BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK C. COGAN,
Petitioner,

and

LEUPOLD & STEVENS, INC.,
Intervenor-Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2008-040

LEUPOLD & STEVENS, INC.,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2008-041

FINAL OPINION
AND ORDER

Appeal from the City of Beaverton.

Charles F. Hinkle and Robert D. Van Brocklin, Portland, filed petitions for review on behalf of Mark C. Cogan and Leupold & Stevens, Inc. With them on the brief was Stoel Rives LLP. Charles F. Hinkle argued on behalf of petitioners.

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

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

BASSHAM, Board Member, did not participate in the decision.

REVERSED 08/12/2008

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 Leupold & Stevens, Inc. (Leupold) petitioned the city for a boundary change to have a portion of its recently annexed property withdrawn from the city's corporate limits. The city denied that petition.

REPLY BRIEFS

Petitioners Leupold and Cogan filed motions seeking permission to file reply briefs. As required by OAR 661-010-0039, the proposed reply briefs accompanied their motions. Under OAR 661-010-0039, a petitioner may file a reply brief of five or fewer pages, but that reply brief must be "confined solely to new matters raised in the respondent's brief." The city objects that the reply briefs are not limited to responding to new matters and argues that the reply briefs should be rejected.

We agree with the city that Cogan's reply brief and part I of Leupold's reply brief simply elaborate on arguments that they present in their petitions for review, and for that reason we grant the city's motion to strike Cogan's reply brief and part I of Leupold's reply brief. *Swyter v. Clackamas County*, 40 Or LUBA 166, 168 (2001); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 250 (1990).

Parts II and III of Leupold's reply brief respond to the city's argument in its response brief that (1) Leupold's arguments in this appeal regarding certain 2005 legislation concerning annexations are barred by claim preclusion and (2) the 2005 legislation is unconstitutional. Those are new issues, and we therefore allow parts II and III of Leupold's reply brief. *See Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 321 (1999) (an argument that an assignment of error should fail without regard to its merits is a new matter warranting a reply brief).

INTRODUCTION

SB 887 was introduced during the 2005 legislative session and ultimately became Oregon Laws 2005, chapter 844. In this opinion we generally refer to that 2005 law as SB 887. SB 887 was adopted to prohibit the city from annexing certain industrially zoned lands.[1] The annexation prohibitions in separate sections of SB 887 were structured as a series of factors that a property would have to possess to qualify for the annexation prohibition. However, there does not appear to be any dispute that the legislatively intended beneficiaries of the SB 887 annexation prohibitions were four well known Oregon businesses, Nike, Tektronix, Electro Scientific Industries and Columbia Sportswear.[2] The beneficiary that the legislature had in mind for SB 887 Section (6) was Columbia Sportswear. Record 250-57. The dispositive issue in this appeal is whether Leupold also has the characteristics set out in SB 887 Section (6), so that the annexation prohibition set out in that section also applies to Leupold. We conclude that it does and, therefore, the city's decision must be reversed. But there are a number of issues that must be resolved before reaching that question of statutory interpretation. Before turning to those issues, an understanding of some of the events that preceded this appeal is helpful in understanding the legal issues that we must resolve in this appeal.

A. SB 887 and *Leupold I*

SB 887 was introduced in April 2005. On May 11, 2005, Leupold testified in favor of SB 887. On May 2, 2005, nine days before Leupold's testimony regarding SB 887, the city adopted Ordinance 4350. Ordinance 4350 annexed Leupold's property without its consent. That annexation was what is referred to as an "island annexation," and under ORS

[1] We set out the relevant text and discuss SB 887 in more detail later in this opinion.

[2] We assume SB 887 was structured as it was to avoid the possibility of running afoul of one of the Oregon Constitution's prohibitions against special laws. Oregon Constitution Article IV Section 1(5), Article IV, Section 23 and Article XI Section 2.

222.750 such annexations do not require owner consent. Leupold appealed Ordinance 4350 to LUBA on May 18, 2005. In this opinion we refer to that appeal of Ordinance 4350 as *Leupold I*.

The legislature passed SB 887 on August 2, 2005. Twenty-seven days later, on August 29, 2005, Leupold filed its petition for review in *Leupold I*. In that petition for review, Leupold asserted two legal theories. First, Leupold argued that 1987 legislation that was adopted at the behest of Tektronix Corp. to prevent city annexation of Tektronix's property also applied to Leupold.[3] Second, Leupold argued the ORS 222.750 island annexation statute authorized nonconsensual annexation of entire islands but did not authorize nonconsensual annexation of parts of islands. Leupold argued that Ordinance 4350 improperly annexed part of an island. Four days after Leupold filed its petition for review in *Leupold I*, SB 887 was signed by the Governor and SB 887 took effect on September 2, 2005. On November 17, 2005, oral argument was held in *Leupold I*. At that oral argument, Leupold argued for the first time, that in addition to the 1987 legislative prohibition that was extended by SB 887 Section (8) (the Tektronix prohibition), the challenged annexation is also prohibited by SB 887 Sections (6) and (9)(2) (the Columbia Sportswear prohibition).[4] LUBA allowed Leupold to submit a supplemental memorandum concerning SB 887, and Leupold did so on November 29, 2005. Leupold attached evidence to its November 29, 2005 memorandum to establish that it has the characteristics that are required to qualify for the SB 887 Section (6) annexation prohibition. On December 15, 2005, the city submitted its memorandum concerning SB 887, which took the position that Leupold's property did not

[3] That 1987 legislation was scheduled to sunset on July 1, 2009. Section 8 of SB 887 extended the sunset date of that 1987 legislation to June 30, 2035.

[4] SB 887 Section (6) set out the annexation prohibition that was intended to benefit Columbia Sportswear, SB 887 Section (9)(2) makes the annexation prohibitions that are specified in SB 887 retroactive to March 1, 2005, which predates the May 2, 2005 enactment date of Ordinance 4350 and makes SB 887 Section (6) potentially applicable to Ordinance 4350.

come within the SB 887 Section (6) annexation prohibition. The city also objected to LUBA's consideration of the evidence attached to Leupold's November 29, 2005 memorandum, because that evidence was not included in the record that the city submitted to LUBA and Leupold had not filed a motion requesting LUBA to consider extra-record evidence under ORS 197.835(2)(b) and OAR 661-010-0045.[5] In our decision in *Leupold I*, we rejected both of the legal theories that Leupold asserted in its petition for review and affirmed the city's decision. With regard to Leupold's arguments concerning SB 887, we concluded that we could not decide whether SB 887 applies to prohibit annexation of Leupold's property without considering evidence that was not in the city's record and concluded "[w]e therefore do not consider that question." *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65, 92 (2006) (*Leupold I*).

