BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF BULL MOUNTAIN
and LISA HAMILTON-TREICK,
Petitioners,

vs.

CITY OF TIGARD,
Respondent,

and

D.R. HORTON, INC.,
Intervenor-Respondent.

LUBA No. 2006-005

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Josselson, Potter & Roberts.

Timothy V. Ramis, Portland, filed a response brief and argued on behalf of respondent. With him on the brief were Gary Firestone and Ramis Crew Corrigan, LLP.

Marc E. Jolin, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Michael C. Robinson and Perkins Coie, LLP.

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

REMANDED 05/25/2006

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 of Tigard Ordinance that annexes 25.61 acres of property.

MOTION TO INTERVENE

D.R. Horton, Inc., the applicant below, moves to intervene in this appeal. There is no opposition to the motion, and it is allowed.

MOTION TO DISMISS PETITIONERS CACH

On March 15, 2006, petitioners moved to dismiss petitioners Chris Cach and Sherry Cach as petitioners in this appeal. There is no opposition to the motion, and it is allowed.

MOTION TO ALLOW REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new issues raised by respondent and intervenor-respondent. The motion is allowed.

INTRODUCTION

Under ORS 222.120(4)(b) and 222.170 the city may annex contiguous property without holding an election in the annexed territory where the property owners and electors consent to annexation. Intervenor-respondent requested that the city annex 19.95 acres of land. In support of that request, intervenor submitted consents signed by the property owners. Subsequently, the city sought and received consents to annex signed by the owners of 5.66 acres of land. The city annexed the combined 25.61 acres under the authority granted by ORS 222.120(4)(b) and 222.170.[1] In their first and second assignments of error,

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[1] ORS 222.120(4) provides in relevant part:

> "After [a] hearing, the city legislative body may, by an ordinance containing a legal description of the territory in question:
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> "* * * * *
>
> "(b) Declare that the territory is annexed to the city where electors or landowners in the contiguous territory consented in writing to such annexation, as provided in ORS

petitioners allege the city erroneously repealed certain county planning and land use regulations that apply to the annexed territory and erred by failing to provide notice to the Department of Land Conservation and Development (DLCD) of the proposed annexation. In their third assignment of error, petitioners allege the city erred in concluding that the services and facilities required by the Tigard Comprehensive Plan (TCP) and Tigard Community Development Code (TCDC) are available to the annexed property. In their final assignment of error, petitioners contend the city improperly coerced the consents that made the annexation possible under controlling statutes. We set forth the relevant facts in our discussion below of each of petitioners' four assignments of error.

FIRST ASSIGNMENT OF ERROR

A. Introduction

Petitioners' central complaint under the first assignment of error concerns the Bull Mountain Community Plan (BMCP). The BMCP is a Washington County plan that was adopted for a 3.4 square mile area of unincorporated territory that includes the subject property. Washington County adopted the BMCP, in part, to comply with Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). The challenged decision takes the position that one of the legal effects of the city's annexation of the disputed 21.61 acres is that the BMCP no longer applies to that annexed property. Petitioners assign error to that part of the city's decision.

> 222.125 or 222.170, prior to the public hearing held under subsection (2) of this section[.]"

As relevant, ORS 222.170 provides:

> "The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if more than half of the owners of land in the territory, who also own more than half of the land in the contiguous territory and of real property therein representing more than half of the assessed value of all real property in the contiguous territory consent in writing to the annexation of their land in the territory and file a statement of their consent with the legislative body * * *."

B. Planning and Zoning History of the Property

Petitioners provide a useful summary description of the planning and zoning of the property, and an intergovernmental agreement between Washington County and the City of Tigard for planning in areas where the city and county have shared interests:

> "In 1996 Washington County adopted Ordinance 487 amending the [BMCP] and creating [Article VIII] of the Washington County Community Development Code (the 'WCCDC') in anticipation of entering into an intergovernmental agreement with the city. The County and City subsequently entered into the intergovernmental agreement in 1997 and amended it in a manner not material here in 2002 (the 'IGA'). The Ordinance 487 amendments adopted the City's comprehensive plan and development code for the unincorporated area subject to the BMCP with important exceptions * * *. Pursuant to the IGA the County delegated to the City the authority to administer those provisions effective in May, 1997.
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> "In a subsequent Urban Planning Area Agreement between the parties the relationship was described in this way:
>
> > "'The COUNTY shall be responsible for comprehensive planning and development actions within the Area of Interest. The COUNTY has entered into an intergovernmental agreement with the CITY [the IGA] for the CITY to provide land development services on behalf of the COUNTY within the Area of Interest. Through this intergovernmental agreement the CITY also provides building services and specific road services to the area on behalf of the COUNTY.'
>
> "In other words, in the BMCP area an applicant for a land use or building permit deals with the City who is an agent of the County.
>
> "Article VIII adopted by Ordinance 487 replaced some, but not all, of the WCCDC standards applicable to development and development proposals with the City's Community Development Code ('TCDC'). It amended the County's BMCP and zoning maps to apply the City's plan and zone use designations. * * *
>
> "WCCDC 801-7.4 explains that the new Article VIII does not amend or alter the applicability of the text of the BMCP and amends its maps only to apply the 'functionally equivalent zoning districts and plan designations of the City of Tigard as shown on Exhibit 1 to Article VIII. * * *
>
> "The County avoided LCDC Goal compliance issues by retaining the Goal 5 * * * provisions of the BMCP and asserting that all conversions to City provisions other than the Goal 5 * * * provisions are equivalent provisions

> that did not trigger goal review. More specifically, CDC 801-8.3B(5) states that Exhibit 2 to Article VIII shows Goal 5 resources identified by the County and that 'approval standards from the CDC, Comprehensive Plan and Community Plans continue to apply, notwithstanding that the affected area is rezoned to City zoning districts and planning designations.' * * * Thus, WCCDC provisions for such things as wetlands, wildlife habitat, trees and steep slopes continue to apply and are to be administered by the City." Petition for Review 5-6 (record and appendix citations omitted).

