BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LEUPOLD & STEVENS, INC.,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2006-143

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Robert D. Van Brocklin and Michelle Rudd, Portland, represented petitioner.

William J. Scheiderich, Beaverton, represented respondent.

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

DISMISSED 01/03/2007

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 appeals a city letter that defers action on petitioner's request for a hearing concerning the city's annexation of its property.

JURISDICTION

A. Introduction

Petitioner's record objections and motion to consider extra-record evidence and the city's motion to dismiss have been pending for some time. We have considered all of the extra-record evidence that the parties have placed before us in considering whether we have jurisdiction to review the disputed letter. *Neighbors for Sensible Dev. v. City of Sweethome*, 39 Or LUBA 766, 771 (2001); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988). We conclude that we do not have jurisdiction, for the reasons explained below. Because we do not have jurisdiction, it is not necessary to resolve the pending record objections and motion to consider extra-record evidence.

B. Facts

While the reasoning that leads us to conclude that we lack jurisdiction to review the city's letter is relatively straightforward and uncomplicated, an understanding of the events that led to the disputed letter provides useful context.

1. Petitioner's Appeal of the City's Annexation Ordinance to LUBA

Under the authority granted by the island annexation statute at ORS 222.750, the city adopted Ordinance 4350 on May 2, 2005, to annex petitioner's property.[1] Four months later, on September 2, 2005, legislation barring island annexation of certain properties took effect. Oregon Laws 2005, ch 844 (Senate Bill 887) (hereafter SB 887). On May 18, 2005, more than three months before SB 887 took effect, petitioner filed a notice of intent to appeal

[1] Simplifying a bit, ORS 222.750 authorizes cities to annex unincorporated territory without property owner consent or an election if the city surrounds that territory on all sides.

Ordinance 4350. On August 29, 2005, four days before SB 887 took effect, petitioner filed its petition for review. In that petition for review petitioner asserted two legal theories. First, petitioner argued that annexation of petitioner's property was barred by 1987 legislation that was adopted at the behest of Tektronix Corp., to bar city annexation of Tektronix's property. Second, petitioner argued that the ORS 222.750 island annexation statute only authorized annexation of entire islands, and that Ordinance 4350 improperly annexed only part of an island.

At oral argument on November 17, 2005, petitioner argued for the first time that Ordinance 4350 was barred by SB 887. LUBA allowed the parties time to submit supplemental memoranda concerning the potential applicability of SB 887 to Ordinance 4350. Petitioner submitted its supplemental memorandum on November 29, 2005. A number of documents were attached to that supplemental memorandum to provide needed factual support for petitioner's arguments that its property qualifies for protection from nonconsensual island annexation under SB 887. On December 15, 2005, the city filed its supplemental memorandum. In that supplemental memorandum, the city argued that petitioner had not established that petitioner's extra-record evidence could be considered by LUBA under OAR 661-010-0045.[2] The city also argued that petitioner's extra-record evidence does not establish that petitioner's property qualifies for protection under SB 887.

In LUBA's final decision affirming Ordinance 4350, we rejected both of the legal theories that were included in the petition for review. In rejecting petitioner's additional argument that LUBA should apply SB 887 and invalidate Ordinance 4350, we explained:

> "[To determine w]hether petitioner's property falls within the prohibitions against nonconsensual annexations in section 6 or 7 of [SB 887] requires that we consider evidence that is not in the record. Petitioner attaches extra-record evidence to its Supplemental Memorandum to establish the facts that would

[2] OAR 661-010-0045 implements ORS 197.835(2)(b), which authorizes LUBA to consider extra-record evidence in certain limited circumstances.

bring it within the protection provided by those sections of the 2005 legislation. In its Supplemental Memorandum, the city objects to LUBA's consideration of any evidence that is not in the record that it filed in this matter.

> "By statute LUBA review is generally limited to the record filed by the city in this appeal. ORS 197.835(2)(a). ORS 197.835(2)(b) specifies certain circumstances where LUBA may consider extra-record evidence. Petitioner has not responded to the city's objection to our consideration of the extra-record evidence that is attached to petitioner's Supplemental Memorandum. Neither has petitioner moved for an evidentiary hearing, under OAR 661-010-0045, and it appears unlikely to us that ORS 197.835(2)(b) and OAR 661-010-0045 authorize LUBA to consider the disputed extra-record evidence to determine whether sections 6 and 7 of the 2005 Legislation apply to petitioner's property and therefore invalidate the city's previously adopted annexation ordinance. We therefore do not consider that evidence. Without considering that evidence it is not possible for us to determine whether the disputed annexation is invalidated by sections 6 and 7 of the 2005 Legislation. We therefore do not consider that question." *Leupold & Stevens v. City of Beaverton*, 51 Or LUBA 65, 92 (2006) (*Leupold I*) (footnote omitted).

