

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

3
4 CITY OF DAMASCUS
5 *Petitioner,*

6
7 vs.

8
9 METRO,
10 *Respondent,*

11
12 and

13
14 CITY OF HAPPY VALLEY,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2005-154

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Metro.

23
24 Eileen G. Eakins, Lake Oswego, filed the petition for review. With her on the brief was
25 Jordan Schrader, PC. Harlan E. Jones, Lake Oswego, argued on behalf of petitioner.

26
27 No appearance by Metro.

28
29 Pamela J. Beery, Portland, filed the response brief and argued on behalf of intervenor-
30 respondent. With her on the brief were Thomas Sponsler, Spencer Q. Parsons and Beery, Elsner
31 and Hammond, LLP.

32
33 HOLSTUN, Board Member; DAVIES, Board Chair; BASSHAM, Board Member,
34 participated in the decision.

35
36 REMANDED

01/26/2006

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

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NATURE OF THE DECISION

The City of Damascus (hereafter Damascus) appeals a Metro Boundary Appeals Commission (MBAC) decision that denies a Damascus ordinance that annexes property to the city.

MOTION TO INTERVENE

The City of Happy Valley (hereafter Happy Valley) moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

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

INTRODUCTION

This appeal is one of three related LUBA appeals concerning two city annexation ordinances. One annexation ordinance was adopted by Damascus, and one annexation ordinance was adopted by Happy Valley. Each of those ordinances is the subject of a separate LUBA appeal. In addition to appealing the Damascus annexation ordinance directly to LUBA, Happy Valley also appealed that annexation ordinance to the MBAC. The MBAC ultimately denied the Damascus annexation ordinance.¹ In this appeal (LUBA No. 2005-154), Damascus challenges that MBAC decision. 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. We issue final opinions in all three appeals this date.

¹ As we explain later in this opinion, 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. The MBAC denied the boundary change because it found Happy Valley had initiated its annexation proceedings first and because the annexation was inconsistent with a memorandum of understanding between Happy Valley and a number of other parties, and thus violated two separate Metro Code (MC) provisions.

1 **FACTS**

2 This appeal turns on the legal significance of a number of events that occurred before
3 Damascus was incorporated. We outline the key events below.

4 **A. The Happy Valley/Clackamas County Urban Growth Management**
5 **Agreement**

6 Happy Valley entered into an Urban Growth Management Agreement (UGMA) with
7 Clackamas County on June 19, 2001. Record 76-82.² The UGMA identifies an area east of
8 Happy Valley as its “Area of Interest.” The UGMA authorizes Happy Valley to annex
9 unincorporated lands in its designated Area of Interest, and the county agrees not to oppose such
10 annexations. Record 79.

11 **B. Happy Valley Measure 3-85**

12 The Happy Valley charter requires a city-wide election before land may be annexed to the
13 city. To avoid having to hold city-wide elections when annexing property in its designated Area of
14 Interest, Happy Valley submitted a measure (Measure 3-85) to city voters to waive that city charter
15 requirement for a five-year period. The voters approved Measure 3-85 at the November 2, 2002
16 general election. Happy Valley thereafter began seeking property owner consents to annexation
17 and accepting petitions for annexation from property owners in the Area of Interest.³ Happy Valley
18 contends that Measure 3-85 is the act that initiated the Happy Valley annexations that are the
19 subject of LUBA No. 2005-125. Damascus disputes that contention. In our decision in *City of*

² The first 307 pages of the record before MBAC include hand written, circled page numbers at the right bottom corner of each page. The record from the Damascus annexation proceedings appears after page 307. Those pages are numbered at the bottom right hand corner as well, but they duplicate pages numbers in the first part of the record. We cite to the page numbers following page 307 as Record II-1, Record II-2, and so on. There is also a separate Supplemental Record.

³ Happy Valley apparently seeks owner consent before annexing property rather than subjecting proposed annexations to a vote in the area to be annexed. With the approval of Measure 3-85, and owner consents to annexation, Happy Valley would be in a position to annex property in its Area of Interest without an election in the city and without an election in the area to be annexed.

1 *Damascus v. City of Happy Valley*, ___ Or LUBA ___ (LUBA No. 2005-125, January 26,
2 2006), we agree with Damascus on this point.

3 **C. Committee for the Future of Damascus/City of Happy Valley—**
4 **Memorandum of Understanding**

5 In preparation for the 2004 election to approve incorporation of Damascus, the Committee
6 for the Future of Damascus and Happy Valley entered into a Memorandum of Understanding (the
7 First MOU) in April 2004. Record 189-91. The parties do not entirely agree about the
8 significance of the First MOU. However, the parties apparently do agree that the First MOU
9 identified 177th Street as easternmost boundary for Happy Valley annexations within its Area of
10 Interest until the proposed city of Damascus could be approved at an incorporation election in
11 November 2004 or at a second incorporation election in 2006 if necessary.⁴ Some of the territory
12 that would be included in the proposed city of Damascus, east of 177th Street, was included in
13 Happy Valley’s Area of Interest in the UGMA. The First MOU, by its terms, expired when
14 Damascus was incorporated in 2004.

⁴ The First MOU includes the following language:

“[T]he boundary line between the City of Happy Valley and the potential City of Damascus is generally described as running from the Clackamas County line on the north southerly along the alignment of 177th Street * * *.

“The City of Happy Valley shall limit its annexation of properties into the City to this boundary.

“The Committee for the Future of Damascus * * *, the committee for the Incorporation of Damascus and the petitioners for the incorporation shall utilize this boundary as the boundary between the City of Happy Valley and the potential City of Damascus.

“The City of Happy Valley agrees to support the incorporation of the potential City of Damascus and the Committee for the Incorporation of Damascus agrees to support the City of Happy Valley in its annexation efforts related to the Urban Growth Boundary areas.

“This [MOU] shall * * * expire upon the incorporation of the City of Damascus or December 31, 2006 which ever occurs first.” Record 190.

