BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PHILLIP D. MORSMAN, BRIGITTE MORSMAN and DOUG SHEPARD,
Petitioners,

vs.

CITY OF MADRAS,
Respondent.

LUBA No. 2003-170

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

REMANDED 05/28/2004

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

We remanded an earlier city decision that annexed substantially the same area that is annexed by the decision that is the subject of this appeal. *Morsman v. City of Madras*, 45 Or LUBA 16 (2003) (*Morsman I*). In *Morsman I*, we set out the following relevant 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. * * *
>
> "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). 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 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. The city council approved the disputed annexation on February 25, 2003 * * *." 45 Or LUBA at 17-18 (footnotes omitted).

In *Morsman I*, we explained that a decision to annex territory must be shown to comply with any applicable standards in the city's comprehensive plan that may govern annexation or, if there are no such standards in the city's comprehensive plan, the city must demonstrate that the annexation is consistent with the statewide planning goals. 45 Or LUBA at 19. We sustained petitioners' first assignment of error, in which they alleged that the city erred by failing to apply either its comprehensive plan or the statewide planning goals to its earlier annexation decision. Petitioners' second assignment of error in *Morsman I* advanced several different legal theories. We rejected

the parts of the second assignment of error that alleged the disputed annexation violates the "reasonableness" test set out in *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952) (hereafter *PGE v. Estacada*). Petitioners also argued under the second assignment of error in *Morsman I* 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)." *Morsman I*, 45 Or LUBA at 27. As we explained in *Morsman I*, the Ninth Circuit Court of Appeals held in *Hussey* that a city's offer of sewer connection subsidies to individual property owners, which was conditioned on their agreement to sign consents to annexation, was an "impermissible burden on [the electorate's] constitutionally protected right to vote."[1] 45 Or LUBA at 28. In *Morsman I*, we agreed with petitioners that city offers of phased-in city property taxation or promises to apply particular zoning to property in the future, which are not offered to all property owners and are conditioned on a property owner's agreement to sign a consent to annexation, would be inconsistent with the court's decision in *Hussey*. Although we did not agree with petitioners that the record showed that the city had conditioned offers of phased-in property taxation on consent to annexation, we did agree with petitioners that the record seemed to support their contention that the city had offered promises to leave existing zoning in place, conditioned on consents to annexation, as an inducement to secure those consents. We remanded under the second assignment of error so that the city could either explain why the cited consents did

[1] In a footnote, we provided the following additional description of the Ninth Circuit's decision in *Hussey*:

> "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 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." 45 Or LUBA at 28 n 11.

not include improper inducements under *Hussey* or obtain consents that are free of any improper inducements. 45 Or LUBA at 31.

Petitioners appealed our decision in *Morsman I* to the Court of Appeals. The Court of Appeals agreed with our reasoning in rejecting petitioners' contention that the disputed annexation was inconsistent with the *PGE v. Estacada* "reasonableness" test. *Morsman v. City of Madras*, 191 Or App 149, 81 P3d 711 (2003) (*Morsman II*). However, in *Dept. of Land Conservation v. City of St. Helens*, 138 Or App 222, 907 P2d 259 (1995), the Court of Appeals previously held that "compliance with land use laws is the 'largely controll[ing]' component of the reasonableness test * * *." *Morsman II*, 191 Or App at 155. Because LUBA had determined in *Morsman I* that the city erred by failing to apply applicable land use laws and demonstrate that the disputed annexation complied with those laws, the Court of Appeals concluded that "[u]ntil the city has demonstrated that the annexation meets [land use] criteria, no definitive conclusion as to reasonableness is possible." *Id*. The Court of Appeals held that "LUBA's conclusion was therefore at least premature; before deciding whether the annexation is reasonable, LUBA must remand to the city for a determination as to whether the annexation meets statutory land use criteria." *Id*. The Court of Appeals characterized the legal effect of its decision reversing our decision in *Morsman I* as follows:

> "The relief we order appears to duplicate what LUBA ordered in the first instance: both require remand to the city for determination of compliance with land use law. However, by requiring remand to the city as well as reversing LUBA's decision regarding reasonableness, we leave open the remote possibility that, in the process of adducing facts regarding land use criteria compliance, petitioners or others could discover facts that, while not indicating noncompliance, nonetheless render the annexation unreasonable under [*PGE v. Estacada*] standards. Thus, LUBA's remand pursuant to this opinion, leaving open the ultimate reasonableness determination, differs from LUBA's original remand, under which that determination is fixed, and that difference could be significant." *Id*. at 155-56.

