BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JACK JOHNSON and PATRICIA JOHNSON,
Petitioners,

vs.

CITY OF LA GRANDE,
Respondent.

LUBA No. 99-053

Appeal from City of La Grande.

Mark Tipperman, La Grande, filed the petition for review and argued on behalf of petitioners.

Martin Birnbaum, La Grande, filed the response brief and argued on behalf of respondent.

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

REMANDED 12/17/99

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

Briggs, Board Member.

NATURE OF THE DECISION

Petitioners appeal a decision by the City of La Grande to annex their property into city limits.

FACTS

Petitioners own property on X Avenue, which is located on the north side of the City of La Grande. Their property is among 155 parcels that were subject to an annexation into the city limits in early 1999.[1] The annexation territory is located adjacent to the northeast portion of the city, south of Interstate 84. The annexation territory is located within the city's urban growth boundary (UGB), and was located within the UGB before it was annexed. The entire annexation territory is zoned medium density residential.

In the early 1970s, seepage from a nearby lumber mill and groundwater pollution from a nearby bulk oil plant made groundwater underlying the annexation territory unpotable. In addition, residential development in the area became too concentrated for the safe installation of septic systems. As a result, the City of La Grande agreed to provide water and sewer service to those dwellings located in the annexation territory. In exchange, the property owners signed consents to annexation and agreed to pay premium water and sewer rates. Over time, more development occurred in the annexation territory. The residential development was approved, provided the property owners signed a consent to annexation as part of a contract for extraterritorial service.[2]

In early 1999, the city council determined that it had enough consents under ORS 222.115 from the property owners to satisfy the provisions of ORS 222.170(1). ORS

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[1]Because petitioners challenge the effectiveness of the ordinance as it pertains to the annexation as a whole, we refer to the "annexation territory" rather than the "subject property."

[2]Not all of the properties within the annexation territory are connected to the city sewer. However, we understand that all of the properties which were dependent on well water prior to the groundwater pollution did connect to the city's water system.

222.170(1) allows annexations without an election by the residents within the annexation area, provided at least 50 percent of the number of property owners, owning over 50 percent of both the land area and assessed property value in the area, have consented to the annexation.

The city council held a hearing on the proposed ordinance on February 3, 1999, prior to the first reading of the ordinance. At the second reading, the city council also took testimony. The ordinance was passed, without substantial revisions, on March 3, 1999.

This appeal followed.

JURISDICTION

The city argues that LUBA does not have jurisdiction to review this matter because the city's decision to approve the annexation is not a "land use decision" as that term is used in ORS 197.825. ORS 197.825(1) provides, in relevant part, that LUBA has "exclusive jurisdiction to review any land use decision * * * of a local government[.]" ORS 197.015(10)(a) defines "land use decision" to include:

> "(A) A final decision * * * made by a local government * * * that concerns the adoption, amendment or application of:
>
> "(i) The [statewide land use] goals;
>
> "(ii) A comprehensive plan provision; [or]
>
> "(iii) A land use regulation[.] * * *"

The city's decision includes a section where the city council determined that the city's decision to approve "the proposed annexation complies with the Land Use Planning and Urbanization provisions of the Comprehensive Plan of the City of La Grande * * *." Record 111. The city's decision applies provisions of the city's comprehensive plan, and as a result, the city's decision is a land use decision subject to LUBA's review. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 80 (1994); *see Petersen v. Klamath Falls*, 279 Or 249, 255-56, 566 P2d 1193 (1977) (Annexation decision that implicates urbanization policies of the

comprehensive plan is a land use decision); *see also* ORS 197.175(1) ("Cities and counties shall exercise their planning and zoning responsibilities, including, but not limited to * * * the annexation of unincorporated territory by a city * * * in accordance with [the statewide land use planning goals]").

We do not mean to foreclose the possibility that a local government might establish a process that bifurcates any application of its land use plan or land use regulations from the statutory annexation requirements of ORS chapter 222, and make separate decisions as to each. In that situation, LUBA would not have jurisdiction to review the separate decision concerning the application of the annexation statutes. However, in cases such as the one here, where a city applies its plan and land use regulations in the same decision that addresses the annexation statutory requirements, LUBA has jurisdiction to review the entire decision.[3]

STANDING

The city challenges petitioners' standing to appeal the city's decision. The city contends that the public hearing on the annexation request was held pursuant to the provisions of ORS 222.120. ORS 222.120(2) requires a hearing prior to an annexation approved without an election to allow city residents to comment on the annexation proposal. Petitioners are not city residents until the annexation is approved. The city argues that petitioners were permitted to speak before the city council as a courtesy, and that standing before LUBA is not conferred upon petitioners by virtue of their appearance before the council during the hearings on the annexation ordinance.

The city is mistaken. Petitioners have standing to appeal a land use decision to LUBA provided they show that they appeared before the local decision maker, in person or in writing, and have filed a timely notice of intent to appeal with LUBA. ORS 197.830(2).

