BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PHILLIP D. MORSMAN
and BRIGITTE MORSMAN,
Petitioners,

vs.

CITY OF MADRAS,
Respondent.

LUBA No. 2003-040

FINAL OPINION
AND ORDER

Appeal from City of Madras.

Michael F. Sheehan, Scappoose, filed the petition for review and argued on behalf of petitioners.

Robert S. Lovlien, Bend, filed the response brief and argued on behalf of respondent. With him on the brief was Bryant, Lovlien & Jarvis, PC.

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

REMANDED 07/07/2003

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city annexation decision.

FACTS

Prior to the disputed decision, the City of Madras included approximately 1,465 acres. The decision annexes approximately 759 acres and increases the size of the city by more than 50%. The annexation is what is commonly referred to as a "cherry stem" annexation. Most of the 759 acres are included in the "cherry," which is located north of the existing city limits. The "cherry" is connected to the city by an annexed "stem," which is an approximately 300-foot section of the Warm Springs Highway. Although much of the annexed territory is occupied by a developed industrial park and the city's sewerage treatment plant and airport, the annexed territory includes other properties as well. One of the other annexed properties is petitioners' 60-unit low-income mobile home park.

The city sought to annex the disputed territory through a procedure that is known as a triple-majority annexation, which does not require that there be an election in the area to be annexed. ORS 222.170(1).[1] The city obtained the necessary consents for a triple majority annexation and provided notices to city electors on January 29, 2003, and February 4, 2003, of a public hearing on the proposed annexation to be held on February 11, 2003. That public

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[1] ORS 222.170(1) provides:

> "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:
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> "(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; or
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> "(b) The city legislative body orders the annexation election in the city under ORS 222.111, if the city legislative body submits the question to the electors of the city."

hearing was continued to February 25, and on February 14, 2003 the city mailed notice of that continued public hearing to property owners in the area to be annexed.[2] The city council approved the disputed annexation on February 25, 2003, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error, for the most part, alleges that the city's decision should be remanded because the city failed to provide the kind of public hearing that is required by ORS 197.763.[3] However, petitioners also argue, as a substantive matter, that the city never considered whether the proposed annexation complies with the city's comprehensive plan. Petition for Review 12.

As we explained in *Roloff v. City of Milton Freewater*, 27 Or LUBA 80, 84 (1994), the various procedures that ORS chapter 222 provides for annexing property—whether those procedures include an election or a public hearing or annex property without an election or public hearing—do not obviate the statutory requirement that the annexing governing body must ensure that the proposed annexation complies with applicable land use requirements. ORS 197.175(1). If the city's acknowledged comprehensive plan includes criteria that govern annexation decisions, the city must establish that those comprehensive plan annexation approval criteria are satisfied. If the city's comprehensive plan does not include any criteria that directly govern annexation decisions, then the city must directly apply the statewide planning goals. *Cape v. City of Beaverton*, 43 Or LUBA 301, 305 (2002), *aff'd* 187 Or App 463, ___ P3d ___ (2003). In either case, the city must establish that the

[2] The city concedes that, although petitioners own property in the annexed area, they were not given written notice of the continued February 25, 2003 hearing. However, the city points out that petitioners nevertheless found out about the public hearing and appeared at the February 25, 2003 continued hearing and opposed the annexation.

[3] ORS 197.763 sets out detailed notice and other requirements for "the conduct of quasi-judicial land use hearings."

proposed annexation is consistent with relevant land use standards and in doing so must render a land use decision.

Much of petitioners' argument under the first assignment of error is directed at the city's failure to provide the kind of notice that is required for a quasi-judicial land use hearing under ORS 197.763 and the city's failure to provide the kind of hearing that is required by ORS 197.763. The city does not dispute that the challenged decision is quasi-judicial and does not dispute that a quasi-judicial public hearing was required.[4] Instead, the city contends that the city provided a public hearing on February 25, 2003 and petitioners attended that public hearing and opposed the proposed annexation. We understand the city to argue that given this participation by petitioners, the city's failure to provide a hearing that was formerly denominated a quasi-judicial land use hearing under ORS 197.763 provides no basis for reversal or remand. The city suggests this is particularly the case since the record shows that petitioners consulted with an attorney and that petitioners only opposed the annexation based on its fiscal impact on petitioners and petitioners' allegations that the annexed territory is not contiguous with the city. Respondent's Brief 4.

