

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 VERIZON WIRELESS (VAW) LLC,
5 *Petitioner,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent,*

11 and

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13
14 MIKE JANTZER and GAYLE JANTZER,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2008-062

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Jackson County.

23
24 E. Michael Connors, Portland, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was Davis Wright Tremaine LLP.

26
27 No appearance by Jackson County.

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29 Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of
30 intervenors-respondents. With him on the brief was Hornecker, Cowling, Hassen & Heysell,
31 LLP.

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

35
36 DISMISSED

09/26/2008

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision by the county denying an application for a wireless communications cellular tower.

FACTS

Petitioner applied to the county for approval to site a cellular communications tower and supporting facilities on land located in the county that was also, at the time of application, within the city of Medford's urban growth boundary. The county deemed the application complete on October 1, 2007. On January 16, 2008, the county administratively approved petitioner's application. On January 28, 2008, intervenors appealed the county's administrative approval to the county hearings officer.

On February 25, 2008, the county hearings officer held a hearing on the appeal. At the appeal hearing, intervenors argued that the county no longer had jurisdiction to decide the application because on February 7, 2008, the city of Medford adopted Ordinance No. 2008-29 (Proclamation), proclaiming annexation of the property on which the cell tower was proposed to be located. The Proclamation rezoned the property to SFR-00, a city residential zoning district, upon the effective date of the annexation. The Proclamation expressly delayed the effective date of the annexation to not earlier than May 21, 2008, a date based on the next scheduled statewide primary election on May 20, 2008.

The hearings officer denied the application after he determined that the county no longer had jurisdiction to make a decision on the application. This appeal followed.

MOTION TO TAKE EVIDENCE

Intervenors move to take evidence not in the record pursuant to OAR 661-010-0045 to demonstrate that the property has been annexed into the city of Medford as of May 21, 2008. Petitioner does not object to the motion. Intervenors' motion is granted.

1 **JURISDICTION**

2 Intervenors move to dismiss this appeal on the grounds that it is moot. Intervenors
3 argue that, even assuming that LUBA sustains one or both of petitioner’s assignments of
4 error and remands the decision to the county, that remand would have no practical effect
5 because the county no longer has jurisdiction over the property and will therefore have no
6 authority to take further action in this matter.

7 Petitioner responds that the appeal is not moot. Under petitioner’s theory, ORS
8 215.427(3)(a), commonly referred to as the “goal-post statute,” requires that LUBA must
9 remand the decision to the county for the county to evaluate the application based on the
10 county standards and criteria that applied on October 1, 2007, the date the application was
11 deemed complete. Petitioner also argues that the hearings officer erred in relying on a
12 county comprehensive plan policy to deny the application prior to the date that the
13 annexation took effect on May 21, 2008, and that the hearings officer’s error requires
14 remand.

15 Although LUBA is not subject to the constitutional requirement to dismiss an appeal
16 where a decision by LUBA would have no practical effect, ORS 197.805 dictates that LUBA
17 “decisions be made consistently with sound principles governing judicial review.” Based on
18 that statutory directive, LUBA has long dismissed appeals when it determines that they have
19 become moot. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524, 531
20 (2002); *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993); *Barr v. City of Portland*,
21 22 Or LUBA 504, 505 (1991). For the reasons explained below, we conclude that the city’s
22 annexation of the property on May 21, 2008 means that a decision by LUBA in this appeal
23 will have no practical effect. It follows that this appeal should be dismissed as moot.

24 **A. The *Standard Insurance* Cases**

25 *Standard Insurance Co. v. City of Hillsboro*, 97 Or App 625, 776 P2d 1313 (1989)
26 and its companion case, *Standard Insurance Co. v. Washington County*, 97 Or App 687, 776

1 P2d 1315 (1989), are instructive in determining the effect of annexation on county land use
2 proceedings that are pending when annexation occurs.¹ The *Standard Insurance* cases
3 support a conclusion that one of the legal consequences of annexation of property into a city
4 is that any county land use proceedings concerning the annexed lands that are not completed
5 before the annexation takes effect come to an end, because the county loses jurisdiction to
6 make a final decision.

7 In *Standard Insurance*, Washington County approved a comprehensive plan
8 amendment, and that decision was appealed to LUBA. LUBA remanded the county's
9 decision. LUBA's remand decision was appealed to the Court of Appeals. While the appeal
10 of LUBA's decision was pending before the Court of Appeals, the county took action to
11 correct the deficiencies noted in LUBA's decision, and the county adopted a second decision.
12 Petitions for reconsideration of that second decision were filed with the county, which had
13 the legal effect keeping the second decision from becoming final until the petitions for
14 reconsideration were denied. However, before the petitions for reconsideration were denied
15 by the county, the City of Hillsboro annexed the property. Thereafter, the city attempted to
16 step into the county's shoes and deny reconsideration. After the city's decision was issued,
17 the county also separately issued a decision that also denied the petitions for reconsideration.

