

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CITY OF HAPPY VALLEY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF DAMASCUS,
10 *Respondent.*

11
12 LUBA No. 2005-118

13
14 SUNRISE WATER AUTHORITY,
15 *Petitioner,*

16
17 vs.

18
19 CITY OF DAMASCUS,
20 *Respondent.*

21
22 LUBA No. 2005-120

23 ORDER

24 **A. Introduction**

25 The annexation ordinance that is the subject of this appeal annexes territory to the City of
26 Damascus “on the condition that a majority of the votes cast in the respective territory to be
27 annexed are in favor of the annexation.” An election on the annexation is scheduled for September
28 20, 2005.

29 Petitioners have separately appealed the ordinance that is the subject of this appeal to the
30 Metropolitan Service District (Metro) as a contested case.¹ ORS 268.354(1)(c) and (d).² As far
31 as we know that appeal is now pending before Metro.

¹ ORS 268.351(2) defines “[c]ontested case” as “a boundary change decision that is contested or otherwise challenged by a city, county or special district.” ORS 268.351(1) defines “[b]oundary change” to include “a major boundary change or a minor boundary change, as those terms are defined in ORS 199.415.” ORS 199.415 defines “[m]inor boundary change” to include “an annexation.”

1 The City of Happy Valley has adopted an ordinance that also annexes at least some of the
2 territory that is proposed for annexation in the City of Damascus ordinance that is the subject of this
3 appeal. That City of Happy Valley ordinance has already been filed with the Secretary of State, but
4 it is the subject of a separate pending LUBA appeal. *City of Damascus v. City of Happy Valley*,
5 LUBA No. 2005-125. The record has been filed in that appeal, and the petition for review is due
6 on September 29, 2005.

7 With that introduction to this consolidated appeal and the related appeal of a City of Happy
8 Valley annexation ordinance, we turn to the motions that are pending in this appeal.

9 **B. Motion to Dismiss**

10 On August 25, 2005, respondent moved to dismiss this appeal. Respondent contends that
11 until the Metro appeal of the annexation ordinance is complete, petitioners in this appeal have not
12 “exhausted all remedies available by right,” as required by ORS 197.825(2)(a).³

13 The only Metro Code provision cited by respondent is Metro Code (MC) 3.09.070(c),
14 which provides “[w]hen a notice of appeal is filed, a boundary change decision shall not be final until

² ORS 268.354(1) provides, in pertinent part:

“(c) Contested cases shall be subject to appeal to a three-person commission established
by [Metro] with further appeals as provided by law. The [Metro] 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 [Metro] 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.”

³ ORS 197.825(2) provides, in relevant part:

“The jurisdiction of [LUBA]:

“(a) Is limited to those cases in which the petitioner has exhausted all remedies available
by right before petitioning the board for review;

“* * * * *”

1 resolution of the contested case by the [Metro] Commission.”⁴ The parties do not discuss other
2 potentially relevant sections of the Metro Code. The appeal that is now pending at Metro
3 apparently will lead to a decision that is governed by MC 3.09.090(f) and (g).⁵ Under MC
4 3.09.090(f), Metro will be required to adopt findings addressing the criteria set out at MC
5 3.09.050(d) and (g).⁶ Metro’s scope of review under MC 3.09.090(f) and 3.09.050(d) is
6 potentially nearly as broad as LUBA’s scope of review.

⁴ Petitioner City of Happy Valley argues that Metro does not have authority under its code to make an otherwise final annexation ordinance no longer final.

⁵ As relevant, MC 3.09.090 provides:

- “(f) No later than 30 days following the close of a hearing before the Commission on a contested case, the Commission shall consider its proposed written final order and shall adopt the order by majority vote. The order shall include findings and conclusions on the criteria for decision listed in Section 3.09.050(d) and (g). The order shall be deemed final when reduced to writing in the form adopted, and served by mailing on all parties to the hearing.
- “(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, and may only stay its proceedings to allow for alternate resolution as provided for in this chapter.”