We see no reason why the public hearings that the city held on February 11, 2003 and February 25, 2003 could not have sufficed as the required public hearings to enable the city to adopt a land use decision that applied applicable city comprehensive plan annexation standards or, if such standards do not exist, applied and demonstrated compliance with the statewide planning goals. However, the city never provided any notice of applicable land use standards and did not consider any land use standards at either of those hearing or in its annexation decision. As far as we can tell, the city simply failed to recognize that it must demonstrate that the disputed annexation is consistent with any criteria in its comprehensive

[4] We seriously question whether an annexation of a 759-acre area that is divided into the number of separate ownerships that the disputed annexation area is divided into is properly characterized as quasi-judicial. However, because the city does not dispute the point, we do not consider that question further.

plan that govern annexations or, if there are no such comprehensive plan annexation criteria, that the disputed annexation is consistent with the statewide planning goals. Given that failure on the city's part, the city's decision must be remanded so that it may provide the required notice and hearing and adopt a decision that addresses the applicable land use standards.

Finally, we note that the city suggests that petitioners waived their right to argue at LUBA that the challenged annexation decision violates comprehensive plan policies by failing to raise any issue concerning those comprehensive plan policies before the city council on February 25, 2003. There are two problems with that suggestion. First, the city concedes that petitioners were not given notice of the February 25, 2003 city council hearing in this matter at which they adopted the challenged decision. Second, even if the city had provided petitioners a copy of the notice it sent to other property owners in the annexed territory, that notice does not comply with the requirements of ORS 197.763(3). Record 346-364. In particular, it does not list the applicable comprehensive plan criteria and it does not state that issues will be waived on appeal to LUBA if they are not raised at the February 25, 2003 hearing. Petitioners did not waive their right to argue that the disputed annexation is inconsistent with the city's comprehensive plan.[5] ORS 197.835(4)(a).

The first assignment of error is sustained.[6]

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[5] To avoid any possible confusion, we do not decide here whether there are any comprehensive plan criteria that govern annexation decisions. We decide only that petitioners have not waived their right to raise that issue to the city and that the city must consider that issue on remand in deciding whether the comprehensive plan or the statewide planning goals provide the applicable land use criteria that must be satisfied to approve the disputed annexation.

[6] The city requests that if we remand the city's decision for failure to address land use standards that "any remand of Ordinance No. 704 should be limited only to Petitioners' property." Respondent's Brief 5-6. Petitioners' challenge is not limited to the annexation of their property. Even if it were, the city cites no authority for LUBA to limit its remand of Ordinance No. 704 in that way, and we are aware of no such authority. *See Dept. of Land Conservation v. Columbia County*, 117 Or App 207, 843 P2d 996 (1992) (questioning LUBA's authority to affirm an appealed ordinance in part and remand in part)

SECOND ASSIGNMENT OF ERROR

In this assignment of error, petitioners allege that the disputed annexation violates the "reasonableness" test that was employed by the Oregon Supreme Court to invalidate a city annexation in *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952) (hereafter *PGE v. Estacada*). In that case, the court held that annexation statutes carry with them an implied requirement that "cities must legislate reasonably and not arbitrarily." 194 Or at 159. Although some of the arguments that petitioners provide in support of the second assignment of error are directed at the assignment of error, other arguments advance somewhat different legal theories. We address each of petitioners' arguments below.

A. Unreasonable Annexation

Petitioners advance four arguments in support of their contention that the disputed annexation violates the "reasonableness" standard in *PGE v. Estacada.*

1. Improper Revenue-Enhancing Purpose

Petitioners complain that the disputed annexation is unreasonable because it was approved "for the sole or primary purpose of garnering tax revenue * * *." Petition for Review 16. As petitioners correctly note, one of the reasons the Oregon Supreme Court cited in invalidating the annexation at issue in *PGE v. Estacada* was the fact that the annexation would have nearly doubled the existing city's real property valuation.