18 Both the city's and the county's decisions were appealed to LUBA, and LUBA
19 reversed both decisions. With regard to the city's decision, LUBA concluded that the city
20 had no authority to take action on a county's land use decision while the decision was
21 pending before the Court of Appeals, because the Court of Appeals' jurisdiction is exclusive

¹ The *Standard Insurance* cases concerned a comprehensive plan amendment, and not a permit application like the decision that is before us in this appeal. Petitioner's legal theory for why LUBA has jurisdiction in this matter, notwithstanding that the property has now been annexed by the City of Medford, relies on the goal-post statute, which does not apply to comprehensive plan amendments. Nevertheless, the principles articulated in the *Standard Insurance* cases regarding the effect of annexation on pending land use proceedings apply in this case unless the goal-post statute dictates a different result. We therefore discuss the *Standard Insurance* cases before turning to petitioner's goal-post statute arguments.

1 while that appeal is pending. 17 Or LUBA 664, 668 (1989). With regard to the county's
2 decision, LUBA concluded that after annexation, the county lacked jurisdiction to make a
3 decision on the application. 17 Or LUBA 647, 662 (1989).

4 With regard to the city's decision, the Court of Appeals concluded, for a different
5 reason than LUBA, that the city had no authority to act on the county's land use proceedings:

6 "[ORS 215.130(2)] does not give the city authority to make a final land use
7 decision in a county proceeding that was pending when the affected area was
8 annexed. *At the time of the annexation, the county lost its authority over the*
9 *area, and the proceedings on the proposed amendment came to an end. There*
10 *was nothing to deny reconsideration of at the time that the city purported to do*
11 *so."* 97 Or App at 628 (emphasis added).

12 The Court also reversed LUBA's decision in the appeal of the county's decision and directed
13 LUBA to dismiss that appeal because the county had not made "a final and appealable land
14 use decision" prior to annexation, and LUBA therefore did not have jurisdiction. 97 Or App
15 at 688.

16 Absent legal authority to the contrary, the *Standard Insurance* cases stand for the
17 proposition that when a land use proceeding begins with a county and, before the county
18 takes final action on that land use proceeding, the property that is the subject of the land use
19 proceeding is annexed, that proceeding ends. The county lacks jurisdiction to take action
20 regarding land that has become subject to the city's jurisdiction. While ORS 215.130(2) has
21 the legal effect of continuing the county planning and land use regulations for the property
22 until the city takes action to apply its planning and zoning, ORS 215.130(2) does not
23 authorize the city to step into the shoes of the county to complete the county's land use
24 proceedings for the county. Applying those principles here, absent legal authority that
25 provides for a different result, remanding the hearings officer's decision could have no legal
26 effect. The county has lost jurisdiction to take further action concerning the property
27 because the city annexation was effective May 21, 2008. The city's planning and zoning

1 now applies to the property, and even if it did not, the city could not step into the shoes of the
2 county to adopt a final decision regarding petitioner’s application.

3 Petitioner identifies legal authority that it contends requires a different result in this
4 appeal. We now turn to that legal authority.

5 **B. The Goal-Post Statute**

6 ORS 215.427(3)(a) provides:

7 “If the application was complete when first submitted or the applicant submits
8 the requested additional information within 180 days of the date the
9 application was first submitted and the county has a comprehensive plan and
10 land use regulations acknowledged under ORS 197.251, approval or denial of
11 the application shall be based upon the standards and criteria that were
12 applicable at the time the application was first submitted.”

13 Petitioner argued to the hearings officer, and argues in its petition for review and its
14 response to intervenors’ motion to dismiss, that the goal-post statute prevented the hearings
15 officer from denying the application based on the Proclamation and requires remand to the
16 county for a determination on the merits of the application. According to petitioner, the
17 goal-post statute applies to preserve petitioner’s application and requires the county to apply
18 the county standards and criteria that applied on October 1, 2007. And even after the
19 annexation became effective on May 21, 2008, we understand petitioner to argue, the goal-
20 post statute requires the county to retain jurisdiction over the application.

21 The effect of the goal-post statute on a pending permit application for property that is
22 annexed into a city either during county land use proceedings on the application but before a
23 final county decision on the permit application is, as far as we are aware, an issue of first
24 impression. In support of its argument, petitioner cites *Davenport v. City of Tigard*, 121 Or
25 App 135, 854 P2d 483 (1993). In *Davenport*, the Court of Appeals construed the term
26 “standards and criteria” to include any “substantive factors” that “have a meaningful impact
27 on the decision permitting or denying an application[.]” *Id.* at 141. The Court also held that
28 the purpose of the goal-post statute is to ensure that the substantive factors that apply to a

1 local government’s evaluation of an application “remain constant throughout the
2 proceedings.” *Id.* However, *Davenport* did not address the issue of whether the goal-post
3 statute preserves county jurisdiction over a permit application when a city annexes the
4 property before the county renders a final decision. For that reason, *Davenport* does not
5 offer much assistance.