Following the Court of Appeals' decision in *Morsman II*, LUBA issued its decision remanding the city's first annexation decision on January 27, 2004. The city issued its final decision annexing the disputed property on the same date.[2]

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners allege that the statutory triple-majority method of annexation authorized by ORS 222.170(1), which allows a city to annex property without an election within the territory to be annexed, violates Article I, section 20, of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In support of these constitutional arguments, petitioners rely almost entirely on the Court of Appeals' decision in *Mid-County Future Alt. v. Port. Metro 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).[3] In responding to the first assignment of error, the city relies almost entirely on the Court of Appeals' decision in *Sherwood School Dist. 88J v. Washington Cty. Ed.*, 167 Or App 372, 6 P3d 518 (2000) which did not involve a triple-majority annexation but discusses the Mid-County decision.[4]

---

[2] The city's local proceedings to respond to our remand in *Morsman I* took place in large part while our *Morsman I* decision was on appeal to the Court of Appeals. One of the more obvious problems with commencing local proceedings to respond to a LUBA remand while LUBA's opinion remains pending on appeal before the Court of Appeals is that the local government cannot know for sure whether LUBA's decision may be reversed, in whole or in part. If it is, the terms of the remand may change, as was the case here. Nevertheless, based on the parties' agreement, while a September 23, 2003 city decision is nominally the subject of this appeal, the parties and LUBA treat the city's subsequent January 27, 2004 decision as the city's final decision in this appeal.

[3] *Mid-County Future* involved a triple-majority annexation that was approved by the Portland Metro Area Local Government Boundary Commission pursuant to ORS 199.495(1) and 199.490(2). Because that annexation was initiated pursuant to ORS 199.490(2) by more than half the owners of more than half the land representing more than half the assessed value, under ORS 199.495(1) the annexation was not subject to ORS 199.505, under which a majority vote of the electors in the annexed area might be required. In *Mid-County Future*, the Court of Appeals held that the triple majority method of annexation authorized by ORS 199.495(1) and 199.490(2), "violates Article I, section 20, of the Oregon Constitution." 83 Or App at 555. In *Storey v. City of Stayton*, 15 Or LUBA 165 (1986), LUBA relied on *Mid-County Future* to conclude that the similar statutory authority for city approval of triple-majority initiated annexations, without an election in the annexed area under ORS 222.170, violates Article I, section 20.

[4] The *Sherwood School Dist*. case involved a statute (referred to in the opinion as "Section 22") that was adopted to end a boundary dispute between adjacent school districts. Section 22 directed the district boundary board to approve the annexation and provided that a statute that would otherwise allow a right of remonstrance

A. Waiver

An initial question, which we raise on our own motion, is whether the constitutional issues that petitioners raise in their first assignment of error are properly before LUBA and reviewable in this appeal. We see no reason why the constitutional issues that petitioners raise in their first assignment of error could not have been raised and addressed in *Morsman I.* Petitioners do not argue that the issues presented in the first assignment of error were not equally present in *Morsman I* and offer no reason why those issues were not presented in *Morsman I*.

The city does not object to our consideration of petitioners' first assignment of error and considered and rejected petitioners' constitutional arguments on the merits in its decision on remand. Record 1056-57. However, the city's decision to consider constitutional issues that were clearly beyond the scope of our remand during its proceedings on remand, and the city's failure to object to petitioners' assertions of constitutional error before LUBA for the first time in this appeal of the city's decision on remand, do not necessarily mean those issues are properly presented and reviewable in this appeal.