Petitioners' summary identifies two important *county* decisions, which predate the annexation ordinance, and are worth emphasizing. First, long before the city adopted the disputed annexation ordinance, the county adopted the *city's* comprehensive plan map and zoning map designations for the BMCP area. For the subject property, the county adopted the city's Medium Density comprehensive plan map designation and the city's R-7 single family residential zoning map designation. Pursuant to the IGA, the county authorized the city to administer these planning and zoning designations.

Second, while the county adopted the city's comprehensive plan map and zoning map designations for the BMCP area, in place of the county comprehensive plan map and zoning map designations, the county expressly retained the BMCP maps and policies and related WCCDC land use regulations for the BMCP area that includes the disputed 21.61 acres. These retained BMCP and WCCDC provisions had been adopted by the county, in part, to comply with Goal 5.[2] Pursuant to the IGA, the city was to administer these retained BMCP

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[2] Article VIII of the WCCDC explains:

> "[Article VIII] does not amend or alter the applicability of the text of either the Bull Mountain or West Tigard Community Plan. It amends only the maps of these two community plans to apply the functionally equivalent zoning districts and plan designations of the City of Tigard to these areas * * *. Provided, however, the Bull Mountain Community Plan resource overlay districts (District B and Areas of Special Concern) are preserved and carried forward in this Ordinance as shown on the attached Exhibit 3 * * *. WCCDC 801-7.4.
>
> "The County has identified certain Goal 5 resources on particular land within the affected area. These identified Goal 5 resources are shown on the attached Exhibit 2, which exhibit is attached hereto and incorporated herein by this reference. The County designation of land as having a Goal 5 resource, including any such future designations, any development and approval standards from the CDC, Comprehensive and Community Plans applicable to these Goal 5 resources shall continue to apply, notwithstanding that the affected area is hereby

and WCCDC requirements in the BMCP area, along with the city plan map and zoning map designations and related city regulations.

C. The City's Decision Concerning the BMCP

TCDC Chapter 18.320 governs annexations. TCDC 18.320.020(C) provides:

> "Assignment of comprehensive plan and zoning designations. The comprehensive plan designation and the zoning designation placed on the property shall be the City's zoning district which most closely implements the City's or County's comprehensive plan map designation. The assignment of these designations shall occur automatically and concurrently with the annexation. In the case of land which carries County designations, the City shall convert the County's comprehensive plan map and zoning designations to the City designations which are the most similar. A zone change is required if the applicant requests a comprehensive plan map and/or zoning map designation other than the existing designations. (See Chapter 18.380). A request for a zone change can be processed concurrently with an annexation application or after the annexation has been approved."

TCDC Table 320.1 makes the conversion from county comprehensive plan map designations and zoning designations to the "most similar" city designations a clear and objective exercise by listing the county's plan and zoning designations and the corresponding "most similar" city and county plan and zoning designations. Table 320.1 is included as an attachment to this opinion.[3]

In addressing TCDC 18.320.020(C), the city adopted the following findings:

> "The Council finds that this criterion is satisfied. The Property is currently subject to Article VIII of the WCCDC, which replaced the County's comprehensive plan and zoning designations with the 'functionally equivalent

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> rezoned to City zoning districts and planning designations. In this regard, the County specifically determines the County District B overlay shall continue to apply to the affected area as shown on the attached Exhibit 3. In addition, the County Areas of Special Concern shown on the attached Exhibit 3 shall also continue to apply to the affected area. Review of applications subject to, and resolution of issues regarding, County Goal 5 inventory and County Goal 5 implementing standards shall follow City procedures applicable to 'Sensitive Lands' as specified in Title 18 of the Tigard Zoning Code, adopted herein." WCCDC 801-8.3(B)(5).

[3] The County has adopted a similar table as part of the WCCDC. WCCDC 801-8.2. Apparently the county applied that similar table to apply the city's Medium Density plan map designation and R-7 zoning map designation to the subject property in 1996.

> zoning districts of the City of Tigard' for property in the Bull Mountain Community Plan area. WCCDC 801-7.4. The Property thus already carries the City of Tigard's comprehensive plan and R-7 zoning designations, and Applicant has not proposed to modify either designation. Therefore, this annexation will not involve a change in the comprehensive plan or zoning designation of the Property. The conversion required by this criterion has, therefore, already occurred and the criterion is satisfied." Record 19.

Later, the challenged decision acknowledges arguments by opponents that the disputed annexation is inconsistent with the BMCP and "amounts to a repeal of the [BMCP]." Record 27. The city adopts the following findings to reject those arguments:

> "City Council finds that these objections are not well taken. The City of Tigard has not adopted the BMCP. There are no criteria in the Comprehensive Plan, the TCDC, or the TUSA [Tigard Urban Services Agreement] that require the annexation to occur subject to the BMCP. *While the WCCDC does currently make the BMCP applicable to the Property, upon annexation this provision of the WCCDC will no longer have any relevance to the Property*. From that point forward, all development will be approved or denied based on its consistency with the City's Comprehensive Plan and the TCDC. * * *" Record 28 (emphasis added).

Still later in the challenged decision, the city acknowledges and rejects arguments that the disputed annexation violates Goal 5 and other statewide planning goals.

> "City Council finds that the Opponent's objections regarding the [Statewide Planning Goals] are insufficiently developed to permit the City to respond. In the interest of avoiding any dispute, however, to the extent that the Opponent was asserting that the annexation involved a substantive Comprehensive Plan amendment that required a demonstration of compliance with the [Statewide Planning Goals], he was mistaken. As explained in [addressing the TCDC 18.320.020(C) conversion provision] above, the annexation does not involve a substantive comprehensive plan amendment or zone change because the Property already carries the City's [Medium Density Residential] comprehensive plan map designation and the City's R-7 zone designation. For the same reasons, the City is not required to find that the other criteria for a comprehensive plan amendment contained in the City's Comprehensive Plan are satisfied. * * * The Annexation is consistent with all the applicable criteria contained in Tigard's acknowledged Comprehensive Plan and the TCDC. *See* OAR 660-014-0060; ORS 197.175(2). ([Statewide Planning Goals] directly applicable only if comprehensive plan and applicable land use regulations have not been acknowledged by the commission)." Record 29-30.

