BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,

Petitioner,

and

WARREN NEIGHBORHOOD ASSOCIATION,

Intervenor-Petitioner,

vs.

CITY OF ST. HELENS,

Respondent,

and

WAL-MART STORES, INC., WESTECH ENGINEERING, INC., RICHARD L. KOHLSTRAND, EDMOND T. BURTON, and MARTHA E. BURTON,

Intervenors-Respondent.

LUBA No. 94-029

FINAL OPINION AND ORDER

OREGON DEPARTMENT OF TRANSPORTATION

Petitioner,

and

WARREN NEIGHBORHOOD ASSOCIATION,

Intervenor-Petitioner,

vs.

CITY OF ST. HELENS,

LUBA No. 94-030

1		)
2	Respondent,	)

and)
)
WAL-MART STORES, INC., WESTECH)
ENGINEERING, INC., RICHARD L.)
KOHLSTRAND, EDMOND T. BURTON,)
and MARTHA E. BURTON,)
)
Intervenors-Respondent.)

Appeal from City of St. Helens.

Celeste J. Doyle, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of petitioners. With her on the brief were Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

Peggy Hennessy, Portland, filed a petition for review and argued on behalf of intervenor-petitioner. With her on the brief was Reeves, Kahn & Eder.

Peter M. Linden, City Attorney, St. Helens, filed the response brief and argued on behalf of respondent.

No appearance by intervenors-respondent.

LIVINGSTON, Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 08/07/95

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal three city land use decisions. The first amends the city's comprehensive plan and the city's public facility plan. The second annexes several parcels of property and portions of county roads into the city. The third applies city zoning designations to the annexed property.

MOTION TO INTERVENE

The Warren Neighborhood Association (WNA) moves to intervene in this proceeding on the side of petitioners. Wal-Mart Stores, Inc., Westech Engineering, Inc., Richard L. Kohlstrand, Edmond T. Burton, and Martha E. Burton (applicants) move to intervene in this proceeding on the side of respondent. There are no objections to the motions, and they are allowed.

FACTS

Applicants seek to build a Wal-Mart store on an irregularly shaped 17.6-acre parcel (the Wal-Mart parcel) located an unspecified distance beyond the city limits but within the city urban growth boundary.[1] In February, 1993,

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[1]In 1979, under ORS chapters 190 and 197, the county and city entered into an Urban Growth Area Management Agreement (UGMA) that governs the transition from urbanizable land to urban uses within the city's urban growth boundaries. The UGMA, Section II, provides:

> "A. Zone Amendments. The [board of commissioners] shall retain the decision making responsibility on all zoning amendments for all land in the Urban Growth Area.

applicants applied to Columbia County (the county) both to rezone the Wal-Mart parcel and approximately eight acres of additional land (together, the subject property) from Residential to Highway Commercial, and to amend the public facilities plan to redesignate Millard Road, which adjoins the property, from a collector street to a minor arterial.[2] In June, 1993, the county planning commission recommended approval. Petitioners, WNA and applicants all appealed to the county board of commissioners.[3] After a public hearing, the county board of commissioners voted to deny the requested zone change and public facilities plan amendment.

> However, such decisions shall be made after the receipt of a recommendation, in accordance with Section II (C and D) of this Agreement, from the City of St. Helens Planning Commission as well as the County Planning Commission.
>
> "* * * * *
>
> "C. The County Planning Department shall refer each of the above requests within the St. Helens Urban Growth Area to the City of St. Helens Planning Department for the City's review and comment within five (5) days of the date the request was filed with the County Planning Department.
>
> "D. The City of St. Helens Planning Commission shall review the request and submit its recommendation to the County Planning Commission within twenty (20) days of the date the request was received by the City of St. Helens. Should no recommendations be forthcoming within twenty (20) days of its receipt, absent request for extension, the City of St. Helens shall be presumed to have no comment regarding the application."

[2]The county comprehensive plan designates the property for "urban" use (UGB), which allows either residential or commercial uses, depending on the zoning.

[3]Applicants appealed two conditions attached to the county planning commission's approval.