[3]The city's response to each assignment of error includes a contention that LUBA does not have jurisdiction to resolve the allegation contained therein. Because we resolve the jurisdictional issue at this juncture, we do not further address the issue in subsequent assignments of error.

Petitioners have demonstrated that they appeared before the city council, and the city does not dispute that petitioners have filed a timely notice of intent to appeal. Therefore, petitioners have standing to appeal the city's decision.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city's decision is quasi-judicial in nature, and therefore, the city is obliged to provide notice to affected property owners regarding the annexation proposal prior to adopting an annexation ordinance. According to petitioners, the Oregon Supreme Court's determination in *Petersen v. Klamath Falls* leads inevitably to the conclusion that all annexation procedures are quasi-judicial in nature, and therefore are subject to the notice provisions of ORS 197.763. Petitioners contend that this failure to provide notice allows petitioners to raise issues before LUBA that were not raised below.

ORS 197.763 establishes the procedural requirements for quasi-judicial land use hearings conducted by local governments. ORS 197.763(3)(b) requires that the notice of hearing provided to those entitled to receive notice include a list of the applicable criteria from the ordinance and plan that apply to the application at issue. ORS 197.835(4)(a) permits petitioners to raise new issues before LUBA if:

> "The local government failed to list the applicable criteria for a decision under * * * ORS 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.] * * *"

The city argues that the hearing it held was pursuant to the requirements of ORS 222.120(2), not ORS 197.763, and that the city's decision to approve the annexation was a legislative decision, not quasi-judicial. Therefore, according to the city, the requirements of ORS 197.763 do not apply. The city argues the three-part test analysis in *Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-3, 601 P2d 769 (1979) applies when determining whether a particular decision is legislative or quasi-judicial in nature. If those

factors are applied to the current situation, the city argues, they lead to a conclusion that the decision at issue in this case is legislative, rather than quasi-judicial.

Petersen v. Klamath Falls dealt with an annexation proposal by four property owners to include 141 acres into the city limits of Klamath Falls. In that case, the appeal record indicated that the city failed to address applicable land use goals. There, the Oregon Supreme Court determined that

> "since the consideration of these statewide goals and the determination that a particular annexation proposal does or does not comply with those goals necessarily involves the application of general standards to a specific situation and to specific individuals, we conclude that such a decision is quasi-judicial in nature." 279 Or at 255-56.

Petersen v. Klamath Falls does not establish that *all* annexation proposals are quasi-judicial decisions subject to the provisions of ORS 197.763. Rather, only those proposals that are quasi-judicial according to the test set out in *Strawberry Hill 4-Wheelers* are subject to the provisions of ORS 197.763. *McGowan v. Lane County Local Gov't. Bdry. Comm.*, 102 Or App 381, 385, 795 P2d 560 (1990).

The *Strawberry Hill 4-Wheelers* test for determining whether a decision is legislative in nature requires consideration of three factors:

> "1. Is 'the process bound to result in a decision?'
>
> "2. Is 'the decision bound to apply preexisting criteria to concrete facts?'
>
> "3. Is the action 'directed at a closely circumscribed factual situation or a relatively small number of persons?'"

Valerio v. Union County, 33 Or LUBA 604, 607 (1997) (applying the considerations enumerated in *Strawberry Hill 4-Wheelers*).

The more definitely the questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. *Id.*

Applying the test to the facts in this case, it is clear that the city was not required to complete the annexation process and adopt a decision. Thus, the answer to the first question

is "no." The decision does apply "preexisting criteria to concrete facts" in that statutory criteria and local comprehensive plan provisions are analyzed to determine whether the proposed annexation complies with applicable land use regulations. However, such general determinations are present in almost all land use decisions. *Churchill v. Tillamook County*, 29 Or LUBA 68, 71 (1995). Finally, the subject appeal deals with the annexation of 155 parcels under 127 different ownerships. From the diversity of the ownerships and the number of parcels, we conclude that the third question must also be answered in the negative.

Our conclusion that the challenged decision is legislative in nature has two important impacts on this appeal. First, to the extent that petitioners wish to raise issues that were not raised below, the "raise it or waive it" provisions of ORS 197.763(1) and ORS 197.835(3) do not apply. *DLCD v. Columbia County*, 24 Or LUBA 32, 36 (1992). Second, because the challenged decision is legislative, it is not required by statute to be supported by findings. *Von Lubken v. Hood River County*, 22 Or LUBA 307, 313-14 (1991). However, it must be supported by substantial evidence. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377 (1994). Moreover, to the extent the challenged decision is not supported by findings, we rely on respondent to provide, in its brief, citations to evidence in the record sufficient to demonstrate that the applicable criteria are met. *Von Lubken*, 22 Or LUBA at 314.