The annexed territory in this case will increase the city's property tax base by 25%. While that is admittedly a significant increase, it is significantly less than the nearly 200% increase in *PGE v. Estacada*.[7] Moreover, while the city in this case is clearly motivated in part by the additional property tax revenue that the annexed territory would generate, the

[7] The court in *PGE v. Estacada* seemed to be equally troubled by the fact that the annexed utility property was located some distance from the city and could only be accessed from the city by a "roundabout road" located outside the annexed area. 194 Or at 163. Access to the utility property through the annexed territory could only be achieved by foot "through the woods and [required traversing] a deep gully separating the city from [the utility's] property." *Id.*

annexation is also motivated by other reasons. Much of the disputed area has already been provided city sewer service. Many property owners in the disputed area apparently wish to receive additional city services. The disputed area is inside the city's urban growth boundary and makes up a significant part of the city's industrial land base, and the city wishes to achieve more direct planning and zoning control over that part of its economic base. While the added property revenues that the disputed territory would produce are clearly a significant part of the city's motivation to annex that territory, there are a number of other legitimate planning factors present. Petitioners are certainly free to disagree with the city on the importance of these other reasons as a matter of public policy. However, we do not agree with petitioners that the city's desire to increase its property tax revenue through the disputed annexation renders the annexation unreasonable under *PGE v. Estacada*.

2. Benefits to the Annexed Area are Small

Petitioners argue that the annexed area generally is already receiving urban services.[8] As already noted, some of those urban services, such as sewer service, are already provided by the city. Other services such as water, roads and electric power are provided by others. Petitioners contend the annexation is unreasonable because the city failed to document the benefits that the annexed territory would receive.

It is unnecessary to go into significant detail to describe the many material differences between the annexation at issue in this appeal and the annexation at issue in *PGE v. Estacada.* Suffice it to say, the annexed territory at issue in this appeal is a largely developed industrial area located next to the city and inside its urban growth boundary. It is the kind of territory that in many jurisdictions would not have been allowed to develop in the manner that it has developed without first annexing to the city, so that basic urban services

[8] Apparently not all of the annexed territory currently receives sewer services. Petitioners are concerned that they will be required to connect to the city's sewer system, and the potential cost of connecting to the city's sewer system apparently forms a major reason for their opposition to the city's decision to include their property in the annexed territory.

could be provided to that territory by the city from the beginning. The city belatedly seeks to annex the territory, with the apparent agreement of a majority of the property owners and electors. That the annexed territory has been able to secure many urban services from various providers without annexing to the city does not mean that it will not benefit from the city taking over and improving some of those services and assuming direct responsibility for future comprehensive planning and land use regulation for the area.

3. No Demonstrated Need for Additional Territory

Petitioners argue the disputed annexation should be found to be unreasonable because there is no demonstration that there is "any substantial shortage of buildable land within the city limits." Petition for Review 18. Petitioners cite no comprehensive plan or other legal standard that requires that the city make such a demonstration as a precondition of annexing the disputed territory. We are aware of no such requirement.

4. Cherry Stem Annexation Omits Other Natural Growth Areas

In *PGE v. Estacada* the court explained that the reasonableness standard for annexation is imprecise: "[n]o exact yardstick can be laid down as to what is reasonable and what is not." 194 Or at 165. The court then went on to cite with approval the following formulation of its reasonableness standard:

> "'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) 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 adaptibility [sic] 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 adaptibility [sic] to town use." *Id*. (quoting from *Vestal v. City of Little Rock*, 54 Ark 321, 15 SW 891, 16 SW 291, 11 LRA 778 (1891))

Citing the first and third of the above considerations, petitioners contend the disputed annexation is unreasonable. Specifically, petitioners contend that the cherry stem passes by, and leaves outside the city, a large number of residentially zoned and developed properties. Petitioners contend that their property was arbitrarily included to avoid leaving an unincorporated space next to property to the south of petitioners that the city wished to annex. Petitioners contend "[t]he design of the territory to be annexed in this area is thus purely 'arbitrary'" and therefore unreasonable under *PGE v. Estacada.* Petition for Review 19.