1 **D. Happy Valley Resolution 04-08**

2 On May 4, 2004, Happy Valley adopted Resolution 04-08, in which the city approved the
3 proposed incorporation of Damascus, as shown on an exhibit attached to the resolution. The copy
4 of Resolution 04-08 in the record does not include an attached exhibit. But that reference may be
5 to the map that is attached to the First MOU, which appears after Resolution 04-08 in the record.
6 Record 191. As just noted, that map shows the western boundary of the proposed city of
7 Damascus running generally along 177th Street and shows an area of unincorporated territory west
8 of 177th Street, between Happy Valley and the proposed city of Damascus.

9 **E. The Damascus Fire House Study Group Memorandum of Understanding**

10 The record includes a document entitled Damascus Fire House Study Group Memorandum
11 of Understanding (Fire House MOU). That document is dated May 4, 2004 and is signed by a
12 number of governmental units, citizen planning organizations and the Committee for the Future of
13 Damascus. Damascus had not yet been incorporated and was not a party to the agreement. This
14 document is at the center of the dispute between the parties in this appeal. The MBAC gave three
15 reasons for denying the Damascus annexation ordinance. The MBAC relies on the Fire House
16 MOU for two of its bases for denial. Simply stated, Damascus contends the Fire House MOU, to
17 which Damascus is not a party, has no bearing on MBAC review of its annexation ordinance.
18 Happy Valley contends that certain Metro Code provisions require that the Damascus annexation
19 must be consistent with the Fire House MOU. Happy Valley contends that the Damascus
20 annexation ordinance, which annexes properties west of 177th in Happy Valley's Area of Interest, is
21 inconsistent with the Firehouse MOU.⁵

⁵ We discuss the Fire House MOU in more detail later in this opinion.

1 **F. The City of Damascus is Incorporated**

2 At the general election on November 2, 2004, the voters approved incorporation of
3 Damascus. The subsequent annexation activity by both cities has culminated in the MBAC decision
4 that is before us in this appeal, the Happy Valley annexation ordinance that is before us in LUBA
5 No. 2005-125, and the Damascus annexation ordinance that is before us in LUBA No. 2005-118.

6 **THE MBAC APPEAL PROCESS**

7 Pursuant to ORS 268.354, Metro has adopted additional requirements for boundary
8 changes within its jurisdiction.⁶ Metro Code (MC) 3.09.050 sets out numerous requirements for
9 “Final Decisions other than Expedited Decisions.” The Damascus annexation ordinance is such a
10 decision. MC 3.09.070 authorizes “Contested Cases.” If a contested case is filed, MC 3.09.090
11 explains how the MBAC is to decide that case. We discuss each of these sections of MC Chapter
12 3.09 separately below.⁷

⁶ ORS 268.354(1) provides:

“In addition to the requirements established by ORS chapters 198, 221 and 222 for boundary changes, boundary changes within a metropolitan service district are subject to the requirements established by the district. * * * The requirements established by a district shall include the following:

- “(a) Boundary changes shall be subject to a uniform hearing and notification process adopted by the district.
- “(b) The district shall establish an expedited process for uncontested boundary changes.
- “(c) Contested cases shall be subject to appeal to a three-person commission established by the district with further appeals as provided by law. The district council shall appoint the members of the commission from a list of nominees provided by Clackamas, Multnomah and Washington Counties, with one member appointed from the nominees provided by each county.
- “(d) All boundary change decisions shall be subject to clear and objective criteria established by the district including, but not limited to, compliance with the adopted regional urban growth goals and objectives, functional plans, cooperative and urban service agreements adopted pursuant to ORS chapter 195 and the regional framework plan of the district.”

⁷ The parties’ briefs do not discuss Metro’s boundary change procedures comprehensively or in as much detail as we do. However, a fairly comprehensive understanding of those procedures is necessary to understand why we resolve this appeal and the related direct LUBA appeal of the Damascus annexation ordinance as we do.

1 **A. Requirements Imposed on Cities When Making Other Than Expedited**
2 **Decisions**

3 The Uniform Hearing and Decision Requirements for Final Decisions Other Than Expedited
4 Decisions are set out at MC 3.09.050 and apply to the Damascus annexation. MC 3.09.050 is
5 broken down into seven subsections. We discuss five of those seven subsections separately below,
6 three of them briefly, two of them in more detail.

7 **1. Other Laws**

8 MC 3.09.050(a) makes it clear that the MC 3.09.050 requirements are minimum
9 requirements and any other procedural requirements under other laws continue to apply.

10 **2. Report Required Prior to Boundary Change**

11 MC 3.09.050(b) is one of the key sections of MC Chapter 3.09 and the complete text of
12 MC 3.09.050(b) is set out in the margin.⁸ MC 3.09.050(b) requires that the city prepare a report
13 and make that report available to the public. To summarize, the required report must address “the
14 criteria in subsections (d) and (g).” We discuss those criteria below. The report must also include

⁸ MC 3.09.050(b) provides:

“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 plans, 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.”

1 the explanations called for in subsections (1) and (4) and the descriptions called for in subsections
2 (2) and (3) and identify the effective date under subsection (5). For purposes of this appeal, the
3 only relevant requirement is the MC 3.09.050(b)(3) requirement that the required report include a
4 “description of” how the boundary change is consistent with “urban planning agreements and similar
5 agreements of the affected entity and of all necessary parties.” It appears that one of the MBAC
6 bases for denying the Damascus annexation ordinance was the failure of the Damascus report to
7 demonstrate that the disputed annexation is consistent with the Fire House MOU, as required by
8 MC 3.09.050(b)(3).

9 **3. Standing and Burden of Proof (MC 3.09.050(c))**

10 Under MC 3.09.050(c): (1) standing to appeal a boundary change is limited to a “necessary
11 party” who “appear[s]” at the annexation hearing and “state[s] reasons why the necessary party
12 believes the boundary change is inconsistent with the approval criteria,” and (2) the party proposing
13 the boundary change has “the burden to prove that the [change] meets the criteria for a boundary
14 change.” The focus of both the standing requirement and the burden of proof is on the “approval
15 criteria.”