D. The Parties' Arguments

1. Preliminary Arguments

The city raises a potentially dispositive issue. The city argues that "[a]s an alternative basis for not making specific Goal findings the City cited OAR 660-014-0060."[4] While that rule addresses annexations, the city contends that where the city's comprehensive plan and land use regulations provide a consolidated process for annexing and changing county planning and zoning designations to city planning and zoning designations, the statewide planning goals need not be applied directly.

Even if OAR 660-014-0060 could be read to apply to decisions that both annex and change planning and zoning designations, in circumstances where the city's acknowledged plan and land use regulations provide standards that govern the annexation and redesignation, that is not the circumstance presented in this case. As we explain in more detail below, the TCDC provisions that the city relies on may adequately specify how to change county comprehensive plan and zoning map designations to city comprehensive plan map and zoning map designations. However, those TCDC provisions do not specify how the city should go about repealing special purpose county plan or land use regulation provisions that go beyond those comprehensive plan map and zoning map provisions and may have no sufficient city plan or land use regulation counterpart that will apply after annexation.

Intervenor-respondent also raises a potentially dispositive issue regarding whether the city was required to address Goal 5 at all. OAR 660-023-0250(3) identifies the circumstances in which a local government adopting a post acknowledgment comprehensive

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[4] OAR 660-014-0060 provides:

> "A city annexation made in compliance with a comprehensive plan acknowledged pursuant to ORS 197.251(1) or 197.625 shall be considered by the commission to have been made in accordance with the goals unless the acknowledged comprehensive plan and implementing ordinances do not control the annexation."

plan or land use regulation amendment is required to address Goal 5.[5] Intervenor-respondent contends petitioners have not demonstrated that one or more of those circumstances is triggered by the disputed annexation.

We likely would agree with intervenor-respondent if the challenged annexation ordinance simply annexed the disputed property and made no changes to the property's planning and zoning. However, as we explain below, the annexation ordinance amounts to a *de facto* repeal of the BMCP and related WCCDC provisions that were adopted to protect Goal 5 resources. It appears that the BMCP inventories and protects at least some Goal 5 resources on the annexed property. Accordingly, the circumstance specified in OAR 660-023-0250(3)(a) applies, and the city was required to address Goal 5. *See* n 5.

2. Repeal of the BMCP and Related WCCDC Provisions

ORS 215.130(2) provides that upon annexation to a city, the county planning and zoning that applied to the property prior to annexation continues to apply to the annexed property "until the city has by ordinance or other provision provided otherwise."[6] ORS

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[5] OAR 660-023-0250(3) provides:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA [post acknowledgment plan or land use regulation amendment] unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
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> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or
>
> "(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area."

[6] ORS 215.130(2) provides:

> "An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:

215.130(2) does not specify or elaborate on how a city must go about providing otherwise. The challenged annexation ordinance nominally is an annexation ordinance only and finds that the annexed property already carries a city comprehensive plan map designation and a city zoning map designation. Those findings can be read to say that it is unnecessary for the city to provide otherwise under ORS 215.130(2) in the circumstances presented in this case.

However, the findings the city adopted in support of the annexation ordinance go further and take the position that after the annexation the BMCP and related WCCDC provisions will be irrelevant. By adopting those findings in support of the appealed annexation ordinance, we understand the city to take the position that the legal effect of TCDC 18.320.020(C) is twofold. First, it causes the automatic conversion of comprehensive plan map and zoning map designations called for in Table 320.1 (where such conversion is needed).[7] Second, it makes any other county plan or land use regulations irrelevant, presumably by repealing or otherwise rendering those county plan or land use regulations inapplicable to the annexed property. By interpreting and applying TCDC 18.320.020(C) in that way, the BMCP and related WCCDC provisions that would have continued to apply under ORS 215.130(2) no longer apply, because the city has provided "otherwise."

We assume the city's theory is that any *county* plan or land use regulation provisions that are removed by the city's interpretation and application of TCDC 18.320.020(C) are simultaneously replaced by acknowledged *city* comprehensive plan and land use regulation provisions that are sufficient to ensure that the property continues to be governed by an acknowledged comprehensive plan and land use regulations. While the city's position has the virtue of abstract symmetry and simplicity, as a hard and fast rule it cannot be squared

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> "(a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise[.]"

[7] As we have already noted, that conversion is not necessary in this case because the county previously applied city planning and zoning designations to the subject property.

with either the county and city planning and zoning in this case or the sometimes detailed site-specific planning and zoning that is required under the Statewide Planning Goals in many other circumstances.

There may be circumstances where TCDC 18.320.020(C) operates in the way the city apparently believes it does, circumstances where replacing county plan and zoning designations with pre-selected and functionally equivalent city plan and zoning designations would, without more, replace all county plan or zoning regulations in the annexed area. In such circumstances TCDC 18.320.020(C) might dramatically simplify the burden of demonstrating that the new plan and zone designations comply with applicable statewide planning goals. However, we do not believe it would be consistent with ORS 215.130(2) to give TCDC 18.320.020(C) that effect when the county, or the city, or both have adopted additional special purpose plans or land use regulations that go beyond any general planning and land use regulation provisions that apply by virtue of the general comprehensive plan map and zoning map designations listed in Table 320.1. This will particularly be the case where any such special purpose plans or land use regulations are applied based on property-specific considerations.[8] In that circumstance, it may be that the city cannot assume that whatever city planning and land use regulations that will apply by virtue of the base planning and zoning map changes dictated by Table 320.1, alone, will be a sufficient replacement for any special county plan and land use regulations that will no longer apply after annexation. *See Cape v. City of Beaverton*, 187 Or App 463, 468, 68 P3d 261 (2003) (rejecting city