Applicants concurrently sought a recommendation from the St. Helens planning commission to the county, as required by the UGMA, to rezone the subject property from Rural Suburban-Unincorporated Residential (RS/UR) to Highway Commercial (HC) and to redesignate Millard Road between Highway 30 and Old Portland Road as a minor arterial. The city's planning commission held hearings on March 23, 1993, March 30, 1993, and April 13, 1993, and then decided not to recommend approval. Applicants appealed to the city council.[4]

On April 12, 1993, the city gave notice of the proposed action to petitioner Department of Land Conservation and Development (DLCD), as required by ORS 197.610(1) and OAR 660-18-020.[5] After a hearing on May 26, 1993, the city

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[4]Under the terms of the UGMA, Section II A, the county board of commissioners retains decision making responsibility on all zoning amendments, upon receipt of a recommendation from the city planning commission. Supplemental Record 2. However, the city is responsible for preparing, adopting and amending the public facility plan for the area outside the city limits but within the urban growth boundary. Supplemental Record 5. Since the subject property was still outside the city limits in April, 1993, it is not clear why the city permitted the appeal from the city planning commission to the city council of the proposed rezone, instead of forwarding the city planning commission's recommendation to the county board of commissioners.

[5]The proposed action is described as

> "Amend Comprehensive Plan in UGB from Rural Suburban-Unincorporated [sic] Residential to Highway Commercial and amend the Public Facilities Plan to designate Millard Rd. between Old Portland Rd. to Hwy 30 as an arterial." Record A-1.

council voted on June 2, 1993, to recommend approval of the application to the county. The mayor signed findings of fact and conclusions on June 16, 1993. Neither petitioners nor WNA filed a notice of intent to appeal the decision to LUBA.

On October 28, 1993, after the county board of commissioners voted to deny the application for plan amendments, applicants submitted to the city annexation petitions and electors' consent documents covering the subject property. The city sent two notices to petitioner DLCD, dated November 4, 1993, and describing two annexations: the first, of 25 acres of land; and the second, of two acres on Millard Road and Old Portland Road.[6]

The city council held hearings on the proposed annexation and rezone of the subject property on December 20, 1993 and January 10, 1994. On January 24, 1994, the city council voted to grant the annexation and approve new zoning of the subject property. On February 2, 1994, the mayor signed findings of fact and conclusions in support of the annexation/rezone decision.

On February 3, 1994, the city adopted three ordinances.

The characterization of the proposed action as a comprehensive plan amendment was apparently erroneous. The county's comprehensive plan did not require amendment to permit the proposed zoning amendments.

[6]The second notice apparently refers to land actually being used as road, including the portion of Old Portland Road linking the subject parcel to the present city limits.

Ordinance 2668 amends the city's comprehensive plan and public facilities plan, relying on the findings of fact and conclusions signed June 16, 1993. Ordinance 2669 annexes the subject property, as well as portions of Old Portland Road and Millard Road. Ordinance 2670 zones the subject property and thereby amends the St. Helens zoning map. Both Ordinance 2669 and 2670 rely on findings similar to the June 16, 1993 findings.

On February 23, 1994, petitioners filed their notices of intent to appeal with LUBA.

FIRST ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend the city's annexation decision fails to comply with Goal 14 and applicable comprehensive plan provisions, because the city did not require, as a condition of approval, that applicants improve the included or impacted portions of Old Portland Road. Petitioners rely specifically on a June 21, 1989 amendment to the UGMA, Section IV, governing roads, which states, in relevant part:

> "* * * * *
>
> "C. The City of St. Helens will neither accept nor maintain any County Road within the annexed area of the City or elsewhere in the Urban Growth Area unless and until it meets City Standards in effect at the time and is acceptable to the City's Public Works Officials.
>
> "D. As a condition of annexation, the City will require the applicant to agree to improve to City Standards any included or impacted portions of County Roads by:

> "1. irrevocable consent to participate in a Local Improvement District or other form of financing district by all affected property owners.
>
> "2. improve to City Standards prior to development on any of the said property to be annexed.
>
> "* * * * *"

Petitioners assert Old Portland Road has not been improved to the city's arterial standards. Petitioners cite a statement signed by the three county commissioners that

> "Old Portland Road is a narrow road without shoulders. It is already very hazardous to pedestrian and bicycle traffic. * * * If it is going to be in the City, it should be improved up to City standards." Record 531.