Leupold appealed our decision to the Court of Appeals. *Leupold & Stevens, Inc. v. City of Beaverton*, 206 Or App 368, 138 P3d 23, *rev den* 341 Or 579, 146 P3d 884 (2006). The Court of Appeals affirmed LUBA's decision in *Leupold I* on June 14, 2006. The Court of Appeals similarly concluded that the applicability of SB 887 Section (6) depended "on the existence of certain predicate facts" that could not be established based on the record in that appeal and declined to consider Leupold's contention that the city's May 2, 2005 annexation of its property was prohibited by SB 887. 206 Or App at 375.

B. Other Proceedings

1. Petition for Writ of Mandamus

LUBA's decision in *Leupold I* was issued on January 16, 2006. On February 24, 2006, while Leupold's appeal of *Leupold I* was pending before the Court of Appeals, Leupold filed a petition for a writ of mandamus in Washington County Circuit Court seeking a writ ordering the county to rescind Ordinance 4350. On July 27, 2006, the circuit court

[5] We discuss LUBA's limited authority to consider extra-record evidence later in this opinion.

dismissed the mandamus petition, concluding that the dispute between Leupold and the city is a land use matter and that the circuit court lacked jurisdiction over land use matters. Leupold appealed that decision to the Court of Appeals. The Court of Appeals held oral argument in that appeal three months ago, on May 6, 2008, and as of the date of this opinion has not issued its decision in that appeal.

2. Appeal of the City's July 18, 2006 Letter

In a June 9, 2006 letter to the city, Leupold asked the city to hold a hearing to consider the applicability of SB 887 to its property. In a July 18, 2006 letter, the city declined to do so, citing pending litigation between the city and Leupold concerning the disputed annexation. The city indicated in its July 18, 2006 letter that it might take up the question when the pending litigation was complete. Leupold appealed that letter to LUBA. In *Leupold & Stevens, Inc. v. City of Beaverton*, 53 Or LUBA 203 (2007), we dismissed that appeal, concluding that the city's July 18, 2006 letter was not a final decision. Our decision dismissing that appeal was not appealed to the Court of Appeals.

3. Declaratory Judgment and Injunction

On June 20, 2007, Leupold filed a complaint in Washington County Circuit Court seeking a declaratory judgment and injunction against city enforcement of Ordinance 4350. Sometime in early 2008, the circuit court dismissed that action. Leupold appealed that decision to the Court of Appeals. That appeal is pending before the Court of Appeals. We are uncertain about the status of that appeal.

C. The Current Proceeding

The city decision that is now before us in this appeal was adopted in response to Leupold's June 27, 2007 petition for a minor boundary change, pursuant to Metro Code 3.09.040.[6] The city issued Order 2058 denying that petition on February 15, 2008. On

[6] We discuss this petition further in our discussion of jurisdiction below.

February 25, 2008, Leupold filed a petition for writ of review in Washington County Circuit court to challenge Order 2058. On March 10, 2008, the circuit court transferred that proceeding to LUBA pursuant to ORS 34.102(3). On March 7, 2008, petitioner Cogan filed his notice of intent to appeal Order 2058 with LUBA. On March 13, 2008, LUBA issued an order consolidating Cogan's appeal and the transferred appeal for LUBA review.

With the above background, we turn first to the first question. Does LUBA have jurisdiction to decide this appeal?

JURISDICTION

LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1).[7] As defined by ORS 197.015(10)(a)(A), "[a] final decision * * * made by a local government * * * that concerns the * * * application of * * * [a] comprehensive plan provision" is a land use decision.[8] Petitioner Leupold, and to a lesser extent petition Cogan, contend that LUBA does not have jurisdiction in this matter. The city argues that LUBA does have jurisdiction.

While there is no dispute that Order 2058 is a *final* city decision, petitioners contend that ORS 197.015(10)(a)(A) land use standards were not applied in issuing Order 2058.

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[7] ORS 197.825(1) provides in part "[t]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

[8] ORS 197.015(10) provides:

> "'Land use decision':
>
> "(a) Includes:
>
> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

According to petitioners, the central legal dispute between the city and petitioners concerns the correct interpretation and application of SB 887 Section (6), which is not a comprehensive plan or any of the other land use standards set out in ORS 197.015(10)(a)(A). *See* n 8. According to petitioners, the circuit court is the appropriate body to resolve the parties' SB 887 dispute.

It may be, as petitioners argue, that the circuit court erroneously determined that it did not have jurisdiction in the declaratory judgment or mandamus proceedings to determine whether SB 887 applies to Leupold's property. That issue will be resolved by the Court of Appeals or the Supreme Court. But whatever the answer to that question, for the reasons set out below, we agree with the city that we have jurisdiction to review Order 2058. Because Order 2058 interprets and applies section 6 of SB 887, we have jurisdiction to consider in this appeal whether the city erroneously interpreted SB 887 not to apply to Leupold's property.

Order 2058 is the city's decision in response to Leupold's petition to withdraw its property from the city. That petition was submitted pursuant to ORS 222.460 and Metro Code 3.09. Order 2058 adopts a number of documents as findings. Record 8. Among those documents is a January 28, 2008 staff report. Record 685-99. That staff report explains that under Metro Code (MC) 3.09.050(d) the city is required to adopt findings addressing a number of criteria. One of those criteria is MC 3.09.050(d)(3), which requires that the city find the withdrawal is "[consisten[t] with specific directly applicable standards or criteria for boundary changes contained in comprehensive land use plans and public facilities plans[.]"[9] Record 696. The staff report includes the following finding:

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[9] At the time Leupold filed its petition with the city, MC 3.09.050(d) provided in part:

> "An approving entity's final decision on a boundary change shall include findings and conclusions addressing the following criteria:
>
> "* * * * *

> "* * * The only policy of the City of Beaverton's Comprehensive Plan relating to boundary changes is Policy 5.3.1.d, which states 'the City shall seek to eventually incorporate its entire Urban Services Area.' The subject territory is within Beaverton's Assumed Urban Services Area * * *." *Id.*

By virtue of the above finding alone, Order 2058 concerns the application of a comprehensive plan and for that reason is a land use decision. ORS 197.015(10)(a)(A)(ii).