As a number of cases that have followed *PGE v. Estacada* point out, while the irregular shape of a particular annexed territory may raise questions under *PGE v. Estacada*, cherry stem annexations and annexations of other odd shaped territories are not *per se* unreasonable. *Dept. of Land Conservation v. City of St. Helens*, 138 Or App 222, 227, 907 P2d 259 (1995) (cherry stem annexations are not unreasonable *per se*); *Rivergate Residents Assn. v. Portland Metro Area*, 70 Or App 205, 211-212, 689 P2d 326 (1984), *rev den* 298 Or 553 (1985) (irregularly shaped triple-majority annexation territory that included an unannexed island held to be reasonable where consenting annexed property owners expressed desire for "more efficient and economical delivery of urban services"); *Mar. Fire Dist. v. Mar. Polk Bndry*, 19 Or App 108, 116-118, 526 P2d 1031 (1974) (irregularly shaped annexation not unreasonable where there was a finding that the annexation would "promote orderly development and growth of [the] urban environment"). The city offers no explanation in its decision or in its brief for why the residentially developed properties that petitioners identify were not included. We assume it was because the city either could not or believed it could not obtain the required number of consents to annex those properties.[9]

[9] It may also be, as petitioners suggest, that the city did not wish to annex these residential properties because the additional property taxes they would generate for the city would not be sufficient to pay the cost of extending city services to those properties.

Whatever the reason for not including those residential properties, the city's primary motivation for the disputed annexation was to include the large industrial area that adjoined the city. As we have already explained, in the circumstances presented in this case, there is nothing unreasonable about that motivation.

The four reasons offered by petitioners for finding that the disputed annexation is unreasonable under *PGE v. Estacada*, whether they are viewed alone or together, are not persuasive. There is nothing unreasonable about a city decision to annex adjacent industrially planned, zoned and developed land that includes the city's sewage treatment plant and airport. That the disputed annexation might have been more complete if certain intervening residentially zoned and developed property had been included does not render the annexation unreasonable under *PGE v. Estacada*.

B. Impact on Low Income Housing

Petitioners contend that the annexation may lead to a city requirement that their low income mobile home park connect to the city's sewer system. Their mobile home park is currently served by a septic system. Petitioners contend that if they are forced to connect to the city's sewer system the cost "may be prohibitively expensive" and thereby run afoul of comprehensive plan provisions that encourage affordable housing. Petition for Review 20.

In sustaining the first assignment of error, we agreed with petitioners that the city's decision must be remanded so that the city may address applicable land use criteria. Petitioners' arguments under this part of the second assignment of error largely duplicate arguments that were advanced under the first assignment of error and therefore provide no additional basis for remand. Petitioners do suggest that the expense they might incur in connecting to the city's sewer system renders annexation of their property unreasonable under *PGE v. Estacada.* We reject the suggestion.

C. The City Offered Improper Inducements to Secure Consents to Annexation

Petitioners next argue that the city improperly coerced property owners into consenting to the disputed annexation by offering to phase in city property taxation over a seven-year period, but limiting that offer to property owners who consented to annexation.[10] If we understand petitioners correctly, they contend that the city took the position in securing consents to annexation that in the event annexation was successful, individual property owners who *did not consent* to annexation would not be eligible for phased-in property taxation. Petitioners also contend that certain property owners were offered favorable future zoning in exchange for their consents to annexation. Petitioners contend that the city's selective offer of phased-in property taxation and favorable zoning improperly coerced consents to annexation. *Hussey v. City of Portland*, 64 F3d 1260 (9th Cir 1995).