The key legislative policies that underlie LUBA review are that "time is of the essence in reaching final decisions in matters involving land use and that those decision [should] be made consistently with sound principles governing judicial review." ORS 197.805. Overlooking

---

and the possibility of an election within the school district did not apply to the disputed annexation. 167 Or App at 376-77. In rejecting the school district residents' challenge to Section 22 under Article I, section 20, the Court of Appeals explained:

> "Our decision in *Mid-County* is not to the contrary. At issue in that case was the constitutionality of a statute that permitted the annexation of an area without an election [if the annexation was initiated by a triple majority of property owners]. The plaintiffs, residents who did not own land in the affected area, challenged the constitutionality of the statute under Article I, section 20. We held that the statute was unconstitutional, but we did so because, on balance, the interest of the state was simply not sufficiently compelling when weighed against the right to vote in annexation matters that ordinarily is available to residents of an affected area. *Mid-County*, 82 Or App at 199-200. The sort of balancing test that this court employed in *Mid-County* has since been explicitly abandoned. *Hale [v. Port of Portland*, 308 Or 508, 524, 783 P2d 506 (1989)] ('This is a test drawn from federal equal protection doctrine (and akin to 'balancing') that for the purposes of Article I, section 20, has been suspended by our more recent decisions.'). *Mid-County* no longer can be regarded as good law. We therefore conclude that the trial court did not err in holding that Section 22 does not violate Article I, section 20." 167 Or App at 388.

petitioners' unexplained failure in *Morsman I* to raise any constitutional challenge to the triple-majority annexation procedure that the city employed to annex the disputed property and allowing constitutional challenges to the statute to be raised for the first time in this appeal of the city's decision following our remand in *Morsman I* is inconsistent with both of those legislative policies. *Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 526-27, 746 P2d 728 (1987). In *Beck v. Tillamook County*, 313 Or 148, 153 n 2, 831 P2d 678 (1992), the Oregon Supreme Court cited *Mill Creek Glen Protection Assoc.* with approval. In *Beck*, the court reviewed the relevant statutes governing LUBA review of land use decisions and judicial review of LUBA decisions and held that where LUBA remands a decision but rejects some of petitioner's assignments of error, those rejected assignments of error may not be reasserted in a subsequent LUBA appeal where petitioner does not appeal LUBA's remand decision and assign error to LUBA's rejection of those assignments of error. Similarly, petitioners may not fail to challenge the constitutionality of the triple-majority method of annexation in their first appeal, successfully argue that the annexation decision should be remanded based on other legal theories, and then in this subsequent appeal following remand expand their legal theories to include a constitutional challenge to the triple-majority annexation procedure authorized by ORS 222.170(1). Deciding legal issues in such a "piecemeal" manner is inconsistent with ORS 197.805. *Fisher v. City of Gresham*, 69 Or App 411, 414 n 1, 685 P2d 486 (1984).

The constitutional issues presented in petitioners' first assignment of error were not preserved in *Morsman I* and are therefore not reviewable in this appeal. Accordingly, the first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the administrative procedures set out in the City of Madras Comprehensive Plan for adopting legislative revisions to the comprehensive plan, a public hearing before the planning commission is required and the planning commission must establish that there are "compelling reasons" for the amendment and that "[t]here is a demonstrated need for the proposed change."

City of Madras Comprehensive Plan 94. Petitioners contend there was no hearing before the planning commission, no findings of compelling reasons and no finding of demonstrated need for the change.

The city responds that the challenged decision is an annexation decision, not a legislative plan amendment. We understand the city to argue that a legislative plan amendment may ultimately be required to change the comprehensive plan and zoning map designations for the annexed territory, but the challenged ordinance does not do so and does not otherwise amend the city's comprehensive plan. As far as we can tell, the city is correct.

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

In their third assignment of error, petitioners assert that the city improperly secured certain consents to annexation by improperly representing to property owners that their property taxes would not be phased in, in the event the city's annexation efforts were successful, unless they signed consents to annex. In their fourth assignment of error, petitioners allege that two large industrial property owners were improperly offered promises of future planning and zoning to secure their consents to annex.

A. *Hussey*

As we have already explained, in sustaining petitioners' second assignment of error in part in *Morsman I*, we relied on the Ninth Circuit Court of Appeals' decision in *Hussey* to resolve petitioners' contention that the city selectively made conditional promises to improperly coerce consents by making the consents a *quid pro quo* for receiving phased-in property taxation and favorable future zoning.

> "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. 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 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.' 45 Or LUBA at 28 (emphases in original; footnote omitted).

