BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BEAR CREEK VALLEY SANITARY AUTHORITY, Petitioner, vs. CITY OF MEDFORD, Respondent.	)	LUBA No. 92-172
	)	FINAL OPINION AND ORDER
BEAR CREEK VALLEY SANITARY AUTHORITY, Petitioner, vs. JACKSON COUNTY, Respondent.	)	LUBA No. 92-192

Appeals from City of Medford and Jackson County.

Lee A. Mills, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief was Brophy, Mills, Schmor, Gerking & Brophy.

Eugene F. Hart, City Attorney, Medford, and Arminda J. Brown, County Counsel, Medford, filed the response brief. Eugene F. Hart argued on behalf of respondents.

E. Andrew Jordan, Portland, filed an amicus brief on behalf of Special Districts Association of Oregon. With him on the brief was Tarlow, Jordan & Schrader.

HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

AFFIRMED 06/10/94

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner challenges a city ordinance and a county ordinance adopting identical revised joint urbanization policies as part of the city's and county's acknowledged comprehensive plans.

MOTION TO APPEAR AS AMICUS

The Special Districts Association of Oregon moves for permission to appear in this matter and file an amicus brief supporting petitioner. Respondents do not object, and the motion is allowed.

FACTS

In 1991, following revision of the Medford Urban Growth Boundary (UGB), city and county officials began considering revisions to the joint urbanization policies that are part of the city's and county's acknowledged comprehensive plans. The joint urbanization policies address land use within the UGB. On February 19, 1992, a letter was sent to a number of interested parties, including petitioner, with a draft of revised joint urbanization policies. Thereafter, public hearings were held by the city and county planning commissions and by the city council and board of county commissioners. The city adopted revised joint urbanization policies on August 7, 1992, and the county adopted the same revised joint urbanization policies on October 14, 1992.

The city and county ordinances were appealed to this Board. On September 14, 1993, the parties stipulated that Urbanization Policy 5 included an erroneous reference to ORS 222.115. The parties stipulated this appeal should be suspended to allow the city and county to amend the challenged ordinances to change the statutory reference from "ORS 222.115" to "ORS 222.173." Thereafter, the ordinances challenged in this appeal were adopted by the city on October 21, 1993 and by the county on October 27, 1993.[1] Those ordinances adopt Urbanization Policy 5, which provides as follows:

> "Within the unincorporated urbanizable area, execution and recording of an irrevocable consent to annexation to the City, pursuant to ORS 222.173, shall be required for:
>
> "A) Single-Family Residential permits[.]
>
> "B) Sanitary sewer and water hook-up permits[.]
>
> "C) All land use actions subject to County site plan review[.]"

Petitioner is a sanitary authority created under ORS 450.705 et seq that provides sanitary sewer service in the unincorporated area of the county. A significant number of the properties potentially eligible to receive sewer service from petitioner are within the "unincorporated

[1]The decisions challenged in this appeal were adopted before any relevant legislative amendments adopted by the 1993 Oregon Legislature took effect. Statutory citations in this opinion are to the statutes as they are codified in the 1991 edition of the Oregon Revised Statutes.

urbanizable area" included inside the Medford UGB. Urbanization Policy 5 requires that the owners of such property sign an irrevocable consent to annexation to the city before a permit allowing them to hook up to petitioner's sanitary sewer facilities may be issued.

Respondents' reason for adopting the above policy is relatively straightforward and is not really disputed by petitioner. The city provides essentially all urban services within the UGB other than sanitary sewer services. Persons living within the UGB who are able to obtain sanitary sewer service from petitioner and water from individual wells have little incentive to annex to the city to obtain and help pay for other urban services provided by the city.

Petitioner and amicus do not dispute the city's and county's logic or that the city and county comprehensive plans call for the city to be the ultimate provider of urban services within the UGB. However, petitioner and amicus contend Urbanization Policy 5 is not authorized by statute and conflicts with statutes which limit the use of consents to annexation and grant individuals a right to vote on annexations. Petitioner and amicus also contend the city and county failed to coordinate their decisions with petitioner, as required by Statewide Planning Goal 2 (Land Use Planning).

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

ORS 222.111(5) imposes a general requirement that proposals for annexation be submitted to the electors within the area to be annexed for a vote. When annexing contiguous territory, ORS 222.170 excuses a city from calling or holding an election in the territory proposed to be annexed in two circumstances. First, an election is not required where "more than half of the owners of land in the territory, who also own more than half of the land in the contiguous territory and of real property therein representing more than half of the assessed value of all real property in the contiguous territory consent in writing to the annexation of their land * * *." ORS 222.170(1). Neither is an election required "if a majority of the electors registered in the territory proposed to be annexed consent in writing to annexation and the owners of more than half of the land in that territory consent in writing to the annexation of their land * * *." ORS 222.170(2).