In *Hussey*, the Oregon Department of Environmental Quality had ordered the City of Portland to provide sewer service to an unincorporated area of the county and "forbade the City from requiring annexation as a condition of using its sewer systems." 64 F3d at 1262. Notwithstanding that proscription, the city wished to annex the unincorporated territory that was to be provided city sewer service. One method available to the city to annex those territories was to hold a conventional election within those territories and annex the area if a majority of the electors voted for annexation. A second method available to the city was to

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[10] ORS 222.111(3) provides:

> "The proposal for annexation may provide that, during each of not more than 10 full fiscal years beginning with the first fiscal year after the annexation takes effect, the rate of taxation for city purposes on property in the annexed territory shall be at a specified ratio of the highest rate of taxation applicable that year for city purposes to other property in the city. The proposal may provide for the ratio to increase from fiscal year to fiscal year according to a schedule of increase specified in the proposal; but in no case shall the proposal provide for a rate of taxation for city purposes in the annexed territory which will exceed the highest rate of taxation applicable that year for city purposes to other property in the city. *If the annexation takes place on the basis of a proposal providing for taxation at a ratio, the city may not tax property in the annexed territory at a rate other than the ratio which the proposal authorizes for that fiscal year*." (Emphasis added.)

secure the written consents of (1) a majority of registered voters in the area to be annexed and (2) the owners of a majority of the land in the area to be annexed. In *Hussey*, the city pursued this second method and, in doing so, the city offered those who connected to the sewer system a subsidy, which could be worth thousands of dollars, if they signed consents to annexation by the city. Persons who did not sign the consents did not receive the subsidy. The Ninth Circuit Court of Appeals held that this subsidy to the electors in the territory to be annexed represented an impermissible burden on their constitutionally protected right to vote.[11]

Based on *Hussey*, we agree with petitioners that *if* the city limited its offer of phased-in property taxation to those property owners who signed consents to annexation, such an offer would be an impermissible burden on those property owners' constitutionally protected right to vote.[12] Similarly, any individual promises that the city might have made to apply particular future zoning to property, as a *quid pro quo* for consents to annexation, would be unconstitutional under *Hussey*. As the court in *Hussey* explained, a city may be able to offer inducements to *all* property owners in the annexed territory to encourage an affirmative vote for annexation or written consents to annexation. 64 F3d 1266. However, the city may not limit its offers of valuable consideration to only those property owners who sign consents to annexation. Under *Hussey*, the city may not make property owners choose

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[11] There are actually a number of critical rulings in the court's decision in *Hussey*. First, the court held that even though there may be no right to vote on a matter in the first place, once the state extends a right to vote, the right to vote is entitled to constitutional protection. 64 F3d 1263. Second, the court held that the "consents" at issue in that case were a substitute for the right to vote and were therefore were "the constitutional equivalent of 'voting.'" Id. Third, the court held that voting is a fundamental right that may trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Finally, the court held that the city's consent program in *Hussey* was not an even-handed regulation of the electoral process, but rather was a significant financial inducement to vote in a particular way. The court held that such a financial inducement was "an unconstitutional infringement on the fundamental right to vote." *Id*. at 1266.

[12] Such an offer would also appear to be inconsistent with ORS 222.111(3), see n 10, and Article I, section 32 of the Oregon Constitution, which requires that "all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

between a thing of value (*i.e.*, phased-in property taxation or favorable zoning) and their right to vote against, or to refuse to consent to, annexation. In the words of the court in *Hussey*, such inducements are "designed to distort the political process by granting substantial subsidies based solely on whether a voter consents to annexation, and * * * cannot stand." *Id*.

The city responds that it did not limit phased-in property taxation to those property owners who signed consents and did not threaten to withhold phased in property taxation from those property owners who did not sign consents. The city also denies that it extended any improper land use regulation preferences.

1. Phased-in Property Taxation

It is hard to imagine that the city could have believed that it could legally limit phased-in property taxation to those property owners who signed written consents to annex and deny such phased-in property taxation to those who refused to sign consents to annex. That position is so clearly at odds with ORS 222.111(3) and Article I, section 32 of the Oregon Constitution, that we will not assume that the city did so here based on the language that petitioners cite in the record. The minutes at Record 585 and the newspaper article at Record 583 that petitioners cite in support of their argument lend some support for their position. However, we do not agree that they are sufficient to establish that the city improperly conditioned its offer of phased-in property taxation on execution of consents to annex.