The city challenges the evidentiary basis for petitioners' assertion that Old Portland Road "is substandard." Even on appeal, however, it is applicants, not petitioners, who carry the burden of proof to show approval standards are met. Andrews v. City of Prineville, 28 Or LUBA 653, 659 (1995). Because the county raised the issue of Old Portland Road's compliance with the city's arterial standards, the city has an obligation to address the issue in its findings. Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Heiller v. Josephine County, 23 Or LUBA 551, 556 (1992).

In its brief, the city does not argue the UGMA does not apply. Rather, it argues that it has interpreted the UGMA, Section IV C, to mean that roads "can be annexed into the

City but not accepted for maintenance purposes." The city argues further that it has interpreted Section IV D as limited in its application to roads which abut a proposed development. Respondent's Brief 8.

To be reviewable by LUBA, a local government's interpretation of its regulations must be provided in the challenged decision or the supporting findings, not in the local government's brief. Gage v. City of Portland, 319 Or 308, 877 P2d 1187 (1994); Watson v. Clackamas County, 129 Or App 428, 879 P2d 1309 (1994); Eskandarian v. City of Portland, 26 Or LUBA 98, 109; Miller v. Washington County, 25 Or LUBA 169, 179 (1993). The city has not interpreted the UGMA, Sections IV C and D, in its decision. When reviewing a decision by a local governing body, this Board cannot interpret local enactments in the first instance. Gage v. City of Portland, 123 Or App 269, 860 P2d 282, on reconsideration, 125 Or App 119 (1993), rev'd on other grounds, 319 Or 308, 877 P2d 1187 (1994); Weeks v. City of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992). We must therefore remand to the city, both for an interpretation of the UGMA, Sections IV C and D, and for additional findings, if necessary under that interpretation.[7]

[7]The city appears confident we will defer to its proposed interpretation. We do owe significant deference to a local government interpretation of its own land use regulations unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. Gage v. City of Portland, 319 Or 308, 316-

Petitioners' first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend that although the findings of fact and conclusions ultimately incorporated by reference in Ordinance 2668 were originally adopted on June 16, 1993, the city did not make a final, appealable decision until February 3, 1994, when the mayor signed Ordinance 2668. Petitioners argue their notices of intent to appeal to LUBA were timely because they were filed within 21 days of the date the mayor signed Ordinance 2668.

Petitioners argue further that the record does not show when the challenged action was submitted for DLCD review as required by ORS 197.610 to 197.615.[8]

17, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must defer to a local governing body's interpretation of its own enactments, unless that interpretation is "clearly wrong." Reeves v. Yamhill County, 132 Or App 263, 269, 888 P2d 79 (1995); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992). We note, however, that the city's interpretation of the UGMA appears manifestly contrary to the language in Sections IV C and D of the UGMA that is emphasized above.

[8]ORS 197.610(1) states:

> "A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to [DLCD] at least 45 days before the final hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The director shall notify persons who have requested notice that the proposal is pending."

ORS 197.615(1) states:

The city responds that it made a final land use decision on June 16, 1993, which must be deemed acknowledged under ORS 197.625(1).[9] The city relies on City of Grants Pass v. Josephine County, 25 Or LUBA 722 (1993), in which we decided that although an ordinance is required to change a county's zoning maps, the county may make a final decision on a zone change application without passing the ordinance ultimately implementing the zone change. See OAR 661-10-010(3).[10] See also Columbia River Television v.

> "A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to the director a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. If the proposed amendment or new regulation that the director received under ORS 197.610 has been substantially amended, the local government shall specify the changes that have been made in the notice provided to the director."

[9]ORS 197.615(1) states:

> "If no notice of intent to appeal is filed within the 21-day period set out in ORS 197.830(8), the amendment to the acknowledged comprehensive plan or land use regulation or the new land use regulation shall be considered acknowledged upon the expiration of the 21-day period. An amendment to an acknowledged comprehensive plan or land use regulation is not acknowledged unless the adopted amendment has been submitted to the director as required by ORS 197.610 to 197.625 and the 21-day appeal period has expired, the board affirms the decision or the appellate courts affirm the decision. (Emphasis added.)

[10]OAR 661-10-010(3) provides:

> "'Final decision': A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the

Multnomah County, 299 Or 325, 702 P2d 1065 (1985).