The first assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR (SUBASSIGNMENTS OF ERROR 2, 3 AND 4)

Petitioners argue that the city's findings supporting its conclusion that the annexation satisfies certain policies of the city's comprehensive plan are either nonexistent or inadequate.

A. Land Use, Housing and Urbanization Policies

Petitioners argue that the city failed to adopt findings to address La Grande Comprehensive Plan (LGCP) Land Use Policy 6 and LGCP Housing Policies 4 and 14, and

that the findings concerning LGCP Urbanization Policy 4 are inadequate.[4] The city argues that it did adopt findings addressing the relevant standards, and that those findings are supported by substantial evidence in the whole record.[5] The city's findings state, in part:

> "The proposed annexation has been evaluated for consistency with the Comprehensive Plan policies and is found by staff to be supportive [of] and consistent with the adopted Comprehensive Plan. The factual basis for this recommendation was based upon an inventory of existing land use within the area to be annexed. The City already provides substantial sewer and water services within the subject area. The City has provided road surfacing and maintenance services to this area for several years. Through the cooperative agreement between Union County and the City of La Grande, the City now exercises jurisdiction over all land use decisions in the subject area. Schools and other community facilities including the new aquatics center, library, medical facilities; retail, service and food stores; parks, fire and police services are provided within or by the City of La Grande to serve the subject area. Several water supply wells and septic tanks servicing properties located in the subject area have failed * * * forcing an emergency extension of City water and sanitary sewer facilities into the area to be annexed. Assessment district financing has resulted in the extension of water facilities into the subject area proposed to be annexed. * * *The majority of the land in the

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[4]Land Use Policy 6 provides:

> "Before property is annexed to the City, it should be clearly established that such annexation will provide a clear benefit to the City with recognition of the fact that City services must be provided to such an area." LGCP 10.

Housing Policy 4 provides:

> "That quality residential environments will be assured by considering safety, health, design, provision of services and overall ecology in the area." LGCP 53.

Housing Policy 14 provides:

> "That the street pattern within the residential neighborhood permits convenient circulation and easy, safe access to neighborhood parks and schools." LGCP 54.

Urbanization Policy 4 provides:

> "That before additional land is annexed to the City, there will be established the need for the uses which are existing or anticipated on that land, and the capability and desire to provide needed public services and facilities for those uses." LGCP 75.

[5]The city council incorporated the planning staff report as part of its findings. The findings quoted in the text were not adopted specifically to address the LGCP policies cited in n 4, but address some of the same concerns expressed in those policies.

subject annexation area has been subdivided to an urban density and has been substantially developed with property improvements. The majority of the lots located within the subject area are less than one acre in size." Record 149.

"The area to be annexed has, prior to Senate Bill 100 establishing the state-wide planning program, been platted and developed with single family residences in an unincorporated area. This patter[n] of development using private water wells and septic tanks has continued, developing historic platted lots and lots formed by minor land partitions. Failures of water wells due to septic tanks have forced the extension of City water and sewer into the area. The time required to provide the service was accelerated by the health concern. Reliable City services, having adequate capacity have been extended to the area. The cost to provide the water and sewer mains has been spent by the City from a H.U.D. Block Grant to serve the majority of the area. A cost for additional line extensions is minimal and can be feasibly spread among the benefiting parties as a reasonable rate. The levels of service needed to serve urban densities in the area proposed for annexation are available and can be met. * * * Having received the high level of urban service, these properties are [appropriate] to be included in the incorporated City limits." Record 152.

"The roadway system serving the proposed area of annexation is in place in the form of local streets that may need to be further improved and extended with further partitioning of land. Collector and arterial roads serving the neighborhood have already been developed and have adequate capacity to serve the area. Connection of local streets to ensure through traffic routes will be necessary as further partitioning of land occurs. The subject property is located adjacent to U.S. Interstate 84 and is compatible with the freeway use due to grade separation and the size of lots abutting the freeway. The subject annexation area is substantially developed and continues to be a desirable area for single family residential use. The City has received no complaints regarding freeway traffic noise, air quality or other potential impacts of the freeway on abutting uses. * * *" Record 154.

"There is adequate land within the Urban Growth Boundary to serve the City for [20] years. In order to make land available for additional single family and medium density residential development, for which there is a need today, this annexation is being recommended. The City has the capability and desire to [provide] needed public services and facilities for uses within the area to be annexed. The primary purposes for this need are: a) to prevent further deterioration of the groundwater supply in this area from septic tank pollution and b) to ensure that proper development standards are applied to development in the area (including the installation of streets, sidewalks, storm drainage facilities and underground utilities)." Record 161.

The city also identifies evidence in the record to show that once the annexation is completed, administrative costs that are currently being absorbed by city residents for actions benefiting

the residents of the annexation territory would be borne by the benefited residents. In addition, the city's comprehensive plan includes a section where the city identifies a need for medium density residential housing within city limits.

