BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WEST SIDE RURAL FIRE
PROTECTION DISTRICT,
Petitioner,

vs.

CITY OF HOOD RIVER,
Respondent.

LUBA No. 2002-055

FINAL OPINION
AND ORDER

Appeal from City of Hood River.

Gary F. Firestone, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Ramis, Crew, Corrigan & Bachrach, LLP.

Pamela J. Beery and Christopher A. Gilmore, Portland, filed the response brief. Pamela J. Beery argued on behalf of respondent. With them on the brief was Beery & Elsner, LLP.

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

REMANDED 01/30/2003

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

Petitioner challenges a city decision to annex 55 acres into the city limits and to withdraw that property from petitioner's service district.

FACTS

In January 2002, the city initiated a process to annex approximately 475 acres of land into the city using quasi-judicial land use hearing procedures. During the proceedings before the planning commission and the city council, the number of acres under consideration was reduced until only 55 acres, including one segment of Interstate 84 and one segment of U.S. Highway 30 (the ODOT property) remained. On April 8, 2002, the city adopted Ordinance No. 1823, annexing the ODOT property. The adopted ordinance purported to adopt findings in support of the decision as an exhibit. However, those findings did not exist at the time the ordinance was adopted. The findings were adopted in a separate action by the city council on June 10, 2002.[1]

Petitioner, a rural fire protection district that serves property located outside of city limits, objected to the proposed annexations, and filed a notice of intent to appeal at LUBA on May 8, 2002, within 21 days of the date Ordinance No. 1823 became final, but before the findings supporting Ordinance No. 1823 were adopted.

MOTION TO STRIKE

Petitioner moves to strike Appendices D and E from the response brief. Appendix D includes minutes from the June 10, 2002 city council meeting, a copy of the findings supporting Ordinance No. 1823, and other council packet items pertaining to those findings. Appendix E is a copy of a letter from the Department of Land Conservation and

[1] In an order on record objections, we sustained a motion by petitioner to strike the portion of the record that contains the June 10, 2002 findings. *West Side Rural Fire Protection District v. City of Hood River*, __ Or LUBA __ (Order on Record Objections, November 7, 2002) slip op 4.

Development dated July 3, 2002 (DLCD letter), acknowledging that the city has completed its periodic review work task with respect to public facilities.[2] Petitioner contends that those items were not part of the record of proceedings below, and may not be used to support the challenged decision.

The city argues that the documents are cognizable by LUBA as official actions of the local governing body, pursuant to Oregon Evidence Code Rule 202 (Rule 202).[3] With regard to the June 10, 2002 findings, the city argues that contrary to petitioner's argument, the items are not appended as evidence in support of the city's decision, but merely demonstrate that the June 10, 2002 findings are derived from other documents that are in the record and that those documents may be used to support the city's legislative decision. *See Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 564 (1994) (a local government may demonstrate that a legislative decision has an adequate factual base by

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[2] The DLCD letter states, in relevant part:

> "On April 18, 2002 the City of Hood River issued notice of its decision on Periodic Review Work Task 5 regarding Public Facilities.
>
> "No objections to the city's work task submittal were received, and the department did not notify the city of a decision to conduct its own review within 60 days of the date the city issued its notice. Therefore, pursuant to OAR 660-025-0140(4), the information and provisions addressing the city's submitted Work Task 5 are acknowledged." Response Brief, Appendix E.

[3] Rule 202 allows a judicial body to take official notice of certain public actions and decisions, including:

> "(2) Public and private official acts of the legislative, executive and judicial departments of this state, * * * and any other * * * jurisdiction of the United States.
>
> "* * * * *
>
> "(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States.
>
> "* * * * *
>
> "(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015."

providing arguments in its brief and citations to the record, if they are adequate to demonstrate that the challenged legislative decision complies with applicable legal standards). With regard to the DLCD letter, the city argues that the letter demonstrates that the city's ordinances comply with Statewide Land Use Planning Goal 11 (Public Facilities and Services), and is a direct response to petitioner's third assignment of error, which argues that the challenged decision is not consistent with Goal 11 because an urban services agreement between the city and service districts must be in place prior to approving an annexation to the city.