B. Phased-in Property Taxation and Future Zoning Inducements in *Morsman I*

After deciding that the consents that the city obtained in this matter are subject to the restrictions described in *Hussey*, we considered petitioners' arguments in *Morsman I* concerning the city's conditional offers of phased-in property taxation and concluded that the record did not support petitioners' contention that the city's offer of phased-in property taxation was a *quid pro quo* for consent to annexation.[5]

We reached a different conclusion after considering petitioners' arguments regarding consents that may have been obtained based on promises of favorable future zoning:

> "* * * 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*.

---

[5] In *Morsman I* we explained:

> "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." 45 Or LUBA at 29.

"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. [I]t 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 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*." 45 Or LUBA at 30-31

C. The City's Arguments in this Appeal

1. Hussey Does not Apply

In *Morsman I*, the city did not dispute petitioners' argument that conditional offers of phased-in property taxation and favorable future zoning as an inducement to secure consents to

annex are inconsistent with the Ninth Circuit's decision in *Hussey*. In the current appeal, the city argues that the consents in this case are the consents of "property owners" and the consents in *Hussey* were consents under the double majority method authorized by ORS 222.170(2), which requires a majority of *electors* in the area to be annexed and a majority of property owners in the area to be annexed. Based on this difference, the city contends the "close scrutiny" the court applied in *Hussey* to find the city had no right to offer conditional financial inducements to effectively coerce consents from *electors* in a double-majority annexation does not apply in this case where the consents were obtained from a triple-majority of *property owners*. Respondent's Brief 9. We understand the city to contend that its offers of phased-in property taxation and future planning and zoning should only be subject to less exacting "rational basis" scrutiny in this appeal, under the Fourteenth Amendment's Equal Protection Clause. *Id*. (citing and relying on *Sherwood School Dist*.). We understand the city to contend that there is a rational basis for the city to offer to keep current planning and zoning in place for seven years and to allow phased-in property taxation to secure the necessary consents to go forward with the disputed annexation under the triple majority annexation procedure.

The distinction that the city draws between annexations that are initiated through the double majority method (involving both electors and property owners) and annexations that are initiated through the triple-majority method (involving only property owners) might provide a basis for distinguishing *Hussey* and concluding that the heightened scrutiny that the Ninth Circuit applied to the city's efforts to secure consents in *Hussey* should not be replicated in evaluating the city's efforts to secure consents in this appeal. The city is quite correct that a critical aspect of the court's decision in *Hussey* was its conclusion that the consents in that case are the constitutional equivalent of votes and the city's actions were therefore subject to more exacting scrutiny to avoid improper interference with the electors' right to vote. 64 F3d at 1263. However, as with petitioners' first assignment of error, the city's general response to the third and fourth assignments of error is based on a new legal argument that could have been presented in *Morsman I* but was not. The city did

not argue in *Morsman I* that the strict scrutiny required under *Hussey* does not apply here. Neither did the city appeal our decision in *Morsman I*, where we concluded based on *Hussey* that such scrutiny must be applied to the disputed consents and annexation agreements. Having failed to raise that legal issue in *Morsman I*, and having failed to appeal our determination that *Hussey* applies to the disputed consents, the city may not challenge that resolved legal issue for the first time in this appeal.[6] *See Beck v. City of Tillamook*, 105 Or App 276, 281, 805 P2d 144 (1991), *aff'd in part, rev'd in part* 313 Or 148, 831 P2d 678 (1992) ("* * *LUBA order that is final and reviewable under ORS 197.850 provides the exclusive occasion for seeking judicial review of issues that the order conclusively decides.").

2. Phased-in City Property Taxes, Reduced Sewer Assessment and Lease for City Property

As we noted earlier, we rejected petitioners' argument in *Morsman I* that the evidentiary record in *Morsman I* supported their contention that the city improperly coerced consents by representing property taxes would be phased-in for consenting property owners and would be assessed in full immediately, without phasing, for non-consenting property owners. In other words, we accepted petitioners' unchallenged legal argument that conditioning phased-in property taxation in that manner would be improper under *Hussey*, but on evidentiary grounds we rejected petitioners' argument that the city had actually done so in this case.

