BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LEUPOLD & STEVENS, INC.,
Petitioner,

and

HENRY KANE,
Intervenor-Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2005-073

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Robert D. Van Brocklin, Portland, filed a petition for review and argued on behalf of petitioner. With him on the brief were Michelle Rudd and Stoel Rives LLP.

Henry Kane, Beaverton, filed a petition for review and argued on his own behalf.

William J. Scheiderich, Assistant City Attorney, Beaverton, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 01/18/2005

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

Petitioner appeals a city ordinance that annexes its property without petitioner's consent.

MOTION TO INTERVENE

On May 21, 2005, Henry Kane (intervenor) moved to intervene on the side of petitioner. The city did not file an objection to that motion. On August 8, 2005, we issued an order that, among other things, granted Kane's motion to intervene. In its response brief, which was filed September 19, 2005, the city for the first time disputes Kane's standing:

> "* * * Respondent concedes Petitioner's statement of standing but objects to Intervenor's standing. Intervenor's references to the record do not show that he has an interest in the property annexed nor show how the City's decision adversely affects his substantial rights. He has no standing to appeal this decision in the courts of this state, *Utsey v. Coos County*, 176 Or App 524[, 32 P3d 933 (2001), *rev dismissed as moot*] 335 Or 217[, 65 P3d 1109] (2003) and he has made no showing of a cognizable interest in the outcome of this decision. The Board should deny his standing to proceed." Respondent's Brief 1.

Even if the city is correct that Kane is unable to establish that a justiciable controversy exists between Kane and the city, so that Kane would not be able to seek review of LUBA's decision in this matter by the Court of Appeals, the city does not explain why that would have any bearing on his standing to intervene in this administrative appeal at LUBA. *See Just v. City of Lebanon*, 193 Or App 132, 142, 88 P3d 312, *rev allowed*, 337 Or 247 (2004) (the justiciability principles described in *Utsey* that circumscribe the exercise of judicial power do not apply to LUBA). Whether Kane has standing to intervene as a party at LUBA is governed by ORS 197.830(7). Under that statute, "[p]ersons who appeared before the local government" have standing to intervene, provided their motion to intervene is filed within the 21-day deadline established by OAR 197.830(7)(a). The city does not dispute

intervenor Kane's claim that he appeared below and does not argue that his motion to intervene was untimely filed.

Because the city offers no reason to question intervenor Kane's standing to participate in this appeal as an intervenor under ORS 197.830(7), we reject the city's argument that Kane should be denied standing to participate in this appeal.

ADDITIONAL PENDING MOTIONS

A. Stipulated Motion

On September 16, 2005, the parties submitted a Stipulated Motion to Allow Inclusion of Evidence in the Record. The object of that motion is an oversized zoning and annexation history map that was delivered to LUBA at oral argument. That motion is allowed.

B. Petitioner's Motion to Allow a Reply Brief

On October 7, 2005, petitioner filed a motion requesting that it be allowed to file a reply brief. In that reply brief, petitioner first objects to LUBA's consideration of the legislative history of recently enacted legislation, Oregon Laws 2005, chapter 844 (SB 887). That legislative history is attached to respondent's brief. That part of the reply brief is allowed. The balance of the reply brief is not directed at new issues raised in respondent's brief. For that reason, we deny petitioner's motion with regard to those parts of the reply brief.

C. Respondent's Motion to Take Official Notice

On November 17, 2005, respondent filed a motion requesting that LUBA take official notice of excerpts of legislative history of Oregon Laws 2005, chapter 844 (SB 887), which are attached to its response brief. Although we allow the motion, we agree with petitioner that the legislative history may not be considered to establish adjudicative facts in support of the disputed annexation. While that legislative history may be considered to help resolve any ambiguities in Oregon Laws 2005, chapter 844, it is not competent legislative history regarding Oregon Laws 1987, chapter 737, which is the focus of this appeal. In short, while

we can and do take official notice of the offered 2005 legislative history, it provides no assistance in resolving the issues that must be resolved in this appeal.

D. Intervenor Kane's Motion to Submit Additional Authority

On November 16, 2005, intervenor Kane filed a Motion to Submit Additional Authority. No party objects, and that motion is allowed.

FACTS

Petitioner owns five lots that are part of a larger territory that is surrounded by the City of Beaverton. Four of those lots are industrially zoned, and one of the lots is residentially zoned. One of the industrially zoned lots (Lot 700) is improved with a building, and the value of the land and improvements on Lot 700 is over $7 million.

The city adopted a resolution on February 14, 2005 to initiate annexation of petitioner's five lots and other properties that are not at issue in this appeal. On May 2, 2005, the city adopted an ordinance annexing petitioner's property (hereafter the annexation ordinance). That annexation is effective July 1, 2006. In annexing petitioner's property without its consent, the city relied on ORS 222.750.[1] Under the annexation method authorized by ORS 222.750, commonly referred to as island annexation, the city may annex territory that is surrounded by the city, without the consent of the owners or residents of the annexed property.

In its petition for review, petitioner contends that Lot 700 falls within a limited statutory prohibition against nonconsensual annexations in certain specified circumstances. Because Lot 700 was nevertheless included in the disputed nonconsensual island annexation, petitioner contends the city's annexation ordinance must be reversed or remanded. Petitioner and intervenor also argue that ORS 222.750 authorizes the city to annex surrounded territory but does not authorize the city to annex a *portion* of a surrounded territory, as the city has

[1] We set out the statutory text later in this opinion.

done here. In addition, intervenor raises a number of constitutional challenges to the island annexation statute. Finally, at oral argument in this appeal, petitioner raised the possibility that the disputed annexation is prohibited by Oregon Laws 2005, chapter 844.