The document dated June 16, 1993 entitled Findings of Fact and Conclusions is reduced to writing, and bears the signature of the mayor, which is attested by the city recorder. Under OAR 661-10-010(3), the June 16, 1993 findings are a final decision. However, until the city annexed the subject property, it could not itself make a comprehensive plan amendment affecting it.[11] Therefore the adoption of Ordinance 2668 was a new land use decision, appealable to LUBA within 21 days.

Furthermore, unless a land use decision is submitted to petitioner DLCD as required by ORS 197.610 to 197.625, it cannot be deemed acknowledged by the passage of the 21-day appeal period stated in ORS 197.625(1). Notices provided to petitioner DLCD should be included in the record.[12]

> decision becomes final at a later time, in which case the decision is considered final as provided in the local rule or ordinance."

[11]Although the June 16, 1993 findings are a final decision, the city lacked authority to make a unilateral decision to amend the comprehensive plan. At most, the city had authority to make a recommendation to the county concerning the proposed comprehensive plan amendment. See note 4, supra. A recommendation is not a land use decision. Collins Foods v. City of Oregon City, 14 Or LUBA 311 (1986).

[12]OAR 661-10-025(1) states:

> "Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include [at least] the following:
>
> "* * * * *
>
> "(d) Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed

The record contains a form Notice of Proposed Action, which states it was mailed April 12, 1993. Supplemental Record 23. This is the notice required by ORS 197.610(1). The record also contains a form Notice of Adoption, which states nonsensically that it was mailed April 12, 1993 and that the subject decision was adopted June 16, 1993. Supplemental Record 25. This is the notice required by ORS 197.615(1). On the second page of the Notice of Adoption, a handwritten note, dated January 6, 1994, states that it was "turned into [sic] DLCD by [an opponent of the development proposal,] not the City of St. Helens." Supplemental Record 26.[13]

The requirements of ORS 197.610 et seq are substantive, not merely procedural. Oregon City Leasing, Inc. v. Columbia County, 121 Or App 173, 854 P2d 495 (1993). The information on the Notice of Adoption suggests it was never mailed by the city to petitioner DLCD. At best, it was "turned in" on or about January 6, 1994, by a person not representing the city. There is no evidence in the record that, as required by ORS 197.615(1), a copy of the decision

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> during the course of the land use proceeding, including affidavits of publication, posting or mailing. Such notices shall include any notices concerning amendments to acknowledged comprehensive plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1) and (2).

[13]At the December 1, 1994 oral argument on record objections, the city conceded the Notice of Adoption was not in the city's own file. It was obtained from petitioner's files and included in the record by stipulation.

accompanied the Notice of Adoption that was eventually delivered to petitioner DLCD. We conclude the city did not satisfy the requirements of ORS 197.615(1). The June 16, 1993 decision was not acknowledged by the passage of time under ORS 197.625(1).

Petitioners' second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend the city's plan amendment, annexation, and rezone decisions do not contain adequate findings, supported by substantial evidence in the record, to satisfy either Goal 14 or the urban growth policies in the city's own comprehensive plan, as they address the conversion of urbanizable land to urban uses.[14]

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[14]Goal 14 provides, in relevant part:

> "Land within the boundaries separating urbanizable land from rural land shall be considered available over time for urban uses. Conversion of urbanizable land to urban uses shall be based on consideration of:
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> "(1) Orderly, economic provision for public facilities and services;
>
> "(2) Availability of sufficient land for the various uses to insure choices in the market place.
>
> "(3) LCDC goals or the acknowledged comprehensive plan; and,
>
> "(4) Encouragement of development within urban areas before conversion of urbanizable areas."

The city's comprehensive plan, Ordinance 2615 (SHCP), Urban Growth Boundary Policy 4, states, in relevant part:

> "Cooperate with the County in managing the Urban Growth Area by establishing the following conditions for the urban development of land within the growth area:

The city performed an alternative sites analysis involving eight sites, in order to satisfy Goal 14. Record 595-615. Petitioners assert the city's analysis is unacceptably superficial in certain respects. The issues of parcel cost and industrial zoning merit discussion.

Petitioners contend the city's findings on the comparative costs of site acquisition are unacceptably conclusory. For example, the challenged decision adopts applicants' proposed finding that one site, located within the city limits, is occupied by a "fully-developed modular home park, and single-family residences (rental) on the north side[.]" Record 601. The city then finds that "[a]lthough the owner may be willing to accept an excessive offer, the property is not presently being marketed for sale." Record 602.