ORS 222.173, cited in the urbanization policy challenged in this appeal, limits the use of consents to annexation as follows:

> "(1) For the purpose of authorizing an annexation under ORS 222.170 or under a proceeding initiated as provided by ORS 199.490(2), only statements of consent to annexation which are filed within any one-year period shall be effective, unless a separate written agreement waiving the one-year period or prescribing some other period of time has

> been entered into between an owner of land or an elector and the city.
>
> "(2) Statements of consent to annexation filed with the legislative body of the city by electors and owners of land under ORS 222.170 are public records under ORS 192.410 to 192.505."

Petitioner contends ORS 222.173 does not grant the city or county authority to condition provision of sewer services by petitioner on execution and recording of an irrevocable consent to annexation. Petitioner points out, correctly, that ORS 222.173 simply (1) imposes a time limit on the effectiveness of such consents to annexation, (2) provides an exception to the time limit, and (3) makes such consents to annexation public records.

ORS 222.115, which was cited in the first version of Urbanization Policy 5, provides as follows:

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

Petitioner correctly notes that ORS 222.115, like ORS 222.173, says nothing about the city or county being able to require that property owners seeking sewer service from a provider <u>other than the city</u> sign irrevocable consents to annexation to the city before receiving sanitary sewer hookup permits.

In short, petitioner contends that although the above statutes may envision the use of consents to annexation in certain circumstances, if the city and county have authority to require consents to annexation in the manner provided by Urbanization Policy 5, that authority must lie elsewhere. Petitioner goes further and suggests the above statutes, and certain comments made during adoption of what is now codified at ORS 222.115, show a legislative policy against forced annexations and a legislative intent to preempt adoption of policies such as Urbanization Policy 5, which petitioner contends effectively coerces agreements to annexation.

A. Statutory Authority to Require Consents To Annexation

We agree with petitioner that nothing in ORS 222.115 or 222.173, or elsewhere in ORS chapter 222, grants the city and county authority to adopt a policy such as Urbanization Policy 5. However, the city and county are given authority elsewhere in the Oregon Revised Statutes to prohibit provision of sewer service in the urbanizable area until either the property to be served is annexed to the city or the owners of such property consent to annexation.

The city and county are required by statute to adopt comprehensive plans in accordance with the Statewide Planning Goals. ORS 197.175(2). The challenged decisions adopt the disputed urbanization policy as part of the city's

and county's acknowledged comprehensive plans. As defined by statute, a "comprehensive plan" is a

> "* * * coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer * * * systems * * *." ORS 197.015(5).

Statewide Planning Goals 11 (Public Facilities and Services) and 14 (Urbanization) explicitly envision that the city and county will adopt policies concerning the provision of sewer service within the UGB.[2]

Goal 11 requires the city and county "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." Among other things, Goal 14 requires that in converting urbanizable land to urban uses, consideration be given to "[o]rderly, economic provision for public facilities and services[.]"[3] OAR Chapter 660, Division 11 is LCDC's administrative rule implementing Goal 11. While that rule does not explicitly authorize consents to annexation, neither that rule nor Goal 11 purport to

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[2]OAR Chapter 660, Division 11 (Public Facilities Planning) imposes detailed requirements for preparation of public facilities plans.

[3]Goals 11 and 14 each include an identical Implementation Guideline 6, which provides as follows:

> "Plans should provide for a detailed management program to assign respective implementation roles and responsibilities to those governmental bodies operating in the planning area and having interests in carrying out the goal."

exhaustively list the implementation measures a city or county may adopt to implement the goal and rule requirements.

The city and county are required by statute and by Goals 11 and 14 to assure "timely, orderly and efficient arrangement of public facilities and services * * *." We conclude the city and county acted within their land use planning authority and obligations under ORS 197.175(2), Goals 11 and 14 and OAR Chapter 660, Division 11 in adopting the disputed policies to implement this objective.[4]

B. Legislative Preemption

We agree with petitioner that there is support in the legislative history of ORS 222.115 for its argument that the legislature generally disfavors involuntary annexation. However, we do not agree that anything in ORS chapter 222 or the legislative history of ORS 222.115 cited by petitioner demonstrates a legislative intent to preempt additional city or county legislation concerning consents to annexation.

The Oregon Supreme Court has explained the analysis required to determine whether state law preempts local legislation as follows:

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[4]The 1993 legislature adopted new legislation concerning the provision of urban services and amended a number of existing statutes governing coordinated provision of urban services. Or Laws 1993, ch 804. That legislation was not yet in effect on the dates the challenged decisions were adopted.