⁶ MC 3.09.050(d) provides:

- “(d) 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;
- “(4) Consistency with specific directly applicable standards or criteria for boundary changes contained in the Regional Framework Plan or any functional plan;

1 Based on the current briefing, we are not sure whether Metro’s review is accurately
2 characterized as a remedy that petitioners must exhaust (as respondent argues) or whether it is
3 accurately characterized as a parallel available forum for review of a final annexation ordinance (as
4 petitioner City of Happy Valley argues). Another possibility that the parties do not discuss is
5 whether Metro might have exclusive jurisdiction. A factor that might have some bearing on these
6 jurisdictional questions is the identity of the appellate body that will have jurisdiction to review
7 Metro’s decision and the statutes that govern that review. The parties do not discuss that factor at
8 all.

9 Given the current state of uncertainty regarding our jurisdiction, we do not rule on the
10 pending motion to dismiss. The parties may provide additional briefing on the jurisdictional question
11 in their briefs on the merits, and we will rule on the jurisdictional question in our final opinion.

12 **C. Motion to Stay**

13 Petitioner City of Happy Valley moves to stay the appealed annexation ordinance, pursuant
14 to ORS 197.845 and OAR 661-010-0068. If we do not have jurisdiction over the challenged
15 annexation ordinance, we do not have jurisdiction to grant a stay of that ordinance. However,
16 because we conclude below that petitioner has not made the demonstration required to grant the
17 motion for stay, we will assume at this point that we have jurisdiction and deny the motion for stay
18 before we take up the motion to dismiss.

19 One of the required demonstrations that petitioner is required to make before LUBA may
20 stay a land use decision is “[t]hat petitioner will suffer irreparable injury if the stay is not granted.”

“(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 ORS 197.845(1)(b). Petitioner alleges that unless the annexation ordinance is stayed there will be
2 jurisdictional uncertainty concerning the annexed territory.

3 The requirement that petitioner demonstrate that failure to grant a stay would result in
4 irreparable injury to petitioner is demanding. We have explained that it requires that LUBA answer
5 each of the following questions in the affirmative:

6 “1. Has the petitioner adequately specified the injury he or she will suffer?

7 “2. Is the identified injury one that cannot be compensated adequately in money
8 damages?

9 “3. Is the injury substantial and unreasonable?

10 “4. Is the conduct petitioner seeks to bar through the stay probable rather than
11 merely threatened or feared?

12 “5. If the conduct is probable, is the resulting injury probable rather than merely
13 threatened or feared?” *City of Oregon City v. Clackamas County*, 17
14 Or LUBA 1032, 1042-43 (1988) (internal citations omitted).

15 The conduct petitioner presumably is attempting to bar is either the election or action by the
16 City of Damascus to file the annexation ordinance with the Secretary of State, in the event the voters
17 approve the annexation on September 20, 2005. Looking first at question four, the election is
18 certainly probable and it seems probable that the City of Damascus will file the ordinance with the
19 Secretary of State to complete annexation of the territory described in the ordinance if the voters
20 approve the annexation at the election on September 20, 2005.

21 Turning next to questions one and three, we do not believe petitioner has adequately
22 specified the claimed injury or demonstrated that any injury the City of Happy Valley is likely to
23 suffer is substantial and unreasonable. Given the pending LUBA appeals of the City of Happy
24 Valley’s annexation ordinance and the City of Damascus’ annexation ordinance, and given that the
25 territory affected by those ordinances overlaps, some jurisdictional uncertainty appears to be
26 unavoidable until all appeals of the disputed annexation ordinances are exhausted. While that
27 uncertainty is perhaps unfortunate and inconvenient, and it may cause some temporary uncertainty

1 regarding assessment or collection of city property taxes, we do not believe it amounts to a
2 substantial or unreasonable injury that warrants issuance of a stay.

3 Petitioner City of Happy Valley's motion for stay is denied.

4 **D. Record**

5 The record in this appeal was filed on August 24, 2005. A duplicate record was filed on
6 August 25, 2005. Petitioner Happy Valley filed a precautionary record objection on September 9,
7 2005. On September 12, 2005, LUBA received a Supplemental Record that appears to resolve
8 the precautionary record objection. Unless petitioner Happy Valley advises LUBA that the
9 Supplemental Record does not resolve its precautionary record objection, LUBA will enter an
10 order settling the record and establishing a briefing schedule on September 21, 2005. That will
11 avoid requiring preparation of briefs on the merits before the result of the September 20, 2005
12 annexation election is known.

13 Dated this 15th day of September, 2005.

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Michael A. Holstun
Board Member