BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALTAMONT HOMEOWNERS' ASSOCIATION, INC.,
Petitioner,

vs.

CITY OF HAPPY VALLEY,
Respondent,

and

PRESTIGE CARE, INC.,
Intervenor-Respondent.

LUBA No. 2017-050

FINAL OPINION
AND ORDER

Appeal from City of Happy Valley.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Wallace W. Lien, P.C.

No appearance by the City of Happy Valley.

Kelly S. Hossaini, Portland, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Miller Nash Graham & Dunn LLP.

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

DISMISSED 11/28/2017

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a city ordinance (Ordinance 516) that annexes 12.33 acres of vacant land, including a portion of S.E. Johnson Creek Boulevard, into the city and applies city plan and zoning map designations to the vacant parcels.

FACTS

The challenged decision is the city's decision on remand from *Altamont Homeowners Assoc. v. City of Happy Valley*, 73 Or LUBA 126 (2016) (*Altamont I*). In 2015, intervenor-respondent Prestige Care, Inc. (intervenor) petitioned the city to annex (1) a 7.04-acre parcel of land owned by intervenor and (2) a 70-foot wide by 1,290-foot long portion of S.E. Johnson Creek Boulevard, which is owned and controlled by Clackamas County. Intervenor applied to change the comprehensive plan and zoning map designations of the 7.04-acre parcel from the county's Low Density Residential (R-15) designation to the city's Mixed Use Commercial (MUC) designation. Intervenor intends to develop a senior care facility on the property. In sustaining a portion of petitioner's second assignment of error, we held that because the county was the owner of the portion of SE Johnson Creek Boulevard included in the annexation petition, and had not provided its written consent to the annexation,

the annexation could not proceed under ORS 222.125.[1] *Id.* at 132. We remanded the city's decision.

In January 2017, Derby-Heinze Partnership (Derby-Heinze), the owner of four properties totaling approximately 2.32 acres that are adjacent to the portion of S.E. Johnson Creek Boulevard that was included in the original annexation petition applied to annex those properties into the city. Record 105. Derby-Heinze also submitted a modification application to rezone the four properties from county to city zoning, and a supplemental narrative addressing the applicable approval criteria for a zone change. Record 102-03, 147-61, 188-90.

In March 2017, the city council held a public hearing on the remand, including the modified annexation and zone change applications that included the Derby-Heinze properties. At its meeting on April 18, 2017, the city council deliberated and voted to approve the applications. The city council adopted

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[1] ORS 222.125 provides:

> "The legislative body of a city need not call or hold an election in the city or in any contiguous territory proposed to be annexed or hold the hearing otherwise required under ORS 222.120 when all of the owners of land in that territory and not less than 50 percent of the electors, if any, residing in the territory consent in writing to the annexation of the land in the territory and file a statement of their consent with the legislative body. Upon receiving written consent to annexation by owners and electors under this section, the legislative body of the city, by resolution or ordinance, may set the final boundaries of the area to be annexed by a legal description and proclaim the annexation."

Ordinance 516, annexing the 12.33 acres comprising intervenor's property, a portion of S.E. Johnson Creek Boulevard, and the Derby-Heinze properties into the city, and a related order approving a zone change for the properties.

Ordinance 516 was subsequently referred to the voters by petition, pursuant to Happy Valley Municipal Code (HVMC) Chapter 4.06, and placed on the ballot for the November 7, 2017 special election. Petitioner also appealed the city's decision to adopt Ordinance 516 and the related order to LUBA in this appeal. After filing this appeal of Ordinance 516 at LUBA, petitioner moved to suspend the LUBA appeal pending the outcome of the special election, arguing that if the voters failed to ratify the annexation, petitioner's appeal to LUBA of Ordinance 516 would be moot.

Intervenor and the city objected to suspending the appeal, and in an order dated July 6, 2017, LUBA denied the motion where petitioner had failed to clearly establish that the failure of the annexation to be ratified would necessarily render the LUBA appeal moot. This appeal then proceeded, and the parties agreed to a stipulated extension of the deadline for filing the petition for review from August 7, 2017 to September 11, 2017, and the deadline for filing the response briefs was extended to October 2, 2017. Oral argument was held on October 19, 2017 and the statutory deadline for LUBA's issuance of its final opinion and order was November 6, 2017. At oral argument, the parties agreed to extend the statutory deadline for the final opinion to November 13, 2017.

In a November 8, 2017 order, LUBA requested information from the parties regarding the outcome of the election and, if the election resulted in the voters failing to ratify the annexation, additional argument from the parties regarding whether the election results render this appeal moot. Petitioner filed a response that states that on November 7, 2017, the majority of city voters voted "no" on the question of whether to annex the subject properties into the city. Petitioner takes the position that the election results render the appeal moot, because any decision by LUBA on the annexation applications would have no practical effect. Intervenor responded to LUBA's November 8, 2017 order by letter stating that it respectfully declined to provide arguments regarding whether the appeal is moot. The city did not respond to LUBA's November 8, 2017 order.

JURISDICTION

As we explained in *Graser-Lindsey v. City of Oregon City*, 57 Or LUBA 279, 280-81 (2008), a case involving an annexation resolution that was adopted by the city's governing body and subsequently disapproved by voters:

> "Appellate courts dismiss appeals that become moot. *Brumnett v. PSRB*, 315 Or 402, 406, 848 P2d 1194 (1993). An appeal is moot unless 'the court's decision * * * will have some practical effect on the rights of the parties to the controversy.' *Id.* at 405. Because LUBA is an Executive Department administrative review tribunal, and not part of the Judicial Department, it is not constitutionally required to dismiss appeals simply because a decision by LUBA in an appeal would have no practical effect. However, ORS 197.805 dictates that LUBA 'decisions be made consistently with sound principles of judicial review.' Based on that statutory directive, LUBA has long dismissed appeals when it determines that they

have become moot. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524, 531 (2002); *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993), *Barr v. City of Portland*, 22 Or LUBA 504, 505 (1991). * * *"

In *Graser-Lindsey*, we held that a decision by the electorate to reject an annexation that has been approved by the governing body rendered moot the pending LUBA appeal of the land use decision that approved the annexation.[2] LUBA has also long held that where a challenged local government land use decision has been rescinded by the local government, and the decision rescinding the challenged decision has not been appealed, any decision LUBA might reach on the merits of the challenged decision would be without practical effect, and LUBA will dismiss the appeal as moot. *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993) (dismissing an appeal of a home occupation permit as moot where the county board of commissioners adopted a decision rescinding the previously approved permit).

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[2] In *Graser-Lindsey*, the city argued that an annexation resolution that was approved by the city governing body but subsequently rejected by the voters could be resubmitted to the voters at a subsequent election without any need for the city to demonstrate that the annexation complies with applicable land use standards, and that that possibility meant that the appeal was not moot. We referred to the city's argument as the "multiple election theory." 57 Or LUBA at 290. After reviewing the provisions of the resolution and the city's municipal code that applied to annexations, we rejected the city's "multiple election theory," finding no support for it in the text of the resolution or the city's code. *Id.* Here, neither the city nor intervenor have responded to petitioner's arguments or argue that the multiple election theory applies.

In effect, in the present circumstances, we understand the city's voters to have rescinded Ordinance 516, the city council's land use decision approving annexation of the subject properties. Absent any argument from intervenor or the city that the appeal is not moot, we conclude that the voters' disapproval of the annexation has rendered any decision LUBA might reach on the merits of Ordinance 516 without practical effect and the appeal is therefore moot.

The appeal is dismissed.