As we explain below, the challenged decision is quasi-judicial. Therefore, the decision must be supported by findings adequate to show compliance with applicable standards, and arguments in the city's brief and citations to the record are not enough to demonstrate that applicable criteria are satisfied. *Sunnyside Neighbors v. Clackamas County Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977); *LeRoux v. Malheur County*, 30 Or LUBA 268, 271 (1995). We therefore agree with petitioner that the June 10, 2002 findings may not be used to support the city's contention that other documents in the record may be used as "argument" to support the challenged decision. Accordingly, we shall disregard all arguments the city makes that rely on Appendix D.

With respect to Appendix E, we have taken official notice of periodic review acknowledgement documents in other contexts. *See D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 530 (1999), *aff'd as modified* 165 Or App 1, 994 P2d 1205 (2000) (documentation of the Land Conservation and Development Commission's acknowledgment of county work task pertaining to Urban Fringe Development Capacity Analysis is subject to official notice). We therefore agree that we may take official notice of the DLCD letter. Accordingly, we deny petitioner's motion to strike Appendix E.[4]

[4] Our decision to deny petitioner's motion to strike Appendix E does not mean that we agree with the city that the letter serves the purpose for which it is presented.

PRELIMINARY MATTERS

A. Quasi-Judicial v. Legislative Decision

Petitioner argues that the challenged decision is a quasi-judicial land use decision because the city's final decision annexes property that is held by only one owner. Petitioner contends that in this circumstance, where the city used quasi-judicial notice procedures that implement ORS 197.763, and the decision itself satisfies two of the three factors articulated in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979) that characterize quasi-judicial land use decisions, the decision must be accompanied by findings that support the decision made.[5] According to petitioner, the findings supporting the challenged decision were adopted well after the decision was adopted and made final and, as a result, those findings cannot be used to support the challenged decision. Petitioner contends in the first and second assignments of error that the city's failure to adopt findings as part of Ordinance No. 1823 necessarily means that the challenged decision must be remanded for findings.

The city responds that the characterization of a decision as legislative or quasi-judicial should be based on the attributes of the application as described in the initial proceedings. Here, the initial notice of proceedings described over 475 acres of land located in various areas west and south of the city. The city contends that under the *Strawberry Hills 4 Wheelers* test, the annexation is a legislative action.

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[5] *Strawberry Hill 4 Wheelers* sets out a three-part test for determining whether a particular decision is legislative or quasi-judicial. We summarized that test in *Valerio v. Union County*, 33 Or LUBA 604, 607 (1997) as:

> "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?" (Internal quotes omitted.)

We do not believe that the determination of whether the challenged decision is legislative or quasi-judicial is governed by the *Strawberry Hill 4 Wheelers* test. For whatever reason, the city zoning ordinance mandates a quasi-judicial process to review annexations.[6]

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[6] The city's annexation procedures are set out at Hood River Zoning Code (HRZC) Chapter 17.15. It provides, in relevant part:

> "17.15.040 PLANNING COMMISSION REVIEW
>
> "* * * [T]he Planning Commission shall review [an annexation] application and forward a recommendation with findings to the City Council who will conduct a public hearing according to the *quasi-judicial hearing procedures* of the Municipal Code.
>
> "17.15.050 EVALUATION CRITERIA – DEVELOPED LAND
>
> "Prior to approving a proposed annexation of developed land, affirmative findings shall be made relative to the following criteria:
>
> "A. The territory is contiguous to the city limits and within the Urban Growth Area;
>
> "B. The annexation represents the natural extension of the existing City boundary to accommodate urban growth;
>
> "C. The development of the property is compatible and consistent with the rational and logical extension of utilities and roads to the surrounding area;
>
> "D. [Based on the considerations set out in HRZC 17.15.080, t]he City is capable of providing and maintaining its full range of urban services to the territory without negatively impacting the City's ability to adequately serve all areas within the existing city limits;
>
> "E. The fiscal impact of the annexation is favorable, as determined by the City of Hood River because of existing development [based on the fiscal considerations set out at HRZC 17.15.070];
>
> "F. The proposed annexation does not negatively impact nearby properties, whether located within the city limits or the urban growth area; and
>
> "G. The annexation conforms with the Comprehensive Plan.
>
> "17.15.060 EVALUATION CRITERIA – UNDEVELOPED LAND
>
> "Prior to approving a proposed annexation of undeveloped land, affirmative findings shall be made relative to the following criteria:
>
> "A. The territory is contiguous to the city limits and within the Urban Growth Area;