FIRST ASSIGNMENT OF ERROR

A. The Island Annexation Statute

ORS 222.750 provides:

> "When territory not within a city is surrounded by the corporate boundaries of the city, or by the corporate boundaries of the city and the ocean shore or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. However, this section does not apply when the territory not within a city is surrounded entirely by water. Unless otherwise required by its charter, annexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory."

There is no dispute that petitioner's five lots are part of a larger territory that is surrounded by the city. In its first assignment of error, petitioner argues that even if ORS 222.750 would otherwise allow the city to annex its five lots without its consent, section 3 of Oregon Laws 1987, chapter 737 (hereafter the 1987 legislation) prohibits city reliance on ORS 222.750 to do so.

B. Section 3 of the 1987 Legislation

Section 3 of the 1987 legislation, with a minor and irrelevant amendment that was adopted in 1997, is reproduced in the Oregon Revised Statutes immediately before ORS 222.111 and is set out below:

> "**SECTION 3.** (1) Notwithstanding any other provision of law, when property:
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> "(a) Is property on which no electors reside;
>
> "(b) Is zoned for industrial uses;
>
> "(c) Has sewer and water lines paid for and installed by the property owner; and

"(d) Has an assessed valuation, including improvements, of more than $7 million

"that property can only be annexed by or to a city after the city receives a petition requesting annexation from the owner of the property.

"(2) Property described in subsection (1) of this section shall not be included with other territory as part of an annexation, or annexed under ORS 222.750, unless the owner of the property consents to the annexation in the form of a petition for annexation.

"(3) This section applies to property that, on September 27, 1987, was within the jurisdiction of a local government boundary commission."[2]

As already noted, it is undisputed that (1) no electors reside on Lot 700, (2) Lot 700 is "zoned for industrial uses," and (3) Lot 700 is valued at more $7 million. Neither is there any dispute that petitioner's properties were "within the jurisdiction of a local government boundary commission" "on September 27, 1987." Therefore, if Lot 700 "[h]as sewer and water lines paid for and installed by the property owner," subsection 3(2) of the 1987 legislation prohibits including Lot 700 in an ORS 222.750 island annexation without petitioner's consent. If Lot 700 satisfies the sewer and water line requirement, at a minimum, the annexation ordinance that is before us in this appeal would have to be remanded so that any properties that are properly the subject of an island annexation can be annexed without including Tax Lot 700.[3]

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[2] Section 10 of the 1987 legislation repealed section 3 effective July 1, 1989. That repeal was delayed by subsequent legislation. In 2005, the legislature adopted Oregon Laws 2005, chapter 844. Among other things, that legislation delays repeal of section 3 of the 1987 legislation until June 30, 2035. We discuss other aspects of the 2005 legislation later in this opinion.

[3] Because one of petitioner's lots is zoned for residential use it does not satisfy the industrial zoning requirement of subsection 3(1)(b). The remaining industrially zoned lots do not satisfy the assessed valuation requirement of subsection 3(1)(d). Therefore it appears that nonconsensual annexation of those four lots would not be barred by section 3 of the 1987 legislation. However the annexation ordinance includes Lot 700, and if Lot 700 meets the sewer and water line requirement of subsection 3(1)(c), subsection 3(2) bars including Lot 700 with other lots in a nonconsensual annexation.

C. Burden of Persuasion

A potentially important threshold question is whether it is petitioner's burden to establish that it qualifies for the protection from nonconsensual annexation provided by section 3 of the 1987 legislation or whether it is the city's burden to establish that it may annex petitioner's property, without its consent, notwithstanding section 3 of the 1987 legislation. Petitioner relies on the generally accepted principle that the proponent of a land use change bears the burden of demonstrating that the proposal complies with relevant approval criteria. *See Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507 P2d 23 (1973) (burden of proof lies on the one seeking a quasi-judicial zoning map amendment). Although *Fasano* concerned a proposal for a quasi-judicial zoning map amendment, that principle has been extended to a variety of other land use contexts, including annexations. *See Petersen v. Klamath Falls*, 279 Or 249, 256, 566 P2d 1193 (1977) (proponents of quasi-judicial "annexation must bear the burden of proving that their annexation proposal is in compliance with applicable planning goals"). As the proponent of the disputed annexation ordinance, petitioner contends that the city has the burden to show that its property can be annexed without petitioner's consent, notwithstanding section 3 of the 1987 legislation.

The city on the other hand, relies on a similarly settled principle that a party who asserts a *defense* has the burden of persuasion regarding all facts necessary to establish entitlement to the defense. ORS 40.105 (OEC 305).[4] We do not understand the city to dispute that it has the burden in adopting the disputed annexation ordinance to establish that the statutory prerequisites for nonconsensual annexation under ORS 222.750 are satisfied. However, the city contends that if petitioner asserts that an annexation that is otherwise consistent with ORS 222.750 is barred by section 3 of the 1987 legislation, it is petitioner's

[4] OEC 305 provides:

> "A party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting."

burden to demonstrate that such is the case rather than the city's obligation to demonstrate that such is not the case.

As an abstract proposition, it would seem that the question of whether section 3 of the 1987 legislation applies to Lot 700 might be described either as one of the approval criteria that the city must demonstrate are satisfied or as a defense that petitioner must raise and establish that it is entitled to. However, we conclude that the language and structure of the 1987 legislation and annexation statutes supports characterizing the 1987 legislation as a defense that petitioner must establish it is entitled to, rather than one of the annexation approval criteria that are included in the city's burden.