[8] The conversions required by Table 320.1 are conversions in base zoning and base planning designations. The requirements imposed by the statewide planning goals are sufficiently complex in some cases that specific properties may be designated in some way for additional regulation beyond the regulations that apply by virtue of the base planning and zoning map designations. Sometimes overlay planning or zoning maps, which apply designations that trigger additional regulation, are used for this purpose. For example a property that is planned and zoned for residential use may be subject to an overlay zone or planning map designation that triggers additional regulations that implement a particular statewide planning goal like Goal 5. The applicability of these overlay planning and zoning requirements frequently turns on property-specific characteristics such as slopes, unique flora or fauna, proximity to transit corridors or any number of other factors that have little or nothing to do with base plan or base zoning map designations. Table 320.1 does not appear to contemplate the possibility that the county or city may have applied these kinds of special planning or zoning requirements.

argument that an urban planning area agreement calling for city plan and zoning designations upon annexation that closely approximate prior county designations made it unnecessary to address statewide planning goals when annexing property, and noting that the city did not "point to a portion of its land use controls that makes it certain that a change in city boundaries to include the territory annexed in the city's ordinance has been 'planned for' in any comprehensive sense."). Similarly, any special city plan and land use regulation provisions that might be sufficient to ensure continued compliance with applicable law might not apply to the annexed property if the annexed property was not included on the city maps or inventories that dictate application of such special city plan and land use regulation provisions. In that circumstance, some additional action by the city beyond the action that occurs automatically under TCDC 18.320.020(C) and Table 320.1 would be necessary to amend the maps or inventory so that the special city plan or land use regulation provision would apply to the annexed property.

Returning to the city decision that is at issue in this appeal, we understand petitioners to argue that the BMCP and WCCDC include special provisions that apply to the annexed property, special provisions that were adopted by the county to satisfy Goal 5 requirements.[9] We also understand petitioners to argue that because the city takes the position that those BMCP and WCCDC provisions no longer apply after annexation, the city must establish that

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[9] Petitioners argue that certain maps that are part of the BMCP show that there are Goal 5 resources on the subject property and that the BMCP and related WCCDC provisions protect those resources. Although intervenor objects that LUBA should not take official notice of the BMCP maps, those maps are part of the county's comprehensive plan, and we see no reason why it is not appropriate for us to do so. However, we need not and do not decide here whether we agree with petitioner that those maps identify protected Goal 5 resources on the annexed property. That issue is for the city to decide in the first instance.

Intervenor also argues that petitioners have not challenged the city's finding that petitioners failed to adequately specify their Goal 5 challenge and that they have waived their right to contend that the challenged decision violates Goal 5. While we agree with intervenor and respondent that the precise scope of petitioners' Goal 5 argument is not entirely clear, we do not agree that they waived the argument. As petitioners correctly point out, the city's notice of hearing in this case does not mention that the city proposed to "end the applicability of the BMCP and WCCDC to the property." Reply Brief 4. Petitioners contend that because the notice does not reasonably describe that aspect of the city's final decision, petitioners are free to raise new issues on appeal. ORS 197.835(4)(b). *See* n 14. We agree with petitioners.

any existing planning and land use regulations that the city has adopted to comply with Goal 5 will apply to the annexed property and be adequate to ensure continued compliance with Goal 5.

We do not understand respondent or intervenor-respondent to dispute petitioners' first argument. While respondent and intervenor-respondent apparently dispute petitioners' second argument, we agree with petitioners. On remand, the city must establish that any city planning and land use regulations that will apply after the previously applicable BMCP and WCCDC provisions are removed are sufficient to ensure continued compliance with the requirements of Goal 5.[10] If the city cannot establish that such is the case, it must adopt appropriate amendments to its Goal 5 program to ensure the city planning and land use regulations that will apply after annexation will be adequate to ensure continued compliance with Goal 5. Alternatively, the city could annex the property but expressly provide in the annexation ordinance that the BMCP and related WCCDC provisions will remain in place until the city is prepared adopt any needed amendments to its Goal 5 program for the annexed property.

Before turning to the second assignment of error, we note that we have found it unnecessary to discuss *Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 4 P3d 765 (2000), the decision that petitioners cite and rely on in their arguments under the first assignment of error. That case involved two properties. The comprehensive plan map designation for one of those properties was residential and the comprehensive plan designation for the other property was commercial. The commercially designated property was redesignated residential and the residentially designated property was redesignated commercial. In that case the Court of Appeals held that it was improper for the city to attach

[10] We emphasize that the question for the city is the adequacy of the city's existing Goal 5 program to comply with Goal 5, when it is expanded geographically to include the annexed property. Those city planning and land use regulations need not be the same as the planning and land use regulations that are included in the BMCP and WCCDC, so long as they are adequate to comply with Goal 5 for the newly annexed property.

a condition to the decision granting those plan map redesignations that the redesignations would revert to the original designations in the event there was no "substantial progress" toward rezoning and development of the property under the new plan designation within two years. The Court of Appeals explained:

> "* * * We agree with petitioners that the [condition] is unlawful. As petitioners maintain, the putative 'reversion' of the sites to their former designations would be--in substance if not in name--a comprehensive plan amendment. Accordingly, it must comply with the procedural and substantive requirements of state and local law for the promulgation of plan amendments. *See, e.g.*, ORS 197.610 *et seq*." 168 Or App at 506.

The "reversion" without following the ORS 197.610 *et seq* post acknowledgment plan amendment procedures, which the Court of Appeals found objectionable in *Neighbors for Livability*, resembles the "conversion" that would occur under Table 320.1, if county plan and zoning designations applied to the property prior to annexation and the city did not follow post-acknowledgment procedures. However, as we explain above, that is not what happened here, because the annexed properties already carried city plan and zoning designations before they were annexed.

An extended discussion of how *Neighbors for Livability* might apply if the circumstances in this case were different is unnecessary and would needlessly complicate our resolution of the first assignment of error. We therefore turn to the second assignment of error without further discussion of *Neighbors for Livability*.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that the city failed to provide notice of its proposed action in this matter to DLCD, as required by ORS 197.610(1).[11] Petitioners argue that this failure on the

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[11] ORS 197.610(1) provides:

> "A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of the

city's part provides an additional basis for remand. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993).