16 **4. Criteria (MC 3.09.050(d))**

17 Perhaps the most important section of MC Chapter 3.09 is MC 3.09.050(d), which
18 requires findings that address specified criteria.⁹ MC 3.09.050(d)(2) applies to “agreements”

⁹ MC 3.09.050(d) provides:

“An approving entity’s final decision on a boundary change shall include findings and conclusions addressing the following criteria:

- “(1) Consistency with directly applicable provisions in an urban service provider agreement or annexation plan adopted pursuant to ORS 195.065;
- “(2) Consistency with directly applicable provisions of urban planning or other agreements, other than agreements adopted pursuant to ORS 195.065, between the affected entity and a necessary party;
- “(3) Consistency with specific directly applicable standards or criteria for boundary changes contained in comprehensive land use plans and public facility plans;

1 “between the affected entity and a necessary party.” The Fire House MOU is an agreement. But
2 MC 3.09.050(d)(2) is expressly limited to agreements “between the affected entity and necessary
3 parties.” Damascus is the “affected entity” in this proceeding, as MC 3.09.020(a) defines that term.
4 However, Damascus is not a party to the Fire House MOU. Nevertheless, the MBAC found that
5 the Damascus annexation was inconsistent with the Fire House MOU and on that basis found that
6 the annexation “does not comply with MC Section 3.09.050(d)(2)[.]” Record 4.

7 MC 3.09.050(d)(7) establishes a criterion that, among other things, a boundary change
8 must be consistent with “applicable criteria” “under state * * * law.” The MBAC found that Happy
9 Valley initiated its annexation proceedings in 2002 when it sought and received voter approval for
10 Measure 3-85. Damascus did not initiate its annexations until 2005. The MBAC cited *Landis v.*
11 *City of Roseburg*, 243 Or 444, 48-49, 411 P2d 282 (1966), in which the Oregon Supreme Court
12 stated “the authorized body which first institutes [incorporation] proceedings acquires exclusive
13 jurisdiction of the subject area and may proceed to final conclusion unfettered by subsequent
14 [annexation] proceedings of another authorized body.” Based on its finding that Happy Valley first
15 initiated annexation proceedings and *Landis*, the MBAC found that the Damascus annexation
16 ordinance violated the requirement under MC 3.09.050(d)(7) that the boundary change be
17 consistent with “applicable criteria * * * under state * * * law.” Record 2.

18 5. Alternative Service Providers (MC 3.09.050(e))

19 Where there is no existing urban service agreement for the area that is the subject of a
20 boundary change contested by a necessary party, the approving entity’s findings must address ten

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- “(4) Consistency with specific directly applicable standards or criteria for boundary changes contained in the Regional Framework Plan or any functional plan;
 - “(5) Whether the proposed change will promote or not interfere with the timely, orderly and economic provisions of public facilities and services;
 - “(6) The territory lies within the Urban Growth Boundary; and
 - “(7) Consistency with other applicable criteria for the boundary change in question under state and local law.”

1 specified “factors in determining whether the proposed boundary change meets the criteria of [MC]
2 3.09.050(d) and (g).” Because the MBAC decided the appeal on other grounds, it did not address
3 the Damascus findings on these factors. Although MC 3.09.050(e) plays no direct role in our
4 decision in this appeal, it plays an indirect role, and could play a direct role in the MBAC’s
5 proceeding on remand. In that regard we note that one of the 10 factors seems to envision the
6 possibility that an annexation might be approved, notwithstanding that the annexation is inconsistent
7 with an existing intergovernmental agreement.¹⁰

8 **B. How Contested Cases Are Filed (MC 3.09.070)**

9 MC 3.09.070(a) sets out how a necessary party goes about filing a contested case. MC
10 3.09.070(b) sets out the requirements for filing the boundary change record for review. MC
11 3.09.070(c) makes it clear that contested case appeals are available to necessary parties by right
12 and that until such an appeal is completed the annexation ordinance does not become final.¹¹

13 **C. Hearing and Decision (MC 3.09.090)**

14 The third major relevant section of MC Chapter 3.09 is MC 3.09.090 which governs the
15 hearing before and decision by the MBAC. The key subsections of MC 3.09.090 are subsections
16 (b), (f) and (g), which are set out in the margin.¹² Under MC 3.09.090(b), (f) and (g), MBAC

¹⁰ MC 3.09.050(e)(10) provides:

“Where a proposed decision is inconsistent with an adopted intergovernmental agreement, that the decision better fulfills the criteria of Section 3.09.050(d) considering Factors (1) through (9) above.”

¹¹ MC 3.09.070(c) provides:

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

¹² MC 3.09.090(b), (f) and (g) provide:

“(b) The Commission shall hear and decide a contested case only on the certified record of the boundary change proceeding. No new evidence shall be allowed. * * *”

1 review is limited to the record before the city, the MBAC is directed to adopt findings regarding the
2 MC 3.09.050(d) and (g) criteria and the MBAC decision is limited to affirming or denying the
3 boundary change.¹³

4 We now turn to Happy Valley’s jurisdictional challenge.

5 **JURISDICTION**

6 LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1). As
7 defined by ORS 197.015(10)(a)(A), a land use decision includes:

8 “A final decision or determination made by a local government or special district
9 that concerns the adoption, amendment or application of:

10 “(i) The goals;

11 “(ii) A comprehensive plan provision;

12 “(iii) A land use regulation; or

13 “(iv) A new land use regulation[.]”