The 1987 legislation is worded more as a defense to nonconsensual annexation than an approval criterion. The 1987 legislation is not codified as part of ORS 222.750. The 1987 legislation operates to bar or prohibit a nonconsensual annexation that would otherwise be proper under ORS 222.750. We do not think it is likely that the legislature intended that a city, in addition to establishing that the circumstances that allow island annexations under ORS 222.750 are present, must also establish that the circumstances set out in the 1987 legislation do not apply to any properties included in an island annexation. We believe it is far more likely that the legislature intended that an affected property owner come forward with evidence that its property qualifies for the exception stated in section 3 of the 1987 legislation and persuade the annexing body that it qualifies for the exception.

For the reasons explained above, we conclude that petitioner, as the property owner, had the burden of persuasion to establish that Lot 700 qualifies for the protection from nonconsensual annexation that is provided by section 3 of the 1987 legislation. If it carried that burden, the disputed annexation ordinance must be remanded.

D. The City's Interpretation and Application of the 1987 Legislation

In the annexation proceedings before the city council, petitioner presented evidence to demonstrate that petitioner and a prior owner of petitioner's property installed and paid for water and sewer lines. The city found that petitioner's evidence was inadequate to do so.[5]

> "The documentation offered to support the contention that the property has sewer and water lines paid for and installed by Leupold & Stevens does not seem to support that contention. *As an initial matter, staff and the City Attorney interpret the term 'sewer and water lines' to mean that significant amount[s] of sewer and water pipes constructed were off of the subject site and [were] not merely lateral[s]*. [The 1987 legislation requires *both* sewer and water pipes]. Additionally, every property owner builds sewer and water pipes on site to serve their property and every property owner builds their sewer and water laterals to connect to the public system. These types of pipes are defined as laterals in the industry. The legislative intent of this measure is clear that it was designed to originally serve the Tektronix site and later expanded to include a Reynolds Aluminum outside of Troutdale. The Tektronix site included a package sewerage treatment facility. This exemption relates back to the time when Tektronix provided all of [its] own sewerage treatment. The legislative history is clear that this [was] special legislation. This special legislation was not meant to serve every industrial property that installed a lateral to the public system but was only intended for these two property owners. *This supports the City's interpretation that the sewer and water lines mentioned in this [legislation] means a significant amount of sewer and water lines [were] built off of the subject property and [were] not just a lateral*. The record does not indicate any significant amount of sewer and waterlines being buil[t] off site or that they were built for any purpose other tha[n] to connect these sites to the public system. As an independent reason for finding that this exemption does not apply, while part of the sewer and water pipes on this property may have been constructed or relocated by a property owner, the vast majority of the sewer and water lines that connect this property to the water source and the sewerage treatment plant were not 'paid for or installed by the property owner' but were 'paid for or installed' by the public." Record 62 (emphases added).

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[5] The city's explanation for why that evidence does not establish that petitioner's property is protected from nonconsensual annexation by the 1987 statute is set out in a supplemental staff report and attachments that appear at Record 60-79. The parties assume that the discussion in that memorandum constitutes the city's findings on this issue, and we do not question that assumption.

The city's findings go on to discuss the evidence submitted by petitioner and conclude that the evidence does not establish that petitioner's property qualifies for the exemption provided by section 3 of the 1987 legislation. Record 62-63.

Petitioner argues that the city erroneously interpreted the requirement in subsection 3(1)(c) of the 1987 legislation that the property must have "sewer and water lines paid for and installed by the property owner" to impose a requirement that the property owner show that it paid for and installed "a significant amount of sewer and water lines * * * off of the subject property and [that those sewer and water lines were] not just laterals."

Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), we begin with the text of the 1987 legislation and contextual annexation statutes. We turn first to the obvious errors in the city's interpretation. Putting aside for the moment the meaning of "sewer and water lines," subsection 3(1)(c) of the 1987 legislation simply does not require that the property owner must have constructed a "significant amount" of sewer and water lines. It is not at all clear to us how many feet of water or sewer lines the city considers a "significant amount." But that lack of clarity aside, there is no textual support or textual ambiguity that supports imposing the "significant amount" requirement. If a property owner paid for and installed "sewer and water lines," within the meaning of the 1987 legislation, the property satisfies that criterion.

The city's application of an additional requirement that the "significant amount" of sewer and water lines must also have been constructed "off of the subject site" similarly finds no support in the text of the 1987 legislation and is not based on any ambiguity in the 1987 legislation. As far as we can tell, section 3(1)(c) of the 1987 legislation appears to be concerned only with sewer and water lines *on the property*, and it includes no reference to off-site improvements.

Even if the text of the 1987 legislation were not sufficiently clear to resolve both these interpretive points, the legislative history that the city relies on does not support its

two-part qualification of section 3(1)(c) of the 1987 legislation to require a "significant amount" of sewer and water lines and that those sewer and water lines be located "off-site." The legislative history makes it clear that the legislature's intent in the 1987 legislation was to protect Tektronix from annexation by the City of Beaverton for period of two years.[6] However, that legislative intent does not mean that the standards the legislature actually adopted in the 1987 legislation to limit the scope and applicability of that legislation to Tektronix can be interpreted to say what those standards do not say, even if it turns out that properties other than the Tektronix property qualify for protection from annexation under those standards. Neither of the qualifications the city reads into the sewer and water line criterion finds any support in the legislative history. First, Tektronix may have paid for and installed lengthy sewer and water lines, but the parties cite us to nothing in the legislative history that establishes that it did or what lengths of sewer and water pipes were installed by Tektronix. Second, the city's interpretation that the sewer and water lines must be located off-site likely would have disqualified Tektronix. As we understand the legislative history, Tektronix constructed an on-site sewer collection and treatment system.[7] Therefore, it seems likely that, at least initially, Tektronix installed no off-site sewer lines. Since it appears that Tektronix received water service from a special district, Tektronix may have constructed some of its water lines off-site, but the city does not cite to any evidence in the legislative history to that effect or that it was these *off-site* water lines that were the basis for subsection 3(1)(c) of the 1987 legislation.