The laws that render a decision a land use decision, if that decision adopts, amends, or applies such laws, are set out at ORS 197.015(10)(a)(A). *See* n 8. It is true that the legal dispute that is presented in the parties' briefs in this appeal concerns SB 877, the ORS 222.460(1) "public interest" criterion for withdrawal of territory, and the Oregon Constitution. None of those laws are set out in ORS 197.015(10)(a)(A). However, the limited focus of the parties' arguments does not change the character of Order 2058. As explained, that decision applies the city's comprehensive plan. Once Order 2058 did that, Order 2058 qualifies as a land use decision. That the parties' dispute concerns other non-land use laws that Order 2058 also applies does not make Order 2058 into something other than a land use decision. LUBA's scope of review is set out in part at ORS 197.835(9). Under that statute, LUBA is authorized to reverse or remand a decision if that decision "[i]mproperly construed the applicable law[.]"[10] ORS 197.835(9)(a)(D). Under ORS

> "(3) Consistency with specific directly applicable standards or criteria for boundary changes contained in comprehensive land use plans and public facility plans[.]"

[10] ORS 197.835(9) provides in part:

> "[LUBA] shall reverse or remand the land use decision under review if [LUBA] finds:
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> "(a) The local government or special district:
>
> "(A) Exceeded its jurisdiction;
>
> "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
>
> "(C) Made a decision not supported by substantial evidence in the whole record;
>
> "(D) Improperly construed the applicable law; or

197.835(9)(a)(D), LUBA may determine whether the city "[i]mproperly construed" SB 877, even though SB 877 is not a land use law. *Citizens for Better Transit v. Metro Service Dist.*, 15 Or LUBA 482, 484 (1987).

FIRST AND SECOND ASSIGNMENTS OF ERROR (LEUPOLD)

A. Introduction

In Leupold's first two assignments of error, Leupold argues the city erroneously concluded that Leupold does not qualify for the annexation prohibition provided by SB 887 Section (6) and therefore erroneously refused to grant its petition for withdrawal from the city. The city responds, on the merits, that Leupold does not come within the annexation prohibition provided by SB 887 Section (6). The city also offers two defenses that would require that we deny the first two assignments of error, even if we agreed with Leupold on the merits. The city first contends that Leupold's SB 887 arguments before LUBA and the appellate courts in *Leupold I* were rejected and therefore are barred by claim preclusion in this appeal. The city also contends that the Oregon Constitution bars application of SB 887 to Ordinance 4350. We first consider the city's claim preclusion argument. Because we conclude Leupold's SB 887 claim is not precluded, we next consider that claim on the merits. Finally, we consider the city's argument that application of SB 887 in this case is barred by the Oregon Constitution.

B. Leupold is not Barred by Claim Preclusion

Section 6 of SB 887 provides:

> "An area of land within the urban growth boundary of the metropolitan service district established in the Portland metropolitan area may not be annexed under ORS 222.750 if:
>
> "(1) The area of land is larger than seven acres and is zoned for industrial use;

"(E) Made an unconstitutional decision[.]"

"(2) The land is owned by an Oregon-based business entity that has been in continuous operation, either directly or through a predecessor, for at least 60 years; and

"(3) The business entity employs more than 500 individuals on the land."

Section 9(2) of SB 887 provides:

"Sections 5, 6 and 7 of this 2005 Act apply to an annexation of territory approved on or after March 1, 2005, and to an annexation of territory proposed on or after the effective date of this 2005 Act."

The prohibition in Section (6) is against annexation of an "area of land" where several factual predicates are shown. The property that is the subject of the annexation:

1. Must be located within the Portland urban growth boundary (UGB).

2. Must be larger than seven acres.

3. Must be zoned for industrial use.

4. Must be owned by a 60 year-old Oregon based business.

5. Must be a site where the 60 year-old Oregon based business employs more than 500 individuals.

Although the first two requirements of SB 887 are relatively straightforward, the fourth and fifth are less so. As the balance of this opinion demonstrates, while the third requirement would seem to be fairly straightforward, it is not.

The city argues that because Leupold argued that it qualified for the SB 887 Section (6) annexation prohibition in *Leupold I*, but failed to prevail in that argument, its attempt to do so in this is appeal is barred by claim preclusions. Under the doctrine of claim preclusion, claims that are based on the same factual transaction may not be separated and pursued separately in serial prosecutions:

"[A] plaintiff who has prosecuted one action against a defendant through to a final judgment * * * is barred * * * from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action. * * *" *Rennie v. Freeway Transport*, 294 Or 319, 323, 656 P2d 919 (1982).

If Leupold's claim under the 1987 legislation and its claim under SB 887 Section (6) are sufficiently "related in time" so that Leupold could have combined its challenge to Ordinance 4350 under SB 887 Section (6) with its challenge to Ordinance 4350 in *Leupold I* under the 1987 legislation, that claim would be barred in this appeal. *McAmis Industries v. M. Cutter Co*., 161 Or App 631, 637-38, 984 P2d 909 (1999).

At about the time that Leupold was making its evidentiary presentation to challenge the proposed annexation that was later approved by Ordinance 4350 on May 2, 2005, SB 887 was introduced. We understand the city to argue that Leupold should have recognized that it might qualify for the annexation prohibition that was proposed in SB 887 Section (6) and made the necessary evidentiary showing to qualify for that prohibition in its opposition to Ordinance 4350, on the chance that SB 887 might ultimately be adopted by the legislature three months later on August 2, 2005 and be signed into law by the Governor four months later on September 2, 2005. We do not agree.

Only a slightly closer question is presented by Leupold's apparent failure to recognize that it might fall within the prohibition in SB 886 Section (6) and include arguments to that effect in its petition for review that was filed on August 29, 2005, 27 days after SB 887 was approved by the legislature but four days before that law took effect. Even if Leupold had recognized that possibility and argued in its petition for review in *Leupold I* that it qualified for the prohibition set out in SB 887 Section (6), Leupold faced an insurmountable problem in prevailing on that legal theory. As LUBA and the Court of Appeals ultimately concluded, application of SB 887 Section (6) requires factual determinations that the city had not considered in adopting Ordinance 4350 and factual determinations that could not be made by LUBA in *Leupold I* based on the record in that appeal.

