

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MARION COUNTY FIRE DISTRICT #1,

5 *Petitioner,*

6
7 vs.

8
9 CITY OF KEIZER,

10 *Respondent,*

11
12 and

13
14 KEIZER RURAL FIRE DISTRICT,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2011-087

18
19 ORDER

20 Petitioner and intervenor-respondent Keizer Rural Fire District (Keizer Fire) are
21 separate rural fire protection districts that each provide fire protection services to different
22 areas of the city. On September 19, 2011, the city council adopted an ordinance (the
23 Withdrawal Ordinance) withdrawing from petitioner’s territory a portion of the city known
24 as the Clearlake neighborhood.¹ The city relied on ORS 222.520 and 222.524 to accomplish
25 that withdrawal.² Petitioner filed a declaratory judgment action and later filed a writ of

¹ The Withdrawal Ordinance provides that it takes effect on June 29, 2012 or June 29, 2013, depending on a series of events set out in the Withdrawal Ordinance. Record 36.

² ORS 222.520(1) provides:

“Whenever a part less than the entire area of a district named in ORS 222.510 becomes incorporated as or annexed to a city in accordance with law, the city may cause that part to be withdrawn from the district in the manner set forth in ORS 222.120 or at any time after such incorporation or annexation in the manner set forth in ORS 222.524. Until so withdrawn, the part of such a district incorporated or annexed into a city shall continue to be a part of the district.”

ORS 222.524 provides:

“(1) If as authorized by ORS 222.520 the governing body of the city elects to cause the withdrawal from a district named in ORS 222.510 of that part of such district

1 review challenging the Withdrawal Ordinance in Marion County Circuit Court. As of this
2 date, both of those actions challenging the Withdrawal Ordinance are pending in circuit
3 court.³

4 Also on September 19, 2011, the city adopted a resolution that proposes to annex the
5 Clearlake neighborhood to Keizer Fire’s territory (the Annexation Resolution).⁴ Petitioner
6 appealed the Annexation Resolution to LUBA, and that is the decision that is challenged in
7 LUBA No. 2011-087.

8 The crux of petitioner’s challenge to the Annexation Resolution is that under ORS
9 198.720(2), the city could not approve a proposal to annex the Clearlake neighborhood to

theretofore incorporated in or annexed to the city, it shall hold a public hearing on the question of such withdrawal. At the hearing, the governing body of the city shall hear objections to the withdrawal and shall determine whether such withdrawal is for the best interest of the city.

- “(2) The governing body shall fix a date, time and place for the hearing and cause notice of the date, time, place and purpose of the hearing to be published once each week for two successive weeks prior to the date of the hearing in a newspaper of general circulation in the city, and shall cause notices of the hearing to be posted in four public places in the city for a like period.
- “(3) After the hearing, the governing body of the city may by ordinance declare that the part of the district which was theretofore incorporated as or annexed to the city is withdrawn from the district.
- “(4) The ordinance referred to in subsection (3) of this section is subject to referendum.
- “(5) The city may withdraw from all of such districts at the same time in one proceeding under this section or may withdraw from each district in separate proceedings at different times.
- “(6) The public hearing and ordinance referred to in this section may be the same as the public hearing and ordinance in ORS 222.120.”

³ ORS 197.175(1) provides that cities and counties must exercise planning and zoning responsibilities, including approving “special district boundary changes,” in compliance with the Statewide Planning Goals. As relevant here, ORS 197.175(1) defines “special district boundary change” to mean “the * * * change of organization of * * * [a] special district authorized by ORS 198.705 to 198.955 * * *.” ORS 198.705(4) defines “change of organization” to mean in relevant part “the annexation or withdrawal of territory to or from a district * * *.” Thus, although we need not and do not decide the matter, it appears to us that the city’s decision to withdraw territory from petitioner is a “change of organization,” and it is therefore a decision that is required by ORS 197.175(1) and (2) to be exercised in compliance with the Statewide Planning Goals and the city’s comprehensive plan and land use regulations.

⁴ The Annexation Resolution provides that it will take effect on June 30, 2012. Record 20.

1 Keizer Fire because the Clearlake neighborhood remains a part of petitioner's territory.⁵
2 Petition for Review 5-6. That is so, petitioner argues, because the Withdrawal Ordinance is
3 invalid.⁶ Keizer Fire responds that the Withdrawal Ordinance is valid, and that in any event,
4 the validity of the Withdrawal Ordinance is not within LUBA's scope of review because the
5 validity of the Withdrawal Ordinance is under review by the circuit court.

6 We agree with Keizer Fire that the validity of the Withdrawal Ordinance is not within
7 LUBA's scope of review. That issue is pending before the circuit court. Even assuming we
8 have review authority to resolve the issue pending before the circuit court, something
9 petitioner has not established, we would decline to exercise any such authority. In our view,
10 the circuit court's decision on the parties' dispute over whether the Withdrawal Ordinance
11 was effective to withdraw the Clearlake neighborhood from petitioner's territory is an
12 unresolved, and threshold, legal issue in petitioner's appeal of the Annexation Resolution.
13 See ns 5 and 6. Before we can resolve petitioner's first assignment of error that argues that
14 the Annexation Resolution is invalid because the Withdrawal Ordinance is invalid, the circuit
15 court must decide whether the Withdrawal Ordinance is invalid.