To summarize our conclusion regarding the first part of the city's interpretation, *i.e.*, its requirement that any sewer and water lines that were paid for and installed by the property owner must (1) have been significant in amount and (2) located off-site, that first part of its

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[6] As we have already noted, subsequent legislation has further delayed repeal of the 1987 legislation.

[7] That on-site treatment system at some point was removed and the Tektronix property is now connected to the regional sewerage system that is operated by a special district, Clean Water Services.

interpretation of the 1987 legislation is erroneous. That interpretation impermissibly adds language to the 1987 legislation that is not there. Even if there were an ambiguity in the 1987 language that might justify resort to legislative history to elaborate on the water and sewer line requirement, the two-part elaboration that the city adopted is not consistent with the legislative history.

We now turn to the city's interpretation of the words "sewer and water lines" to exclude "laterals." Although the city's interpretation could be clearer, we understand this part of the city's interpretation to divide the community sewer collection and community water distribution systems into two related but distinct parts. The first part of those systems begins with the water and sewer lines that include the plumbing inside petitioner's buildings and include the water and sewer lines that connect the plumbing system inside petitioner's building to the public sewer and water system. The parties apparently agree that these lines were installed when petitioner's building was built. These "lateral" sewer and water pipes connect to larger, shared sewer and water pipes that are owned by, in this case, Clean Water Services (sewer) or the Tualatin Valley Water District (water).[8] It is at this point that the first part of the sewer collection and water distribution system transitions to the second part. These larger, shared pipes deliver water to individual properties and collect waste water from individual properties. These larger, shared pipes frequently connect with still larger shared pipes to increase capacity and ultimately connect the property to sewage and water treatment facilities. We understand the city to have interpreted the 1987 legislation's reference to "sewer and water lines" to refer to the sewer and water lines in this second part of the sewer collection and water distribution system and not to the lateral sewer and water lines in the

[8] We do not understand any party to this appeal to dispute that the above-described laterals are almost always installed and paid for by the property owner. Therefore, if the reference to "sewer and water lines" in the 1987 legislation encompasses these lateral lines, the sewer and water line criterion would only eliminate industrially zoned properties that are undeveloped and lack sewer or water service altogether, but nevertheless are assessed at more than $7 million.

first part. While these shared sewer and water lines are frequently located in public rights of way, rather than on private property, that is not always the case. In fact, in this case, although the city disputes petitioner's contention that it installed and paid for a shared community sewer line that crosses Lot 700, there is no dispute that such a shared community sewer line crosses Lot 700.

Petitioner contends that the meaning of "sewer and water lines" in the 1987 legislation is clear, and that text does not differentiate between laterals and other kinds of sewer and water lines. Under petitioner's interpretation of the 1987 legislation, if any water line or any sewer line (presumably including the water and sewer lines inside petitioner's building) were installed and paid for by petitioner, the sewer and water line criterion in section 3(1)(c) of the 1987 legislation is satisfied.[9] We do not agree that section 3(1)(c) of the 1987 legislation unambiguously states a legislative intent to allow the sewer and water line requirement to be satisfied by such lateral sewer and water lines. It is therefore appropriate to consider the legislative history the parties have provided. That legislative history includes a transcript of a June 25, 1987 public hearing before the House Environment & Energy Committee on the 1987 legislation. Record 109-42.

While the legislative history of the 1987 legislation is not particularly focused on the critical issue in this appeal, it is reasonably clear that the legislative intent was to impose criteria that would limit applicability of the 1987 legislation rather than to impose criteria that would eliminate almost no developed industrial property. It is also reasonably clear from that legislative history that the situation at Tektronix, from which the legislative committee was attempting to derive the limiting criteria in the 1987 legislation, was viewed by the committee as atypical. As the lobbyist for Tektronix testified:

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[9] Petitioner's arguments do not appear to go this far, and seem to be limited to water and sewer lines that connect the building to the larger shared community water and sewer lines. However, we have some difficulty seeing why only a part of the lateral system of water and sewer lines would be included in the protection offered by the 1987 legislation, if the lateral system was to be included at all.

> "We have our own private roads that have specs that meet or exceed all of those in the city. We have lights. We have a sewer system, water system, we have our own wastewater treatment facility. * * *" Record 111.

That lobbyist went on to point out that Tektronix sought to have the City of Beaverton provide urban services and only after the city declined did it seek sewer and water services elsewhere:

> "[W]hen [Tektronix] purchased the property almost 30 years ago, we did approach the City to provide services, and * * * clearly the upshot of what happened is the City declined to do that, for whatever reason, [and] they may well have been great reasons at the time. In that subsequent 30 years, the corporation [has worked] with special districts * * *." Record 113.

One of the committee members later in the proceedings offered the following observation;

> "Mr. Chair, the one thing that has bothered me, [the Tektronix lobbyist] said that thirty years ago they tried to get services from the city of Beaverton and they were denied that. They were forced to provide their own financing, build an infrastructure and now when they are a going concern, the city of Beaverton wants to annex, may be able to annex them to increase their property tax revenues and I had some confusion over the net effect of the taxes. * * * I think it's a bit unfair to Tektronix at this time to try to collect more revenues." Record 137.

