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. 2000-143

FINAL OPINION
AND ORDER

Appeal from City of La Grande.

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

Jonel Ricker, La Grande, filed the response brief and argued on behalf of respondent. With him on the brief were Anne Morrison, and Ricker and Roberson.

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

REVERSED 01/26/01

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

Opinion by Briggs.

NATURE OF THE DECISION

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

FACTS

This is the second time this matter has been appealed to LUBA. In *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999) (*Johnson I*), we set out the relevant facts as follows:

> "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. 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.
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> "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.
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> "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 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.
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> "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." 37 Or LUBA at 383-84 (footnotes omitted).

We remanded the city's decision in *Johnson I.* Both parties appealed our decision to the Court of Appeals, which affirmed our decision, but corrected our analysis regarding

certain arguments presented by the parties. *Johnson v. City of La Grande*, 167 Or App 35, 1 P3d 1036 (2000) (*Johnson II*). On remand, the city conducted a public hearing to allow testimony and evidence pertaining to the issues identified in LUBA's and the Court of Appeals' decisions, and on August 16, 2000, adopted the challenged decision.

This appeal followed.

INTRODUCTION

In *Johnson I*, we set out the process used by the city to annex the challenged area as follows:

> "* * * 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. This annexation process is allowed, provided that certain notice and hearing procedures are followed prior to adoption of the annexation ordinance.
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> "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).
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> "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 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.
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> "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)." 37 Or LUBA at 393-94 (footnotes omitted).

In *Johnson I*, we concluded that under *Skourtes v. City of Tigard*, 250 Or 537, 444 P2d 22 (1968), the city must demonstrate that those persons who provided consents to annexation pursuant to ORS 222.170 were provided with an annexation plan, and the annexation plan had to show, at the very least, the boundaries of the proposed annexation area. 37 Or LUBA at 398.[1] We also concluded that inclusion of the annexed property in the city's urban growth boundary was, by itself, insufficient to satisfy the *Skourtes* requirement for informed consent. *Id.* In addition, we concluded that those consents to annexation that were obtained as a result of the city providing extraterritorial sewer and water service were not subject to the *Skourtes* requirement that an annexation plan be provided prior to an effective consent. We reasoned that the consent for annexation was a *quid pro quo* for the provision of service and, therefore, no additional information was necessary in order for the consent to be effective. *Id.*

On appeal, the Court of Appeals held that those persons who signed consents to annexation in exchange for sewer and water service prior to the adoption of ORS 222.115 and corresponding amendments to ORS 199.487(2) in 1991 were entitled to the same

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[1]The Court of Appeals explained in *Johnson II* that ORS 222.175, adopted in 1985, supersedes the requirements established in *Skourtes*. 167 Or App at 44. ORS 222.175 provides:

> "If a city solicits statements of consent under ORS 222.170 from electors and owners of land in order to facilitate annexation of unincorporated territory to the city, the city shall, upon request, provide to those electors and owners information on that city's ad valorem tax levied for its current fiscal year expressed as the rate per thousand dollars of assessed valuation, a description of services the city generally provides its residents and owners of property within the city and such other information as the city considers relevant to the impact of annexation on land within the unincorporated territory within which statements of consent are being solicited."

information contained in an annexation plan that was provided to other persons who were solicited for consents to annexation.[2]

FIRST AND SECOND ASSIGNMENTS OF ERROR

In their second assignment of error, petitioners argue that the city did not have the authority to obtain consents to annexation in exchange for the provision of extraterritorial services prior to the enactment of ORS 222.115 in 1991. We need not address the second assignment of error in this case because, as we explain below, we conclude that even if the city had the authority prior to 1991 to obtain consents to annexation in exchange for the provision of city services, the city failed to provide the requisite annexation plan to the contracting parties prior to obtaining their consent.[3]

In their first assignment of error, petitioners argue that the city improperly relied on consents to annexation that were procured in exchange for city services, because the consenting parties were not furnished with an annexation plan prior to signing their consents. Petitioners argue that the city failed to provide evidence to show that those consents received prior to 1991 were given after the city provided an annexation plan to the consenting parties. Petitioners contend that without a demonstration that the annexation plan was provided to those parties, the pre-1991 consents are invalid. According to petitioners, a maximum of 19 contractual consents to annexation were procured after 1991. Petitioners explain that if only those consents obtained after 1991 are valid, the city lacks the requisite majority of property owners and electors in the area to approve the annexation.

The city responds that it complied with the spirit of *Skourtes* and the requirements of

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[2]The court appears to have based its decision on the fact that ORS 199.487(2) permits consents to annexation obtained pursuant to ORS 222.115 to be used in formulating annexation proposals "notwithstanding" the requirements of ORS 222.175.

[3]*But see Johnson II*, 167 Or App at 39-40 (rejecting argument that *Bear Creek Valley Sanitary v. City of Medford*, 130 Or App 24, 880 P2d 486, *rev den* 320 Or 493 (1994), is correctly understood to hold that cities had no previous authority to enter into agreements requiring consents to annexation in exchange for city services prior to the enactment of ORS 222.115).

ORS 222.175 by establishing an urban growth boundary in 1983 and by establishing an annual ad valorem tax rate that was readily available to those persons who were interested in obtaining that information prior to providing their consents. The city argues that those persons who own property or reside in the urban growth boundary of a city must understand that their property will be annexed at some point, and that inclusion of property within the urban growth boundary implies a consent by the owners to that inclusion. In addition, the city contends that it is not *required* by the court's holding in *Skourtes* or by ORS 222.175 to show that every consenting party had been provided a copy of an annexation plan prior to signing the consents to annex in order for those consents to be valid. The city argues it is enough that an annexation plan is available prior to initiating the formal annexation process. According to the city, nothing prevented those property owners or electors who objected to the annexation from withdrawing their consent after reviewing the annexation plan that eventually was adopted.

In *Johnson I*, we concluded that the city could not rely on its urban growth boundary to demonstrate that the residents within the boundary have consented to the annexation plan presented by the city. 37 Or LUBA at 398. The Court of Appeals' decision in *Johnson II* did not disturb that conclusion. Therefore, we believe it is clear that the city cannot rely on a generalized plan for urbanization to establish the boundaries for and the timing of an annexation of a portion of land located within the urban growth boundary. The fact that the city published the annual ad valorem tax rate also does not assist the city. The Court of Appeals in *Johnson II* explained that both the Supreme Court's interpretation of the requirements of ORS 222.170 in *Skourtes* and the provisions of ORS 222.175 require that an annexation plan be available *at the time the consents are solicited*, and not at some later time. 167 Or App at 44-45. Therefore, unless the city can demonstrate that those consents obtained prior to 1991 were the result of informed consent, which included the provision of an annexation plan, those consents are not valid.

The first assignment of error is sustained.

CONCLUSION

The city has had two opportunities to demonstrate that parties consenting to annexation prior to 1991 were provided a copy of an annexation plan prior to signing their consents. The city has failed to do so. Therefore, the city may not use those consents. We understand from petitioners that if all of the pre-1991 consents to annexation are invalid, the city does not have the requisite number of consents to annex the subject territory without holding an election. If that is true, and we believe it is, the city's decision to annex the disputed territory based on those consents must be reversed. OAR 661-010-0071(1)(c) (the Board shall reverse a land use decision when "the decision violates a provision of applicable law and is prohibited as a matter of law").

The city's decision is reversed.