The city argues, with respect to this site and others, that it is intuitively obvious a previously developed site without an established market price will be more difficult to acquire than the Wal-Mart parcel. While the city has a point, we agree with petitioners that more than supposition

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"A) The orderly and economic provision of public services and facilities can be attained;

"B) Sufficient infilling has occurred within the City;

"C) A demonstrated need exists; and

"D) Sufficient land for development has been identified to meet the demand." SHCP 45.

is required to support a finding that it would take an "excessive offer" to acquire the site. See Neuman v. City of Albany, 28 Or LUBA 337, 345-47 (1994). Furthermore, it is not enough to speculate the cost of a particular site will be unacceptably increased by expenses that are merely forecasted, such as cleanup costs or the added expense of road improvements or utility line extensions. Applicants must either support each claimed additional expense with substantial evidence or show reasonable efforts were made to obtain such evidence, but it was unavailable.

Petitioners contend the challenged findings improperly reject four sites because they include land with existing industrial zoning. Petitioners argue that since the SHCP recognizes the likelihood of future shortages of industrial, commercial, and residential land, the city has no more reason to avoid rezoning industrially zoned property than to avoid rezoning residentially or commercially zoned property.

The city responds that the SHCP contemplates rezoning 22 acres of land within the urban growth boundary for commercial use and argues that the location of the Wal-Mart parcel is preferable to any of the industrially zoned sites.

The city is correct that the SHCP contemplates rezoning 22 acres within the urban growth boundary for commercial

use. SHCP 3.[15] However, the city's predictions should not dissuade it from following, in the present, policies established in its comprehensive plan. We agree with petitioners that otherwise appropriate sites within the city limits should not have been discounted in the site analysis on the basis they are industrially zoned.

In preparing its site analysis, the city has not complied with the Goal 14 and SHCP policies governing development of urbanizable lands. Neither has the city complied with its own economic policy concerning infill development.[16] The city cannot justify noncompliance by arguing that to attract Wal-Mart, it had to ignore or jettison inconvenient provisions of Goal 14 and the SHCP. See Benjfran Development v. Metro Service Dist., 95 Or App 22, 767 P2d 467 (1989).

Petitioners raise an additional issue which warrants discussion. If Wal-Mart does in fact choose not to build on the Wal-Mart parcel and if the city nevertheless zones the property HC, it will have created an attractive site for strip development that is expressly discouraged by SHCP Economic Policy 10.

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[15]The SHCP also contemplates rezoning additional land within the Urban Growth Boundary as needed for both residential and industrial use. SHCP 2, 20.

[16]SHCP Economic Policy 10 is "Discourage strip commercial development and encourage the in-filling of under-utilized lands close to Uptown and Downtown." SHCP 5. (Emphasis added.)

The St. Helens Zoning Ordinance of 1991, Ordinance 2616 (SHZO), 5.010 states, in relevant part:

> "* * * * *
>
> "2. Circumstances for Granting an Amendment to the Zoning Ordinance. An amendment to the Zoning Ordinance may be granted only in the event that all of the following circumstances exist:
>
> "a: The proposed change must comply with the Comprehensive Plan.
>
> "b. The proposed change must comply with local ordinances.
>
> "c. A public need must exist for the proposed change.
>
> "d. The public need is best met by this specific change.
>
> "* * * * *" SHZO 91.

The city bases its analysis on an assumption that if the Wal-Mart parcel is zoned HC, Wal-Mart will build there. Yet it does not condition the challenged ordinances on Wal-Mart's doing so. Without such a condition, there is no certainty the comprehensive plan and zoning map amendments will not occur even after the reason for them is gone.

Finally, petitioners invite us to take official notice of historical facts and attach a number of newspaper clippings to their brief.[17] LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except

[17]The clippings tend to show Wal-Mart, Inc. has decided not to construct its store on the Wal-Mart site.

in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b). We will consider facts outside the record where they are essential to determining if LUBA has jurisdiction or if an appeal is moot. Blatt v. City of Portland, 21 Or LUBA 337, 342, aff'd 109 Or App 259, 819 P2d 309 (1991), rev den, 314 Or 727, 843 P2d 454 (1992). We decline petitioners' invitation to take official notice for another purpose of historical facts contained in newspaper clippings.