From the above, we conclude that when the legislature in 1987 used the words "sewer and water lines" it was referring to the community sewer lines and water distribution lines that the users of a sewerage system and water system share. While those larger shared lines are sometimes initially constructed at private expense, apparently it was not common for such community water and sewer lines to be constructed at private expense when the Tektronix campus was constructed. Viewed in this way, the exception provided by the 1987 legislation is not as limited as it would be under the first part of the city's interpretation, which we have already rejected, but neither is it the meaningless standard it would be under petitioner's interpretation of subsection 3(1)(c).

Petitioner also cites the testimony quoted below by a representative of the City of Beaverton during the same hearing on the 1987 legislation that we discuss above. Petitioner

claims that this testimony shows that the committee was aware that the 1987 legislation reference to sewer and water lines was so broad that it made the standard meaningless:

> "* * * This morning the Committee heard comments from the representative of Tektronix describing [the 1987 legislation] as narrowly drafted. * * * The effect of the amendment in short is to exempt Tektronix from Oregon's annexation laws. Tek's representative testified before this Committee that this is supportable because of its unique situation. Anomalous was the word of choice, I believe, in that Tek is special because it provides its own water, sewer lines, its own roads and its own security. Mr. Chair, this may have been true 30 years ago when Tek moved to Beaverton, but is not true today. Virtually all corporate developers inside or outside of cities are required as a condition of development to build their own water and sewer lines, to put in their own roads, in fact Tek gets its water and sewer service from special districts outside of the city as do other corporate employers on the fringes of Beaverton, so its not a unique or anomalous situation by any stretch of the imagination. * * *" Record 125.

We believe the quoted testimony was offered to show that by 1987 it was far more common for the larger shared community sewer and water lines to be extended to and through property at the property owner's expense than it was when the Tektronix campus was first constructed. Therefore, as we interpret subsection 3(1)(c), it may not operate to exclude as many industrially zoned properties that meet the other subsection 3(1) criteria as the legislature may have imagined in 1987. That warning apparently was not understood or was ignored by the legislature. However, to the extent petitioner contends that the above testimony was offered to show that section 3(1)(c) could be satisfied by lateral water and sewer lines that in almost all cases are paid for and installed by the property owner as part of the initial development of property, we do not agree.

If the city findings that were quoted earlier were the only city findings concerning whether petitioner's property satisfies subsection 3(1)(c), remand would be required. While those findings include a correct interpretation (that owner financed and installed sewer and water laterals are not sufficient to satisfy subsection 3(1)(c)), they also include an incorrect interpretation (that significant lengths of owner financed and installed shared community sewer and water pipes must have been installed off-site). That erroneous interpretation is

stated not once but twice in the previously quoted findings, and if we limited our review to those findings, we could not be sure that the city would have reached the same conclusion regarding subsection 3(1)(c) if it had not adopted the erroneous interpretation of subsection 3(1)(c). However, the city adopted additional findings that appear directly after the previously quoted findings. Those findings do not rely on the city's erroneous interpretation of subsection 3(1)(c) and address the adequacy of petitioner's evidence to establish the presence on the property of any community water or sewer lines that were paid for and installed by the property owner. We turn now to those findings to determine whether they provide a sufficient basis for the city's decision concerning subsection 3(1)(c), notwithstanding the city's erroneous interpretation of that subsection.

The evidence in the record concerning whether petitioner paid for and installed at least some shared community water lines on Lot 700 is unclear, and the city's findings on this point are equivocal. We therefore do not consider those findings or the evidence concerning water pipes further and turn directly to the findings concerning community sewer pipes. Petitioner submitted evidence to demonstrate that it paid for and installed community sewer pipes. The city's findings that address that evidence are set out below:

> "The letter [states] that in 1995 Leupold paid $25,890 for on-site sanitary sewer improvements. The documentation is unclear as to exactly what these improvements were. Staff looked at as-builts (copies in the file)) and guessed that this payment may have been for relocating an existing public 21-inch sanitary sewer line that needed to be relocated due to Leupold & Stevens building expansion. See memorandum from Terry Waldele, City Engineer which is Exhibit C. Sanitary sewer lines in the vicinity of the Leupold & Stevens property are shown on Exhibit D." Record 223.

In the referenced Exhibit C, the city engineer explains his review of the evidence to show that Clean Water Services constructed a 21-inch community sewer pipe across petitioner's property in 1987 to replace an existing, inadequate 10-inch sewer pipe. Record 237. The engineer explains that subsequently, in 1995, petitioner relocated that 21-inch sewer pipe southward so that a building expansion could be constructed in the area of Lot

700 where the 21-inch sewer pipe was originally located. A map that appears at Record 95 was submitted by petitioner and shows the original and 1995 locations of the 21-inch sewer pipe. We understand the city to have found that while the evidence submitted by petitioner may establish that it paid to "relocate" a previously installed 21-inch sewer pipe to accommodate its building plans in 1995, the "relocated" sewer pipe does not qualify as a sewer pipe that was "installed" by the property owner, within the meaning of subsection 3(1)(c). We agree with that interpretation of section 3(1)(c), and there is substantial evidence in the record to support the city's finding that petitioner failed to demonstrate that the property owner paid for and installed sewer lines on the subject property.

Because Section 3(1)(c) requires that the property owner have "sewer *and* water lines paid for and installed by the property owner" and the city's findings are sufficient to establish that petitioner failed to establish that it paid for and installed sewer lines on its property, we must sustain the city's ultimate finding that petitioner does not qualify for the protection from nonconsensual annexation provided by the 1987 legislation. Although we agree with petitioner that the city relied in part on an erroneous interpretation of subsection 3(1)(c) in reaching its ultimate conclusion regarding the applicability of the 1987 legislation in this case, it also relied on an alternative interpretation that we sustain. The city's findings concerning sewer lines on the subject property are adequate to demonstrate that the subject property does not qualify for protection under the 1987 legislation, under a correct interpretation of subsection 3(1)(c).