That process clearly requires individual notice to property owners within the area to be annexed as well as to owners within 250 feet of the annexation boundary. *See* HRZC 17.09.040(F) (setting out notice procedures for quasi-judicial public hearings). HRZC 17.15.050 and 17.15.060 also require that the annexation decision be supported by "affirmative findings." *See* n 6. Because the city code clearly sets out a quasi-judicial process for reviewing annexations, and the challenged decision was made according to those quasi-judicial procedures, the decision is reviewable as a quasi-judicial decision.

Our conclusion that the challenged decision is quasi-judicial has two consequences. First, the city must adopt findings to support its decision. Second, petitioner is subject to the

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> "B. The annexation represents the natural extension of the existing City boundary to accommodate urban growth;
>
> "C. The annexation of the territory is compatible and consistent with the rational and logical extension of utilities and roads to the surrounding area;
>
> "D. [Based on the considerations set out in HRZC 17.15.080, t]he City is capable of providing and maintaining its full range of urban services to the property without negatively impacting the City's ability to adequately serve all areas within the existing city limits;
>
> "E. The fiscal impact of the annexation is favorable, as determined by the City of Hood River, either upon approval or because of a commitment to a proposed development, unless the City determines that a public need outweighs the increase;
>
> "F. The annexation meets the City's urban growth needs and it is to the City's advantage to control the growth and development plans for the territory; *i.e.*, to be able to address the issues of traffic, density, land use and the level and timing of necessary facilities and services;
>
> "G. If the criteria in [HRZC] 17.15.060(F) does not apply, the annexation provides a solution for existing problems resulting from insufficient sanitation, water service, needed routes for utility or transportation networks or other service-related problems;
>
> "H. The proposed annexation does not negatively impact nearby properties, whether located within the city limits or the urban growth area; and
>
> "I. The annexation conforms with the Comprehensive Plan." (Emphasis in original.)

waiver provisions of ORS 197.763(1) and 197.835(3).[7] As we have explained, the findings that support the county's decision were adopted separately, after the challenged decision became final.

B. Basis for Reversal or Remand

The city argues that because findings supporting the challenged decision have been adopted, the city's failure to attach findings to the decision does not provide a basis for reversal or remand. According to the city, the necessary findings have been drafted and approved by the city. Therefore, the city argues that there is no need to remand the challenged decision to require the city to perform an exercise that it has already done.

Presumably, the city council could have readopted Ordinance No. 1823 with the corresponding findings, in which case the present appeal would be moot. *See Davis v. City of Bandon*, 19 Or LUBA 526, 527 (1990) (LUBA will dismiss an appeal if its decision will have no practical effect). Here it is not clear that remand of our decision would have no practical effect. The city is not obligated to readopt the June 10, 2002 findings. In addition, some of the arguments that petitioner has proffered are legal challenges that question the interpretation and application of certain standards in those findings. Therefore, we disagree with the city that its adoption of findings on June 10, 2002 necessarily resolves the first and second assignments of error pertaining to the adequacy of the city's findings, or that a remand would have no practical effect.

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[7] ORS 197.763(1) provides, in relevant part:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body * * * an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

> "Issues [that may be raised in a petition for review] shall be limited to those raised by any participant before the local hearings body as provided by * * * ORS 197.763[.]"

FIRST ASSIGNMENT OF ERROR

HRZC 17.15.010 provides, in relevant part:

"[T]he city shall annex property where:

"A. The proposed annexation represents the natural extension of the existing City boundary consistent with urban growth;

"* * * * *

"D. The proposed annexation would serve the interests of the entire community and not solely the interests or convenience of those within the territory proposed to be annexed."

