

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 KATHERINE KEHOE,
5 *Petitioner,*

6
7 and

8
9 ELIZABETH GRASER-LINDSEY,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 CITY OF OREGON CITY,
15 *Respondent,*

16
17 and

18
19 OREGON CITY GOLF CLUB,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2008-169

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Oregon City.

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29 Katherine Kehoe, Oregon City, represented herself.

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31 Elizabeth Graser-Lindsey, Beavercreek, represented herself.

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33 Edward J. Sullivan and Carrie Richter, Portland, represented respondent.

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35 Kelly S. Hossaini, Portland, represented intervenor-respondent.

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

39
40 DISMISSED

04/01/2009

41
42 You are entitled to judicial review of this Order. Judicial review is governed by the
43 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city resolution that approves a request for annexation and refers that annexation proposal to a vote by the city’s voters.

MOTIONS TO INTERVENE

Elizabeth Graser-Lindsey, moves to intervene on the side of the petitioner in this appeal. Oregon City Golf Club moves to intervene on the side of the respondent in this appeal. There is no opposition to the motions, and they are granted.

FACTS

This appeal concerns a proposal to annex 114 acres to the City of Oregon City. An identical proposal to annex the 114 acres into the city was the subject of a prior appeal in *Graser-Lindsey v. City of Oregon City*, ___ Or LUBA ___ (LUBA No. 2007-057, August 21, 2008). In the City of Oregon City, annexations require a two-step process. The first step is a land use decision that the proposed annexation complies with applicable land use laws. If the city decides that the proposed annexation complies with applicable land use laws, the second step is an election, at which the city’s voters approve or deny the annexation. The second step is not a land use decision over which LUBA has jurisdiction. The decision at issue in *Graser-Lindsey* (Resolution 07-29) and the decision at issue in the present appeal (Resolution 08-35) are the city’s first step decisions that the proposed annexation complies with applicable land use laws.

In *Graser-Lindsey*, while petitioner’s appeal of Resolution 07-29 was before LUBA, the city’s voters rejected the proposed annexation. After requesting additional briefing from the parties, we dismissed the appeal of Resolution 07-29 as moot. The city subsequently adopted Resolution 08-35, which grants first step approval for the same annexation and called for the proposed annexation to be subject to a vote of the city electorate on November 4, 2008. Petitioner appealed Resolution 08-35 to LUBA. On November 4, 2008, the city’s

1 voters rejected the proposed annexation while Resolution 08-35 was pending before LUBA
2 in this appeal. The city moves to dismiss this appeal as moot.

3 **MOTION TO DISMISS**

4 The city and intervenor-respondent (respondents) argue that just as petitioner's
5 appeal of Resolution 07-29 was rendered moot by the city's voters' rejection of the proposed
6 annexation in *Graser-Lindsey*, petitioner's appeal of Resolution 08-35 in the present appeal
7 has also been rendered moot by the voters' rejection of the proposed annexation. Petitioner
8 and intervenor-petitioner (petitioners) argue that this appeal of Resolution 08-35 is not moot
9 because the city could merely refer the annexation to the city's voters again without having
10 to reconsider whether the proposed annexation complies with applicable land use laws.¹

11 While none of the parties discuss our decision in *Graser-Lindsey* in any detail, we
12 explained in some detail there why we concluded that petitioner's appeal of Resolution 07-29
13 was moot. After discussing relevant appellate court and LUBA decisions, we stated that we
14 will look to the local procedures that govern annexations and the record of the first step
15 approval decision (which is the land use decision component of a city annexation) to
16 determine whether that land use decision survives a negative vote of the electorate and can
17 therefore be referred to the city's voters a second time without adopting a new land use
18 decision. *Graser-Lindsey*, ___ Or LUBA ___ slip op 7. After considering the Oregon City
19 Municipal Code (OCMC) and the challenged resolution we held:

20 "Whatever the practical problems with respondents' multiple election theory,
21 the fatal problem is that there is simply no support at all in the text of OCMC
22 Chapter 14.04 for that legal theory. To the contrary, as we explain above, in a
23 number of places the text of OCMC Chapter 14.04 seems to clearly anticipate
24 a single election. Stated differently, Chapter 14.04 anticipates that an
25 annexation proposal will begin with an application, proceed through a review
26 process and be approved by the city commission and terminate with an
27 election. If the voters approve the annexation at the election, the annexation
28 is proclaimed. If the voters reject the annexation at the election, the

¹ We referred to this possibility in *Graser-Lindsey* as the multiple election theory.