The first assignment of error is denied.

THIIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error is based on Metro Code (MC) 3.09.050(d). MC 3.09.050(d) imposes a number of criteria for boundary changes, including annexations. MC 3.09.050(d)(7) requires that the disputed annexation ordinance must be consistent "with other applicable criteria for the boundary change in question under state and local law." As we

have already explained in addressing petitioner's first assignment of error, petitioner contends the annexation ordinance is inconsistent with section 3 of the 1987 legislation. As far as we can tell, petitioner's third assignment of error depends entirely on its first assignment of error. Because we deny the first assignment of error, we deny the third assignment of error as well.

SECOND ASSIGNMENT OF ERROR

The island annexation statute, ORS 222.750, was quoted earlier in this opinion. We set out the text of that statute again, below:

> "When territory not within a city is surrounded by the corporate boundaries of the city, or by the corporate boundaries of the city and the ocean shore or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. However, this section does not apply when the territory not within a city is surrounded entirely by water. Unless otherwise required by its charter, annexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory."

As relevant in this appeal, the statute allows the city to annex "territory" that is "surrounded by the corporate boundaries of the city." There is no dispute that petitioner's five lots are part of a much larger territory that is surrounded by the corporate boundaries of the city. But there is also no dispute that at least part of the exterior boundary of petitioner's five lots, whether those lots are viewed collectively or individually, borders unincorporated county territory. Petitioner describes the city's annexation of its five lots as the annexation of "a button from a pocket of unincorporated land." Petition for Review 14-15. With the clarification that the button in this case is shaped more like a triangle and located at the edge of the pocket of unincorporated land, and adjacent to the city, petitioner's description is accurate. The question presented under the second assignment of error is whether ORS 222.750 authorizes the city to annex a *portion* of a surrounded territory or whether ORS 222.750 only authorizes the city to annex surrounded territory if the *entire* surrounded territory is annexed at the same time.

We have recently addressed this precise question in two separate appeals concerning the respondent in this appeal. In *Kane v. City of Beaverton*, 49 Or LUBA 512, 527-28, *aff'd* 202 Or App 431, ___ P3d ___ (2005) we concluded that ORS 222.750 does not mandate an all-or-nothing approach:

> "* * * While ORS 222.750 requires that an 'island' exist, *i.e.*, land that is surrounded either by city boundaries or by city boundaries and a body of water, the statute does not explicitly require the city to take an all-or-nothing approach to annexation of such islands. * * * Because the statute clearly authorizes the city to annex the entire island, and nothing in the statute prohibits piece-meal annexation of the island, petitioners have not established that the city erred in proceeding under ORS 222.750."

In *Costco v. City of Beaverton*, ___ Or LUBA ___ (LUBA Nos. 2005-044, 2005-046, 2005-050 and 2005-053, September 27, 2005), *appeal pending*, we relied on our decision in *Kane* and again rejected arguments that ORS 222.750 mandates that identified islands be annexed all at once:

> "In order for the statute to apply, there must be territory not within the city that touches, or is adjacent to, the city boundaries or a body of water on all sides. However, the statute does not require, as petitioners assert, that the *property to be annexed* be adjacent to the city boundaries or a body of water on all sides. We adhere to our previous interpretation of ORS 222.750 and, specifically, the meaning of the term 'surrounded.'" Slip op at 8. (Emphasis in original).

Petitioner contends that out decision in Kane applies an "incorrect standard of review under *PGE* * * *." Petition for Review 12. According to petitioner, the city may only annex property "as specifically allowed by the legislature" and that ORS 222.750 "must, therefore, be narrowly construed." *Id.*

The only authority petitioner cites for its contention that ORS 222.750 must be narrowly construed is an Illinois Supreme Court case in which the court found that a city's serial annexations were inconsistent with the relevant Illinois statutes. *People v. Village of Lyons*, 400 Ill 82, 79 NE 2d 33 (1948). However, the statutes at issue in *Village of Lyons*

were worded differently and the court did not hold that the statutes must be narrowly construed.

The Illinois statutes at issue in *Village of Lyons* imposed two important requirements, one that is similar to the "surrounded" requirement in ORS 222.750 and one that is not. First, the territory to be annexed had to be "wholly bounded by one or more municipalities or wholly bounded by one or more municipalities and navigable waters." 400 Ill at 86. Although the wording is not identical, the "wholly bounded" requirement is similar to the ORS 222.750 requirement that territory be "surrounded" by city boundaries or a combination of city boundaries and water bodies. The second important requirement imposed by the Illinois statute was that the annexed territory had to "contain 30 acres or less." ORS 222.750 includes no such maximum size limitation or requirement for the surrounded territory to be annexed.

The area that satisfied the first requirement that the territory be "wholly bounded" by existing municipalities or navigable waters was a quarter section of land that was bordered by navigable waters on its eastern side and by three municipalities on its other sides.[10] The Village of Lyons annexed the entire 160 acres by adopting eight ordinances to annex 20 acre portions of those 160 acres separately:

> "The eight ordinances were adopted [one after another on successive dates]. Each ordinance purported to annex 20 acres of the land. The one first adopted included the west 20 acres of the quarter section of land, and each of the succeeding ordinance included a similar 20-acre strip lying immediately east of the one included in the ordinance next previously adopted, the last ordinance covering the east 20 acres of the quarter section." 400 Ill at 83-84.