LUBA affirmed Ordinance 4350.

2. Petitioner's Appeal of LUBA's Decision to the Court of Appeals

Petitioner appealed LUBA's decision in *Leupold I* to the Court of Appeals. Before the Court of Appeals, petitioner did not assign error to LUBA's conclusion that ORS 222.750 authorizes cities to annex a portion of an island. Petitioner did assign error to LUBA's conclusion that the city did not qualify for protection from island annexation under the 1987 legislation. Although petitioner apparently did not assign error to LUBA's decision not to consider whether SB 887 applies to Ordinance 4350, petitioner argued to the Court of Appeals that SB 887 applied retroactively to preclude Ordinance 4350. In an opinion dated June 14, 2006, the Court of Appeals rejected both arguments. In rejecting petitioner's SB 887 argument, the Court of Appeals explained:

> "Petitioner argues that [SB 887] applies retroactively and precludes the city's annexation in this case. Petitioner does not actually assign error to LUBA's decision as to the applicability of [SB 887]. Instead, it advances the argument as one of 'mootness,' apparently in an effort to avoid the problem that LUBA described as the lack of any evidentiary basis for petitioner's argument in the record before it. According to petitioner, under ORAP 8.45, a party is not

constrained by the evidence in the record if it becomes aware of additional facts that probably render a matter moot.

"Petitioner's argument is clever, but unavailing. ORAP 8.45 does provide that 'when a party becomes aware of facts that probably render[ ] an appeal moot, that party shall provide notice of the facts to the court and to the other party or parties to the appeal, and may file a motion to dismiss the appeal.' The key is that the facts of which the party becomes aware probably render an appeal 'moot.'

"'Mootness' is a term of art concerning the authority of the courts to exercise the judicial power conferred by Article VII of the Oregon Constitution. *Brumnett v. PSRB*, 315 Or 402, 406, 848 P2d 1194 (1993). It is an aspect of justiciability, *Yancy v. Shatzer*, 337 Or 345, 349, 97 P3d 1161 (2004), that applies only to the courts and not to local governments or administrative agencies, *Just v. City of Lebanon*, 193 Or App 132, 142, 88 P3d 312, *rev allowed*, 337 Or 247, 95 P3d 728 (2004).'

"* * * * *

"In this case, petitioner's arguments about the applicability of the 2005 statute concern the merits of its case, not justiciability. Petitioner is not contending that, because of the legislature's enactment of the 2005 statute, there no longer is a controversy between it and the city as to the city's authority to annex its property. To the contrary, petitioner's argument is that, because of the legislature's enactment of the 2005 statute, it should prevail on the merits of that controversy.

"Because the evidence that petitioner asks us to consider pertains not to the issue of justiciability but to the merits of its dispute with the city, it is not evidence that we may consider under ORAP 8.45. Judicial review of a decision of LUBA is not the proper place to sort out disputed issues of evidentiary fact. That is what hearings before the city--and, under certain circumstances, *see* ORS 197.835(2)(b); OAR 661-010-0045, before LUBA--are for.

"Because the applicability of section 6 of the 2005 statute depends on the existence of certain predicate facts that cannot be demonstrated on the record before us, we decline to consider further petitioner's contention that this case is disposed of by that statute." *Leupold & Stevens v. City of Beaverton*, 206 Or App 368, 373-75, 138 P3d 23 (2006) (*Leupold II*).

Petitioner petitioned the Court of Appeals for reconsideration, based on an issue that is unrelated to SB 887. That petition for reconsideration was denied on August 23, 2006. The appellate judgment was entered in *Leupold II* on November 27, 2006.

