BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROADS END SANITARY DISTRICT
and ROADS END WATER DISTRICT,
Petitioners,

vs.

CITY OF LINCOLN CITY,
Respondent.

LUBA No. 2004-064

FINAL OPINION
AND ORDER

Appeal from City of Lincoln City.

Robert W. Connell, Newport, filed the petition for review and argued on behalf of petitioners. With him on the brief was Minor, Bandonis and Connell, PC.

Christopher P. Thomas, City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 10/15/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners challenge the city's decision amending its municipal code provisions on providing city water and sewer service to customers outside of the city limits but within the urban growth boundary.

FACTS

Petitioner Roads End Sanitary District (sanitary district) is a special district that provides sewer service to the Roads End area, a developed area just outside the city limits of the City of Lincoln City but within the city's urban growth boundary (UGB). We also understand the sanitary district to collect sewage from the area and then deliver the sewage to the city's system for processing and disposal. Customers in the Roads End area contract directly with the sanitary district, which in turn contracts with the city. The city currently provides sewage treatment pursuant to a contract entered into with the sanitary district in 1977 that remains in effect. The city provided water service to the area pursuant to a contract entered into with a predecessor to petitioner Roads End Water District (water district) in 1978. By its terms, that contract expired in 2003, and that contract has not been renewed or replaced. Although it is not clear from the briefs, we understand the city to currently provide direct water service to the area, with individual customers dealing directly with the city.

Prior to the challenged decision, the city's municipal code required customers outside of the city limits but within the UGB to agree to annex to the city or to sign irrevocable consents to annexation before obtaining water and sewer services, unless service is "required by written agreement."[1] Lincoln City Municipal Code (MC) 13.12.030, Section 2(E)(4) and 13.12.050(B), Section 3(4). The challenged decision amends the municipal code to also require annexation or consents to annexation as a condition of any change in the person to be

[1] The parties apparently dispute whether services provided by the districts are provided pursuant to a written contract.

billed for water or sewer service.[2] Petitioners opposed the decision below, and this appeal followed.

JURISDICTION

The city raises a number of arguments as to why petitioners' individual assignments of error are outside of our jurisdiction. We will address some of those under our discussion of the various assignments of error. There is, however, one overarching challenge that the city raises. The city argues that petitioners did not raise any of the issues presented in the petition for review below and, therefore, have not exhausted all available remedies. According to the city, we therefore do not have jurisdiction to review any of the assignments of error.

ORS 197.825(2)(a) provides that our jurisdiction is limited to "those cases in which the petitioner has exhausted all remedies available by right before" appealing to LUBA. Generally, that statutory requirement has been understood to mean that a party challenging a decision must have exhausted all available local appeals before appealing to LUBA. In other words, a petitioner must appeal the decision to the highest local body possible. *Kamppi v. City of Salem*, 21 Or LUBA 498, 502 (1991). The challenged decision in the present appeal was made by the city council. There was no further local appeal for petitioners to pursue.

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[2] MC 13.12.050(B), Section (E)(4) provides:

> "Consents to Annexation. Except where service is required by written agreement, no application for an initial connection to the water system shall be allowed, and, for a property connected to the water system for which no annexation agreement and waiver has been filed, no change in the person to be billed for the water service shall be allowed, until:
>
> > "a. The property owner agrees in writing to the annexation of the property to the city at such time as the city shall determine that annexation is in the best interests of the city, signs a separate agreement waiving the one year time limit for consents to annex as provided in ORS 222.173, and acknowledges the City's right to terminate the service, in a form approved by the City Attorney."

As amended, MC 13.12.030, Section 2(E)(4) imposes the same requirements as MC 13.12.050(B), Section (E)(4) for extension of sewer service.

The city acknowledges that it is presenting a novel argument, but nonetheless argues that by failing to raise the issues before the city council, petitioners failed to exhaust all available remedies.

Under our review of a quasi-judicial local government decision, issues must generally be raised below to preserve them for our review. ORS 197.763(1); 197.835(3). Failure to raise issues is treated as a waiver rather than as a failure to exhaust administrative remedies. Even if the city is correct that petitioners failed to raise below the issues they now raise on appeal, because the challenged decision is a legislative decision the "raise it or waive it" requirements of ORS 197.763(1) do not apply. *Parmenter v. Wallowa County*, 21 Or LUBA 490, 492 (1991). The city offers no basis for extending the "raise or waive it" principle to legislative proceedings, other than its attempt to recharacterize the principle as a failure to exhaust administrative remedies. We reject the attempted recharacterization. All of the city's jurisdictional challenges based on this argument are denied.