In finding that the annexations were improper, the Illinois Supreme Court explained:

> "[T]he [annexed] territory in none of the ordinances was wholly bounded by one or more municipalities or wholly bounded by one or more municipalities

[10] There was some question whether the navigable body of water actually bordered the quarter section on its eastern side or lay a short distance to the east of the quarter section's eastern border. The court assumed that that the navigable body of water bordered the eastern side of the quarter section.

> and navigable waters. The territory sought to be annexed by the first ordinance and by each of the next six ordinances was in each instance bounded on the east by unincorporated territory and no navigable waters touched such eastern boundary at any point. The village had no power under the [relevant statutes] to annex territory so bounded and situated. The power delegated to the village by the statute could not be called into exercise if the territory sought to be annexed was not bounded on *all* sides as the statute requires." *Id*. at 86-87.

Although we are not bound by a 57-year old Illinois Supreme Court decision that construes a differently worded statute, the above-quoted parts of the decision in *Village of Lyons* lend some support to petitioner's contention that annexation of less than an entire island is not allowed by ORS 222.750. However, while the Illinois Supreme Court's decision focuses on the "wholly bounded" requirement, the serial annexations in that case were a thinly veiled attempt to avoid the second requirement, which limited annexations of "wholly bounded" territories to territories of "30 acres or less." It was in that context (serial annexations of 20-acres each to avoid the 30 acres or less requirement) that the court concluded that annexation of a portion of the 160-acre "wholly bounded" territory was not permitted. It is certainly possible to extend the above reasoning to the statute and facts that are presented in this appeal, but we decline to do so absent a more persuasive basis for reversing our conclusions in *Kane* and *Costco* that annexation of a portion of a surrounded territory is permissible under ORS 222.750.

The second assignment of error is denied.

KANE'S FIRST AND SECOND ASSIGNMENTS OF ERROR

In his first and second assignments of error intervenor Kane argues that the island method of annexation without an election in the area to be annexed, which is authorized by ORS 222.750, violates his rights under the Equal Protection Clause and Due Process Clause of the 14th Amendment of the U.S. Constitution. We rejected that argument in *Kane v. City of Beaverton*, 49 Or LUBA at 524-25. We reject it again here for the same reasons.

KANE'S THIRD ASSIGNMENT OF ERROR

Under his third assignment of error, Kane argues that ORS 222.750 violates Article II, sections 1 and 2 of the Oregon Constitution.[11] The county responds that petitioner "concedes that Oregon Court of Appeals precedent holds contrary to his arguments * * *." Respondent's Brief 8. We do not read the petition for review to include such a concession. Nevertheless, petitioner's argument is without merit. As the Court of Appeals explained in rejecting an Article II, section 2 challenge to a state law that amended a school district boundary without requiring an election:

> "Plaintiffs' contentions may be easily answered. None of the provisions of the Oregon Constitution creates a right to demand an election in any circumstance. Each merely describes *who* may vote in elections and *how* elections must be conducted. Indeed, as we have explained above, the Supreme Court has held that there is no constitutional right to demand an election on the revision of a school district boundary. * * *" *Sherwood*

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[11] Article II, sections 1 and 2 provide as follows:

"**Section 1. Elections free.** All elections shall be free and equal.

"**Section 2. Qualifications of electors.**

"(1) Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

"(a) Is 18 years of age or older;

"(b) Has resided in this state during the six months immediately preceding the election, except that provision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President or Vice President of the United States or elector of President and Vice President of the United States; and

"(c) Is registered not less than 20 calendar days immediately preceding any election in the manner provided by law.

"(2) Except as otherwise provided in section 6, Article VIII of this Constitution with respect to the qualifications of voters in all school district elections, provision may be made by law to require that persons who vote upon questions of levying special taxes or issuing public bonds shall be taxpayers."

> *School Dist. 88J v. v. Washington Cty. Ed.*, 167 Or App 372, 389, 6 P3d 518 (2000) (emphases in original).

Similarly, there is no general right under either the U.S. Constitution or Oregon Constitution to vote on an annexation proposal. *Mid-County Future Alternatives v. City of Portland,* 310 Or 152, 166, 795 P2d 541, *cert den* 498 US 999, 111 S Ct 558, 112 L Ed 2d 564 (1990). By reason of ORS 222.750, there is no right to an election on a proposed annexation in the circumstances described in the statute. Kane confuses his constitutional right to vote in an election, once an election is required, with his right to an election on the disputed annexation in the first place.

Kane's third assignment of error is denied.

KANE'S FOURTH ASSIGNMENT OF ERROR

In his fourth assignment of error, Kane argues the disputed annexation ordinance must be remanded because the city failed to demonstrate that the disputed annexation is consistent with the statewide planning goals or, alternatively, any city comprehensive plan annexation criteria that might apply in place of the statewide planning goal. *See Cape v. City of Beaverton*, 43 Or LUBA 301, 305 (2002), *aff'd* 187 Or App 463, 68 P3d 261 (2003) (annexation decision is either governed by comprehensive plan and land use regulation criteria or the statewide planning goals).

The city points out that one of the criteria applied by the city in this matter requires the city to demonstrate that the annexation is consistent "with specific directly applicable standards or criteria for boundary changes contained in comprehensive land use plans and public facilities plans * * *." Record 41. The city points to the finding it adopted to address that requirement:

> "* * * The City of Beaverton Comprehensive Plan Policy 5.3.1.d states: 'The City shall seek to eventually incorporate its entire Urban Services Area.' The subject property is within Beaverton's Assumed Urban Services Area and annexing it furthers this policy. There are no other specific directly applicable standards or criteria for boundary changes in Beaverton's Comprehensive

> Plan, Washington County's Comprehensive Plan, or the Public Facilities Plans of either jurisdiction and, therefore, this criterion is met."[12] Record 41.

