to operate indefinitely. While Measure 3-85, like the UGMA, undeniably represents an initial step in preparation for ultimate annexation in the area, we understand *Landis* and *Tualatin v. Durham* to require more than such preliminary efforts to "institute" annexation proceedings. For annexation proceedings to be instituted under *Landis* and *Tualatin v. Durham*, we believe it must be possible to determine which properties are the subject of annexation proceedings, and those annexation proceedings must be governed by legal requirements that will result in a final decision on the annexation proceedings in a reasonably short and knowable period of time.

c. Mailing and Receiving Annexation Petitions

We do not believe the city's efforts to process petitions for annexation for properties other than the properties that were annexed by Ordinance 315 could possibly constitute institution of annexation proceedings for the properties annexed by Ordinance 315. Even for the properties that were ultimately annexed by Ordinance 315, the city's decision to mail annexation petitions to those property owners is not sufficient to institute annexation of property. Property owners are not in any way obligated to respond to such mailings, whether the petitions were solicited or unsolicited. Again, such mailings are undeniably part of Happy Valley's ongoing efforts to annex properties in its Area of Interest. But the city's preliminary efforts to secure voluntary annexations simply do not constitute "institution" of annexation proceedings, as that concept is described in *Landis* and *Tualatin v. Durham*.

Whether city receipt or property owner submission of an annexation petition is sufficient to institute annexation proceedings poses a much closer question. At least under ORS 222.173 such petitions expire in one year or some other specified period of time.[7] We note that in *Landis*, and *Tualatin v. Durham*, it was the County Court order and Tualatin ordinance and resolution that scheduled elections, rather than the filing of the petition for incorporation and consents to annexation that initiated the incorporation and annexations in that case. Similarly, it was the Roseburg Ordinance and Durham action to schedule public hearings rather than the petitions for annexation that initiated those annexations. It may be that the petitions in this case should be viewed differently, because under the procedure followed by Happy Valley there is no required hearing or election on the annexation and, arguably, if the petitions for annexation do not initiate annexation the annexations

[7] ORS 222.173(1) provides:

> "For the purpose of authorizing an annexation under ORS 222.170 or under a proceeding initiated as provided by ORS 199.490 (2), only statements of consent to annexation which are filed within any one-year period shall be effective, unless a separate written agreement waiving the one-year period or prescribing some other period of time has been entered into between an owner of land or an elector and the city."

are not initiated until the ordinance approving the annexation is adopted. In other words the annexation would be instituted and ended by the same event.

In this case it is not necessary for us to determine whether submittal or receipt of the annexation petitions is the date Happy Valley's annexation proceeding was instituted," within the meaning of *Landis* and *Tualatin v. Durham*. Even if it is, only one of those petitions was submitted or received before May 16, 2005, and that petition did not concern one of the three tax lots that have now been annexed by both cities. We therefore need not and do not decide whether submittal or receipt of a petition for annexation is sufficient to institute annexation proceedings, as that concept is used in *Landis* and *Tualatin v. Durham*. Happy Valley instituted its annexation after Damascus instituted its annexation.

D. Conclusion

Because we conclude that Damascus instituted annexation before Happy Valley instated the annexation that led to Ordinance 315, it follows that Ordinance 315 is invalid and must be remanded. We note that if this issue were presented to a judicial court, it seems likely based on the court's discussion in *Landis* that the court would limit its ruling to the three tax lots that both cities have annexed. That of course assumes that the remaining 17 lots that Happy Valley annexed in Ordinance 315 do not depend on one or more of those three lots to satisfy the statutory requirement that they be contiguous to Happy Valley. That would allow Ordinance 315 to remain effective to annex the other 17 tax lots that were not annexed by Damascus. However, the Court of Appeals has strongly suggested LUBA lacks authority to affirm an ordinance in part and remand in part. *Dept. of Land Conservation and Development v. Columbia County*, 117 Or App 207, 843 P2d 996 (1992); *Morsman v. City of Madras*, 45 Or LUBA 16, 21 n 6, *aff'd in part, rev'd in part on other grounds*, 191 Or App 149, 81 P3d 711 (2003) (citing *Dept. of Land Conservation and Development* and rejecting city request to limit remand of annexation ordinance to petitioner's property). Although we do not decide the question here, it would appear that given the limited nature of petitioner's assignment of error and our decision, Ordinance 315 could be amended or a substitute ordinance could be adopted to annex the 17 tax lots that are not included in

one of the six Damascus annexation areas that were approved by the voters. Given that option and questions regarding our authority to affirm Ordinance 315 in part, we remand Ordinance 315.

Finally, we remand Ordinance 315, rather than reversing it, because there is some uncertainty regarding Happy Valley's options on remand. As thing stand now, the principle articulated in *Landis* and *Tualatin v. Durham* would appear to preclude a city decision to readopt Ordinance 315 and include the three tax lots that have been annexed by Damascus. However, in a separate final opinion and order issued this date we remand the MBAC decision that denied Damascus's annexation. Our decision in that case is subject to appeal, as is our decision in this case. That means it is not possible to know at this point whether Damascus's annexation ordinance will ultimately be denied or approved. Given the possibility that the Damascus annexation could still be denied by the MBAC and never become final, we cannot say at this point that a Happy Valley decision to annex those three tax lots following this remand is permanently barred under the principle articulated in *Landis* and *Tualatin v. Durham*.

Ordinance 315 is remanded.