16 Under ORS 197.830(14), the statutory deadline for issuing our final opinion and
17 order in this appeal is January 18, 2012.⁷ Under ORS 197.840, LUBA may extend the
18 deadline for issuing its final opinion and order if it makes the findings required under ORS

⁵ ORS 198.720(2) prohibits a rural fire protection district from including territory that is included within another fire district unless the withdrawal and annexation proceedings are "approved for both districts." Petitioner has not approved the withdrawal of the Clearlake neighborhood from its territory.

⁶ Briefly, petitioner argues that the city erred in relying on ORS 222.520 and 222.524 to withdraw the Clearlake neighborhood from petitioner's territory because those statutes allow the city to withdraw territory from petitioner only if the city will be the provider of the service that is currently provided by petitioner. Accordingly, petitioner argues, because the city is not proposing to provide fire services directly to the Clearlake neighborhood, ORS 222.520 and 222.524 do not provide an available mechanism to accomplish the withdrawal of the territory from petitioner. Rather, petitioner argues, the only mechanism that allows the city to withdraw territory from petitioner is under ORS 198.720, and that withdrawal is prohibited by ORS 198.720(2) because petitioner has not approved the withdrawal. Petition for Review 5-6. See n 5.

⁷ The parties previously agreed to extend the statutory deadline for issuing our final opinion and order by seven days from January 11, 2012 to January 18, 2012.

1 197.840(1)(d) and (2).⁸ We conclude that an extension of the deadline is appropriate in this
2 case. The Board hereby adopts the following findings in accordance with ORS
3 197.840(1)(d) and (2).

- 4 1. The Board finds that this appeal is of unusual complexity and that the
5 ends of justice served by granting the continuance outweigh the best
6 interests of the public and the other parties in issuing a final opinion
7 within the current statutory deadline.
- 8 2. The Board finds that this appeal presents complex and novel legal
9 issues, including novel questions of law regarding the interaction and
10 legal effect of multiple statutes that govern special district boundary
11 changes, and the effect of the pendency of a separate and related action
12 in circuit court, the outcome of which will affect the Board's
13 resolution of the issues in this appeal.
- 14 3. The Board finds that delaying action on the appeal until such time as
15 the circuit court renders its opinion on petitioner's challenges to the

⁸As relevant, ORS 197.840 provides:

“(1) The following periods of delay shall be excluded from the 77-day period within which the board must make a final decision on a petition under ORS 197.830(14):

“* * * * *

“(d) Any reasonable period of delay resulting from a continuance granted by a member of the board on the member's own motion or at the request of one of the parties, if the member granted the continuance on the basis of findings that the ends of justice served by granting the continuance outweigh the best interest of the public and the parties in having a decision within 77 days.

“(2) No period of delay resulting from a continuance granted by the board under subsection (1)(d) of this section shall be excludable under this section unless the board sets forth in the record, either orally or in writing, its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the other parties in a decision within the 77 days. The factors the board shall consider in determining whether to grant a continuance under subsection (1)(d) of this section in any case are as follows:

“(a) Whether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice; or

“(b) Whether the case is so unusual or so complex, due to the number of parties or the existence of novel questions of fact or law, that it is unreasonable to expect adequate consideration of the issues within the 77-day time limit.

1 Withdrawal Ordinance and any appeals of the circuit court’s opinion
2 have concluded will preclude unnecessary rulings by this Board, and
3 the interests of the parties in obtaining consistent rulings on the
4 Withdrawal Ordinance and the Annexation Resolution will not be
5 prejudiced by the delay.

6 4. Based on all of the above factors, an extension of the statutory
7 deadline is warranted.

8 The statutory deadline under ORS 197.840(14) for issuing our final opinion and order
9 in this appeal is extended pending the decision of the circuit court on petitioner’s challenges
10 to the Withdrawal Ordinance. The parties shall provide the Board with a copy of the circuit
11 court’s rulings on petitioner’s declaratory judgment and writ of review actions challenging
12 the Withdrawal Ordinance within seven days of the date of the rulings.⁹ Thereafter, if the
13 rulings are not appealed, the Board shall notify the parties regarding the timeline for issuing
14 our final opinion and order. If the rulings are appealed, the parties shall so notify the Board
15 and the deadline shall remain extended pending the decision of the Court of Appeals.

16 Dated this 11th day of January, 2012.
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21 _____
22 Melissa M. Ryan
23 Board Chair

⁹ If the circuit court transfers petitioner’s appeal of the Withdrawal Ordinance to LUBA, within seven days of LUBA’s receipt of the transferred appeal LUBA shall issue an order proposing an expedited briefing schedule for the transferred appeal.