14 In adopting its annexation ordinance, Damascus was legally required to apply either the
15 statewide planning goals or a comprehensive plan provision. *Cape v. City of Beaverton*, 187 Or
16 App 463, 470-71, 68 P3d 261 (2003). When that ordinance becomes final, it will fall within the
17 statutory definition of “land use decision.” However, Happy Valley argues, the Damascus
18 annexation ordinance is not the decision that is before LUBA in this appeal. We agree. Happy
19 Valley also argues that because the MBAC decision is not based on any of the land use standards

“(f) * * * The [MBAC final] order shall include findings and conclusions on the criteria
for decision listed in Section 3.09.050(d) and (g). * * *”

“(g) The Commission shall affirm or deny a final decision made below based on
substantial evidence in the whole record. The Commission shall have no authority to
remand a decision made below for further proceedings before the approving entity
* * *.”

¹³ The MC 3.09.050(g) criterion has no bearing on this appeal and we do not discuss it.

1 described in ORS 197.015(10)(a)(A), the MBAC decision that is before LUBA in this appeal is
2 not a land use decision.¹⁴ For the reasons that follow, we do not agree with that argument.

3 As defined by ORS 197.015(13), Metro is a “local government.” The MBAC decision in
4 this appeal is Metro’s “final decision.” The only remaining question under ORS 197.015(10)(a) is
5 whether the MBAC decision “concerns” “application of” one or more of the land use standards
6 specified in ORS 197.015(10)(a)(A). It does. As we have already explained in section A(4) of
7 our above discussion of the MBAC appeals process, the criteria that Damascus must apply
8 approving the disputed annexation are set out at MC 3.09.050(d). *See* n 9. Under the MC
9 3.09.050(d)(3) criterion, Damascus was required to determine whether the proposed annexation is
10 consistent with “specific directly applicable standards or criteria for boundary changes contained in
11 comprehensive land use plans * * *.” Even if there are no such comprehensive plan criteria, under
12 MC 3.09.050(d)(7) the city would be required to apply the statewide planning goals directly. *See*
13 *Cape*, 187 Or App at 470 (if comprehensive plan does not address annexation decision, OAR
14 660-001-0310 requires that the statewide planning goals be applied directly). Turning next to MC
15 3.09.090, which governs the MBAC decision, the MBAC is expressly directed to adopt findings on
16 “the criteria for decision listed in [MC] 3.09.050(d) * * *.” MC 3.09.090(f). *See* n 12. Since the
17 MBAC, like Damascus, is required to adopt findings addressing either comprehensive plan criteria
18 or the statewide planning goals in approving an ordinance that approves a boundary change, its
19 decision is a land use decision.

20 As Happy Valley correctly notes, the particular MBAC decision in this appeal denied the
21 annexation ordinance, and did so on other grounds, making it unnecessary to address
22 comprehensive plan criteria or the statewide planning goals. However, it is clear that a decision to
23 *approve* the Damascus annexation ordinance would concern application of land use standards and

¹⁴ Again, the cited bases of the MBAC decision to deny the ordinance are (1) violation of MC 3.09.050(b)(3) due to the failure of the annexation report to discuss the consistency of the annexation with the Fire House MOU, (2) violation of MC 3.09.050(d)(2) due to the inconsistency of the annexation with the Fire House MOU, and (3) violation of state law under MC 3.09.050(d)(7), because the Happy Valley annexation was initiated first.

1 would qualify as a land use decision. The fact that the particular MBAC decision in this case
2 instead denied the Damascus annexation ordinance on other grounds does not mean the MBAC
3 decision is not a decision that concerns application of a comprehensive plan or the statewide
4 planning goals. Where a comprehensive plan provision or statewide planning goals are among the
5 approval criteria for a decision, the decision “concerns” “the application” of a comprehensive plan
6 or the statewide planning goals.

7 LUBA has jurisdiction to decide this appeal.

8 **FIRST ASSIGNMENT OF ERROR**

9 **A. Consideration of Relevant Caselaw**

10 The MBAC found that Measure 3-85, which was approved by Happy Valley voters in
11 2002, was sufficient to initiate annexation in its Area of Interest. All of the Damascus annexation
12 areas are located in Happy Valley’s Area of Interest. The MBAC also found that Damascus did
13 not initiate annexation until 2005. Based on these findings, the MBAC found that the Damascus
14 annexation ordinance was invalid:

15 “[T]he [MBAC] finds that Happy Valley obtained and retains exclusive legal
16 jurisdiction over the disputed area for purposes of annexation until such time as the
17 voter approval expires after December 31, 2007. *Landis v. City of Roseburg*,
18 243 Or. 44, 48,-49, 411 P.2d 282 (1966). The annexation ordinance adopted by
19 Damascus is invalid on this basis. [MC] 3.09.050(d)(7) requires that the Damascus
20 decision be consistent with applicable criteria under state and local law.” Record 2.

21 Damascus argues the MBAC is not permitted under MC 3.09.050(d)(7) to consider
22 whether the disputed annexation ordinance is inconsistent with the Oregon Supreme Court’s *Landis*
23 decision:

24 “[MC] 3.09.050(d)(7) reads that the decision must be reviewed for ‘consistency
25 with other applicable criteria for the boundary change in question under state and
26 local law’ The analysis under *Landis* did not qualify as ‘applicable criteria for the
27 boundary change in question.’ *Landis* dealt with jurisdiction of an entity to annex
28 while another annexation proceeding was underway – it did not raise procedural
29 questions as contemplated by the [MC]. The [MBAC’s] jurisdiction is limited to
30 applying the [MC] and ‘applicable criteria’ under state and local law. Although
31 case law on this issue is essentially non-existent, ORS 197.825(1) makes it clear

1 that LUBA’s jurisdiction to review land use decisions is exclusive. To interpret the
2 [M]BAC’s jurisdiction as extending to matters outside the procedural purview of
3 the [MC] will ultimately undermine LUBA’s exclusive right to decide these
4 questions, as granted in statute. This precedent cannot stand.” Petition for Review
5 5.