We reiterate our earlier determination that the subject decision is a legislative decision, and therefore petitioners' arguments that the city failed to adopt findings specifically addressing relevant criteria does not, of itself, provide a basis for reversal or remand.[6] The city council incorporated the planning staff report as part of its findings. The findings quoted in the text were not adopted specifically to address the LGCP policies cited in n 4, but address some of the same concerns expressed in those policies. The findings and other evidence cited by the city are adequate to demonstrate that the annexation decision satisfies the LGCP policies set out in n 4.

The third and fourth subassignments of error are denied.

B. Public Facilities Policies

Petitioners argue that the city's findings regarding LGCP Public Facilities and Services Policies 1 and 2 are inadequate.[7] With respect to Policy 1, petitioners contend that they and others presented testimony to show there are no plans for sewer lines to be installed on X Avenue and Spruce Street, two streets within the annexation territory. Petitioners also

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[6] The city council incorporated the planning staff report as part of its findings. The findings quoted in the text were not adopted specifically to address the LGCP policies cited in n 4, but address some of the same concerns expressed in those policies. To the extent that petitioners raise the issue of whether there is substantial evidence in the record to support the city's decision, the city's brief must articulate why findings adopted to satisfy one set of policies also satisfy other policies that arguably are relevant, but are not specifically listed in the city's decision.

[7] Public Facilities and Services Policy 1 provides:

> "Encouragement of urban development * * * in areas with existing water and sewer facilities, and in those areas where future facility development is most feasible, beneficial and appropriate." LGCP 63.

Public Facilities and Services Policy 2 provides:

> "That the City provide public water and sewer facilities and other public services to areas within the city limits before serving areas outside the city limits." LGCP 63.

cite to testimony to the effect that the high cost of installing sewer lines was the determining factor in the city's decision not to include sewer lines on those streets in the city's public facility plan. Petitioners argue that this testimony regarding the high cost of providing sewer service to those streets is uncontradicted, and that their testimony provides evidence that, contrary to the city's finding of compliance, sewer service is not feasible. With respect to Policy 2, petitioners argue that this policy requires a finding that all areas within the city are currently served by public sewer and water prior to annexation of additional territory. Because there is testimony in the record to the effect that such service is not currently available to all properties located within city limits, petitioners contend that the city's findings of compliance are not supported by substantial evidence in the record.

The city cites to evidence that the annexation territory currently receives urban services from the city, and that the territory has been developed at urban densities for many years. The city's findings conclude that by incorporating the annexation territory into the city limits, the city furthers its policies to encourage urban development in areas with existing water and sewer facilities, because the cost to extend the current lines to those dwellings in the annexation territory that do not have water and sewer services is minimal. The findings also conclude that, because the city has already provided urban levels of service, either voluntarily or through necessity, to the annexation territory, annexation will better spread the cost of those services to the benefited parties. Finally, the city's findings conclude that by annexing the subject territory, the city will be incorporating needed housing into the city limits, and that the annexation is the most appropriate means of obtaining the needed housing.

The evidence in the record cited by the city to support its claim that the cost of extending services to the annexation territory will be minimal, is sufficient to demonstrate these policies have been satisfied, despite the contrary testimony by petitioners and others.

The second subassignment of error is denied.

The eighth assignment of error is denied, in part.

FIFTH ASSIGNMENT OF ERROR

A. Introduction

To address petitioners' assignments of error regarding annexation procedures, some background explanation is required. ORS 222.170(1) permits a city to annex property contiguous to city limits without holding an election, provided the city receives the written consent of more than half of the owners of land in the territory to be annexed. Those property owners must also own more than half of the land in the contiguous territory and the real property owned by that majority must represent over half of the assessed value of the contiguous territory.[8] This annexation process is allowed, provided that certain notice and hearing procedures are followed prior to adoption of the annexation ordinance.

If a local government determines that an election within the territory to be annexed is not necessary because it has met the triple-majority requirement, and the city also determines that approval by city electors is not necessary, then the local government must set a time for a public hearing to allow for electors within the city to appear and provide comment regarding the annexation. ORS 222.120(2). Notice of the hearing must be published at least twice in a newspaper of general circulation and otherwise posted in at least four public places. ORS 222.120(3). Written statements of consent of the property owners described by ORS 222.170(1) must be filed with the local government on or before the day that the public hearing required by ORS 222.120 is held. The written consents are valid for only one year, unless the consenting parties sign a separate agreement waiving the one-year limitation. ORS 222.173(1).