FIRST THROUGH THIRD ASSIGNMENTS OF ERROR[3]

Petitioners argue that the city misconstrued its comprehensive plan in interpreting it to *mandate* an amendment to the municipal code to require consents to annexation regardless of whether a new connection to or extension of public facilities is involved.[4] While such an interpretation might very well misconstrue the applicable law, that it is not the interpretation that the city actually made. The city interpreted its amended code to be *consistent with* and in accord with *the intent* of the comprehensive plan. The city's findings state:

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[3] The petition for review does not comply with OAR 661-010-0030(4)(d) which requires that each assignment of error be set forth under a separate heading. The petition for review has eight paragraphs that each purport to raise an assignment of error. Those eight paragraphs are then followed by nine pages of undifferentiated argument. Even though the petition for review does not comply with our rules, to the extent we can discern the assignments of error we will address them. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999).

[4] While it is difficult to tell where one assignment of error ends and another begins, it appears that the first assignment of error challenges the city's interpretation of its local legislation while the second and third assignments of error challenge the implementation of that allegedly erroneous interpretation.

> "It is consistent with, and in accord with the intent of, Statewide Goals 11 and 14 and their guidelines, and the Comprehensive Plan's Public Services and Utilities Goal and the Goal's Individual Public Facility Policy I(1), for the City to require consents to annexation to the greatest extent practicable as a condition of property outside the City limits but within the [UGB] receiving City water or sanitary sewer service." Record 37.

Petitioners appear to argue that the comprehensive plan provisions limit the city to requiring consents to annexation only when there is a new water or sewer connection or a new extension of water or sewer facilities. The language of the comprehensive plan, however, contains no language limiting the city's authority to require consents to annexation. The only language of the comprehensive plan cited to us that even refers to consents to annexation is the Public Services and Utility Goal, Individual Public Facility Policy I(1), which provides:

> "Connection to or extension of public facilities (i.e. water and sewer) to areas outside existing city limits, but within the adopted Urban Growth Area boundary shall be conditional upon annexation to the City of Lincoln City, unless such service is provided for by written contract executed prior to December 1, 1990. The requirement for annexation may be satisfied by the execution and recording of an irrevocable consent to annexation and waiver of time limitation of such annexation consent by the owner(s) of record."

The policy requires annexation or consent to annexation as a condition to connection or extension of city water and sewer service. There is nothing in the policy that prohibits the city from requiring consents to annexation in other circumstances. We will affirm a local government's interpretation of its own legislation unless it is contrary to the express language of the local legislation. ORS 197.829(1). We agree with the city that it did not misconstrue the Public Services and Utility Goal, Individual Public Facility Policy I(1).

The first through third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that by requiring irrevocable consents to annexation as a condition of property owners receiving water and sewer service, when the person to be billed for those services changes, the city violates a contract the city entered into with the United States

Department of Agriculture Farm Home Administration (FHA). According to petitioners, under the challenged amendments, if a customer refuses to consent to annexation the city may disconnect water service to that customer. Petitioners argue that the FHA contract prohibits the city from discontinuing water service to the Roads End area.

Even assuming petitioners are correct that the challenged ordinance authorizes the city to take actions prohibited under the FHA contract, petitioners fail to explain how that allegation falls within our limited scope of review set out in ORS 197.835. As far as we can tell or petitioners advise us, whether the ordinance is inconsistent with the city's obligations under the FHA contract is presumably a matter of interpreting the FHA contract. Petitioners cite no authority that allows LUBA to resolve disputes regarding the parties' obligations under a contract. *See Carlsen v. City of Portland*, 39 Or LUBA 93, 100 (2000) (discussing LUBA's limited authority to review non-land use matters).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that by violating the FHA contract the city is violating Article I, Section 21, of the Oregon Constitution.[5] If petitioners are attempting to make an argument regarding an impairment of the obligation of contracts that argument is not sufficiently developed for our review. Apart from the scope of review considerations discussed under the fourth assignment of error, we will not consider claims of a constitutional violation when the petitioner raising the claim does not make a legal argument sufficient for review of the claim. *Sparks v. Tillamook County*, 30 Or LUBA 325, 330 (1996).

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[5] Article I, Section 21 provides:

> "No ex-post facto law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested."

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners argue that by requiring property owners to consent to annexation that the city violated ORS 222.115, which provides:

> "A contract between a city and a landowner relating to extraterritorial provision of service and consent to eventual annexation of property of the landowner shall be recorded and, when recorded, shall be binding on all successors with an interest in that property."

It is difficult to tell from the petition for review which parts of the undifferentiated discussion apply to the sixth assignment of error and which parts apply to the eighth assignment of error that also concerns ORS 222.115. We understand the sixth assignment of error to argue solely that the consent to annexation contracts envisioned by the amended code violate ORS 222.115 because they are "illusory contracts."

