

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 COSTCO WHOLESALE
5 CORPORATION,
6 *Petitioner,*

7
8 and

9
10 HENRY KANE,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 CITY OF BEAVERTON,
16 *Respondent.*

17
18 LUBA No. 2005-044

19
20 WELLS REAL ESTATE FUNDS, INC.,
21 *Petitioner,*

22
23 vs.

24
25 CITY OF BEAVERTON,
26 *Respondent.*

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28 LUBA No. 2005-046

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30 BOLD, LLC,
31 *Petitioner,*

32
33 and

34
35 HENRY KANE,
36 *Intervenor-Petitioner,*

37
38 vs.

39
40 CITY OF BEAVERTON,
41 *Respondent.*

42
43 LUBA No. 2005-050

1 C.E. JOHN COMPANY, INC.,
2 *Petitioner,*

3
4 and

5
6 HENRY KANE,
7 *Intervenor-Petitioner,*

8
9 vs.

10 CITY OF BEAVERTON,
11 *Respondent.*

12
13 LUBA No. 2005-053

14
15 FINAL OPINION
16 AND ORDER

17
18
19 On remand from Court of Appeals.

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21 Joseph S. Voboril, Portland, represented petitioner Costco Wholesale Corporation.

22
23 Dana L. Krawczuk, Portland, represented petitioners Wells Real Estate Funds, Inc.
24 and Bold, LLC.

25
26 Roger A. Alfred, Portland, represented petitioner C.E. John Company, Inc.

27
28 Henry Kane, Beaverton, represented himself.

29
30 Alan A. Rappleyea, City Attorney, Beaverton, represented respondent.

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32 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
33 participated in the decision.

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35 Ordinance No. 4338 REMANDED 08/30/2007

36 Ordinance No. 4339 AFFIRMED 08/30/2007

37 Ordinance No. 4340 AFFIRMED 08/30/2007

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

NATURE OF THE DECISION

In these consolidated appeals, petitioner Costco Wholesale Corporation (Costco) appealed Ordinance No. 4338 (LUBA No. 2005-044). Petitioner Wells Real Estate Funds, Inc. (Wells) also appealed that ordinance (LUBA No. 2005-046). Petitioner Bold, LLC (Bold) appealed Ordinance No. 4339 (LUBA No. 2005-050). Petitioner C.E. John Company, Inc. (C.E. John) appealed Ordinance No. 4340 (LUBA No. 2005-053). Each of those ordinances annexes several properties under ORS 222.750.¹

INTRODUCTION

LUBA consolidated the above described appeals pursuant to OAR 661-010-0055 and issued a single decision to resolve all four appeals. *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476 (2005) (*Costco I*). In our opinion in *Costco I*, LUBA affirmed all three of the ordinances referenced above. We rejected petitioners’ arguments that the use of the phrase “surrounded by” in ORS 222.750 requires that the property to be annexed must be adjacent to the city boundaries on all sides. *Id* at 484-85.

Wells appealed our decision affirming the city’s decision annexing the properties described in Ordinance No. 4338, and Bold appealed our decision affirming the city’s decision annexing the properties described in Ordinance No. 4339. The Court of Appeals affirmed this Board’s decision as to Bold, but reversed our decision as to Wells. *Costco Wholesale Corp. v. City of Beaverton*, 206 Or App 380, 136 P3d 1219 (2006) (*Costco II*).

¹ 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.”

1 After considering the text of ORS 222.750 in context, and the legislative history, the court
2 held:

3 “We thus conclude that the legislature, in enacting the current version of ORS
4 222.750, intended ‘surrounded by’ to mean that the territory to be annexed
5 must be completely enclosed by and contiguous with the corporate boundaries
6 of the annexing city * * *.” *Id.* at 398.

7 The city appealed the Court of Appeals’ decision to the Supreme Court.² The
8 Supreme Court affirmed the Court of Appeals’ decision, holding:

9 “We conclude from our examination of the text of ORS 222.750, the statutory
10 scheme in which it is embedded, and relatedly, its historical roots, that the
11 legislature has granted cities the right to annex property beyond its borders in
12 only particular, limited circumstances. Because ORS 222.750 does not
13 explicitly authorize annexation of part of an island that is not itself
14 surrounded, completely and contiguously, by city boundaries, we hold that the
15 statute does not authorize annexation of the Wells property.” *Costco*
16 *Wholesale Corp. v. City of Beaverton*, 343 Or 18, 27, __ P3d __ (2007)
17 (*Costco III*).

18 The Supreme Court affirmed the Court of Appeals’ decision and remanded the case back to
19 LUBA for further proceedings.

20 **DECISIONS ON REMAND**

21 As we note above, our decision in *Costco I* affirmed three ordinances. The Court of
22 Appeals reversed our decision in *Costco I* as to petitioner Wells and affirmed our decision in
23 *Costco I* as to petitioner Bold. The ordinance that annexed petitioner Wells’ property is
24 Ordinance No. 4338. Ordinance No. 4338 is remanded for additional proceedings in
25 accordance with the Supreme Court’s decision in *Costco III*. Ordinance No. 4339 and
26 Ordinance No. 4340 are affirmed.

² Bold did not appeal the Court of Appeals’ decision in *Costco II*.