1 annexation proposal is denied. In either case, the decision about whether the
2 annexation ‘should’ be approved is rendered at the election. That annexation
3 proposal may be reinitiated by filing a new application in accordance with
4 OCMC 14.04.050. But there is simply nothing in the text of OCMC Chapter
5 14.04 that supports respondents’ multiple election theory.

6 “Finally, as we have already pointed out, Resolution No. 07-29 itself only
7 anticipated a single election on March 11, 2008. If the disputed annexation is
8 to be submitted to city voters again, a new resolution will be required. We see
9 no reason why the city could not adopt such a resolution if it does so in
10 accordance with OCMC 14.04, following a new application for annexation.
11 But there is simply no suggestion in Resolution No. 07-29 or OCMC Chapter
12 14.04 that the city may do so by simply calling a new election for the same
13 annexation proposal that was referred to the voters by Resolution No. 07-29
14 and rejected by the voters on March 11, 2008, without first repeating the
15 requirements of OCMC Chapter 14.04. Any resubmittal of that annexation
16 proposal would have to stand on its own and be reviewed and approved under
17 OCMC Chapter 14.04. *Because any such effort to resubmit that application*
18 *proposal to the voters at a November 2008 election would require a new land*
19 *use decision and would not be able to simply rely on Resolution No. 07-29 as*
20 *the land use decision that authorized the annexation, a decision by LUBA*
21 *resolving petitioner’s appeal of Resolution No. 07-29 would serve no*
22 *practical effect. We therefore dismiss this appeal as moot.” *Id.* at slip op 13-*
23 *14 (emphasis added).*

24 Our decision in *Graser-Lindsey* was not appealed. The key point we made in that
25 decision is that a second election on the proposed annexation would require that the city
26 adopt a new land use decision. A second point in the above-quoted portion of our decision,
27 which was not critical to our decision, is that under the OCMC such a second land use
28 decision would require a new application and would require that the city completely repeat
29 the process that it followed to adopt Resolution 07-29. We now emphasize that the holding
30 in *Graser-Lindsey*, which was critical to our decision to dismiss that appeal as moot, was that
31 the city would be required to adopt a second land use decision to send the proposed
32 annexation to the electorate for a second time. While we also observed in *Graser-Lindsey*
33 that such a second land use decision would require a new application and require the city to
34 repeat the process it followed in adopting Resolution 07-29, that observation was based on
35 the OCMC sections that we analyzed in our decision in *Graser-Lindsey*. We did not mean to

1 say that an expedited or shortened process for adopting a second land use decision might not
2 exist elsewhere in the OCMC. To the extent the above-quoted language could be read to
3 preclude the use of such an expedited or shortened process, if it exists, we now clarify that
4 we did not intend any such preclusion.

5 In adopting Resolution 08-35, to send the proposed annexation to the city voters for a
6 second time, the city relied on OCMC 14.04.120 to expedite its adoption of the second land
7 use decision that we said in *Graser-Lindsey* would be required to send the proposed
8 annexation to the voters for a second time. OCMC 14.04.120 provides:

9 “The city commission may authorize an exception to any of the requirements
10 of this chapter. An exception shall require a statement of findings that
11 indicates the basis for the exception. Exceptions may be granted for identified
12 health hazards and for those matters which the city commission determines
13 that the public interest would not be served by undertaking the entire
14 annexation process. All annexations, however, shall be referred to the voters
15 of the city except those exempted by state law. An exception referring to an
16 annexation application that meets the approval criteria to an election cannot
17 be granted except as provided for in the Oregon Revised Statutes.”