Petitioners do not argue that the city's failure to provide notice to DLCD in this case prejudiced their substantial rights. In cases where a local government actually provides the notice required by ORS 197.610(1), but deviates from the statutory notice requirement in some way, we have held that a petitioner must demonstrate that the deviation from the statutory procedural requirements must result in some prejudice to petitioners substantial rights before it will provide a basis for reversal or remand. *Bryant v. Umatilla County*, 45 Or LUBA 653, 657 (2003). However, where there is a complete failure to provide notice to DLCD under ORS 197.610(1), which is the case here, that error is substantive, not procedural. *Oregon City Leasing*, 121 Or App 177. The city's substantive error in failing to provide notice to DLCD under ORS 197.610(1) independently requires remand.

Intervenor-respondent suggests that because the challenged decision is an annexation ordinance, it is not a comprehensive plan or land use regulation amendment that implicates the ORS 197.610(1) notice requirement. OAR 660-018-0010(11).[12] If the challenged decision only annexed property, we might agree with intervenor-respondent. However, the challenged decision does not simply annex property. As we have already explained, the findings the city adopted in support of the challenged annexation ordinance take the position

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> Department of Land Conservation and Development at least 45 days before the first evidentiary hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The notice shall include the date set for the first evidentiary hearing. The director shall notify persons who have requested notice that the proposal is pending."

[12] OAR chapter 660 division 18 governs comprehensive plan and land use regulation amendments. OAR 660-018-0010(11) provides the following definition of "land use regulation:"

> "'Land Use Regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan. 'Land use regulation' does not include small tract zoning map amendments, conditional use permits, individual subdivisions, partitioning or planned unit development approvals or denials, *annexations*, variances, building permits, and similar administrative-type decisions." (Emphasis added.)

that the ordinance renders all previously applicable county comprehensive plan and land use regulations inapplicable. Adopting those findings in support of the challenged annexation ordinance results in *de facto* comprehensive plan and land use regulation amendments.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error, petitioners challenge the city's findings concerning TCP Section 10.1.1 and TCDC 18.320.020(B)(1).[13] The findings that the city adopted appear to interpret TCDC 18.320.020(B)(1) to impose essentially the same service and facility availability standard as TCP Section 10.1.1. Petitioners contend that implied interpretation is erroneous. Petitioners also argue the city's findings regarding these provisions are not supported by substantial evidence.

A. Waiver

Intervenor-respondent contends that petitioners drew no distinction between TCP Section 10.1.1 and TCDC 18.320.020(B)(1) below and should not be allowed to argue for the first time on appeal to LUBA that they impose different requirements. While petitioners do not appear to have raised this issue below, as we have already noted, the notices that preceded the city's action in this matter made no mention that the city intended its action to repeal all previously adopted county plan and land use regulations for the annexed property. *See* n 9. The city's notice therefore did not accurately describe the city action, and petitioners may raise new issues for the first time on appeal. ORS 197.835(4)(b).[14]

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[13] We set out the text of those provisions later in this opinion.

[14] As relevant, ORS 197.835(4) provides:

"A petitioner may raise new issues to [LUBA] if:

"* * * * *

B. Petitioners' Interpretive Challenge

TCP 10.1.1 is awkwardly worded.[15] The city's interpretive findings are not always easy to follow either.[16] We therefore summarize our understanding of the key parts of the

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> "(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

It is not clear to us whether the right to raise new issues under ORS 197.835(4)(b) is limited to new issues that are related to the aspect of the decision that was not adequately described in the notice. Neither respondent nor intervenor-respondent argue that ORS 197.835(4)(b) should be interpreted in that way or that the issue petitioners raise under this assignment of error would be waived under that interpretation. We therefore assume that petitioners may raise the new issue they raise under this assignment of error.

[15] As relevant, TCP 10.1.1 provides:

> "PRIOR TO THE ANNEXATION OF LAND TO THE CITY OF TIGARD:
>
> "a. THE CITY SHALL REVIEW EACH OF THE FOLLOWING SERVICES AS TO ADEQUATE CAPACITY, OR SUCH SERVICES TO BE MADE AVAILABLE, TO SERVE THE PARCEL IF DEVELOPED TO THE MOST INTENSE USE ALLOWED*, AND WILL NOT SIGNIFICANTLY REDUCE THE LEVEL OF SERVICES AVAILABLE TO DEVELOPED AND UNDEVELOPED LAND WITHIN THE CITY OF TIGARD. THE SERVICES ARE:
>
> "1. WATER;
>
> "2. SEWER;
>
> "3. DRAINAGE;
>
> "4. STREETS;
>
> "5. POLICE; AND
>
> "6. FIRE PROTECTION.
>
> "* Most intense use allowed by the conditions of approval, the zone or the Comprehensive Plan."

[16] We set out the relevant city findings below:

> "As a preliminary matter, City Council interprets the term 'capacity' as used in this Policy to mean that the system of providing the services at issue is capable of providing the services. In some cases, this may mean that some components of the service are not presently in place but can and will be added before development. For example, local distribution lines and local streets throughout an area to be annexed do not need to be in place to determine that the water or transportation system is adequate. What is needed is that the overall system is adequate and that the addition of local lines or any necessary upgrades will occur before development

city's interpretation of TCP 10.1.1.a. The city understands TCP 10.1.1.a to require that the city consider whether six services are available to serve the most intense use that would be allowed in the annexed area under the city's land use regulations. Fairly read, the city's findings conclude that TCP 10.1.1.a requires that (1) all six services be currently available to the annexed area and currently have sufficient capacity to serve that annexed area or (2) if any of the specified services is not currently available or does not have adequate capacity, any such service can be made available with sufficient capacity to serve the annexed area before it is developed. The city adopted fairly extensive findings applying TCP 10.1.1.a and concluded that each of the six services can be provided with adequate capacity prior to the time of development. Record 23-24.

The city also adopted findings addressing TCDC 18.320.020(B)(1).[17] However, those findings summarily conclude that the standard is met and rely on the more detailed findings the city adopted to address TCP 10.1.1.a to support that conclusion. Record 19.