3. Petitioner's Petition for Writ of Mandamus

In February 2006, while petitioner's appeal of LUBA's decision in *Leupold I* was pending before the Court of Appeals, petitioner filed a petition for writ of mandamus in Washington County Circuit Court. It is not entirely clear to us what petitioner asked the circuit court to order the city to do. It is also not entirely clear to us what the circuit court decided in dismissing petitioner's petition for mandamus. We set out below petitioner's description of its petition for writ of mandamus, the court's response and subsequent events:

> "In February 2006, Leupold & Stevens filed a petition for writ of mandamus in Washington County Circuit Court asking the court to order the City to rescind Ordinance 4350 based on the application of [SB 887] to the subject property. The circuit court, at the request of the City and without reaching the merits, ruled that application of [SB 887] to the subject ordinance was not a matter within its jurisdiction. To preserve its remedies, Leupold & Stevens appealed that circuit court decision to the court of appeals. Nonetheless, having been instructed by the trial court that the application of [SB 887] to the property was outside its jurisdiction, Leupold & Stevens, by letter dated June 29, 2006, submitted evidence demonstrating the applicability of the subject statute to the annexation and asked the City to consider and apply [SB 887] to the subject annexation, and to hold a hearing on authority to enforce the annexation and the question of whether the Property was 'exempt' from annexation by reason of [SB 887]. The City has refused to hold a timely hearing or otherwise consider the applicability of [SB 887] to the Property. That denial is being appealed in this case." Petitioner's Response to Motion to Dismiss and Motion to Take Evidence Outside the Record 5-6.

4. The City's Decision

The city's July 18, 2006 letter that is the subject of this appeal is relatively short. We set out the text of that letter below:

> "Thank you for your June 29 letter to me and the City Council requesting a hearing 'to consider the applicability of SB 887 to the annexation' of Leupold and Stevens properties in May 2005.
>
> "As you know, your attorneys made this same request at both LUBA and the Oregon Court of Appeals and both have affirmed the annexation. Your attorneys now have asked the Court of Appeals to reconsider its opinion. We discussed your request with legal counsel at our July 17, 2006 Council meeting. *The Council decided to defer any further action on your request while the Court of Appeals decision on reconsideration is pending. When that*

decision is published we will meet again with our attorneys to decide whether and how to proceed, and I will inform you of their decision at that time." Record 1 (emphasis added).

C. Conclusion

Petitioner has the burden of establishing that LUBA has jurisdiction to review the city's July 18, 2006 letter. *Sparrows v. Clackamas County*, 24 Or LUBA 318, 326 (1992). As relevant here, LUBA has exclusive jurisdiction to review land use decisions. A decision is a "land use decision" if it is a *final* decision and if it applies or should have applied certain land use standards.[3] Ordinance 4350 was required to apply the statewide planning goals or the city's comprehensive plan and therefore was a land use decision. *See Cape v. City of Beaverton*, 43 Or LUBA 301, 305 (2002), *aff'd* 187 Or App 463, 68 P3d 261 (2003) (annexation decisions are land use decisions because they are governed by annexation criteria in the applicable acknowledged comprehensive plan and land use regulations or, if not, by the statewide planning goals). Although we need not decide the question here, it seems highly likely that a final city decision either to (1) apply SB 887 and repeal Ordinance 4350, or (2) find that SB 887 does not apply to petitioner's property and affirm Ordinance 4350, would be a land use decision. But regardless of how we might resolve any jurisdictional challenge to a final city decision that concludes that SB 887 does not protect petitioner's property from island annexation or concludes that it does protect petitioner's

[3] ORS 197.015(11)(a)(A) defines "land use decision" to include:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

property, the city's July 18, 2006 decision to defer making such a decision is not such a *final* decision.

We agree with the city that its July 18, 2006 decision to defer making a final decision regarding whether and how the city will address the question of whether SB 887 invalidates Ordinance 4350 is not a land use decision. *See Grabhorn v. Washington County*, 46 Or LUBA 672, 677-78 (2004) (a decision to reconsider an earlier land use decision, but to await a decision on reconsideration until a related pending land use proceeding results in a final decision, is not a final land use decision). In only a very limited sense is the July 18, 2006 decision a *final* decision of any kind. It appears to be a final decision that the city would not *immediately* take up petitioner's request that SB 887 be applied to invalidate Ordinance 4350. Based on the pending appeal in *Leupold II*, the city decided that it would wait until the conclusion of that appeal to decide petitioner's request. It also appears to be a final city decision that the city will revisit the potential applicability of SB 887 when the appellate judgment is entered in *Leupold II* and tell petitioner whether it will apply SB 887 to Ordinance 4350. Neither of those decisions applies or is governed by land use standards. And neither of those decisions has any effect on Ordinance 4350. Neither of those decisions is a land use decision.