6 Turning first to Damascus’s last point, we do not understand how MBAC consideration of
7 the potential relevance of the *Landis* decision in this matter could have any effect on LUBA’s
8 jurisdiction. Damascus’s concern may have something to do with the fact that Happy Valley’s
9 direct appeal of the Damascus annexation ordinance is currently pending before LUBA in LUBA
10 No. 2005-118 and the briefs in that appeal address the issue. As we have already noted, we
11 dismiss that appeal this date because we conclude the disputed annexation ordinance is not final.
12 We see no bases for any concern regarding LUBA’s jurisdiction under the first assignment of error.

13 Returning to Damascus’s remaining contentions, we discuss the Supreme Court’s *Landis*
14 decision, and *City of Tualatin v. City of Durham*, 249 Or 536, 239 P2d 624 (1968) (*Tualatin*
15 *v. Damascus*) , a subsequent decision that cites and relies on the *Landis* decision, in our decision in
16 *City of Damascus v. City of Happy Valley*, ___ Or LUBA ___ (LUBA No. 2005-125, January
17 26, 2006). Suffice it to say that the holdings in those two Oregon Supreme Court cases, and the
18 bearing of those holdings on the respective powers of competing bodies that are attempting to annex
19 the same territory, do not fit neatly into what most people would describe as “applicable criteria for
20 [a] boundary change.” Such criteria are generally set out in statutes, administrative rules,
21 comprehensive plans and land use regulations. However, we do not believe MC 3.09.050(d)(7)
22 must be interpreted as narrowly as Damascus suggests. The factual similarities between the
23 competing incorporation and annexation in *Landis* and the competing annexations in *Tualatin v.*
24 *Durham* and the competing annexations in this case are obvious. If the MBAC chooses to interpret
25 MC 3.09.050(d)(7) broadly to allow it to consider whether Damascus was second to initiate
26 annexation, and therefore improperly annexed the disputed property under state law, we do not see
27 that it exceeded its interpretive discretion in doing so.

1 As we have already noted, we conclude in our decision in *City of Damascus v. City of*
2 *Happy Valley* that Damascus was first to initiate annexation. But the merits of the question of which
3 city first initiated annexation are not presented in the first assignment of error. The question
4 presented in the first assignment of error is MBAC’s jurisdiction to consider the question. We
5 conclude that the MBAC did not err in interpreting MC 3.09.050(d)(7) to authorize it to consider
6 the question.

7 **B. Scope of Review Limited to the Criteria in MC 3.09.050(d) and (g)**

8 Another issue is raised briefly in the petition for review under the first assignment of error
9 and responded to by Happy Valley. As we explain later in this opinion, it is a significant issue that is
10 ignored in the MBAC decision and dealt with lightly in the parties’ briefs. That issue is whether the
11 only approval criteria for the disputed annexation appear at MC 3.09.050(d) and (g), or whether
12 other subsections of MC 3.09.050 also operate as approval criteria, in the sense that
13 noncompliance with requirements in those other subsections constitutes a basis for MBAC denial of
14 a city annexation ordinance. Damascus argues:

15 “* * * ORS 268.354(1)(d) requires all [boundary change] decisions within Metro’s
16 purview to ‘be subject to clear and objective criteria established by the district.’
17 These ‘clear and objective criteria’ are set forth in the [MC], at 3.09.050(d) and
18 (g). [MC] 3.09.090(f) limits the scope of the [M]BAC’s review to those criteria. *
19 * *.” Petition for Review 5.

20 Happy Valley responds:

21 “Damascus also claims that its annexation is not subject to review by the [M]BAC
22 for compliance with any [MC] requirement beyond Sections 3.09.050(d) and (g),
23 claiming that [MC] 3.09.090(f) limits the [M]BAC’s scope of review to those
24 criteria. That attempt to avoid complying with the remainder of [MC] 3.09.050’s
25 requirements is not substantiated upon closer review of the applicable [MC]
26 provisions.” Intervenor-Respondent’s Brief 11.

27 Happy Valley goes on to cite contextual MC language that it believes shows that the MBAC is
28 authorized to deny annexation ordinances based on requirements outside MC 3.09.050(d) and (g).

29 The MBAC found that the city’s failure to address the Fire House MOU in the report that
30 preceded its annexation violated MC 3.09.050(b)(3) and the MBAC decision can be read to find

1 that the deficiency in the report warranted denial of the annexation ordinance. *See* n 8. The MBAC
2 also found, as a separate reason for denial, that the disputed annexation is inconsistent with the Fire
3 House MOU and therefore violates MC 3.09.050(d)(2). *See* n 9. There are problems with both of
4 those findings. Rather than attempt to resolve here the issue of whether a failure to comply with the
5 MC 3.09.050(b)(3) report description requirements could be a basis for denial, we address that
6 question under the third and fourth assignments of error where the bulk of Damascus’s attack on the
7 Fire House MOU is located.

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 As we noted earlier, MC 3.09.090(b) limits MBAC review to the evidentiary record that is
11 compiled by the body that adopted the disputed boundary change. *See* n 12. The MBAC is
12 specifically directed not to allow new evidence.

13 At its October 5, 2005 hearing in this matter, the MBAC heard testimony by the mayors of
14 both cities. Damascus objected:

15 “* * * Over Damascus’s strenuous objections, and as the hearing transcript clearly
16 illustrates, most of Happy Valley’s argument before the BAC was not legal
17 argument from Happy Valley’s counsel based on the record, but extemporaneous
18 argument and purported ‘facts’ from [the] Happy Valley Mayor * * * -- a witness
19 called by Happy Valley’s attorney without warning or consent from Damascus.
20 Happy Valley’s justification for offering [the mayor’s] ‘testimony’ was, ostensibly,
21 that [the mayor] had appeared at Damascus’s annexation hearing and submitted
22 written testimony, and that testimony was in the record before the [M]BAC. This
23 justification of course utterly guts both the ‘only on the certified record’ and ‘no new
24 evidence’ rules. * * *” Petition for Review 6-7.