> "Outside the context of laws prescribing the modes of local government, both municipalities and the state legislature in many cases have enacted laws in pursuit of substantive objectives, each well within its respective authority, that were arguably inconsistent with one another. In such cases, the first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive. It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent. * * *." LaGrande/Astoria v. PERB, 281 Or 137, 148, 576 P2d 1204 (1978).

ORS 222.173 assumes the existence of consents to annexation and imposes limitations on their use. If anything, this demonstrates that the legislature does not prohibit consents to annexation. ORS 222.115 apparently was adopted to recognize longstanding city practice of requiring such consents to annexation before extending city services outside municipal limits. We see nothing in ORS 222.115 which suggests the legislature intended that statute to be the exclusive authority for consents to annexation. Statements by individual legislators expressing general hostility toward involuntary annexation are not sufficient to establish a legislative intent to preclude city or county legislation concerning consents to annexation. Despite expressions of general hostility toward forced annexation, the statutes explicitly envision and allow consents to

annexation and other procedures for compelling annexation over the objections of persons owning property within or residing within the area being annexed.[5] We see no general legislative intent that state legislation in the area of consents to annexation be exclusive.

C. Right to Vote

While there is no federal constitutional right to vote on annexations, "once the legislature creates a right to vote on an annexation matter, it may not restrict that right to vote on grounds other than age or residence without a showing that the restriction furthers a 'compelling state interest.'" Mid-County Future Alt. v. Port. Metro. Area LGBC, 82 Or App 193, 200, 728 P2d 63 (1986), modified 83 Or App 552 (1987). Petitioner contends the city's and county's concerns about obstacles to annexation created by providing sewer service in advance of annexation or without obtaining consents to annexation do not amount to a "compelling state interest." Therefore, petitioner argues, the challenged ordinances impermissibly limit the statutory right of citizens living within the Medford UGB to vote on annexations.

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[5]In addition to the explicit recognition in ORS 222.115 for cities to require consents to annexation when extending services outside their municipal boundaries, hostile or unilateral annexation is authorized in certain circumstances. ORS 222.840 to 222.915 (health hazard annexation); ORS 222.750 (island annexation).

We do not agree with petitioner's characterization of the challenged ordinances as limiting the statutory right created by ORS 222.111(5) to vote on annexations. No person within the Medford UGB is required to give up his or her right to vote on annexation. The challenged ordinances simply provide that such persons may not receive sewer hookup permits unless they first annex to the city or sign a consent to do so. The statutes explicitly provide that a person may consent to annexation to obtain extraterritorial extension of city services. ORS 222.115. The challenged ordinances simply create another instance in which a person desiring sewer service may obtain it only by signing a consent to annexation.

Petitioner contends the consents to annexation authorized by ORS 222.115 are truly consensual, whereas the consents to annexation required by the disputed urbanization policy are not. Urbanization Policy 5, on its face, is no more coercive than the consents to annexation authorized by ORS 222.115. In both cases the person seeking sewer service may consent to annexation in exchange for sewer service. However, in both cases the person also may elect not to consent to annexation. In that event, the person does not receive the sewer service.

Petitioner identifies two differences between the nature of the consents to annexation envisioned by ORS 222.115 and those envisioned by Urbanization Policy 5 which

merit comment. First, cities are not obligated to provide sewer service outside their municipal boundaries. Therefore, petitioner argues, the sewer service obtained through the consent to annexation envisioned by ORS 222.115 is properly viewed as consensual. Because the properties at the center of the dispute in this appeal lie within petitioner's service area, except for the disputed urbanization policy, a consent to annexation would be unnecessary to obtain sewer service. Petitioner suggests such consents to annexation are not truly consensual and therefore improperly infringe on the statutory right to vote on annexations.

The essential and faulty premise underlying petitioner's first point is that persons within the Medford UGB have an unqualified right to receive sewer service from petitioner. Such persons' rights to receive sewer service, and petitioner's authority and obligation to provide sewer service, are clearly subject to the county's comprehensive plan and land use regulations. See Jackson County v. Bear Creek Authority, 53 Or App 823, 829, 632 P2d 1349 (1981), aff'd 293 Or 121 (1982). As respondents correctly note, the county's plan and land use regulations impose a number of requirements that may make actually securing sewer service for particular land uses difficult or impossible. Urbanization Policy 5 is simply one of a number of plan and land use regulation provisions affecting where, when,

whether and under what conditions sewer service may be provided within the UGB.