We tend to agree with the city that under *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005) and *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd on other grounds* 97 Or App 687, 776 P2d 1315 (1989), the city lacked jurisdiction to reconsider and repeal Ordinance 4350 while LUBA's decision affirming that ordinance was on appeal at the Court of Appeals. But that potential jurisdictional bar to taking up petitioner's request appears to have been eliminated. The circuit court did not review Ordinance 4350 or SB 887 on the merits. It seems unlikely to us that the pending appeal of the circuit court's dismissal of petitioner's petition for writ of mandamus would pose a jurisdictional bar to a city decision to now proceed to consider whether SB 887 bars

Ordinance 4350. In a December 19, 2006 letter to LUBA, the city appears to suggest that petitioner's appeal of the circuit court's dismissal of its petition for a writ of mandamus may also pose a jurisdictional bar to petitioner's request that the city consider the applicability of SB 887 to Ordinance 4350. Given the current state of the briefing on the possible effect of that appeal may have on the city's ability to consider the applicability of SB 887 to Ordinance 4350, and given the lack of any necessity to consider that question in resolving the pending motions in this appeal, we do not consider the question further. Even if the city is not legally precluded from considering the potentially applicability of SB 887 to Ordinance 4350 while the appeal of the circuit court's dismissal of petitioner's petition for writ of mandamus is pending before the Court of Appeals, we see no reason why the city could not elect to do so.

The only other argument that petitioner advances that merits further comment is its contention that the city should have treated its June 29, 2006 letter to the city as a petition to withdraw territory from the City of Beaverton. Under Metro Code 3.09.020(i) a "minor boundary" change includes "withdrawal of territory * * * from a city[.]"[4] Once a petition for a minor boundary change is complete, a city has 30 days to deliberate on the petition. MC 3.09.030(b). Boundary changes must be consistent "with specific directly applicable standards or criteria * * * in comprehensive land use plans[.]" MC 3.09.050(d)(3). Petitioner argues that it follows that a city decision in response to a petition for a minor boundary change is a "land use decision" within the meaning of ORS 197.015(11)(a). *See* n 3. Therefore, petitioner argues, LUBA has jurisdiction to review the city's failure to conduct the required deliberations.

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[4] MC 3.09.020(i) provides:

> "'Minor boundary change' means an annexation or withdrawal of territory to or from a city or district or from a city-county to a city. 'Minor boundary change' also means an extraterritorial extension of water or sewer service by a city or district."

The city does not respond to petitioner's argument that under MC 3.09.030(b) the city was bound to act on petitioner's June 29, 2006 letter in 30 days or petitioner's argument that the city's decision to defer making a decision on the alleged petition for a minor boundary change is a land use decision. However, it is clear that petitioner's June 29, 2006 letter is not a petition to withdraw territory pursuant to MC Chapter 3.09. Certainly nothing in the June 29, 2006 letter suggests that it is a petition for a minor boundary change. Rather the June 29, 2006 letter asks the city to apply SB 887 and find that SB 887 renders Ordinance 4350 invalid and unenforceable. We reject petitioner's after the fact attempt to characterize the June 29, 2006 letter as a petition for a minor boundary change.

In summary, assuming the city does what it said it would do in its July 18, 2006 letter, it will soon give petitioner an opportunity to show that SB 887 invalidates Ordinance 4350 or renders it unenforceable, and the city will render a final decision regarding whether it accepts or rejects petitioner's position. If the city does what it suggests it might do in its December 19, 2006 and December 26, 2006 letters, petitioner may have to wait until its pending appeal of the circuit court's dismissal of its mandamus request is resolved to receive an answer from the city concerning its position concerning the applicability of SB 887. The city has also suggested that it might refuse to consider whether SB 887 applies to petitioner's property, based on a theory that such a claim is now barred by claim preclusion. If the city elects to refuse to consider the potential applicability of SB 887, petitioner will have an opportunity to challenge that final decision in an appropriate forum. But however the dispute between petitioner and the city concerning the potential applicability is SB 887 is finally resolved by the city, the city's July 18, 2006 decision to defer action on petitioner's June 29, 2006 request is not a *final* decision concerning the application of land use standards, and it is not a land use decision.

This appeal is dismissed.