25 Happy Valley responds:

26 “[MC] 3.09.090(b) sets no limit on the number of representatives of a necessary
27 party that may participate at a hearing before the [M]BAC. Indeed, as the minutes
28 indicate, [the mayor] of Damascus participated in the hearing before the [M]BAC
29 as well. Damascus cannot claim that its substantial rights were prejudiced where it
30 was provided an equal footing as Happy Valley in the proceedings before the
31 [M]BAC. [The Happy Valley mayor] merely provided argument to the [MBAC]
32 based on evidence in the record before the [M]BAC. As [MC] 3.09.090(b)

1 states, ‘The party bringing the appeal shall have the burden of persuasion.’ Happy
2 Valley was simply meeting its burden. The Final Order does not cite to [the mayor]
3 or any new ‘evidence’ provided by him at the hearing as a basis for its decision.
4 Damascus has not asserted that any part of the Final Order relies on any such new
5 evidence. * * *’ Intervenor-Respondent’s Brief 13-14.

6 Local governments frequently allow additional legal argument or other commentary on the
7 evidence after the evidentiary record is closed. Indeed, ORS 197.763(6)(e) requires that local
8 governments do so in the situation described in that statute. The informality of most local land use
9 proceedings, and the size of the evidentiary record that may have been compiled before the record
10 is closed, frequently will give rise to a potential for claims that legal arguments or commentary on
11 evidence that is already in the record is really new evidence. A petitioner that asserts such a claim
12 must do more than assert that new evidence was improperly submitted. The petitioner making a
13 claim that testimony went beyond legal argument or commentary on evidence already in the record
14 must, at a minimum, (1) adequately identify the objectionable testimony, (2) explain why that
15 testimony goes beyond legal argument or commentary on evidence that is already in the record or
16 for some other reason constitutes new evidence and (3) offer some substantial reason to believe the
17 objectionable testimony had some effect on the ultimate decision. Absent such a showing, there is
18 no basis for LUBA to conclude that the testimony was improper and whether any procedural error
19 in allowing the testimony resulted in prejudice to Damascus’s substantial rights, so as to provide a
20 basis for remand. ORS 197.835(9)(a)(B).¹⁵

21 Damascus does not specifically identify any part of the mayor’s testimony, or explain why it
22 believes any particular testimony goes beyond legal argument or commentary on the evidentiary
23 record or does anything more than speculate that the testimony may have swayed the MBAC. In its
24 reply brief, Damascus seems to agree that the testimony is not properly viewed as new evidence,
25 but argues:

¹⁵ Under ORS 197.835(9)(a)(B), one of the bases upon which LUBA may reverse or remand a land use decision is when LUBA finds that the local government “[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]”

1 “[T]he [M]BAC was required to affirm or deny a boundary change decision made
2 below, based on substantial evidence in the whole record. [MC 3.09.090(g).]
3 There is no way to know for certain the degree to which the [M]BAC’s decision
4 was based on ‘substantial evidence’ as required, and how much on [the mayor’s]
5 commentary, which Happy Valley admits was not ‘evidence.’ Inclusion of [the
6 mayor’s] testimony was an egregious procedural violation.” Reply Brief 3-4.

7 If Damascus is now arguing that non-evidentiary commentary (legal argument or argument
8 concerning the evidence already in the record) is improper, we do not agree. As we have already
9 noted, local governments frequently allow such non-evidentiary argument and in some contexts must
10 allow it. If Damascus believes the impropriety arises because the non-evidentiary commentary was
11 presented by the city’s mayor rather than its legal counsel, we fail to see why the source of the non-
12 evidentiary commentary is important. Non-evidentiary commentary may in some cases persuade a
13 decision maker to adopt a decision that the legal standards or evidentiary record will not support. If
14 so, the decision may be remanded because it is not supported by the law or substantial evidence.
15 But there is no impropriety in arguing that a decision maker should adopt a particular view of the
16 law or the evidence in the record. In fact, that is precisely the goal when presenting legal argument
17 and commentary on evidence that is not in the record.

18 The second assignment of error is denied.

19 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

20 We tend to agree with Happy Valley that Damascus’s arguments under these assignments
21 of error overlap and at times are difficult to follow. That may have been a byproduct of the
22 accelerated briefing schedule that was followed to allow oral argument in all three related appeals to
23 be scheduled for the same day. It is also no doubt partially attributable to the fact that our ruling on
24 Damascus’s earlier motion to dismiss in *City of Happy Valley v. City of Damascus* (LUBA No.
25 2005-118) was deferred, making it somewhat more difficult to determine the appeal or appeals
26 where particular arguments should be made. Whatever the explanation, much of the argument
27 under the third and fourth assignments of error (1) concerns when Happy Valley initiated its
28 annexation, a matter that is resolved in a separate final opinion issued this date, (2) concerns the

1 UGMA, which was not the cited basis for the MBAC’s decision, or (3) concerns the First MOU,
2 which has expired and was not a basis for the MBAC’s decision. We therefore focus on the
3 arguments under these assignments of error that are directed at the Fire House MOU and comment
4 on the UGMA and First MOU only to the extent it is helpful in understanding the legal significance
5 of the Fire House MOU.

6 **A. The Fire House MOU**

7 As we have already noted, the May 10, 2004 Fire House MOU is signed by Happy Valley,
8 two other cities, Clackamas County, four special districts, three citizen planning organizations, and
9 the Committee for the Future of Damascus. The possible incorporation of Damascus is recognized
10 in the Fire House MOU, but because Damascus did not yet exist, it was not a party to the Fire
11 House MOU.

12 The primary reason for the Fire House MOU was a perceived need to proceed in a
13 coordinated and organized way to plan and make governance decisions regarding a large area of
14 unincorporated land that was included in the Metro Urban Growth Boundary (UGB) in 2002 (the
15 Damascus/Boring area). As the Fire House MOU explains:

16 “This Memorandum is presented not as a final statement on governance, but as a
17 working record of discussions of the Study Group. Any decisions about
18 governance must be preceded by a serious and committed process of public
19 outreach and dialogue, and this is not meant to substitute for that larger process in
20 any way. It can, however, provide a starting point for understanding and framing
21 the issues, and that is the spirit with which this work has been undertaken.” Record
22 201.