> and will not burden the overall system to the point that the level of service to other properties is significantly reduced.
>
> "This interpretation is consistent with the rest of the sentence, which refers to 'such other services to be made available.' This makes it clear that additional portions of the service system [are] expedited to be in place by the time of development.
>
> "To interpret this policy as requiring that all portions of every system be physically in place at the time of development would be inconsistent with the overall approach to annexation demonstrated in the comprehensive plan. That overall approach is that urbanization is to occur in an orderly fashion, with development occurring in annexed areas, not in unincorporated areas. Requiring all portions of all systems to be in place would preclude annexation, contrary to the overall intent of the Comprehensive Plan, which is to provide for orderly annexation.
>
> "This interpretation is consistent with other provisions of the Comprehensive Plan. Policy 10.1.1.b provides that annexation applicants may be required to agree to local improvement districts. This policy anticipates that some portions of the required systems will be provided after annexation but before development. Interpreting Policy 10.1.1.a to require all portions of service systems to be in place prior to annexation would make Policy 10.1.1.b meaningless." Record 23.

[17] TCDC 18.320.020 sets out the process and criteria for approval of annexation requests and provides in part:

It is possible to interpret TCDC 18.320.020(B)(1) to require that facilities or services in addition to the six listed in TCP 10.1.1.a must be considered and that all services and facilities must be presently available and presently have capacity to serve the annexed property, as petitioners argue it should be interpreted. However, we agree with respondent and intervenor-respondent that the city's implied interpretation that TCDC 18.320.020(B)(1) should be interpreted to implement TCP 10.1.1.a is entitled to deference under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524-25, 69 P3d 759 (2003). Specifically, we agree with respondent and intervenor-respondent that the city implicitly interpreted TCDC 18.320.020(B)(1) to be co-extensive with TCP 10.1.1.a so that only the six facilities or services listed in TCP 10.1.1.a must be considered and that the ultimate legal standard is whether those facilities and services are either currently available with adequate capacity or can be made available with adequate capacity prior to the time of development. *See Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498, 508-10 (1998) (rejecting similar argument that a nearly identically worded code provision should be interpreted to require current service availability and capacity to serve annexed property). As intervenor-respondent points out, TCDC 18.110.020 and 18.210.030(A) support its contention that TCDC 18.320.020(B)(1) was adopted to "implement" TCP 10.1.1.a and should be interpreted to "conform[]" with that policy.[18]

> "B. Approval Criteria. The decision to approve, approve with modification, or deny an application to annex property to the City shall be based on the following criteria:
>
> "1. All services and facilities are available to the area and have sufficient capacity to provide service for the proposed annexation area[.]"

[18] TCDC 18.110.020 is the purpose section of the TCDC and provides in part:

> "As a means of promoting the general health, safety and welfare of the public, [the TCDC] is designed to set forth the standards and procedures governing the development and use of land in Tigard *and to implement the Tigard Comprehensive Plan*." (Emphasis added.)

TCDC 18.210.030(A) provides:

C. Traffic

Petitioners challenge the city's findings that transportation infrastructure is adequate to serve the annexed property. To the extent petitioners' transportation infrastructure argument is relies on its interpretation of TCDC 18.320.020(B)(1) to require current capacity to serve development on the annexed property, we reject that interpretation.

To the extent petitioners contend the city's decision that adequate transportation infrastructure can be provided as needed to coincide with development on the annexed property in the future is not supported by substantial evidence, we do not agree. Intervenor-respondent points out that the applicant's traffic engineer provided a letter in which it contended that, based on a September 5, 2005 traffic impact analysis, all affected intersections would operate at an acceptable level of service. Record 213.[19] Respondent cites to a letter from the city engineer, which states that with improvements that will be required at the time of development, adequate street capacity will be available. Record 99. We agree with respondent and intervenor-respondent that these letters constitute substantial evidence that TCDC 18.320.020(B)(1) and TCP 10.1.1.a are satisfied, with regard to streets.

Petitioners also argue that the city's findings that adequate street capacity will be available at the time of development is based on a condition that development be limited to residential uses allowed in the R-7 zone. Petitioners contend that the city failed to impose such a condition in approving the disputed annexation. We agree with respondent and

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> "Each development and use application and other procedure initiated under this title shall be consistent with the adopted comprehensive plan of the City of Tigard as implemented by this title and with applicable state and federal laws and regulations. All provisions of this title shall be construed in *conformity with* the adopted comprehensive plan." (Emphasis added.)

[19] The transportation impact analysis that the traffic engineer relied on in writing the letter apparently is not in the record.

intervenor-respondent that the challenged decision adequately imposes that condition in approving the disputed annexation.[20]

D. Parks

Petitioners contend that the city failed to demonstrate that adequate park facilities will be available to service the annexed property. Respondent and intervenor-respondent argue that, as the city interprets TCDC 18.320.020(B)(1) and TCP 10.1.1.a, adequacy of park facilities is not a mandatory consideration in approving the disputed annexation. We agree with respondent and intervenor-respondent.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue under the fourth assignment of error that the city improperly coerced the consents that allowed the disputed annexation to go forward without an election.[21]

There are two parts to petitioners' argument under this assignment of error. First, petitioners contend that under controlling statutes and court precedent, the consents that authorize annexations without an election must be "informed consent." Second, petitioners contend that because the city misrepresented its authority to withhold planning and building services and water service and erroneously represented that the BMCP and related WCCDC provisions would no longer apply after annexation, the consents that underlie the annexation were not "informed consents," with the result that the annexation is invalid. Respondent and intervenor-respondent dispute petitioners' contention that an "informed consent" standard

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[20] The condition is discussed in the city's findings at Record 25. The city's decision includes an express reference to that condition. Record 32. That reference is sufficient to impose the condition.