2. Land Use Preferences

Petitioners' argument that the city may have improperly offered land use regulation preferences and other inducements as a *quid pro quo* for securing individual property owner

consents to annexation are not so easily dismissed. At least two of the annexation consent agreements certainly can be read to suggest that the city did so. Record 555-559, 462-468.[13]

We note that it appears that most of the consent agreements include a promise on the city's part to leave existing zoning in place during a seven-year property tax phase-in period. The city is clearly permitted to leave existing county zoning in place following annexation under ORS 215.130(2)(a).[14] Assuming that agreement to leave existing zoning in place is uniformly extended to all property owners in the annexed area, including those who did not consent to annexation, we do not believe such an inducement runs afoul of *Hussey*.[15] However, continuation of existing zoning could easily be of significant value to a property owner. If individual property owners were forced to choose between refusing to consent to annexation and giving up that right to secure the city's potentially valuable promise that existing zoning would continue to apply, that would constitute the kind of inducement to consent to annexation that is constitutionally prohibited under *Hussey*.

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[13] The Keith Investments agreement states that the "[c]ity agrees to leave in place the existing zoning regulations * * * unless both the Owners and the City agree to a change of regulations." Record 556. That same agreement goes on to state that "[t]he City agrees to place Owners in a zone which allows for its current uses." Record 558. The Bright Wood Corporation agreement similarly provides "[t]he city shall place Bright Wood Corporation property in the M2 zone or a comparable zone which allows for Bright Wood's current uses." Record 466.

[14] It is not clear to us whether the annexed territory is currently subject to county comprehensive plan and zoning map designations or whether the county has applied city comprehensive plan and zoning map designations. The parties have not provided us with copies of the city's comprehensive plan and zoning ordinance. Assuming county comprehensive plan and zoning map designations currently apply in the annexed territory, those county designations will continue to apply until the city takes action to change them. As relevant, ORS 215.130(2) provides:

> "An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:
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> "(a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise[.]"

[15] Petitioners question whether the city can legally bind future city councils to leave existing zoning in place. We need not and do not decide here whether the city's promise is enforceable.

The petition for review cites two agreements in arguing that the landowners who signed those agreements were offered improper land use preferences to sign that were (1) conditioned on their agreement to consent to annexation and (2) not extended to other property owners in the annexed territory. The city's entire response to petitioners' argument is as follows:

> "There is nothing in the Record to indicate that anyone received preferences as consideration for consents. The Keith Investments Preannexation Agreement referred to in the Petition for Review * * * does include items other than the annexation issue. These other issues had been pending between the City of Madras and Keith Investments previously and were able to be resolved at the same time through this Agreement." Respondent's Brief 8.

The city's response is inadequate. First, it incorrectly suggests that there would be nothing wrong under *Hussey* if the city settled an unrelated dispute with Keith Investments on terms favorable to that property owner in exchange for its consent to annexation. What is proscribed under *Hussey* is the city's extension of valuable consideration to a property owner in exchange for the property owner's consent to annex his or her property. The form of the valuable consideration does not appear to be relevant under *Hussey*. As second problem with the city's response is that it makes no attempt to respond to petitioners' allegations that the Bright Wood Corporation agreement at Record 462-468 includes similar improper city promises of future zoning as an inducement for the consent to annex.

As we have already explained, if the city made valuable promises with respect to the future planning and zoning of the Keith Investments and Bright Wood Corporation properties that (1) were conditioned on the property owner's consent to annexation and (2) were not extended to all other property owners in the annexed territory, such promises are impermissible under *Hussey*. Petitioners' argument that the promises in those two agreements run afoul of *Hussey* appear to have merit. Although we do not foreclose the possibility that the city might be able to explain why its promises concerning future zoning of the Keith Investments and Bright Wood Corporation properties are not inconsistent with

Hussey, that explanation is not included in the challenged decision and is not included in the city's brief in this appeal. The city does not contend that those consents were unnecessary for the city to annex the disputed territory without an election. Remand is required so that the city can either (1) explain why the cited agreements include no improper inducements under *Hussey* or (2) revise those agreements so that they are consistent with *Hussey*.

The second assignment of error is sustained in part.

The city's decision is remanded.