Kane makes no attempt to explain why that finding is not sufficient to satisfy the city's obligation to demonstrate that the annexation complies with applicable comprehensive plan annexation criteria and thereby make it unnecessary for the city to consider the statewide planning goals. *Costco Wholesale v. City of Beaverton*, slip op at 18; *Patterson v. City of Independence*, 49 Or LUBA 589, 595 (2005).

Kane's fourth assignment of error is denied.

KANE'S FIFTH ASSIGNMENT OF ERROR

Kane argues under his fifth assignment of error that the annexation is not "reasonable," because the sole purpose for the annexation "is to obtain property tax and other revenue for the benefit of the city." *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). We assume without deciding that one of the motivations behind this annexation is to enhance the city property tax base. However, the city argues, and we agree, that there are other legitimate land use planning reasons for the city's decision to annex petitioner's property. As we explained in *Kane v. City of Beaverton*:

> "As the city points out, the annexation territory is within the city's urban services area, an area in which the city and county have agreed that the city will ultimately be responsible for providing and maintaining urban services. It is entirely reasonable for the city to annex territory for which it has assumed, or obligated itself to assume, the responsibility of providing and maintaining urban services, even if those urban services are at the same level and quality that the county currently provides. * * *" 49 Or LUBA at 526.

Kane's fifth assignment of error is denied.

KANE'S SIXTH ASSIGNMENT OF ERROR

Under Kane's sixth assignment of error he alleges that the standard of review for an annexation without an election is "strict scrutiny." The sixth assignment of error and the

[12] In *Cape*, the city took the opposite position, *i.e.*, that its comprehensive plan includes no annexation standards or criteria. No party assigns error to that change of position.

argument in support of the assignment of error consume less than one-half page of the 38-page petition for review. We agree with the city that petitioner's argument is not sufficiently stated or developed to allow review. To the extent petitioner is arguing that island annexations or the statute that authorizes such annexations are subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, that argument was rejected by the Court of Appeals in *Kane v. City of Beaverton*, 202 Or App at 438-39.

Kane's sixth assignment of error is denied.

KIANE'S SEVENTH ASSIGNMENT OF ERROR

Under his seventh assignment of error, Kane argues the annexed property is only part of a surrounded territory and therefore cannot be annexed under ORS 222.750.

This assignment of error is rejected for the same reason we rejected petitioner's second assignment of error.

OREGON LAWS 2005, CHAPTER 844 (SB 887)

The annexation ordinance that is before us in this appeal was adopted on May 2, 2005 and takes effect June 30, 2006. Oregon Laws, chapter 844 (SB 887) (hereafter the 2005 Legislation) was approved by the House in its final form on August 2, 2005 and was signed by the Governor on September 2, 2005. The 2005 Legislation took effect when it was signed by the Governor. Section 1 of the 2005 Legislation appears to operate prospectively and prohibits island annexations by the City of Beaverton, without the consent of residents and property owners in the annexed territory, until January 2, 2008. The 2005 Legislation also imposes a longer prohibition on nonconsensual annexations, including island annexations, in the circumstances described in sections 5, 6 and 7 of the 2005 Legislation. The prohibition described in sections 5, 6 and 7 of the 2005 Legislation applies prospectively and retroactively to annexations that were approved after March 1, 2005. As previously noted, the disputed annexation was approved after March 1, 2005. Petitioner contends that its property falls within the prohibition imposed by sections 6 and 7 of the 2005 Legislation.

Petitioner's contention that the disputed annexation is barred by sections 6 and 7 of the 2005 legislation is not included in the petition for review that was filed with LUBA on August 29, 2005. On that date, the 2005 Legislation had been approved by both the House and Senate, but it had not yet been signed by the Governor. As noted earlier, the Governor signed the 2005 Legislation and it took effect on September 2, 2005. Petitioner first asserted that the disputed annexation might be barred by the 2005 legislation on November 17, 2005, at oral argument in this matter. LUBA allowed the parties time following oral argument to submit memoranda concerning the 2005 legislation.

Whether petitioner's property falls within the prohibitions against nonconsensual annexations in section 6 or 7 of the 2005 legislation requires that we consider evidence that is not in the record. Petitioner attaches extra-record evidence to its Supplemental Memorandum to establish the facts that would bring it within the protection provided by those sections of the 2005 legislation. In its Supplemental Memorandum, the city objects to LUBA's consideration of any evidence that is not in the record that it filed in this matter.

By statute LUBA review is generally limited to the record filed by the city in this appeal. ORS 197.835(2)(a). ORS 197.835(2)(b) specifies certain circumstances where LUBA may consider extra-record evidence.[13] Petitioner has not responded to the city's objection to our consideration of the extra-record evidence that is attached to petitioner's Supplemental Memorandum. Neither has petitioner moved for an evidentiary hearing, under OAR 661-010-0045, and it appears unlikely to us that ORS 197.835(2)(b) and OAR 661-010-0045 authorize LUBA to consider the disputed extra-record evidence to determine

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[13] ORS 197.835(2)(b) provides:

> "In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record."

whether sections 6 and 7 of the 2005 Legislation apply to petitioner's property and therefore invalidate the city's previously adopted annexation ordinance. We therefore do not consider that evidence. Without considering that evidence it is not possible for us to determine whether the disputed annexation is invalidated by sections 6 and 7 of the 2005 Legislation. We therefore do not consider that question.

The city's decision is affirmed.