[6] We also question the city's assumption that applying "rational basis" review rather than the "strict scrutiny" that is required under *Hussey* necessarily would lead to a different result in this case. Respondent's Brief 10. It is one thing to offer phased-in property taxation to all property owners and to offer a continuation of existing planning and zoning for seven years for all property owners, without conditioning those offers on execution of individual consents to annexation. We indicated in *Morsman I* that there would be nothing improper in such uniform and unconditional offers. But it is quite another thing to obtain consents based on false representations that if an area is ultimately annexed city property taxes will be phased in for those property owners who signed consents while those property owners who do not sign consents will immediately be subject to full property taxation. Such differentiated treatment in property taxation is unlawful, and it is hard to imagine what rational basis there might be that would permit such false representations. Similarly, it is hard to imagine what rational basis there might be that would allow the city to extend conditional promises for future zoning to some but not all property owners to secure their consents.

But for the city's decision on remand to accept additional evidence on the question of city representations regarding phased-in property taxes to secure consents to annex, we would reject petitioners' repetition of their argument regarding improper phased-in property taxation representations. However, on remand, the city allowed petitioners to submit additional evidence that supports petitioners' contention that the city in fact did make improper conditional offers of phased-in property taxation to secure some consents to annexation. As relevant here, petitioners identify three affidavits. In each of those affidavits, the affiant alleges that he or she is a property owner and that the city represented that the city would only agree to phase in property taxation if the property owner signed a consent to annexation.[7] In addition, petitioners attach another affidavit (Glen Price) and a series of documents that pertain to property owned by the Wilbur-Ellis Company. The Price affidavit alleges that the city represented that a sewer assessment would be three times higher if the property owner did not consent to annexation. The Wilbur-Ellis Company documents appear to document that a consent to annex the company's property was a condition of the city's decision to lease other city-owned property to the Wilbur-Ellis Company.

The city contends that the record shows that one of the affiants, Darlene Binder, later acknowledged that she does want her property to be annexed, however, the city does not identify where that acknowledgment appears in the record. We will not search the record for that representation. We do not understand the city to contest that the other affidavits show that the consent was a *quid pro quo* for the offered phased-in property taxation or, in the case of Glen Price and the Wilbur-Ellis Company, a reduced sewer assessment and a lease of property from the city.

Based on this new evidence, we agree with petitioners that the record now shows that the action the city took to secure consents from property owners Binder, Light, Russell, Price and Wilbur-Ellis Company were improper under *Hussey*. That impropriety was not cured by the city's

[7] Those affidavits appear at Record 84 (Darlene Binder), 86 (Charles H. Light) and 87 (R.D. Russell).

later decision, after the required number of consents had been obtained, to extend phased-in property-taxation to all property owners in the annexed area. This is because we cannot know whether those property owners would have signed the consents if they knew their right to receive phased-in property taxation would be unaffected by a decision not to sign the consent.[8] Of course, even though the consents were improperly obtained, that does not necessarily mean that those property owners would now withdraw those consents if given the opportunity or that they would not be willing to re-execute those consents or execute new consents based on the city's ultimate decision to extend phased-in city property taxation to all property owners. On remand, the city must first determine whether it retains the required triple majority without these five consents. If those consents are not needed for a triple majority, the error was harmless and the city may readopt the annexation without correcting the faulty consents. If any or all of these five consents are necessary for a triple majority, the city must have the property owners again consent to annexation, with the knowledge that that their refusal to consent to annexation will not affect their right to receive phased in city property taxation in the event of annexation, and in the case of property owners Price and Wilbur-Ellis Company, would not affect their right to receive a reduced sewer assessment or a lease of property from the city.[9]

In limiting our remand under the third assignment of error to the five consents described above we recognize that with the additional evidence that we rely on to conclude that these consents were improperly obtained and the evidence that petitioners previously cited in *Morsman I*, which they again call to our attention in this appeal, it might be reasonable to infer that other consents might well have been secured improperly with a representation that the property owner would be refused the privilege of phased-in city property taxation if the property owner did not sign a consent and the

---

[8] Similarly, the city's final decision to extend phased-in city property taxes to all property owners does nothing to eliminate the city's conditioning of Glen Price's sewer assessment or a lease of property from the city to Wilbur-Ellis Company on execution of consents to annex.

[9] If the city is unable to do so, it may also attempt to secure the required consents from other property owners who have not yet consented.

annexation were nevertheless successful. On the other hand, any property owners who were improperly influenced to sign consents in this manner presumably had an opportunity to call that error to the city's attention during its proceedings following our remand in *Morsman I*, as the five property owners noted above did. It might be reasonable to infer from the fact that they did not do so that there are not other cases where conditional promises of phased-in property taxation were improperly used to influence property owners' decisions concerning whether to sign those consents. Without a stronger evidentiary basis for doing so, we will not assume that other consents were obtained with improper representations that failure to sign the consent would lead the city to refuse to phase in their city property taxes in the event their property was annexed without their consent.