ORS 222.115 provides a second method of obtaining the consents required by ORS 222.170(1). The city may require, in exchange for the extraterritorial provision of city

[8]This is known as the "triple-majority requirement."

services, that the owners of properties outside of city limits sign a contract which includes an agreement for annexation. Such a contract is binding on successors in interest to the property, provided that the contracts are recorded. ORS 222.115.[9]

After the written consents are obtained, and the hearing under ORS 222.120 is held, the city may adopt by resolution or ordinance a decision that declares that the territory is annexed. The decision must fully describe the boundaries of the territory to be annexed. ORS 222.120(4)(b) and ORS 222.170(3). If the boundaries of the territory are different from the boundaries described in an annexation plan or notices of hearing, then the city must ensure that the property owners are made aware of the changes in boundaries. *Peterson v. Portland Met. Bdry. Com.,* 21 Or App 420, 535 P2d 577 (1975).

B. Constitutionality of ORS 222.170(1)

In the fifth assignment of error, petitioners argue that ORS 222.170(1) is unconstitutional, and therefore, the city may only use the provisions of ORS 222.170(2) to annex property without an election within the annexation territory. Petitioners argue that ORS 222.170(1) is unconstitutional because it grants owners of property within the annexation area the right to determine whether property will be included within city limits without conferring the same right to electors within the annexation area. Petitioners argue that this disparate treatment by the city is unlawful. *Mid-County Future Alt. v. Port. Metro. Area LGBC*, 82 Or App 193, 728 P2d 63 (1986), *modified* 83 Or App 552, 733 P2d 451, *rev dismissed* 304 Or 89, 742 P2d 47 (1987).

We need not resolve petitioners' constitutional arguments because, as we explain below, the county has not demonstrated that the consents it obtained satisfy the statutory requirements for annexation without an election.

The fifth assignment of error is denied.

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[9]The parties dispute whether the contracts permitted under ORS 222.115 are subject to the same time limitations as consents for annexation required by ORS 222.170.

SIXTH ASSIGNMENT OF ERROR

ORS 222.170 allows a city to annex property without an election held in the territory to be annexed in two circumstances. ORS 222.170 provides, in relevant part:

> "(1) 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 on or before the day:
>
> > "(a) the public hearing is held under ORS 222.120, if the city legislative body dispenses with submitting the question to the electors of the city[.] * * *
>
> "* * * * *
>
> "(2) The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed 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 and those owners and electors file a statement of their consent with the legislative body on or before the day:
>
> > "(a) the public hearing is held under ORS 222.120, if the city legislative body dispenses with submitting the question to the electors of the city[.] * * *"

The city's decision states, in relevant part:

> "WHEREAS, pursuant to ORS 222.170, not less than fifty percent (50%) of the owners of the land in the subject territory including not less than fifty percent (50%) of the land area and assessed value, and not less than fifty percent (50%) of the electors, if any, residing in the subject territory consented in writing to the annexation of the land in the territory and filed a state[ment] of their consent with the City Council of the City of La Grande, Oregon; * * *" Record 139.

In addition to proceeding under ORS 222.170(1), the city made a determination that 50 percent of the electors had consented to the annexation, which petitioners construe as an attempt to proceed under ORS 222.170(2). However, petitioners argue, the record does not

demonstrate that more than 50 percent of the electors within the annexation territory consented to the annexation. The city concedes that the record does not show that more than 50 percent of the electors within the annexation territory consented to the annexation.

The challenged decision does not specify which provision of ORS 222.170 the city is proceeding under. The statement regarding electors suggests that the city intended to proceed under ORS 222.170(2) as an alternative to ORS 222.170(1). To the extent the city did so, its concession requires us to sustain this assignment of error.

The sixth assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the city was required to provide an annexation "plan" to those persons from whom consents to annexation were solicited, at the time they were solicited. *Skourtes v. City of Tigard*, 250 Or 537, 444 P2d 22 (1968). In *Skourtes*, a petition for annexation was circulated for property owners to sign. The petition contained a general request by the signators to be included in the city limits. The petition did not describe the boundaries of the area to be annexed; the "promoter of the annexation simply obtained signatures and rearranged the boundaries of the proposed annexation 'as the mathematics would work out' to satisfy the [triple-majority] requirements[.]" 250 Or at 540. The court held that the request for annexation must be the result of "informed consent," and that the triple-majority procedure must include a process by which a disclosure of the boundaries of the territory proposed to be annexed is provided to those persons petitioning for annexation. *Id.*

The annexation territory in this case has been part of the city's urban growth boundary for many years. The city argues that *Skourtes* is distinguishable because it predates the Oregon statewide planning program. According to the city, the inclusion of property within the urban growth boundary satisfies the *Skourtes* requirement for informed consent,

because property owners within urban growth boundaries must assume that, at some point, their property will be annexed into the city.

The city also argues that the present situation can be distinguished from *Skourtes* on its facts. According to the city, the annexation petition in *Skourtes* was circulated by a private landowner, and was processed as a petition for annexation submitted by landowners. The city argues that the situation in *Skourtes* did not involve recorded contracts for service containing consent to annexation or consent agreements accompanied by waivers of the one-year filing limitation as described in ORS 222.173. Further, in *Skourtes*, the petition failed to describe the territory to be annexed prior to the annexation hearing. The city claims that in this case "before the hearings were even scheduled and landowners notified, a legal description of the area to be annexed and maps of the area were readily available." Respondent's Brief 19.