Petitioners' third assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR (WNA)

WNA contends the SHCP requires the city to involve the county planning commission in its annexation review process. The SHCP, Urban Growth Boundary Policy 5, states, in relevant part:

> "* * * * *
>
> "[It is the policy of the city to] [c]ooperate with the County in establishing a process to manage the St. Helens urban growth area by:
>
> "A) Establish a joint review procedures [sic] with the County Planning Commission, the Citizens Planning Advisory Committee and the St. Helens Planning Commission [for] conditional use permit[s], land partitioning, annexations and service extensions; * * *.
>
> "* * * * *" SHCP 45.

The city responds that compliance with the UGMA is sufficient to establish compliance with the SHCP, that the review process would at most yield a recommendation from the

planning commission, and that the language of the SHCP is not mandatory.

The UGMA mentions annexations only once, as follows:

> "Annexation of sites within the City of St. Helens Urban Growth Area shall be in accordance with relevant annexation procedures contained in the Oregon Revised Statute, Oregon Case Law, and St. Helens City Ordinances and shall not occur until such sites become contiguous to the City of St. Helens." Supplemental Record 6.

The UGMA was signed in 1979. The SHCP was adopted in 1991. We do not agree with the city that the UGMA carries out the policies of the SHCP addressing annexations. It does not mention the county planning commission, the Citizens Planning Advisory Committee or the St. Helens Planning Commission in connection with annexations.

The SHCP clearly contemplates a process involving these public bodies somehow in city decisions regarding annexations. The city may not ignore a stated policy in its own comprehensive plan.[18]

WNA's third assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR (WNA)

WNA contends the annexation of the subject property violates the contiguity requirement of ORS 222.111(1), which states, in relevant part:

> "When a proposal containing the terms of annexation is approved * * * the boundaries of any

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[18]We do not answer here what are appropriate "joint review procedures." That is for the city to address in the first instance. Weeks, supra.

> city may be extended by the annexation of territory that is not within a city and that is contiguous to the city or separated from it only by a public right of way or a stream, bay, lake or other body of water. * * *" (Emphasis added.)

The city responds with two arguments. First, the city notes that it has annexed some length of Old Portland Road between the city limits and the subject property, in order to provide contiguity. The city contends it has satisfied the requirements of ORS 222.170 by obtaining the written consents of the owners of the subject property. The subject property comprises more than half of the land in the territory to be annexed, and although the owner or owners of the land occupied by Old Portland Road is or are unknown, the land is not assessed.[19]

Second, the city contends such "cherry stem annexations" are permitted by the emphasized language of ORS 222.111(1). The city argues that the connecting section of Old Portland Road that is to be annexed is all that separates the subject property from the city limits.

We reject both arguments. First, cherry stem

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[19]ORS 222.170(1) states, in relevant part:

> "The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if 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 in the territory and file a statement of their consent with the legislative body * * *."

annexations frustrate the contiguity requirement of ORS 222.111(1). Cherry stem annexations are inherently unreasonable. See Portland Gen. Elec. Co. v. City of Estacada, 194 Or 145, 159, 291 P2d 1129 (1952).

Second, the city's suggested interpretation of the language of ORS 222.111(1) emphasized above runs contrary to the meaning of "separate," which means "to set or keep apart; detach." Websters Third International Dictionary 2069 (1981). The city would redefine "separated from" to mean "joined to." The emphasized language is more reasonably interpreted to make it permissible for a city to annex territory located across a public right-of-way where the territory is needed for natural growth. See 30 Op Atty Gen 372, 373 (1962); People v. Village of Streamwood, 15 Ill 505, 155 NE2d 635, 638 (1959).

WNA's fifth assignment of error is sustained.

REMAINING ASSIGNMENTS OF ERROR (WNA)

Since we are remanding for further proceedings, we do not address WNA's first and second assignments of error, which allege procedural violations below that will, in any event, be cured by an evidentiary hearing. Since we find cherry stem annexations to be prohibited by ORS 222.111, we do not reach WNA's fourth, sixth, and seventh assignments of error, which state additional reasons this annexation should not be permitted.

STIPULATED REMAND

Petitioner Oregon Department of Transportation and the city have stipulated to a remand for further proceedings to assure compliance with Goal 12 and OAR 660-12-060.

The city's decisions to adopt Ordinances 2668, 2669 and 2670 are remanded.