Petitioners' third assignment of error is sustained.

3. Promises of Future Planning and Zoning

We have already concluded that the city may not in this appeal challenge our decision in *Morsman I* that the city's offers of future planning and zoning in annexation agreements that led two large individual property owners to consent to annexation must be shown to comply with the limits in *Hussey*. The city's decision on remand is not entirely clear, but we do not understand the city to dispute that offers of future planning and zoning were made to these two property owners to secure their consents or to resolve other pending disputes between those property owners and the city. These valuable promises were not offered to other property owners. As we explained in *Morsman I*, such selective inducements, offered as a *quid pro quos* to secure those property owners' consents, are inconsistent with the constitutional protection that is extended to annexation consents in *Hussey*.

We understand from the city's arguments in this appeal that the agreement of these property owners to annex is necessary to secure the triple-majority that is required to annex the disputed area without an election. If so, the city must have these property owners re-execute their agreements without the improper inducements or, alternatively, consent to annexation without any *quid pro quo* that is improper under *Hussey*.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

In their fifth assignment of error, petitioners argue that the city's annexation decision violates the "reasonableness" test that is described in *PGE v. Estacada*. In agreeing with LUBA in *Morsman* II that petitioners had not shown that the disputed annexation failed the "reasonableness" test in *PGE v. Estacada*, the Court of Appeals observed:

> "[A]lthough the court has never identified the source of the reasonableness requirement, it appears to derive from--or at least bear a close resemblance to--the general reasonableness requirement that the United States Supreme Court imposes on all legislation by virtue of the Due Process Clause of the Fourteenth Amendment. That requirement, at least insofar as social and economic legislation is concerned, is notoriously lax. *See, e.g., Williamson v. Lee Optical*, 348 US 483, 487, 75 SCt 461, 99 LEd 563 (1955) (upholding 'needless, wasteful' Oklahoma law against due process challenge because such laws are within legislative competence). 191 Or App at 154.

Nevertheless, as we have already explained, the Court of Appeals held that the city's failure in its first annexation decision to apply its comprehensive plan and any other relevant land use standards meant that LUBA's conclusion in *Morsman I* that the disputed annexation does not violate the reasonableness test of *PGE v. Estacada* was premature. However, the Court of Appeals explained the limited purpose of the required remand under the *PGE v. Estacada* "reasonableness" test:

> "[W]e leave open the remote possibility that, in the process of adducing facts regarding land use criteria compliance, petitioners or others could discover facts that, while not indicating noncompliance [with land use criteria], nonetheless render the annexation unreasonable under [*PGE v. Estacada*] standards. * * *" 191 Or App 155.

In their argument under the fifth assignment of error, petitioners identify no newly adduced facts on remand that convince us that our decision in *Morsman I* that the disputed annexation passes the *PGE v. Estacada* "reasonableness" test was erroneous.

In an apparently unsuccessful effort to eliminate petitioners Morsmans' opposition to the proposed annexation, prior to adopting the annexation ordinance following our remand in *Morsman*

I, the city deleted the Morsmans' property and the adjacent portion of Warm Springs Highway. Petitioners contend that this deletion changed the annexation proposal in a way that rendered the consents invalid and made the connecting cherry stem even more objectionable.

The cherry stem is admittedly more tenuous after the deletion of the Morsmans' property, but petitioners do not contend that the annexed area was rendered noncontiguous by virtue of the deletion of the Morsmans' property, and we do not believe that change affects the "reasonableness" of the annexation under *PGE v. Estacada*. With regard to the effect of that deletion on the validity of the consents the city relied on in this matter, as the city correctly points out, the consents are merely consents to annex the property owners' property. Those consents were not dependent on annexation of the entire 759-acre area that the city originally annexed in the decision that we remanded in *Morsman I*. We do not agree that the deletion of the Morsmans' property affected the legal validity of the consents.

The fifth assignment of error is denied.

The city's decision is remanded for additional proceedings in accordance with our resolution of the third and fourth assignments of error.