6 In *DLCD v. Jefferson County*, 220 Or App 518, 188 P3d 313 (2008) (*Burk*), the Court
7 of Appeals applied the interpretive principles set out in *PGE v. Bureau of Labor and*
8 *Industries*, 317 Or 606, 859 P2d 1143 (1993) to its construction of the goal-post statute.²
9 The Court examined the text and context of the goal-post statute and concluded that:

10 “* * * the upshot of [the goal-post statute] * * * is that, once an application
11 has been completed in a timely fashion, state and local governments may not
12 enact new legislation that alters the criteria by which the application may be
13 approved or denied.” 220 Or App at 523 (citations omitted).

14 The Court ultimately rejected *Burk*’s argument that filing the subdivision application vested
15 the Measure 37 holder’s waiver even after that holder died, noting that *Burk* had pointed to
16 nothing in the wording of the goal-post statute, case law, or the county’s zoning ordinance to
17 support that interpretation. *Id.*

18 The Court arguably adopted a more narrow interpretation of the term “standards and
19 criteria” in *Burk* than the interpretation in *Davenport*. However, neither *Davenport* nor *Burk*
20 can be read to stand for the broad proposition urged by petitioner: that the goal-post statute
21 operates to “vest” its right to the county’s jurisdiction over its application, even where the
22 county loses jurisdiction over the property after annexation by the city. There is simply
23 nothing in the text of the goal-post statute that would support a conclusion that the goal-post
24 statute does anything other than require that any county decision on petitioner’s application

² *Burk* had been granted state and county waivers from application of certain laws under ORS 197.352(2005) (Measure 37). Relying on those waivers to avoid land use laws that would preclude subdivision of his land, *Burk* submitted an application for subdivision approval. When *Burk* died before the county took final action on his subdivision application, his personal representative argued that the goal-post statute protected *Burk*’s application for subdivision approval from being subject to the waived laws.

1 be based on the county standards that were in effect when petitioner’s application was first
2 submitted. Importantly, nothing in the goal-post statute purports to address what happens if
3 the property that is the subject of the permit application is annexed by a city while an appeal
4 of the final county decision on the permit application is pending. After annexation, the
5 county loses jurisdiction to take action in that circumstance, and nothing in the goal-post
6 statute supports a different result.

7 **C. County and City Joint Urbanization Policies**

8 In 1993, the county and the city entered into an intergovernmental agreement and the
9 county and the city adopted “Urbanization Policies” for lands within the city’s urban growth
10 boundary (UGB) to guide the administration of UGB land. As relevant here, Urbanization
11 Policy 3 addresses annexation. Policy 3 provides:

12 “Except in cases where a contract for annexation has been executed, or after
13 proclamation of an annexation having a delayed effective date pursuant to
14 ORS 222.180(2), *Jackson County shall retain jurisdiction over land use*
15 *decisions within the unincorporated urbanizable area* and such decisions shall
16 conform to these adopted policies.” (Italics and underlining added.)

17 Petitioner argues that the use of the phrase “retain jurisdiction” in Policy 3 indicates
18 that the county and city intended that the county would have continuing jurisdiction over
19 land use decisions for UGB property, even after that property is annexed into the city. Under
20 Policy 3, the county “retains jurisdiction” over all land use decisions involving
21 “unincorporated urbanizable” (UGB) lands. After annexation has occurred, those lands are
22 no longer “unincorporated urbanizable” lands. Petitioner’s suggested interpretation of Policy
23 3 is not plausible, and we reject it. As with the goal-post statute, Policy 3 does not provide
24 legal authority that requires a different result in this appeal.³

³ In its second assignment of error, petitioner argues that the hearings officer erred in concluding that the city delayed the effective date of the annexation pursuant to ORS 222.180(2). Because the property has now been legally annexed into the city, even if we were to sustain petitioner’s second assignment of error this appeal would still be moot because neither the county nor the city could take action to respond to our remand. We therefore do not address petitioner’s arguments regarding ORS 222.180(2).

1 **D. Conclusion**

2 Petitioner “requests that LUBA conclude that the fixed goal-post rule prohibits the
3 County from terminating jurisdiction over the Application based on the Proclamation and
4 remand the decision to the hearings officer to evaluate the Application based on the County’s
5 standards and criteria applicable at the time the application was deemed complete.” Petition
6 for Review 9. As we explain above, we do not think the goal-post statute can be interpreted
7 to vest jurisdiction over a land use permit application where county jurisdiction over the
8 property that is the subject of the permit application has been lost through operation of law
9 because the property has been annexed by a city. On the date the city’s annexation of the
10 subject property took effect, the county lost jurisdiction to act on petitioner’s land use
11 application. For that reason, remand would have no practical effect on the proceeding.
12 *Central Klamath County CAT*, 41 Or LUBA at 531.

13 Accordingly, this appeal is dismissed.