The second distinction identified by petitioner is a practical, but hypothetical, one. Petitioner has authority to create local improvement districts (LIDs) and to levy assessments against benefited properties to pay the cost of providing sewer service within the LID. ORS 450.840 et seq. Petitioner argues such a LID could be approved over the objections of a minority of property owners within the LID who might oppose such sewer service. Petitioner goes on to argue a benefit assessment might thereafter be levied to pay the cost of extending sewer service to these unwilling property owners, and they would have to pay such costs. Moreover, such property owners would also have to give up their right to vote against a future annexation, in order to obtain sewer service they did not want in the first place and must pay for in any event. Petitioner contends the coercion present in such a scenario improperly restricts such property owners' right to vote on annexations.

The problem with the above scenario is that it depends on resolution of a legal issue that is not properly presented in this appeal. Just as importantly, however that legal issue is resolved, it provides no basis for reversal or remand of Urbanization Policy 5.

As petitioner recognizes, the hypothetical objecting owners of property in a LID could challenge such a benefit

assessment in an appropriate forum at the time the benefit assessment is levied. At that time the court, with an actual controversy before it, could determine whether such a benefit assessment against an objecting property owner improperly coerces that property owner to give up his or her right to vote on future annexation. The court could conclude that a benefit assessment against such an objecting property owner does not have an improper coercive effect. Even if the court concludes the benefit assessment does have such an impermissible coercive effect, the result would be the assessment would be invalidated, and any coercive effect associated with the assessment would be eliminated. Urbanization Policy 5, of itself, does not improperly coerce property owners to give up their statutory right to vote on annexations.

If the court determined a benefit assessment is improper in such circumstances, the only consequence would be that fewer properties would be required to pay the cost of the sewer system. That consequence might well make the LID more expensive for nonobjecting property owners or economically infeasible, but there is no improper limitation on the statutory right to vote on annexations.

The first, second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner and amicus contend respondents failed to adequately coordinate the challenged decisions, as required by Statewide Planning Goal 2 (Land Use Planning).

Statewide Planning Goal 2 (Land Use Planning) requires that a city's and county's comprehensive plan "and related implementing measures shall be coordinated with the plans of affected governmental units." (Emphasis added.) There is no dispute that petitioner is an "affected governmental unit," within the meaning of Goal 2. The definition of "comprehensive plan" contained in ORS 197.015(5) describes what is required for a comprehensive plan to be "coordinated," as follows:

> "* * * A [comprehensive] plan is 'coordinated' when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible."

We have explained the statutory obligation to coordinate does not require that the enacting body and the affected local governments reach agreement.[6] In Rajneesh v. Wasco County, 13 Or LUBA 202, 209-11 (1985), we explained

[6]In City of Portland v. Washington County, ___ Or LUBA ___ (LUBA No. 93-195, May 6, 1994), we explained that except where a county or Metropolitan Service District exercises its coordination responsibilities under ORS 197.190, a local government may not amend an acknowledged comprehensive plan in a way that creates an inconsistency with another acknowledged comprehensive plan. However, there is no allegation here that the disputed urbanization policy is inconsistent with an acknowledged comprehensive plan.

the statutory obligation to coordinate involves essentially two steps:

> "1. The makers of the plan [must engage] in an exchange of information between the planning jurisdiction and affected governmental units, or at least invite such an exchange.
>
> "2. The jurisdiction [must use] the information to balance the needs of all governmental units as well as the needs of citizens in the plan formulation or revision."

Here, petitioner was not a participant in the initial development of the draft revised joint urbanization policies that were sent out by the city and county for comment on February 19, 1992. However, thereafter, there were numerous opportunities for petitioner to make its views known. Petitioner took advantage of those opportunities.

Petitioner and respondents disagree about the desirability of Urbanization Policy 5 for obvious reasons. Petitioner's main concern is that uncertainty about whether persons opposing sewer service and annexation may be included in a LID and assessed for the costs of extending such sewer service may seriously inhibit its ability to provide additional sewer service inside the UGB. Petitioner may well be correct. However, the city and county clearly may conclude that the consequences associated with any difficulty petitioner may have in providing sewer service to unincorporated areas within the Medford UGB are outweighed by the consequences of allowing such sewer service to be provided without first securing consents to annexation.

Supp. Record 4-5 and 29-30. The parties' positions in this instance are simply adverse. The city and county might have been required to address any specific alternatives identified by petitioner which would address the city's and county's concerns about the disincentive to ultimate annexation posed by provision of sewer service in the unincorporated urbanizable area as well as petitioner's concerns about being able to provide such sewer service prior to annexation. However, petitioner does not argue it identified such alternatives below. We conclude the city and county adequately coordinated their decisions with petitioner.

The fourth assignment of error is denied.

The city's and county's decisions are affirmed.