As we explained in the introduction, when Leupold called LUBA's attention to the possibility that SB 887 Section (6) might apply to Leupold and prohibit the annexation that

was challenged in *Leupold I*, Leupold was given an opportunity to submit a memorandum to raise that issue. But the city objected to Leupold's attempt to attach the evidence needed to make the required findings of fact to establish whether SB 887 Section (6) applies to Leupold. Without that evidence, we concluded that it was not possible to determine whether SB 887 Section (6) applies. *Leupold I*, 51 Or LUBA at 92. The Court of Appeals similarly concluded in its decision in *Leupold I* that the evidence required to review Leupold's SB 887 Section (6) claim on the merits was not in the record and the evidentiary record could not be expanded on review, leaving the Court of Appeals unable to assess the merits of Leupold's SB 887 Section (6) claim.

> "* * * Judicial review of a decision of LUBA is not the proper place to sort out disputed issues of evidentiary fact. That is what hearings before the city—and, under certain circumstances, *see* ORS 197.835(2)(b); OAR 661-010-0045, before LUBA—are for.
>
> "Because the applicability of section 6 of the 2005 statute depends on the existence of certain predicate facts that cannot be demonstrated on the record before us, we decline to consider further petitioner's contention that this case is disposed of by that statute." *Leupold & Stevens, Inc. v. City of Beaverton*, 206 Or App 368, 375, 138 P3d 23 (2006).

We noted in our decision in *Leupold I* that Leupold neither responded to the city's opposition to LUBA's consideration of Leupold's proffered extra-record evidence, nor moved for an evidentiary hearing under ORS 197.835(2)(b) and OAR 661-010-0045. 51 Or LUBA at 92. The Court of Appeals noted those failures as well. 206 Or App at 372. But we also noted in *Leupold I* that, with narrow exceptions, LUBA's review is limited to the evidentiary record that is submitted by the local government in a LUBA appeal. ORS 197.835(2)(a).[11] We also noted that "it appears unlikely" that ORS 197.835(2)(b) would "authorize LUBA to consider the disputed extra-record evidence to determine whether [Section (6) of SB 887 applies] to Leupold's property." *Id*.

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[11] ORS 197.835(2)(a) provides that LUBA review of a land use decision "shall be confined to the record."

ORS 197.835(2)(b) identifies a limited number of exceptions to the rule stated in ORS 197.835(2)(a) that LUBA's review is confined to the local record.

> "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. * * *"[12]

Under OAR 661-010-0045(1), LUBA may also consider extra-record "evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."[13]

The dispute between the parties about whether Leupold's property qualifies for the SB 887 Section (6) annexation prohibition does not concern a factual dispute about "standing, unconstitutionality of the decision, ex parte contacts, actions described in [ORS 197.835](10)(a)(B) * * * or other procedural irregularities." LUBA could not have granted a request for an evidentiary hearing under ORS 197.835(2)(b), even if Leupold has requested one. Similarly, the parties' dispute regarding SB 887 Section (6) is not a dispute "regarding [a] request[] for stay[], attorney fees, or actual damages under ORS 197.845." Neither was that dispute about the "content of the record." The dispute in *Leupold I* was about whether LUBA could consider the extra-record evidence that Leupold asked LUBA to consider, not whether that evidence had been placed before the city before it adopted Ordinance 4350 so that under OAR 661-010-0025(1)(b) the city should have included that evidence in the record it transmitted to LUBA. Under OAR 661-010-0045(1), LUBA could not have considered the evidence that Leupold attached to its supplemental memorandum.

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[12] ORS 197.835(10)(a)(B) authorizes LUBA to reverse a local government decision if it "was for the purpose of avoiding the requirements of ORS 215.427 or 227.178," which impose deadlines for a final decision on certain land use decisions.

[13] Under ORS 197.845(3), LUBA may award "actual damages" where it grants a stay of a land use decision and later affirms the decision on appeal.

Leupold was given an opportunity to attempt to assert its SB 887 Section (6) claim in *Leupold I*. As we have explained, Leupold had to make a number of evidentiary showings to do that. When the city objected to LUBA considering the evidence that was needed to assess the merits of that claim, petitioner had no way to put that evidence before LUBA in *Leupold I*. It follows that Leupold's SB 887 Section (6) claim is not precluded in this appeal. To the extent the city argues that Leupold was obligated to predict that SB 887 would ultimately pass in its introduced form and to make an evidentiary showing that it qualified for the annexation prohibition in Section (6) before Ordinance 4350 was adopted on May 2, 2005, we reject the argument.

Finally, the city suggests in its brief that Leupold could have demanded that the city reopen its record in *Leupold I* to receive evidence concerning the applicability of SB 887. Respondent's Brief 18. The city identifies no legal basis upon which Leupold might have made. The city's record in Leupold I closed some time before Ordinance 4350 was adopted on May 2, 2005 and the city offers no reason to believe that such a demand would have been voluntarily granted by the city.

Leupold's SB 887 Section (6) claim in this matter is not precluded by any of the actions it took or failed to take in *Leupold I*.

C. Section 6 of SB 887 Applies to Leupold's Property

We have attached as appendices to this opinion three maps from the Record to aid us in describing Leupold's business and the disputed property. One map shows the five adjoining tax lots that Leupold owns (tax lots 400, 600, 700, 1200 and 1300). Record 316. Another map shows a site plan for development of tax lots 600, 700, 1200 and 1300 that was approved by Washington County in 2003. Record 318. Tax Lot 400 is not shown on that site plan. A final map is an aerial photograph of Leupold's property showing the developed portion of that property occupying the right triangle that is made up of tax lots 600, 700, 1200 and 1300. Record 11. The parking and open space that is included on those lots was

required by Washington County when development of the property was approved. The aerial photograph and the map showing tax lots also shows tax lot 400, which is a trapezoid that extends south from the right triangle. Tax lot 400 is undeveloped, zoned for residential use and, as required by county land use law, is separated from the industrial zoned tax lots 600, 700, 1200 and 1300 by a chain link fence. The legal significance of tax lot 400 is at the heart of this case.