18 Rather than repeat the application and review process that led to adoption of
19 Resolution 07-29 the city may have attempted to do in Resolution 08-35 what we expressly
20 said the city could not do in *Graser-Lindsey*. The city’s findings state:

21 “[OCMC] 14.04.120 authorizes the City Commission to grant an exception to
22 any of the requirements of Chapter 14.04. Under the circumstances applicable
23 to [the annexation proposal], the City Commission does not believe that it is
24 in the public interest to require the applicant * * * to resubmit an annexation
25 application for the same property * * * in order to have that property be
26 considered at the * * * election. This is because [the annexation proposal]
27 was made approximately nine months ago and there has been no change in the
28 land use regulations since it was approved. *It would, therefore, be inefficient
29 and a waste of the City’s resources to require a new land use decision under
30 the same regulations as a decision made so recently.*

31 “The City Commission also finds that making an exception and allowing [the
32 annexation proposal] to be considered by the voters * * *, is in the public
33 interest because [the annexation proposal] was noticed according to the
34 applicable City code requirements, the required public hearings were held,
35 and all who wished to be heard as part of that proceeding were allowed to
36 participate. * * *”

1 In Resolution 08-35, the city did one of two things. We discuss each of those
2 possibilities below.

3 **A. Resolution 08-35 Readopts Resolution 07-29 as a Second Land Use**
4 **Decision.**

5 It could be that, despite the emphasized language in Resolution 08-35, the city meant
6 to readopt the same land use decision that was adopted for the first time by Resolution 07-29
7 as the second land use decision that was needed under our decision in *Graser-Lindsey* to
8 refer the proposed annexation to the voters for a second time. If that is what Resolution 08-
9 35 does, petitioners would be free in this appeal to challenge the land use decision that was
10 adopted for a second time by Resolution 08-35 on the merits in this appeal. However, as was
11 the case in *Graser-Lindsey*, the election on November 4, 2008 rendered any such appeal
12 moot. That is because a third resolution will now be needed to adopt a third land use
13 decision and submit the proposed annexation to a third election. It is possible that the city
14 might adopt another resolution in the future that yet again readopts the same land use
15 decision that the city first adopted in Resolution 07-29. That would be the city's third land
16 use decision in this matter. If city does so and if the electorate approves the proposed
17 annexation or such an appeal becomes ripe for a decision before the election is held,
18 petitioner would be entitled to a decision by LUBA on the merits of any appeal of that third
19 land use decision. The fact that petitioners' appeals of the first two land use decisions were
20 dismissed as moot would not affect our review of any such third land use decision. But the
21 annexation proposed by Resolution 08-35 was rejected by the electorate on November 4,
22 2008, and for that reason this appeal of the city's second land use decision is moot.

23 **B. Resolution 08-35 Call for an Election on the Proposed Annexation**
24 **Without Adopting a Second Land Use Decision**

25 It appears the city may have determined in Resolution 08-35 that it could send the
26 proposed annexation to city voters without adopting a second land use decision. Such a
27 determination would be inconsistent with our decision in *Graser-Lindsey*. If this appeal was

1 not moot, petitioner would be entitled to argue that LUBA should adhere to its decision in
2 *Graser-Lindsey* and remand Resolution 08-35. Unless LUBA decided to revisit the holding
3 in its decision in *Graser-Lindsey*, petitioner would almost certainly prevail in such an appeal.
4 But as we have already concluded, this appeal is moot. The election on November 4, 2008
5 ended any possibility that the annexation that was approved and sent to the voters in
6 Resolution 08-35 will be approved without further action by the city. A third land use
7 decision will be required to send the proposed election to the voters for a third time. That the
8 city may have erred in adopting Resolution 08-35 in the mistaken belief that the proposed
9 annexation could be referred to the voters without adopting a second land use decision does
10 not affect the fact that the annexation that was proposed by Resolution 08-35 was defeated at
11 the November 4, 2008 election. By virtue of that rejection by the city electorate, this appeal
12 is moot.

13 This appeal is dismissed.²

² Because we dismiss the appeal, we need not consider petitioner's and intervenor-petitioner's record objections.