Petitioner argues that the challenged decision fails to explain why the city believes that those standards are met. Petitioner argues that the city does not interpret those provisions, nor does it explain why it believes that the addition of only the ODOT property will satisfy those two criteria. Petitioner explains that the decision annexes a Y-shaped parcel that includes two stretches of highway. According to petitioner, the ODOT parcel is already developed, is in public ownership and serves no other purpose than to provide a springboard for the city to annex other properties. In addition, petitioner argues that because the challenged decision annexes only one property, the findings contained in various staff reports prepared prior to the adoption of the city's decision are inadequate because those findings address the general benefits of annexing larger blocks of land that include the ODOT property. Petitioner argues that the challenged decision must explain why the ODOT property, by itself, satisfies applicable annexation criteria.

The city responds that HRZC 17.15.010 is a purpose statement and does not provide any applicable approval criteria. The city argues that the provisions of HRZC 17.15.010 are incorporated into other sections of HRZC 17.15, such as HRZC 17.15.050 and 17.15.060, which do provide applicable approval criteria. Therefore, the city contends that the assignment of error provides no basis for reversal or remand.

It is not clear to us that HRZC 17.15.010 is merely a general statement that does not, in itself, establish applicable approval criteria. The notice of hearing identifies HRZC 17.15 generally as providing the applicable approval criteria. Record 430. As the city notes in its brief, HRZC 17.15.010, 17.15.050 and 17.15.060 contain arguably duplicative or overlapping standards which means that a party could reasonably understand that HRZC 17.15.010 contains applicable approval criteria. In addition, the staff reports in support of the annexation identify HRZC 17.15.010 as applicable, and provides findings responding to each section. Record 138-41, 321-24. Because the city's decision neither provides an adequate explanation of what criteria it believed to be applicable, nor adopts findings to support its conclusion that the ODOT property satisfies the applicable criteria, we agree with petitioner that the city's findings are inadequate. We also agree that because the annexation is limited to the ODOT property, the city must adopt findings that analyze the benefits and consequences of annexing only that property. Because the findings are inadequate, we do not address petitioner's evidentiary challenges. *McNulty v. City of Lake Oswego*, 14 Or LUBA 366, 373 (1986), *aff'd* 83 Or App 275, 730 P2d 628 (1987).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision fails to adopt findings addressing HRZC 17.15.060. The city responds that HRZC 17.15.060 is not applicable, as it provides review criteria for the annexation of *undeveloped* property, and the ODOT property is fully developed. According to the city, HRZC 17.15.050 provides the relevant review criteria. *See* n 6 (setting out HRZC 17.15.050 and 17.15.060). The city argues that its failure to address HRZC 17.15.060 therefore provides no basis for reversal or remand.

At oral argument, petitioner argued that the ODOT property is not "developed" in the normal sense, because it does not contain any taxable improvements. In any event, petitioner argues that the two provisions set out almost identical review criteria and therefore, even if

petitioner erred in arguing that HRZC 17.15.060 applies, it was harmless error, because the criteria at HRZC 17.15.050 clearly do apply, and the city did not adopt findings that address those criteria.

The standards at HRZC 17.15.050 and 17.15.060 are virtually identical. We agree with petitioner that its argument under the second assignment of error is general enough to address the deficiencies in the city's decision with respect to findings for HRZC 17.15.050, even though the assignment of error is directed at HRZC 16.15.060. As we have discussed earlier in this opinion, the city's failure to adopt findings in support of its decision as a whole requires remand. Accordingly, petitioner's second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city violated Statewide Planning Goals 2 (Land Use Planning) and 11 (Public Facilities and Services) by failing to enter into an urban services agreement pursuant to ORS 195.065 prior to annexing the ODOT property.[8] Petitioner

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[8] ORS 195.065 provides, in relevant part:

> "(1) [U]nits of local government and special districts that provide an urban service to an area within an urban growth boundary that has a population greater than 2,500 persons * * * shall enter into urban service agreements that:
>
> "(a) Specify whether the urban service will be provided in the future by a city, county, district, authority or a combination of one or more cities, counties, districts or authorities.
>
> "(b) Set forth the functional role of each service provider in the future provision of the urban service.
>
> "(c) Determine the future service area for each provider of the urban service.
>
> "(d) Assign responsibilities for:
>
> "(A) Planning and coordinating provision of the urban service with other urban services;
>
> "(B) Planning, constructing and maintaining service facilities; and
>
> "(C) Managing and administering provision of services to urban users.

explains that the city's annexation of property results in withdrawal of territory from petitioner's service district. Petitioner contends that it has adopted capital improvement plans that depend in large part on a stable revenue base. According to petitioner, the initial annexation proposal would have resulted in a loss of approximately 25 percent of its tax base without a corresponding loss in its expenses. Petitioner argues that Goals 2 and 11 require urban service agreements prior to annexation to address precisely the issues that were identified by petitioner during the proceedings before the city.