Leupold produces "sports optics, binoculars, rifle scopes, and related accessories" on its property, which lies south of Sunset Highway near its intersection with N.W. Cornell Road. Record 313. In the proceedings before the city that led to Order 2058, Leupold presented evidence to establish that its property is inside the Portland UGB. Leupold also established that tax lots 600, 700, 1200 and 1300, together, occupy an area that is larger than seven acres and that those tax lots at all material times have been zoned for industrial use. Finally, Leupold also submitted evidence that established that when tax lots 600, 700, 1200 and 1300 were annexed by Ordinance 4350 on May 2, 2005, Leupold employed more than 500 people on tax lots 600, 700, 1200, and 1300.

Notwithstanding the foregoing, the city determined that Leupold does not come within the SB 887 Section (6) annexation prohibition, because tax lot 400, which Leupold owns and adjoins tax lot 700, is zoned for residential use. The city explained:

> "3. SB 887 is not applicable to the [Leupold] property based on the plain text of the statute because it only applies to 'an area of land' owned by an Oregon business that is industrially zoned and all of these requirements need to be read together and met.
>
> "4. The 'area of land' on which Petitioner operates is business consists of all five of the contiguous lots that it owns and that were annexed by Ordinance 4350, and that one of those five lots is not 'zoned industrial' as is required to meet the exemption form annexation without consent stated in SB 887 Section (6). The Council finds that the legislature in Section (6) did not intend to describe [Leupold's] property especially when Section (6) is read in the context of the entire act and when one reads the legislative history of SB 887. The Council

finds that the legislature's exemption from annexation without consent should be read narrowly as with any statutory exemption.

> "5. Looking to the text of the statute, it requires that 500 employees be employed 'on the land' that is industrially zoned. This is the same 'area of land' for which the annexation prohibition applies. [Leupold has] only one building. The affidavits by [Leupold] show that employees use the other vacant portions of land for parking, scope sightings, enjoying the green spaces and buffers. [Leupold] admit[s] that its 500 employees are employed on the three other parcels without buildings and with these passive uses and that these parcels are part of its campus. [Leupold] then [tries] to distinguish the residentially zoned parcel as not part of its campus. However, [Leupold] admits that the residential property is adjacent to loading docks and acts as a buffer to the residential uses. It was purchased, in part, for that reason. As such, this parcel, just like the other parcels without buildings, is part of the area of land and the [Leupold] employees are employed on all 5 parcels. As the one parcel is zoned residential, it does not meet the requirement that the 'area of land' where the 500 employees are employed be zoned industrial." Record 9-10.

As we have already noted, it is undisputed that the SB 887 Section (6) prohibition was adopted by the legislature to protect Columbia Sportswear from being annexed by the city. But if Leupold satisfies the criteria set out in SB 887 Section (6), it also qualifies for the annexation prohibition, and on appeal we do not understand the city to argue otherwise. SB 887 Section (6) is ambiguous. As always, our analysis of this ambiguous statute begins with the text of SB 887 Section (6). *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993).

The key term "area of land" is not defined by statute, and dictionary definitions of "area" and "land" are not particularly helpful.[14] Subsection (3) of SB 887 Section (6)

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[14] The dictionary definition of "area" is set out below:

> "1 * * * b: a definitely bounded piece of ground set aside for a specific use or purpose[.]" *Webster's Third New International Dictionary* 115 (1981).

The dictionary definition of "land" is set out below:

> "4 * * * b: *law* : any ground, soil or earth whatsoever regarded as the subject of ownership (as meadows, pastures, woods) and everything annexed to it whether by nature (as trees, water)

requires that the "business entity [must employ] more than 500 individuals *on the land*." (Emphasis added.) Subsection (2) of SB 887 Section (6) requires that the area of land be at least seven acres in size and be zoned for industrial use. From those requirements for industrial zoning and location of the business entity on the "area of land," we believe it is reasonably clear that the legislature intended that the business entity referenced in SB 887 Section (6) must actually occupy the "area of land" that would come within the annexation prohibition in some real and practical way, and use that "area of land" for business purposes. The buildings that occupy tax lot 700 and parking lots and open space that occupy tax lots 600, 700, 1200 and 1300 that were legally required by Washington County's land use regulations all clearly satisfy that requirement, and those tax lots are zoned for the industrial use that occupies those tax lots. Tax lot 400 is undeveloped and densely vegetated. Tax lot 400 is zoned for residential use and that zoning does not allow industrial uses. In fact, Washington County's land use regulations require that adjoining industrial and residential zoning districts be separated by a "Type 5 buffer." Record 72. The chain link fence that runs along the entire length of the southern property lines of 700, 600 and 1300 provides that Type 5 buffer. The chain link fence physically separates the business entity on tax lots 600, 700, 1200 and 1300 from tax lot 400 and other residentially zoned and developed properties to the south. These factors all support a conclusion that the Leupold business operation that employs over 500 people on tax lots 600, 700, 1200 and 1300 does not occupy tax lot 400 at all, much less occupy tax lot 400 in any real or practical way. The nexus that the legislature required between the business entity mentioned in Subsections (2) and (3) and the land that is the subject of the SB 887 Section (6) annexation prohibition is simply missing.

Leupold purchased tax lot 400 anticipating that it might be able to develop parking on tax lot 400 in the future. In 1995, a Washington County hearings officer denied that request,

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or by man (as buildings, fences) extending indefinitely vertically upwards and downwards[.]" *Webster's Third New International Dictionary* 1268 (1981).

because while parking is allowed on residentially zoned property when it adjoins commercially or institutionally zoned land, parking may not be developed on residentially zoned land that adjoins industrially zoned land. Record 334-35. Therefore, although Leupold purchased tax lot 400 with the hope that it might be put to use in conjunction with the business entity to the north in the future, that effort failed due to the residential zoning of tax lot 400.