We disagree with the city that merely because property is included within an urban growth boundary, the requirement for informed consent is eliminated. Inclusion within an urban growth boundary does not mean that the persons subject to an annexation proposal agree that the annexation territory as described should be included within city limits at the time the city determines it is appropriate to do so.

However, we do agree that some distinctions may be made between the requirements for petitions for annexation, consents to annexation obtained pursuant to ORS 222.170 and consents to annexation contained within contracts for service. In the first two cases, the persons consenting to the annexation are consenting based on the particular circumstances of the annexation, and whether the annexation serves their interests. In these cases, an annexation plan, which at the very least describes the boundaries of the area proposed to be annexed, must be provided to persons from whom consent is sought. *Skourtes,* 250 Or at 541.

The latter situation is a contract where the consent for annexation is consideration for the provision of a service that otherwise would not be made available to the property. Further, because the contracts are executed and services provided years, perhaps decades

before annexation occurs, the scope of the "consent" obtained is not specific to any particular annexation, but is a general consent to be annexed regardless of what other property is also annexed. Thus, no particular annexation plan must be provided prior to signing a contract for service that includes a consent for annexation.

The city's decision was supported in part by consents obtained pursuant to ORS 222.170. There is no evidence in the record that an annexation plan or anything similar was shown to those persons consenting under ORS 222.170. Accordingly, we conclude that the county erred to the extent it relied on those consents.

The second assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioners make two arguments. First, petitioners argue that the city failed to establish that it had enough consents under ORS 222.115 because at least some of the annexation contracts that the city relies upon to establish its triple-majority were obtained through coercion.[10] Petitioners claim that they and others on their street connected to city water because of groundwater pollution created by operations at a nearby timber mill and that, in such circumstances, the city's requirement for consents under ORS 222.115 prior to providing that service amounted to coercion. Second, petitioners claim that the city's provision of water service in exchange for a consent to annexation under these circumstances is unlawful, based on the holding of the Ninth Circuit Court of Appeals in *Hussey v. City of Portland*, 64 F3rd 1260 (9th Cir 1995).

If the city's requirement for consents to annexation in its contracts for the provision of city services is unlawful, we need not address petitioners' coercion argument, or

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[10]ORS 222.115 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."

petitioners' third, seventh, ninth or tenth assignments of error. Therefore, we address this matter first.

In *Hussey*, the court struck down an annexation that was based on consents obtained from property owners as a result of a city-subsidized sewer connections program. There, groundwater contamination resulted in an order by the Oregon Environmental Quality Council that required residents to connect to a sewer system. The City of Portland subsidized sewer connections to properties located outside of city limits and within the contaminated area, provided the property owners signed a consent for annexation. The court found that the subsidized service was conditioned upon how the elector voted, and that the condition was an unconstitutional infringement on the right to vote.

The city argues that, unlike *Hussey* and the cases the court relied upon in deciding that case, the City of La Grande did not create the pollution that contaminated petitioners' well. More importantly, neither did the city *require* petitioners to connect to city services once the contamination was discovered. The city argues that it merely required that, upon a request for an extension of city services, a consent to annexation be obtained from the requesting property owner. The city contends that the property owners had other options for water service, and that the city had the authority under ORS 222.115 to include a consent-to-annexation clause in its contracts for water and sewer service.

The statute that authorized the annexations in *Hussey* required consent of both the electors and the property owners within the area to be annexed. The court found that the requirement that a majority of the electors consent to annexation meant that subsidies benefiting *voters* required strict scrutiny. The *Hussey* court found that the consents to annexation obtained as a result of the subsidies were unlawful because the consents in that case were the equivalent of votes.

We find it noteworthy that, in the same opinion, the court distinguished the facts in *Hussey* from a case involving a statute containing similar provisions to ORS 222.115. In

Blackwell v. City of St. Charles, 726 F. Supp. 256, *aff'd per Curiam* 917 F.2d 1150 (8th Cir 1990), the court upheld consents to annexation contained in contracts for extraterritorial service. The court found that the provision of city services is not a benefit to which persons outside of the city limits are entitled, and therefore, the city could include a consent to annexation as part of its requirements to obtain that city service. In deciding whether contractual consents for annexation survive constitutional scrutiny, the court in *Blackwell* held that:

> "The [constitution] is not implicated by a rational requirement of assent to a particular proposition in order to obtain a benefit to which the would-be recipient has no legal entitlement.
>
> "* * * * *
>
> "The consent to annexation is not compulsory in the constitutional sense. It is 'forced' upon plaintiff only in the sense that it is a contract term which they must accept in order to obtain the city's agreement to provide them with water. * * * Plaintiffs may reject the required assent as too high a price for the benefit they seek." 726 F. Supp. at 258.