23 It is made clear elsewhere in the Fire House MOU that it was anticipated that the unincorporated
24 area that was included in the UGB in 2002 would be annexed by existing cities or included in
25 Damascus, if that incorporation was approved by the voters. We understand the concept of “a final
26 statement on governance” as a shorthand description for a final decision on how that unincorporated
27 territory would be divided among those cities. The above paragraph makes it clear that the Fire
28 House MOU is not such a final decision.

1 The Fire House MOU then goes on to list a number of discussions that have occurred in the
2 past. One of the identified discussions is a concern that the 2002 UGB amendment will provide an
3 incentive for property owners to seek annexation to existing cities immediately to speed up planning
4 for and development of urban land uses. The Fire House MOU indicates that such annexations
5 could leave “large areas without the fiscal capacity to perform as cities in the future.” The Fire
6 House MOU also expresses some concern regarding the effect of governance decisions in this area
7 on the fiscal health of existing service providers.

8 The Fire House MOU goes on to identify three scenarios. Under the first scenario, no
9 incorporation or annexation decisions would be made until concept planning is completed. Under
10 the second scenario, annexation of existing industrial lands could proceed immediately. The difficult
11 fiscal question of how to deal with the predominantly residential unincorporated areas that would be
12 left would be deferred to the future. Under the third scenario, based on continuing fiscal analyses,
13 the parties would continue to seek to equitably and efficiently share the costs and benefits of urban
14 development in the area. The third scenario ends with the following cautionary statement:

15 “This would not prevent or forestall the logical annexation of lands to existing and
16 prospective cities, as determined by the coordinated concept planning process
17 described above, but would simply operate to ensure that fiscal viability for self-
18 governance remains a feature of the evolution of this area.” Record 202.

19 The third scenario is selected in the Fire House MOU.

20 Under the heading “Cities for Governance,” the Fire House MOU explains that in the area
21 being considered for concept planning east of 177th Street, the Committee for the Future of
22 Damascus will be given the opportunity to seek incorporation twice before the end of November
23 2006 and until that opportunity to incorporate expires, other cities will not seek to annex territory
24 east of 177th Street. The Fire House MOU explains that if those incorporation elections are
25 unsuccessful, Happy Valley will seek permission from city voters to annex east of 177th and other
26 cities will annex in that area as well.

1 Under the heading “City Boundaries,” the Fire House MOU similarly explains the
2 significance of the approximate 177th Avenue division between Happy Valley and the potential city
3 of Damascus:

4 “The City of Happy Valley and the Committee for the Future of Damascus have
5 determined that the boundaries for the proposed City of Damascus and the City of
6 Happy Valley will generally lie at 177th on the West * * *. This boundary will be
7 used by the City of Happy Valley as the eastern-most extent of its UGMA [Area of
8 Interest] for concept planning and annexation activity prior to November 30, 2006,
9 in order to give the Committee for the Future of Damascus an adequate opportunity
10 for the development and approval of its incorporation proposal.” Record 204.

11 The Fire House MOU goes on to state that the parties agree to meet again in 2005 to
12 consider possible revisions to the MOU in the event a second Damascus incorporation election is
13 required. The parties agree to continue to meet “to share information about concept planning,
14 actions taken to address the issues noted in this agreement, and other issues as may relate to
15 governance and service delivery in the Damascus/Boring communities, broadly defined.” Record
16 206.

17 With the above summary of the main features of the Fire House MOU we turn to the
18 MBAC’s reliance on the Fire House MOU to deny the Damascus annexation ordinance.

19 **B. MC 3.09.050(d)(2)**

20 As have already explained, MC 3.09.050(d) provides seven criteria that Damascus was
21 required to address in approving the boundary adjustment and the MBAC was required to address
22 on appeal. MC 3.09.050(d)(2) requires that the city and MBAC find that the boundary change is
23 consistent with “agreements * * * between the affected entity and a necessary party.” The MBAC
24 adopted the following findings in support of its conclusion that the city’s annexation ordinance is
25 inconsistent with the Fire House MOU and for that reason violates MC 3.09.050(d)(2):

26 “The [MBAC] finds that the [Fire House] MOU is an agreement subject to the
27 terms of [MC 3.09.050(d)(2)]. The challenged annexation is inconsistent with the
28 [Fire House] MOU * * * in that it is inconsistent with the agreed [to] boundary
29 between Happy Valley and Damascus which is at SE 177th Avenue. The
30 annexations in the challenged ordinance are all to the west—on the Happy Valley

1 side—of that boundary. The MOU is still in effect by its terms. The incorporation
2 of Damascus did not affect the validity of the [Fire House] MOU or render it
3 inapplicable. Therefore, the challenged ordinance does not comply with [MC]
4 3.09.050(d)(2) because it is inconsistent with the [Fire House] MOU.” Record 3-
5 4.

6 Most of Damascus’s arguments focus on its disagreement with the MBAC regarding the
7 legal significance of the Fire House MOU—specifically whether it was intended to preclude
8 annexations by Damascus west of 177th Avenue, in the event incorporation was successful. Stated
9 differently, Damascus does not believe the Fire House MOU grants Happy Valley the *exclusive*
10 authority to annex unincorporated territory that lies west of 177th Avenue or exclude Damascus
11 from doing so after it was incorporated. However, the city also points out the critical flaw in relying
12 on MC 3.09.050(d)(2) and the Fire House MOU to deny the city’s annexation ordinance:

13 “The City of Damascus was not a party to the [Fire House] MOU, as the city had
14 not yet incorporated.” Petition for Review 10.