Ironically, the residential zoning of tax lot 400, which the city relied on to find that SB 887 Section (6) does not apply, appears to make it nearly impossible to use tax lot 400 as part of the business operation to the north. It is true, as the city suggests in its findings, that the residentially zoned tax lot 400, if it is left in its current overgrown and undeveloped state and not developed residentially, would serve as a buffer that might minimize conflicts between Leupold's business on tax lots 600, 700, 1200 and 1300 and residentially zoned and developed property to the south. However, we do not think the current *de facto* use of tax lot 400 as a buffer—a buffer that is not legally required—is enough to make tax lot 400 a part of the business operation to the north in any real or practical way. It is also true that there might be some use allowed in the residential zone that applies to tax lot 400 that Leupold might be able to develop in the future and use in conjunction with the business to the north, assuming there is some way to do so and maintain the Type 5 buffer that must be maintained between the industrially zoned and developed use to the north and the residentially zoned land to the south. However, that possibility is simply too speculative to support a conclusion that tax lot 400 is correctly viewed as part of the business operation to the north in any real or practical way. In the words of SB 887 Section (6), tax lot 400 is not part of the "area of land" where Leupold's business is located. That "area of land" is made up of tax lots 600, 700, 1200 and 1300.

For the reasons explained above, the city erred by concluding that Leupold's tax lots 600, 700, 1200 and 1300 are not an area of land that comes within the SB 887 Section (6)

annexation prohibition. We therefore sustain Leupold's first and second assignments of error.

D. Application of SB 887 Section (6) to Leupold's Property is not Barred by Article I, Section 21 of the Oregon Constitution.

Article I, Section 21 of the Oregon Constitution provides that no law shall be passed, "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution * * *." The city argues that application of SB 887 Sections (6) and (9)(2) retroactively to prohibit or invalidate Ordinance 4350 is prohibited by Article I, Section 21:

> "* * * In *Schmidt v. City of Cornelius*, 211 Or 505, 316 P2d 511 (1957) the court declared unconstitutional an action by property owners under former ORS 221.810 for an order mandating that their land be 'disconnected' from the city. The Supreme Court ruled that a statute that allowed a private cause of action to invalidate a duly-enacted city boundary would violate Article I Section 21. In this case, [SB 887] says nothing as to the effect of any local enactment contrary to Section 9(2). Leupold is attempting by a private action to reverse or invalidate after the fact a change of city boundaries that was enacted in due course and affirmed by this Board and the Oregon appellate courts. To apply Section 9(2) of [SB 887] as Leupold and Cogan seek is unconstitutional." Respondent's Brief 15-16.

The statutes at issue in *Schmidt* were former ORS 222.810 and 222.820, which provided:

> "*The owner of any land* consisting of one or more contiguous tracts lying in the corporate limits of any city having a population of 2,000 inhabitants or less * * * *may have the same disconnected* from the city under the provisions of ORS 222.810 to 222.830 if such area of land:
>
> "(1) Contains 20 or more acres.
>
> "(2) Is not subdivided into city lots and blocks and is used principally for agricultural purposes or is unimproved waste land.
>
> "(3) Has not been improved with and is not served by sidewalks, sewers, improved streets or other municipal improvements, and does not receive any substantial benefit by reason of being within the corporate limits of the cities.
>
> "(4) Is located on the border or boundary of the city; provided, however, that such disconnection shall not result in the isolation of any part of

> the city from the remainder of the city." Former ORS 222.810 (emphases added).

> "*The owner of any area of land* described in ORS 222.810, *if desirous of such disconnection*, shall file a complaint in the circuit court of the county where the land or the greater part thereof is situated, in which complaint he shall allege facts in support of the disconnection. The particular city shall be made a defendant, and it, or any taxpayer resident in the municipality, may appear and defend the complaint. If the court finds that the allegations of the complaint are true and that the area of land is entitled to disconnection under ORS 222.810, it shall order the land disconnected from the city. This order shall become effective when filed." Former ORS 222.820 (emphases added).

While there are some similarities between former ORS 222.810(1) through (4) and SB 887 Section (6), for purposes of the city's Article I, Section 21 argument, there is an important difference between SB 887 Sections (6) and 9(2) on the one hand and ORS 222.810 and ORS 222.820 on the other.

Under SB 887 Sections (6) and 9(2), the legislature has prohibited city annexation of lands that fall within the description set out in SB 887 Section (6) after March 1, 2005. It may be that a property owner or any other person with standing can file an action to enforce that prohibition if the city annexes qualifying property and refuses to allow the property to be withdrawn, but it is the *legislature* that has determined the city may not annex qualifying lands under SB 887 Section (6).

Under ORS 222.810 and ORS 222.820, the legislature did not prohibit cities from annexing lands that fell within the description in ORS 222.810(1) through (4). Cities could still annex such lands and such lands would remain part of the city unless and until "[t]he owner of any [qualifying] area of land" who was "desirous of * * * disconnection" filed "a complaint in * * * circuit court" and made the necessary factual allegations. Therefore under ORS 222.810 and ORS 222.820, the legislature gave the *affected property owner* the discretion to seek a court order to withdraw property from the city, or not to do so, as the property owner desired.

In *Schmidt*, the Supreme Court explained that "changing of the boundaries of a municipality is an amendment to [a city's] Charter * * *." 211 Or at 508. The Supreme Court also explained in Schmidt, that the legislature may not, consistent with the Home Rule Provisions of the Oregon Constitution, adopt a special law that amends the charter of a home rule city like the City of Cornelius. The Supreme Court held in *Schmidt* that ORS 222.810 and ORS 222.820 effectively delegated to certain property owners a special legislative power that the legislature itself did not have:

> "It is sufficient for the disposal of the pending question to hold that since the legislature could not pass a special law amending the charter of the city of Cornelius and excluding territory from its boundaries, 'Hence, what the Legislature cannot do directly it cannot do through indirection.' *City of Portland v. Welch*, 154 Or. at 295, 59 P.2d at 232. We hold that the legislature could not, by an act general in form, effect an amendment to the charter of the city of Cornelius by empowering a private individual at his sole option to initiate a judicial proceeding which upon proof of specified facts would result in mandatory action by the court amending the city charter and excluding plaintiffs' territory from the city. To hold otherwise would be to deprive the city of its admitted power to change its own boundaries by its own procedure, and would in practical effect violate the mandate of Constitution Article I, § 21 which provides that no law shall be passed 'the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; * * *.' Whatever may be the merit of cases like *Punke v. Village of Elliott*,[364 Ill. 604, 5 N.E.2d 389 (1936]), which arose in other states and were decided under other constitutional provisions, we must reject them as authority in this jurisdiction. To follow them would be to emasculate the Home Rule Provisions of our Constitution." 211 Or at 523.