The city responds that there is nothing in Goals 2 or 11 that require the city to enter into an urban services agreement with the fire district prior to annexing property into the city. In fact, the city argues that the only deadline that is connected with an urban service agreement pertains to periodic review. *See* n 8. Therefore, the city argues, in the absence of a showing that an urban services agreement is a perquisite for ensuring compliance with Goals 2 and 11, petitioner's argument provides no basis for reversal or remand.

We agree with the city that petitioner has not demonstrated that it is necessary for the city to enter into an urban services agreement prior to annexing property into the city in order to comply with Goals 2 and 11, even if those goals do directly apply to the annexation decision before us. Accordingly, the third assignment of error is denied.[9]

> "(e) Define the terms of necessary transitions in provision of urban services, ownership of facilities, annexation of service territory, transfer of moneys or project responsibility for projects proposed on a plan of the city or district prepared pursuant to ORS 223.309 and merger of service providers or other measures for enhancing the cost efficiency of providing urban services.
>
> "(f) Establish a process for review and modification of the urban service agreement."

ORS 195.085(1) provides that local governments and special districts shall comply with ORS 195.065 "[n]o later than the first periodic review that begins after November 4, 1993[.]"

[9] The city also argues that petitioner's goal challenge is a collateral attack on the city's acknowledged comprehensive plan. *See* OAR 660-001-0310 (city annexation made in compliance with acknowledged comprehensive plan shall be considered to have been made in accordance with the goals). We do not reach this

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision allows the city to embark on "cherry stem" annexations.[10] Petitioner concedes that the challenged decision itself cannot be characterized as a cherry stem annexation, because the annexation merely extends the city boundaries to include a Y-shaped parcel that includes a portion of U.S. Highway 30 and Interstate 84. However, petitioner contends that, by annexing the ODOT property, the city may then annex properties that are contiguous to city limits only because they are adjacent to the ODOT right-of-way. As a result, petitioner argues that the city will accomplish cherry stem annexations in two steps, where it could not accomplish them in one. In addition, petitioner argues that the annexation leaves one area as an "island" of unincorporated territory between the current city limits and the ODOT property. Petitioner argues that in these circumstances, the annexation fails the reasonableness test established for annexations in *Portland General Electric Co. v. City of Estacada*, 194 Or 145, 165, 241 P2d 1129 (1952), because it cannot be justified by showing that the city can provide better service to the annexed area, and the city cannot show that the annexed area is needed for city development.[11] Petitioner argues that the annexation should be subject to particular scrutiny

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argument because we agree with the city that ORS 195.065 does not require that an urban service agreement between petitioner and the city be in place prior to the challenged annexation.

[10] The Court of Appeals has described a "cherry stem" annexation as

> "the annexation of a noncontiguous 'target parcel' (the 'cherry'), together with the territory between that parcel and the city (the 'stem'), that is necessary to make the [target] parcel and the city contiguous." *Dept. of Land Conservation v. City of St. Helens*, 138 Or App 222, 225, 907 P2d 259 (1995).

[11] In *Portland General Electric Co.*, the Oregon Supreme Court held that annexations are subject to review by the courts to determine whether the annexation is reasonable. It stated:

> "No exact yardstick can be laid down as to what is reasonable and what is not. A sound formula is laid down in *Vestal v. City of Little Rock*, [15 S.W. 801, 895 (1891)], as follows:
>
> > "'That city limits may reasonably and properly be extended so as to take in contiguous lands (1) when they are platted and held for sale or use as town lots; (2) whether platted or not, if they are held to be brought on the market, and sold as town property, when they reach a value corresponding with the views of the owner; (3)

under the reasonableness test, because it creates an unincorporated island and, as petitioner notes, ORS 222.750 permits those properties located within an unincorporated island to be annexed without an election.

