BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROADS END WATER DISTRICT,
Petitioner,

vs.

CITY OF LINCOLN CITY,
Respondent.

LUBA No. 2012-101

ROADS END SANITARY DISTRICT,
BRAYDEN CRISWELL, CHRIS JALOWY
and ROGER MIDDLETON.
Petitioners,

vs.

CITY OF LINCOLN CITY,
Respondent.

LUBA No. 2013-002

FINAL OPINION
AND ORDER

Appeal from City of Lincoln City.

Jack L. Orchard and Tommy A. Brooks, Portland, filed a joint petition for review. Jack L. Orchard argued on behalf of petitioner Roads End Water District. Tommy A. Brooks argued on behalf of petitioners Roads End Sanitary District et al. With them on the brief were Clark I. Balfour, Cable Huston Benedict Haagensen & Lloyd LLP and Ball Janik LLP.

Joan S. Kelsey, Tillamook, and Dan R. Olsen, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 06/24/2013

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 an annexation ordinance.

REPLY BRIEF

Petitioners move for permission to file a reply brief. The city does not oppose section B of the reply brief, which addresses the preclusive effect, if any, of a prior LUBA decision and a U.S. District Court decision regarding issues presented in this appeal. The city does oppose sections A and C of the reply brief. Under our rules, a reply brief must be "confined solely to new matters raised in the respondent's brief * * *. OAR 661-010-0039. The city contends sections A and C are not confined to new matters in the city's response brief.

Section A addresses the weight that should be given to legislative history and the Court of Appeals' and LUBA's decisions in *Johnson v. City of La Grande*, 167 Or App 35, 1 P3d 1036 (2000) and *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999), regarding the meaning of the key statute at issue under the first assignment of error. We agree with the city that the arguments under section A of the reply brief do not respond to new matters that were raised in the city's response brief. However, petitioners made all of the arguments that are contained in section A of the reply brief at oral argument. While we do not consider section A of the reply brief, we have taken petitioner's oral argument on these issues into consideration.

The city also opposes section C of the reply brief, which addresses the city's contention that the validity of the consents to annexation in this case is a legal rather than an evidentiary issue. We believe that section of the reply brief is accurately characterized as responding to a new matter in the reply brief.

The motion to allow a reply brief is granted as to sections B and C of the reply brief and denied as to section A of the reply brief.

FACTS

The challenged ordinance annexed an area called Roads End to Lincoln City. At the time of its annexation, Roads End was an adjoining unincorporated area of Lincoln County located north of Lincoln City, and west of Highway 101 along the Pacific Ocean. Roads End includes approximately 246 acres, consisting of approximately 906 tax lots. Approximately 706 of those lots are developed with houses. Roads End is located inside the city's urban growth boundary (UGB) and is planned and zoned by the county for residential development.

Roads End was developed initially with water service from a private water company and with individual septic systems. In 1972 the Oregon Health Department identified serious health problems associated with the water supply and failing septic systems in Roads End. Roads End Water District (REWD) and Roads End Sanitary District (RESD), petitioners in this appeal, were formed in 1975 to address the identified health problems. In 1977, the city entered an agreement with REWD to supply water directly to REWD customers for a period of 25 years, and REWD was dissolved at that time. In 2001 a new REWD was formed. The city contends the purpose of the new REWD was to negotiate an annexation agreement because the 25 year water service agreement was about to expire in 2002.

Although the RESD apparently owns sewer pipes in Roads End, the city collects and treats all Roads End sewage at the city's sewage treatment plant and maintains the sewer pipes. REWD apparently owns no facilities and the city supplies water to Roads End through city-owned water system facilities.

Beginning in 1990, the city began requiring that property owners execute written consents to annexation as a condition of providing water service to property owners in Roads End. Beginning in 2004, the city began requiring that property owners who had not executed a consent to annexation, but were already receiving water service, to execute and record a consent to annexation when the name on the utility bill changed, as a condition of continuing

to provide water service to those Roads End property owners.[1] When some property owners who were already receiving water service refused to execute the required consents, the city filed an action in U.S. District Court. In an April 9, 2008 ruling by a federal Magistrate Judge, the court ruled that the city could lawfully require the property owners' consents to annex as a condition of continuing to provide water service, and could stop providing water service to any property owners who refused to execute the required consent to annexation. Record 970.

The disputed annexation was accomplished without holding an election in either the annexation area or the city, as would otherwise be required by ORS 222.111(5). ORS 222.170(1) authorizes what is commonly referred to as triple majority annexations without an election.[2] Triple majority annexations require the consent of more than half the property owners, owning more than half the area to be annexed, which represents more than half the assessed value. The city found that it had the required triple majority of consents to annex Roads End without an election:

> "[T]he City Council finds there are approximately 906 tax lots in the Annexation Area. The City has received consents to annexation and waiver of time limitation on such consents from 519 property owners, or 57.7% of the 900 property owners, who own approximately 112.65 acres, representing 57.37% of the 246 total acres of land in the territory and having an assessed value of $157,089,150 constituting 64.88% of the assessed value of $242,103,960 in the territory." Record 11.[3]

Finally, sections 9 and 10 of the annexation ordinance withdraw the annexed area from the Roads End Water District and Roads End Sanitary District, leaving both those districts without any territory.