The improper delegation of legislative authority that the Supreme Court found violated Article I, Section 21 of the Oregon Constitution in *Schmidt* is not present in SB 887 Section (6), because the legislature prohibited annexation of the lands described in SB 887 Section (6). The legislature did not leave the decision about whether such lands should be annexed to the affected property owners. It is true that Leupold is seeking in this appeal of Order 2058 and in its mandamus and declaratory judgment proceedings in Washington County Circuit Court to require the city to recognize that it violated the legislative prohibition set out in SB 887 Section (6) and take appropriate action to withdraw its property

from the city or have Ordinance 4350 declared invalid. But Leupold's LUBA appeal and circuit court actions are property owner initiated actions to enforce a state law rather than an unconstitutional exercise of delegated legislative authority. We reject the city's argument that applying SB 887, Section (6) to Ordinance 4350 would violate Article I, Section 21.

E. Conclusion

For the reasons explained above, we conclude that SB 887 Section (6) applies to Leupold's property and has the legal effect of prohibiting the city from annexing Leupold's property after March 1, 2005. It follows that Ordinance 4350, which annexed Leupold's property on May 2, 2005, violates SB 887 Section (6). Leupold made no attempt before the city to show that its petition for withdrawal satisfies the legal standards under MC 3.09 that would normally govern such petitions. Nevertheless, we understand Leupold to argue that because (1) SB 887 Section (6) applies to Leupold's property, (2) Leupold is not barred by claim preclusion from raising SB 887 Section (6) in this appeal and (3) application of SB 887 Section (6) is not unconstitutional under Article I, Section 21 and the Supreme Court's holding in *Schmidt*, Leupold's petition for withdrawal should have been granted. We agree with Leupold.[15] The city's denial of Leupold's petition in Order 2058 is inconsistent with SB 887 Section (6) and for that reason must be reversed. ORS 661-010-0071(1)(c).[16] Our resolution of Leupold's first two assignments of error makes it unnecessary to resolve Cogan's assignments of error or Leupold's third assignment of error.

Order 2058 is reversed.

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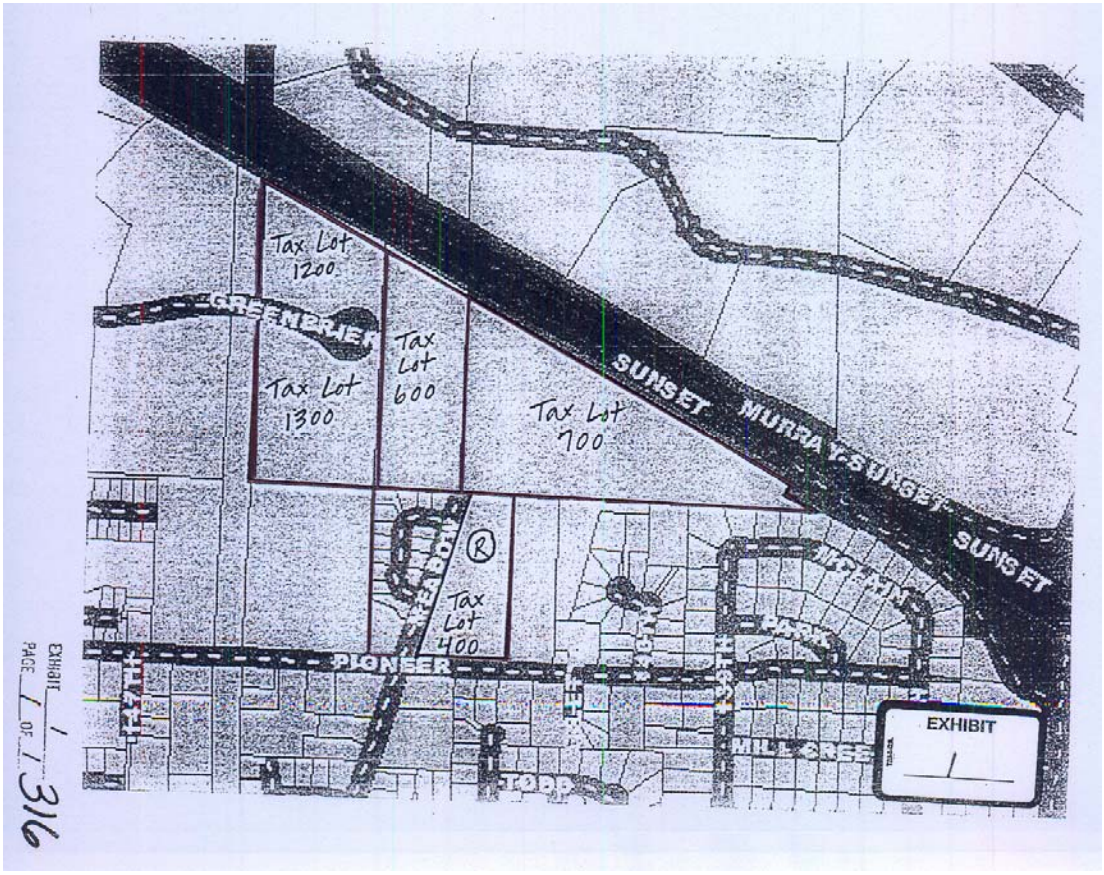
[15] We understand the city to have conceded at oral argument that if Leupold is correct about the applicability and constitutionality of SB 887 Section (6) and Leupold is not precluded from raising SB 887 Section (6) in this appeal, Leupold's July 27, 2007 petition for withdrawal should have been approved without regard to whether the MC 3.09 criteria that would have to be applied in the absence of SB 887 are met. We agree with that concession.