The city responds that, by definition, the challenged decision does not effect a cherry stem annexation. According to the city, the ODOT property is contiguous to the city in two places; is located entirely within the urban growth boundary; and is "valuable by reason of [its] adaptability for prospective town uses." The city argues that the ODOT property "represents the City's current and future direction for commercial growth" and, therefore, the challenged annexation satisfies the *Portland General Electric Co.* reasonableness test.

The city also argues that there is no basis for requiring an enhanced level of scrutiny for those properties that will, as a result of this annexation, be located in the unincorporated island. According to the city, ORS 222.750 allows islands to be annexed to a city without a vote and to the extent that statute violates constitutional principles regarding the right to vote on an annexation, that remedy lies with the legislature and not with LUBA. The city argues that the annexation is reasonable and complies with statutory provisions pertaining to annexations. Therefore, the city argues the fourth assignment of error must be denied.

> when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas, or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective town uses. But the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation if it did not appear that such value was enhanced on account of their adaptability to town use.
>
> "'We conclude further that city limits should not be so extended as to take in contiguous lands (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use; (2) when they are vacant, and do not derive special value from their adaptability for city uses.'" 194 Or at 165 (spelling corrected).

The court went on to say:

> "We do not hold that the above is exclusive as facts may alter the situation since each case must depend upon its own facts." *Id.*

We agree with the city that the challenged annexation satisfies the *Portland General Electric Co.* reasonableness test. The property is contiguous to the city limits; it is located within the city's urban growth boundary, which has been acknowledged to be suitable for urban development; and it is developed with an urban transportation interchange that serves the city and its environs. Even if the city's ultimate aim is to annex properties adjacent to the ODOT property that are located farther away from the core of the incorporated city limits, that aim does not defeat the annexation here.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

ORS 222.125 permits annexations to occur without an election, provided that all of the property owners and a majority of the electors within the area to be annexed consent to the annexation. ODOT is the only property owner within the territory annexed by the city's decision and there are no electors in the area. Consequently, the city proceeded to annex the property without an election. Petitioner argues that the city's finding that it has the consent of the "owner" of the ODOT property is unsupported by the evidence in the record. According to petitioner, it challenged the authority of the ODOT right-of-way manager to sign a consent-to-annex form on behalf of the agency. Petitioner argues that only the regional manager has the authority to bind ODOT in a consent to annexation.

The city responds that the challenged decision specifically found that ODOT consented to the annexation, and by attaching a copy of a consent-to-annex form signed by ODOT's right-of-way manager. The city argues that the testimony of petitioner's attorney below that questioned the authority of the manager to sign on behalf of ODOT is not sufficient to undermine the city's finding that the consent is valid.

We are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes*

County, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In evaluating the substantiality of evidence in the whole record, we are required to consider whether supporting evidence is refuted or undermined by other evidence in the record, but cannot reweigh the evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). Here, we agree with the city that, while petitioner presented evidence that tended to undermine the city's evidence that the right-of-way manager had the authority to bind ODOT to the annexation, that evidence is not so overwhelming as to render the city's choice of evidence unreasonable.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the process the city followed that culminated in the challenged annexation was flawed from the beginning. According to petitioners the city erred by

> "initiat[ing] the process without an application and without [the supporting materials required by HRZO 17.15.020[12]]. Most importantly, the City substantially changed the proposal without requiring a new application and without providing opponents the opportunity to provide evidence or argument regarding the final configuration of the annexation.
>
> "[Petitioner's] substantial interests have been adversely affected by the procedural errors because the City 'hid the ball' as to what annexation would eventually result, so that [petitioner's] efforts in opposing the annexation

[12] HRZO 17.15.020 provides, in relevant part:

> "An annexation may be proposed by the City of Hood River * * * and shall include the following elements:
>
> "A. Preliminary plans and specifications, drawn to scale, showing the actual shape and dimensions of the property to be annexed and the existing and proposed land uses and residential density. City and County zoning in the proposed territory, as shown on a vicinity map, and contiguous lands must be indicated also.
>
> "B. Comprehensive statement of reasons in support of the annexation addressing the applicable annexation criteria.
>
> "C. Completed certifications of property ownership, registered voter status, map, and legal description."