15 We conclude that MC 3.09.050(d)(2) is unambiguously limited to “agreements * * *
16 between the affected entity and a necessary party.” In other words, if Damascus is not a party to
17 the Fire House MOU, which is the case here, MC 3.09.050(d)(2) simply does not apply and could
18 not provide a basis for denying the disputed annexation ordinance.

19 **C. MC 3.09.050(b)(3).**

20 We turn next to the annexation report requirement in MC 3.09.050(b)(3). Unlike the
21 criterion set out at MC 3.09.050(d)(2), MC 3.09.050(b)(3) is not limited to agreements to which
22 Damascus is a party. As we have already noted, MC 3.09.050(b)(3) requires that the city prepare
23 a report before annexing territory. *See* n 8. MC 3.09.050(b)(3) requires that that report include
24 the following description:

25 “A description of how the proposed boundary change is consistent with * * * urban
26 planning agreements and similar agreements of the affected entity and of all
27 necessary parties.”

28 The Fire House MOU is clearly an “urban planning” or “similar agreement” of necessary parties.
29 Therefore, under MC 3.09.050(b)(3) the city was required to explain why its proposed annexation

1 is consistent with the Fire House MOU. While Damascus argues at length in its brief why it believes
2 the disputed annexations are not inconsistent with the Fire House MOU, the city report that
3 preceded the disputed annexation does not address the Fire House MOU at all. Citing that failure,
4 the MBAC relies on MC 3.09.050(b)(3) as a separate basis for denying the disputed annexation
5 ordinance:

6 “[MC 3.09.050(b)(3)] required Damascus to describe ‘how the proposed
7 boundary change is consistent with the . . . urban planning agreements and similar
8 agreements of all necessary parties.’ The [MBAC] finds that this Metro Code
9 provision applies to the [Fire House MOU]. The [MBAC] finds that most (if not
10 all) of the parties to the [Fire House] MOU are ‘necessary parties’ as that term is
11 defined at [MC] 3.09.020(j), thus making the [Fire House] MOU subject to [MC]
12 3.09.050(b)(3).

13 “* * * In addressing [MC] 3.09.050(b)(3), the Damascus staff report defers
14 compliance to its discussion of [MC] 3.09.050(d). In addressing the latter [MC]
15 requirement, the Damascus staff report does not address the [Fire House] MOU.
16 Therefore the [MBAC] finds that Damascus has not satisfied [MC]
17 3.09.050(b)(3).” Record 2-3.

18 We return now to the issue we left unresolved under the first assignment of error, *i.e.*,
19 whether the report requirements listed under MC 3.09.050(b) constitute approval criteria. It would
20 appear that the seven criteria at MC 3.09.050(d) are undeniably approval criteria. However, it is
21 not at all clear that the five report requirements set out at MC 3.09.050(b) are properly viewed as
22 approval criteria, in the sense that failure to satisfy a report requirement, in and of itself, is a basis for
23 denying an ordinance approving a boundary change, without regard to whether the proposed
24 boundary change is consistent with all seven MC 3.09.050(d) criteria. The MBAC decision offers
25 no explanation for why a report information requirement that has no direct bearing on one or more
26 of the seven MC 3.09.050(d) criteria should be given that legal effect.

27 Clearly there are similarities and overlap between the report requirements set out in MC
28 3.09.050(b) and the review criteria set out in MC 3.09.050(d). In some cases the required report
29 information under MC 3.09.050(b) is nearly identical to one of the MC 3.09.050(d) criteria that

1 follow.¹⁶ But that is not always the case. Here, the MC 3.09.050(b)(3) report requirement that the
2 affected party describe how a proposed boundary change is consistent with agreements the affected
3 entity is not a party to is not repeated in one of the seven MC 3.09.050(d) approval criteria. As we
4 have already explained, the consistency requirement that is imposed by the MC 3.09.050(d)(2)
5 criterion is limited to agreements that both the affected entity and necessary parties are a party to.
6 The MBAC decision does not even address this interpretive issue. It simply applies the MC
7 3.09.050(b)(3) report requirement as though it has the same legal status as the seven MC
8 3.09.050(d) approval “criteria.” We seriously question that apparent interpretation, although we do
9 not foreclose the possibility that the MBAC may be able to defend that interpretation on remand.¹⁷
10 However, even if the MBAC can adequately explain its interpretation, its failure to do so in the
11 decision that is before us in this appeal requires that we remand the challenged decision.

12 On remand the MBAC should first consider whether failure to prepare a report that
13 complies with all the requirements of MC 3.09.050(b) provides an independent basis for denying
14 the appealed annexation ordinance absent a showing that the failure implicates one or more of the
15 MC 3.09.050(d) approval criteria. If the MBAC concludes that it does not, there are other
16 approval criteria that the MBAC did not consider that will need to be considered on remand.

17 For the reasons explained above, the third and fourth assignments of error are sustained.

18 The MBAC decision is remanded.

¹⁶ For example, the description required by MC 3.09.050(b)(2) concerning urban service provider agreements is very similar to the approval criterion imposed by MC 3.09.050(d)(1), which requires a demonstration that a proposed boundary change is consistent with “directly applicable provisions in an urban service provider agreement or annexation plan adopted pursuant to ORS 195.065.” *See* ns 8 and 9.

¹⁷ In this regard we note that MC 3.09.050(e)(10) may have some indirect contextual bearing on the question. *See* n 10 and related text. As we noted earlier, the MBAC is required to consider the ten factors at MC 3.09.050(e) in applying the MC 3.09.050(d) criteria. The MC 3.09.050(e)(10) factor seems to allow approval of a boundary change that is inconsistent with an adopted intergovernmental agreement in certain circumstances, notwithstanding the MC 3.09.050(d)(1) approval criterion seems to require such consistency. *See* n 9. If it is possible to approve a boundary change notwithstanding that it violates one of the MC 3.09.050(d) approval criteria, it seems questionable that a boundary change that has not been shown to violate one of the MC 3.09.050(d) criteria must be denied simply because a single MC 3.09.050(b) report requirement was not satisfied.