Petitioners have not demonstrated that the city coerced them or anyone else into signing the consents under ORS 222.115. The city did not create the circumstances that made connecting to the city's water system the best available option for petitioners and petitioners were not entitled under any circumstances to connect to the city's system.

The facts in this case are also similar to the situation in *Bear Creek Valley Sanitary v. City of Medford*, 130 Or App 24, 880 P2d 486 (1994). There, the City of Medford attempted to use its authority under ORS 222.115 to require that persons who wished to develop within the city's urban growth boundary sign an irrevocable consent to annexation to the city prior to receiving new service from the *sanitary authority*. The court held that the city could not require a consent to annexation prior to the provision of services from another entity. However, the court indicated that ORS 222.115 specifically conferred upon the city the ability to require a consent to annexation prior to the provision of city services, and that situation is exactly what the legislature contemplated in adopting ORS 222.115. *Bear Creek*

Valley Sanitary, 130 Or App at 30. ORS 222.115 is lawful, and consents obtained pursuant to that statute under the circumstances described in this appeal are lawfully obtained consents.

The fourth assignment of error is denied.

SEVENTH (PART), NINTH AND TENTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioners argue (1) that consents to annexation contained in extraterritorial service contracts are subject to the time limitation for effective consent provided for in ORS 222.173(1);[11] (2) that any consents to annexation contained in extraterritorial service contracts signed prior to 1991 are ineffective, because ORS 222.115, the statute that authorized such consent-to-annexation contract provisions, was not adopted until 1991; and (3) that consents under ORS 222.115 cannot be used to incorporate properties where the owners have *not* consented to annexation. We address each argument in order.

A. Time Limitations for Consent to Annexation Contained in Extraterritorial Service Contracts

Many of the city's annexation consents are contained within extraterritorial service contracts and are many years old. Petitioners argue that these contracted-for consents are subject to the one-year time limitation provided for in ORS 222.173(1). Therefore, petitioners argue, they are completely ineffective, because the city has not obtained the requisite waivers of the one-year consent period and more than one year has passed since those consents were given.

The city argues that the time limitation for effective consent relates only to written statements of consent to annexation filed with the local government pursuant to ORS 222.170, and do not apply to consents authorized by ORS 222.115. The city argues that there

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[11] ORS 222.173(1) provides, in relevant part:

> "For the purpose of authorizing an annexation under ORS 222.170 * * *, 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 and between an owner of land or an elector and the city."

is a difference between "recording" consents with the county clerk, as provided for in ORS 222.115, and "fil[ing]" written statements of consent with the local government as provided for in ORS 222.170. According to the city, the recording of the consents under ORS 222.115 constitute constructive notice to successors in interest that the consent has been given, and that the consent binds successors to consent to annexing to the city at any time. The city contends that only the written statements of consent and not consent contracts are subject to the time limitation and waiver requirements of ORS 222.173(1). The city argues that ORS 199.487(2) supports its contention that the time limitations of ORS 222.173(1) were never meant to apply to consents under ORS 222.115.

ORS chapter 199 supplements the annexation statutes provided for in ORS chapter 222. ORS chapter 222 applies solely to cities; ORS chapter 199 applies to local government boundary commissions. However some of the provisions of ORS chapter 199 also pertain to cities and to other entities with annexation authority. ORS 199.487(2) provides in relevant part:

> "* * * Notwithstanding * * * [ORS] 222.173(1), 222.175 or any other requirement for obtaining consent to annexation, a city or district may use a consent to annexation contained in contracts authorized by * * * [ORS] 222.115 in formulating annexation proposals or petitions under ORS * * * 222.170 for properties whose owners have signed such consents to annexation."

Read together, we believe that the statutes provide that consent to annexation contained in contracts for extraterritorial service entered into pursuant to ORS 222.115 are effective in determining whether the requirements of ORS 222.170 have been met, and that the provisions of ORS 222.173 limiting the effectiveness of written statements of consent filed with the local government pursuant to ORS 222.170 are not applicable to consents obtained pursuant to ORS 222.115.[12]

[12] Our conclusion here requires that the seventh and ninth assignments of error be denied, in part.

B. Validity of Consent Contracts Obtained Prior to 1991

Petitioners argue that the city cannot use consents to annexation contained within contracts for extraterritorial service entered into before Or Laws 1991, chapter 637 became effective because, prior to that time, the city did not have the authority to require consents to annexation in its service contracts.

The city argues that the 1991 Legislature, in adopting ORS 222.115, merely codified existing practices regarding contracts for annexation, and that the city had independent authority under its general statutory duties and powers as a municipality to require consents to annexation within its contracts for service. In *Bear Creek Valley Sanitary*, the Court of Appeals rejected the argument that is advanced by the city here, stating:

> "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." 130 Or App at 30-31.