> could not be concentrated on the annexation that ultimately was adopted. * * * [Petitioner] had to address a myriad of issues and multiple configurations of potential annexations and was given no opportunity to present evidence or arguments as to the annexation that was actually adopted because the public hearing had been closed and the deadlines for submitting additional evidence and argument had passed when the City proposed the final form of the annexation. The deprivation of the right to provide evidence and argument on the final form of the annexation affected [petitioner's] substantial rights." Petition for Review 13-14 (footnote added).

The city responds that nothing in its ordinance or in the annexations statutes require the city to re-notice and reiterate its review process each time an annexation proposal is modified to delete territory. According to the city, petitioner was given numerous opportunities to testify regarding its interest in the annexation process and, in fact, took advantage of each opportunity. The city further argues that petitioner was informed at the commencement of the last evidentiary hearing before the city council that the city would only be considering the "I-84, W[est] Cascade and the Country Club [Road] corridor" and thereafter petitioner's attorney testified and submitted written argument against the annexation, and questioned the reliability of the ODOT consent to annexation. Record 34-36, 122, 125-26.[13] The city argues that even if petitioner can demonstrate that the process was flawed, it cannot, at this juncture, challenge the process because petitioner did not raise the issue of compliance with HRZC 17.15.020 below.

Petitioner argues, and we agree, that petitioner did raise the issue of compliance with HRZC 17.15.020 during testimony before the city council on February 11, 2002, even though that provision was not specifically named.[14] We also agree with petitioner that the area that

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[13] West Cascade is the local name for the segment of U.S. Highway 30 that is the subject of the annexation.

[14] At the February 11, 2002 hearing, petitioner's attorney stated:

> "The City did not submit an application as required by [its] own code, which requires a map to scale, a legal description and certifications of property ownership and registered voter status. These items were required to be part of the application, but they were not received until tonight. The public is therefore prejudiced in its right to submit rebuttal." Record 126.

the city considered at the February 11, 2002 hearing, and the area that the council later directed staff to include in the annexation ordinance was different than the area that was finally described in Ordinance No. 1823, in that the area discussed and tentatively approved at the February 11, 2002 hearing included at least two other properties in addition to the ODOT property.[15] However, we do not agree with petitioner that its argument that the city "hid the ball" by continually revising the proposed annexation area provides a basis for reversal or remand.

In *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), the Court of Appeals addressed the circumstances where a party may have an opportunity to provide testimony and evidence in response to a new or significantly changed interpretation that is articulated for the first time in a local decision:

> "* * * [I]n certain limited situations, the parties to a local land use proceeding should be afforded an opportunity to present additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation and that the local body's failure to provide such an opportunity when it is called for can be reversible error. * * * [H]owever, * * * *at least* two conditions must exist before it or we may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is

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[15] The February 11, 2002 minutes state, in relevant part:

> "The Mayor declared that there was a consensus of the Council that the bulk of the annexation should not be pursued at this time. He asked if there was consensus to proceed with the Staff recommendation to limit the annexation to I-84, W. Cascade, Country Club Road, Timbercrest Condos and the Hattenhauer property (Harvey's Texaco). * * *
>
> "Motion: To accept the Staff recommendation, and direct Staff to amend Ordinance 1823 accordingly and schedule special meetings for readings of the revised ordinance.
>
> "* * * * *
>
> "Vote: Aye – [five]. No – [one]." Record 132 (Emphasis omitted.)

> directly responsive to the unanticipated interpretation." 155 Or App at 373-4 (emphasis in original; citation and footnote omitted.)

We believe the principle articulated in *Gutoski* is applicable to circumstances such as this one where the change in the city's decision is to narrow an area under consideration for annexation. As a result of its participation in this case, petitioner certainly was aware that the city was considering only a fraction of the area initially proposed for annexation, and that the area for consideration was narrowed to three properties, including the ODOT property. Each time the city narrowed the annexation area to be considered, petitioner presented essentially the same arguments in opposition. Petitioner has not provided any argument that it has evidence or that it could have presented, but was prevented from doing so, because it was not aware that the ODOT property alone was under consideration. Accordingly, we deny petitioner's sixth assignment of error.

The city's decision is remanded.