The city's amended code provides that the city will not provide a new water or sewer service connection or a change in the person to be billed for the service until:

> "The property owner agrees in writing to the annexation of the property to the city at such time as the city shall determine that annexation is in the best interests of the city, signs a separate agreement waiving the one year time limit for consents to annex as provided in ORS 222.173, and acknowledges the City's right to terminate the service, in a form approved by the City Attorney." Municipal Code Section 13.12.050(B), Section 3(E)(4); *see also* n 2.

Petitioners cite *Bear Creek Valley Sanitary Authority v. City of Medford,* 130 Or App 24, 880 P2d 486 (1994), for the proposition that an allegedly "coercive" contract violates ORS 222.115. In *Bear Creek,* the city attempted to require consents to annexation for property owners to receive sewer service from Bear Creek Valley Sanitary Authority. The court held:

> "In sum, reading ORS 222.115 in the context of the 1991 Act through which it was adopted, we interpret the statute to be the defining source of and limitation on city authority to obtain consents to annexation in exchange for extraterritorial services. We also interpret the statute to allow that procedure to be used by cities only when they are the providers of the services." *Id.* at 30-31.

According to petitioners, because the city retains the "right to terminate service" even after the consents to annexation have been obtained, the contract is coercive and illusory, thereby violating ORS 222.115. While petitioners may well be correct that the potential contracts that property owners may have to enter into to obtain city services are one-sided, they do not explain how that violates the statute. *Bear Creek* indicates that ORS 222.115 is the only source of a city's ability to obtain consents to annexation for the provision of services.[6] The amended code provides that the city will require annexation or consents to annexation in order to obtain city water and sewer services. We do not see how that violates ORS 222.115, as interpreted by *Bear Creek*.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioners argue that by coercing consents to annexation while retaining the right to terminate service that the city is violating Article II, Section 1, of the Oregon Constitution.[7] Petitioners apparently contend that the amended code somehow violates the constitutional right to a "free and equal" election. If that is the argument, however, then it is not sufficiently developed for our review. We will not consider claims of a constitutional violation when the petitioner raising the claim does not make a legal argument sufficient for review of the claim. *Sparks*, 30 Or LUBA at 330.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

As discussed earlier, ORS 222.115 provides the authority for cities to require consents to annexation involving a "contract between a city and a landowner" to provide services. In

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[6] We further discuss *Bear Creek* under petitioners' eighth assignment of error.

[7] Petitioners again fail to discuss the constitutional provision they claim to be violated. Article II, Section 1 provides:

"All elections shall be free and equal."

Bear Creek, the court further explained that a city could only require consents to annexation for services the city itself is to provide; the city cannot require such consents for services provided by other entities. 130 Or App at 30-31. Petitioners argue that the city violates the statute by requiring consents to annex in exchange for sewer services provided by the sanitary district rather than the city.

As discussed earlier, the sanitary district, not the city, is the provider of sewer service in the Roads End area. The sanitary district collects sewage and delivers it to the city, which then treats and disposes of the sewage. The sanitary district has a contract with the city, but individual landowners in the Roads End area do not. Petitioners apparently believe that the city will interpret its amended code to require consents to annexation from landowners in the Roads End area when there are new connections to the sanitary district or changes in customer accounts for sewer service provided by the sanitary district.

The city responds that the amended code applies to new connections or customer account changes involving areas of the UGB to which the city provides direct sanitary services, not to areas of the city's UGB served by the sanitary district. According to the city, the amended code section 13.12.030, Section 2(E)(4) provides an express exception to the consent requirement, where "service is required by written agreement[.]" The city argues that that language refers to agreements such as that between the city and the sanitary district, and makes it clear that the city will not apply the consent requirement in a manner inconsistent with ORS 222.115 or *Bear Creek*.

The present appeal involves a facial challenge to a legislative decision. In such a context, petitioners must demonstrate that the challenged legislation is facially inconsistent with applicable law. *See Rogue Valley Assoc. of Realtors v. City of Ashland*, 158 Or App 1, 4, 970 P2d 685 (1999) (challenge to legislative zoning ordinance amendments is a facial challenge that, to succeed, must demonstrate that the amendments are categorically incapable of being applied consistent with statutory requirements for clear and objective regulations).

Petitioners' concern that in particular cases the city might interpret or apply the amended code in a manner that transgresses ORS 222.115 or *Bear Creek* does not demonstrate that the challenged decision is facially inconsistent with applicable law, and we do not see that it is.

The eighth assignment of error is denied.

The city's decision is affirmed.