[21] Petitioners contend that the city provides planning and building permit services under an IGA and Urban Planning Area Agreement with the county and provides water service under an IGA with the Tigard Water District. Petitioners contend the city has no authority to condition provision of those services on consent to annexation. Petitioners also contend that the city improperly agreed to waive application of the BMCP and related WCCDC provisions, to secure the disputed consents.

must be applied to the consents in this case. Respondent and intervenor-respondent also contend that even if an "informed consent" standard of some sort applies to the disputed consents, the city is authorized by statute to condition extension of services outside city limits on consent to annex and, therefore, the city did not misrepresent its authority to require consents. Finally, respondent and intervenor-respondent argue the consents were voluntarily given, and were not the product of the city's service extension policy. We turn first to petitioners' contention that an "informed consent" standard must be applied to the disputed consents.

A. Informed Consent

Petitioners rely on *Skourtes v. City of Tigard*, 250 Or 537, 540-41, 444 P2d 22 (1968) in arguing that annexation consents must be "informed consents." At the time of the decision in *Skourtes*, ORS 222.170(1) authorized annexations without an election where a triple two-thirds majority of landowners consented in advance. The consents in *Skourtes* were obtained by circulating petitions. The court described the process used to arrive at the territory to be annexed as follows:

> "* * * The petition[s] did not contain a description of a specific area proposed to be annexed; the promoter of the annexation simply obtained signatures and rearranged the boundaries of the proposed annexation 'as the mathematics would work out' to satisfy the triple two-thirds requirements of ORS 222.170 for the number of landowners, the area of land and the assessed valuation within the territory to be annexed." 250 Or at 540.

The Supreme Court reasoned that because ORS 222.170 was adopted as an alternative to annexation methods that required an election, and because the statutes that governed annexation elections required that the boundaries of the territory to be annexed must be described before the election, it was "reasonable to infer that the legislature intended that the alternative procedure under ORS 222.170 would also include a disclosure of the boundaries of the territory proposed to be annexed." 250 Or at 540. In *Peterson v. Portland Met. Bdry. Com.*, 21 Or App 420, 535 P2d 577 (1975), the Court of Appeals held that the Portland

Metropolitan Boundary Commission's statutory authority to alter proposed boundary changes under ORS 199.461(2) did not allow the commission to expand a proposed annexation area so there was no triple majority consent for the expanded area that was ultimately annexed without an election. The Court of Appeals quoted with approval the circuit courts' description of *Skourtes* as imposing an "informed consent requirement." 21 Or App at 426.

The "informed consent" short-hand description of the principle articulated in *Skourtes* obscures the fact that *Skourtes* is actually a case of statutory construction. As the Court of Appeals explained in *Johnson v. City of La Grande*, 167 Or App 35, 44, 1 P3d 1036 (2000)

> "* * * *Skourtes* held that, under ORS 222.170, as it then read, there is an 'implied' requirement that certain information be disclosed to persons whom a governmental body asks to consent to an annexation. It is important to emphasize that, notwithstanding its apparent moorings in policy considerations, the *Skourtes* opinion at least purports to be an exercise in statutory construction--specifically, of ORS 222.170. * * *"

The Court of Appeals went on to point out that subsequent legislative amendments to ORS 222.170 and other statutes now control what information must be provided in seeking consents to annexation. *Id*.

We agree with respondent and intervenor-respondent that there is no overarching "informed consent" requirement under ORS 222.170, as such. "Informed consent" implies an affirmative obligation on the part of the city to provide information. That term makes more sense in the factual circumstance that was presented in *Skourtes* than it does in the circumstance presented in this case. In view of the subsequent legislative action in response to *Skourtes* to elaborate on the information that must be provided when obtaining consents, it seems highly unlikely that an "informed consent" requirement, as such, remains viable today. *See Johnson*, 167 Or App 44-45 (describing legislative changes in the information that must be provided in obtaining consents to annexation).

However, while we reject petitioners' contention that a formal "informed consent" test must be applied to the consents in this case, it seems to us that the Supreme Court's willingness in *Skourtes* to imply a disclosure requirement in ORS 222.170 and the Court of Appeals' willingness to limit the authority granted the Boundary Commission under ORS 199.461(2) to alter annexation proposal boundaries was based on the courts' conclusion that its action in each case was justified to avoid evisceration of the consent requirement in ORS 222.170. The precise nature of the analysis that our appellate courts would apply in circumstances presented in this appeal, in response to petitioners' claim that the consents were improperly obtained, is unclear. We have no doubt that some actions might render what is nominally a "consent" something other than a "consent," as that term is used in ORS 222.120(4)(b) and 222.170. Intervenor-respondent concedes that "a consent to annexation that is obtained by 'multiple material misrepresentations' would be of questionable validity." Intervenor-Respondent's Brief 26. We agree. We therefore consider petitioners' challenge to the consents in this case, to determine whether they are accurately described as consents, within the meaning of ORS 222.170(1). For purposes of that consideration, we will assume that if those consents are based on material misrepresentations of fact or law by the city, they would not be valid consents under ORS 222.120(4)(b) and 222.170(1).

B. Authority to Require Consents

Petitioners contend that the authority the city exercises to provide planning and building permit services and water service to certain areas outside the city is contractual authority under an IGA and the Urban Planning Area Agreement with Washington County and an IGA with the Tigard Water District. Record 145-70; 336-48; 350-69. Because the city's authority to provide these services is granted by the IGAs, rather than a direct grant of authority by statute or local law, petitioners contend the city is acting on the county's and service district's behalf and may not condition provision of the services on consent to

annexation under ORS 222.115.[22] Petitioners argue the city misreads the holding of the Court of Appeals' decision in *Bear Creek Valley Sanitary v. City of Medford*, 130 Or App 24, 880 P2d 486 (1994):

> "[T]he City argues that consents to annexation in return for extending city services are allowed by ORS 222.115, citing *Bear Creek Valley Sanitary* * * *. The City's argument misses the point as well as the actual holding in *Bear Creek*. The services the City would withhold in return for annexation consents are not City services. They are services the City is obligated to provide as an agent of the primary service providers, Washington County and the Tigard Water District. The holding in *Bear Creek* was that a county and city could not make annexation to the city a condition of receiving service from the sanitary authority because the city did not provide the sewer services. The Court said, 'We also interpret the statute [ORS 222.115] to allow that procedure [consent to annexation in return for service] to be used by cities only when they are the providers of the services.' * * *" Petition for Review 22.

