BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PHILLIP D. MORSMAN
and BRIGITTE MORSMAN,
Petitioners,

vs.

CITY OF MADRAS,
Respondent.

LUBA No. 2003-040

FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Michael F. Sheehan, Scappoose, represented petitioner.

Robert S. Lovlien, Bend, represented respondent.

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

REMANDED 01/27/2004

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

Holstun, Board Member.

DECISION

We remanded the city annexation decision that is the subject of this appeal. *Morsman v. City of Madras*, ___ Or LUBA ___ (LUBA No. 2003-040, July 7, 2003). In our decision, we sustained petitioners' first assignment of error, in which petitioners alleged the city erred by failing to consider whether the disputed annexation is consistent with the city's comprehensive plan. But, we rejected petitioners' subassignments of error A and B under their second assignment of error. Those subassignments of error included allegations that the challenged annexation violates the "reasonableness" test that was employed by the Oregon Supreme Court to invalidate a city annexation in *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952) (hereafter *PGE v. Estacada*). Petitioners appealed our resolution of subassignments of error A and B under their second assignment of error to the Court of Appeals.

Although the Court of Appeals agreed with our analysis rejecting petitioners' argument under *PGE v. Estacada*, it concluded that in view of the city's failure to consider whether the challenged annexation complies with its comprehensive plan or any relevant statewide planning goals, the part of our decision addressing the *PGE v. Estacada* "reasonableness" test was premature. *Morsman v. City of Madras*, 191 Or App 149, ___ P3d ___ (2003). The Court of Appeals explained:

> "Petitioners also argue that the failure to demonstrate that the annexation complies with land use laws also supports the conclusion that it is not reasonable. As petitioners phrase this part of their argument, 'If 'reasonableness' is to be judged in the context of the applicable law, how can the annexation be found to be reasonable in the absence of *any* findings showing *how* the proposal complies with the law?' [(petitioners' emphases)]. In light of what this court held in [*Dept. of Land Conservation v. City of St. Helens*, 138 Or App 222, 907 P2d 259 (1995)]--that compliance with land use laws is the 'largely controll[ing]' component of the reasonableness test--petitioners are correct. LUBA held, and the city does not disagree, that the city 'simply failed to recognize that it must demonstrate that the disputed annexation is consistent with' local or state land use criteria. Until the city has demonstrated that the annexation meets those criteria, no definitive conclusion as to reasonableness is possible. LUBA's conclusion was therefore at least

> premature; before deciding whether the annexation is reasonable, LUBA must remand to the city for a determination as to whether the annexation meets statutory land use criteria.
>
> "The relief we order appears to duplicate what LUBA ordered in the first instance: both require remand to the city for determination of compliance with land use law. However, by requiring remand to the city as well as reversing LUBA's decision regarding reasonableness, we leave open the remote possibility that, in the process of adducing facts regarding land use criteria compliance, petitioners or others could discover facts that, while not indicating noncompliance, nonetheless render the annexation unreasonable under *Portland Gen. Elec. Co.* standards. Thus, LUBA's remand pursuant to this opinion, leaving open the ultimate reasonableness determination, differs from LUBA's original remand, under which that determination is fixed, and that difference could be significant." 191 Or App at 155-56.

Consistent with the Court of Appeals' decision, we modify the part of our prior opinion that rejected petitioners' subassignments of error A and B under their second assignment of error. Final resolution of those assignments of error in our prior opinion was premature and must await the city's decision on remand in response to our decision to sustain petitioners' first assignment of error.

The city's decision is remanded.