[16] ORS 661-010-0071(1)(c) provides that LUBA is to reverse a land use decision if "[t]he decision violates a provision of applicable law and is prohibited as a matter of law."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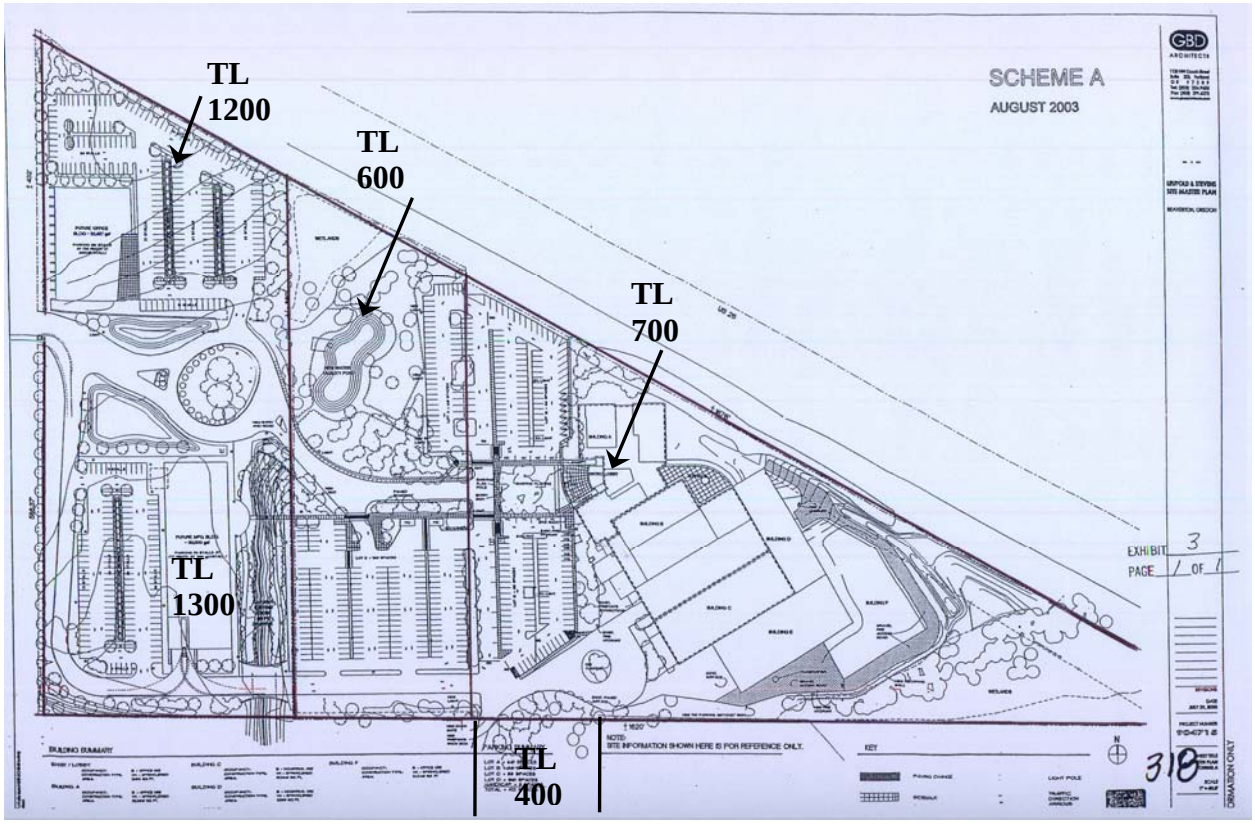
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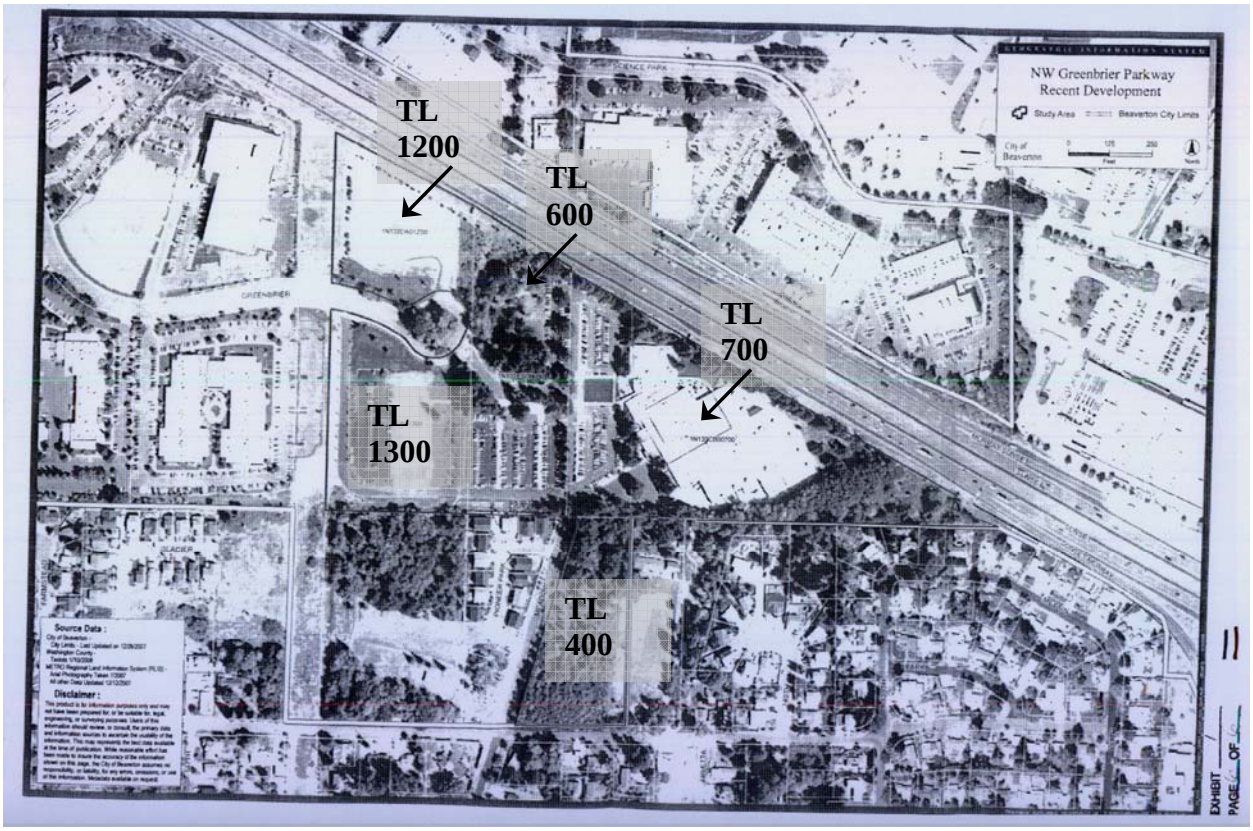
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