Thus, the court determined that the city did not have independent authority to require consents to annexation as part of a contract for extraterritorial service prior to the statutory authorization provided by ORS 222.115. Therefore, petitioners are correct that the city may not use consents obtained by contracts prior to the effective date of ORS 222.115, because the city did not have the authority to obtain those consents.[13]

C. Using Consents under ORS 222.115 to Include Property Held by Nonconsenting Owners

Petitioners argue that the legislative history makes it clear that the legislature did not intend for consents to annexation obtained pursuant to ORS 222.115 to be used against those persons who oppose an annexation. Petitioners in their brief provide excerpts from the 1991 legislative hearings where legislators asked proponents of consent contracts if the consent

[13]Our conclusion here requires that the ninth assignment of error be sustained in part and the tenth assignment of error be sustained.

contracts would result in nonconsenting owners being included in an annexation territory by virtue of being surrounded by consenting owners. Petitioners contend that the legislative history makes it clear that such an action by the city is prohibited.

We need not look to legislative history to resolve this assignment of error, because the statute is clear on its face. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). ORS 199.487(2) permits the city to use consents under ORS 222.115 in determining whether it has the required number of consents to eliminate the election requirement. An annexation, with or without an election, may be accomplished without the consent of all the property owners within the annexed territory.

The seventh assignment of error is denied, in part. The ninth assignment of error is sustained, in part. The tenth assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

A majority of the consents acquired by the city for this annexation were obtained through consents to annexation contained within contracts for extraterritorial service. *See* n 10. Petitioners cite ORS 93.640 for the proposition that, in order for the consents to be effective as to the successors in interest, the contracts have to be recorded prior to the transfer of property.[14] Otherwise, petitioners contend, successors in interest are not put on notice that the consents have been given prior to the transfer of title. Petitioners argue that the record does not demonstrate when the consents under ORS 222.115 were recorded, and that they testified before the city council that at least one of the consents under ORS 222.115

[14]ORS 93.640(1) provides in relevant part:

> "Every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state which is not recorded as provided by law is void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof is first filed for record * * *"

was recorded by the city years after the property owners signed it, and after the property had transferred to a third party.

The city argues that ORS 222.115 does not require that annexation contracts be recorded by the consenting land owner prior to a transfer of property to third parties. The city also argues that petitioners have not otherwise demonstrated that the city's decision must include findings that such contracts were recorded prior to subsequent conveyances in order to be effective.

In order for a consent obtained pursuant to the provisions of ORS 222.115 to be valid against current third-party owners, it must be recorded. In their testimony before the city council, petitioners raised the issue of whether certain of the consents obtained by the city had been recorded prior to transfer to third parties. The city's findings do not respond to this issue, nor has the city pointed to evidence in the record to demonstrate that the consents contained in the contracts for extraterritorial service were recorded prior to any transfer of title. We agree with petitioners that the city erred to the extent it relied upon consents that had not been recorded prior to a transfer of title.

The third assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR (PART) AND EIGHTH ASSIGNMENT OF ERROR (SUBASSIGNMENT 1)

Petitioners contend that there is not substantial evidence in the record to show that the city had the requisite number of consents for annexation, because copies of the actual consent documents were not entered into the record. The record includes staff summaries of the consent documentation, including the names, tax lot numbers, property acreages, valuation of properties, dates of consent, and whether the named property owners have connected to city sewer or water. Petitioners cite to portions of the record where they argued that the consents themselves should be included in the record because without them, the city did not have sufficient evidence on which to base a conclusion that an adequate number of effective consents had been given. Petitioners argue that it is important for the record to

include the consents because the city must determine whether each consent satisfies the requirements needed to make that consent effective. Petitioners argue that the evidence in the staff summary is insufficient to allow the city council to make those determinations because they do not show (1) the number of the consents granted pursuant to ORS 222.115; (2) the recording dates of the contracts; and (3) separate written agreements for waivers of the one-year time limitation.

The city argues that it is not required to incorporate copies of the original consents into the record, nor is it required by the annexation statutes to include that evidence in the record. The city argues that it only considered valid consents to annexation in its determination of whether it had met the criteria for annexation without an election, and that determination, which was incorporated into its decision, was sufficient to establish that the tally was correct.

As we have already explained, when an annexation is also a land use decision, it is subject to review by this Board. LUBA's review is limited to the record submitted by the local government. ORS 197.835(2). LUBA must remand a land use decision that is not supported by substantial evidence in the record. In the absence of specific findings demonstrating the validity of the consents or the presence of the consents in the record, we agree with petitioners that the city's decision to rely on the consents to annexation as valid is not supported by substantial evidence in the record.

The seventh assignment of error is sustained, in part. Subassignment 1 of the eighth assignment of error is sustained.

The city's decision is remanded.