We do not assign as much significance to the source of the city's authority to provide planning, building permit and water services as petitioners do. Neither do we read the Court of Appeals' decision in *Bear Creek Valley* as narrowly as petitioners. The fact of the matter is that the city is the provider of the planning and building permit services and water services. While the city's source of authority to do so is derived from agreements with the county and water district and while the county and water district might be obligated to provide those services absent the IGA, it is the city that is currently providing those services. In the words of the Court of Appeals, the ORS 222.115 authority to require consents to annexation is "to be used by cities only when they are the providers of the services." 130 Or App at 31. Pursuant to the IGAs and Urban Planning Area Agreement, the city is the provider of those services.

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[22] ORS 222.115 provides:

> "A contract between a city and a landowner relating to extraterritorial provision of service and consent to eventual annexation of property of the landowner shall be recorded and, when recorded, shall be binding on all successors with an interest in that property."

We also note that petitioner concedes that there is nothing in either IGA that prohibits the city from requiring consents to annex when it performs its duties under the IGAs to provide services. In fact, the Urban Planning Area Agreement with the County provides:

> "[The] COUNTY recognizes annexation plans as the most appropriate method to annex properties to the CITY. Annexation to the city, however, shall not be limited to an annexation plan and the CITY and COUNTY recognize the rights of the CITY and property owners to annex properties using the other provisions provided by the Oregon Revised Statutes. * * *" Record 342.

The county simply recognized the rights the city has under ORS 222.115 and other statutory provisions to annex properties. The county presumably could have included a provision to prohibit the city from requiring consents to annex when providing services under the Urban Planning Area Agreement. The county elected to do the opposite and expressly recognized the city's authority to do so. While the parties cite no language in the city's IGA with the Tigard Water District that expressly recognizes the city's authority under ORS 222.115, neither have the parties cited any language in the IGA that would operate to limit the city's authority under ORS 222.115. Accordingly, we agree with respondent and intervenor-respondent that even if the consents in this case can be attributed to the city's apparent policy of requiring consents to annex before providing planning, building permit and water services, there is nothing improper about that policy. It follows that even if the consents were obtained in part as an exercise of the city's service extension policy, those consents were not the product of any material misrepresentation of fact or law.[23]

[23] As previously noted, respondent and intervenor-respondent also argue that the consents in this case were voluntarily given and were not based on the city's policy against providing planning and building permit services or water service outside the city without a consent to annexation. While we tend to agree with respondent and intervenor-respondent, we need not and do not reach that issue.

C. Waiver of the BMCP and WCCDC

Finally, petitioners contend that the disputed consents were obtained, in part, through a promise that the city would waive the BMCP and related WCCDC provisions following annexation. We reject the argument.

We agree with respondent and intervenor-respondent that it is inaccurate to characterize the city's actions with regard to the BMCP as a waiver. The city simply expressed the view during the local proceedings that the BMCP and related WCCDC provisions will not apply after annexation. In our resolution of the first assignment of error, we agree with petitioners that the city's *de facto* decision to repeal the BMCP and related WCCDC provisions that previously applied to the annexed property has not been justified at this point. The city must demonstrate that the city's existing acknowledged city Goal 5 program that would apply in place of the BMCP and related WCCDC provisions is sufficient to ensure continued compliance with Goal 5. If the city does that, or if the city adopts any needed amendments to its Goal 5 program that may be necessary to ensure that the planning and zoning that applies to the annexed property is sufficient to comply with Goal 5, the city will be correct that the BMCP and related WCCDC provisions can be repealed following annexation. In that circumstance, the BMCP and WCCDC provisions will no longer apply to the annexed property.

Absent the additional actions described above, the city's error in interpreting TCDC 18.320.020(C) to have the legal effect of repealing the BMCP and WCCDC provisions is an error that warrants remand of the city's decision. But the city's mistaken reading of legal effect of TCDC 18.320.020(C) is not a material misrepresentation of fact or law. The city is not required to be clairvoyant in predicting the legal effect of its annexation under TCDC 18.320.020(C). As far as we can tell, the city's understanding of the status of the BMCP and related WCCDC provisions following annexation was an honest misreading of what the city must demonstrate before the BMCP and related WCCDC provisions may be removed from

the annexed property. The city committed no material misrepresentation of fact or law when it expressed its belief that the BMCP and related WCCDC provision will no longer apply after annexation.

The city's decision is remanded to respond to our resolution of the first and second assignments of error.

Appendix

TABLE 320.1

CONVERSION TABLE FOR COUNTY AND CITY PLAN AND ZONING DESIGNATIONS

Washington County Land Use Districts/Plan Designation	**City of Tigard Zoning**	**City of Tigard Plan Designation**
R-5 Res. 5 units/acre	R-4.5 SFR 7,500 sq. ft.	Low density 1-5 units/acre
R-6 Res. 6 units/acre	R-7 SFR 5,000 sq. ft.	Med. Density 6-12 units/acre
R-9 Res. 9 units/acre	R-12 Multi-family 12 units/acre	Med. Density 6-12 units/acre
R-12 Res. 12 units/acre	R-12 Multi-family 12 units/acre	Med. Density 6-12 units/acre
R-15 Res. 15 units/acre	R-25 Multi-family 25 units/acre	Medium-High density 13-25 units/acre
R-24 Res. 24 units/acre	R-25 Multi-family 25 units/acre	Medium-High density 13-25 units/acre
Office Commercial	C-P Commercial Professional	CP Commercial Professional
NC Neighborhood Commercial	CN Neighborhood Commercial	CN Neighborhood Commercial
CBD Commercial Business District	CBD Commercial Business District	CBD Commercial Business District
GC General Commercial	CG General Commercial	CG General Commercial
IND Industrial	I-L Light Industrial	Light Industrial ■