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[1] This would most commonly happen when a property was sold and the new owner's name is replaced for the old owner's name on the water bill.

[2] We set out the relevant text of ORS 222.170(1) later in this opinion.

[3] 112.65 acres is not 57.37% of 246 acres, but no party raises any issue regarding the triple majority calculations or assigns error to the calculations.

FIRST ASSIGNMENT OF ERROR

The consents the city relied on to annex Roads End were required as a condition of providing or continuing to provide water service. Petitioners argue those types of consents—consents that were required by contract for extra-territorial extension of services—may not be used in a triple majority annexation. Petitioners also argue that even if such consents can be used, the consents the city relied on here were coerced, illusory, and lacking in consideration and for those reasons may not be relied on. Petitioners further contend many of the contract consents were revoked by property owners.

A. Use of ORS 222.155 Contract Consents to Annex Non-Consenting Property Owners

We first set out the relevant statutes before turning to petitioners' arguments.

1. The Relevant Annexation Statutes

a. ORS 222.170(1)

ORS chapter 222 governs city boundary changes, mergers, consolidations and withdrawals. As noted above, ORS 222.170 authorizes cities to annex contiguous property without an election. As relevant, ORS 222.170(1) provides:

> "The legislative body of [a] 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[.]" (Emphases added.)

b. ORS 222.115

ORS 222.115 specifically authorizes cities to enter contracts for extra-territorial extension of services that include landowner consent to future annexation, and makes those consents binding on the contracting landowner's successors:

> "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."

c. ORS 222.173(1)

ORS 222.173(1) provides that ORS 222.115 consents that are relied on for a triple majority annexation are only effective for one year, unless the property owner enters a separate written agreement to waive that one year limit.

> "For the purpose of authorizing an annexation under ORS 222.170 * * *, only statements of consent to annexation which are filed within any one-year period shall be effective, unless a separate written agreement waiving the one-year period or prescribing some other period of time has been entered into between an owner of land or an elector and the city.

The city obtained separate waivers to the one-year period in the consents it relied on to annex Roads End.

d. ORS 199.487(2)

ORS 199.487(2) is the statute that is the focus of the first assignment of error. It is codified at ORS Chapter 199, which governs local government boundary commissions and city-county consolidations, but all parties agree it applies to the city in this case. The parties dispute the meaning of the statute.

ORS 199.487(2) applies in a number of circumstances. In quoting the relevant text of ORS 199.487(2) below we have italicized the statutory references that make it clear that ORS 199.487(2) applies to contract consents obtained under ORS 222.115 and applies to triple majority annexations under ORS 222.170(1). We underline the ORS 199.487(2) text that petitioners rely on to challenge the annexation of Roads End.

> "* * * Notwithstanding ORS 199.490 (2)(b), *222.173 (1)*, 222.175 or any other requirement for obtaining consent to annexation, a city or district may use a consent to annexation contained in contracts authorized by ORS 198.869 or *222.115* in formulating annexation proposals or petitions under ORS 198.855, 199.490 (2), 222.125 or *222.170* <u>for properties whose owners have signed such consents to annexation</u>. * * *" (Italics and underlining added.)

2. Legislative History

Relying on the underlined language in ORS 199.487(2), petitioners contend ORS 222.115 contract consents to annexation may be used in a triple majority annexation to annex "properties whose owners have signed such consents to annexation" but they may not be used in a triple majority annexation to annex properties whose owners have not consented to the annexation. Under petitioners' reading of ORS 199.487(2), triple majority annexations under ORS 222.170(1) that rely on any ORS 222.115 contract consents must have the unanimous consent of all the annexed property owners, rather than the simply majority of property owner that would be required under ORS 222.170(1) if the city were using other kinds of consents to annexation. To support that interpretation of ORS 199.487(2), petitioners largely rely on legislative history.

The ORS 222.115 statutory authority for contract consents and the text that appears at ORS 199.487(2) began as separate bills in 1991 (HB 3498 and HB 3499 respectively). The version of HB 3498 that passed the house consolidated the two bills and the language that now appears at ORS 199.487(2) was included in HB 3498 and read as follows:

> "* * * Notwithstanding ORS 199.490 (2)(b), *222.173 (1)*, 222.175 or any other requirement for obtaining consent to annexation, a city or district may unconditionally use a consent to annexation contained in contracts authorized by [ORS 198.869 or *222.115*] in formulating annexation proposals or petitions under ORS 198.855, 199.490 (2), 222.125 or *222.170*." (Italics and underlining added.)

During the Senate's consideration of HB 3498, the City of Eugene made the following request:

> "The City of Eugene has worked with property owners outside the city limits but within the urban growth boundary to secure passage of this measure. On behalf of the property owners, we are requesting that HB 3498A be amended to make clear that individual consents to annex will not be used to bring non-

consenting property owners in to the city or district through double-majority annexation process.[4] The needed amendments are:

> "On page 2 of HB349-A, line 9, delete 'unconditionally"
>
> "At the end of line 10, insert 'for properties which have signed such consents to annex"

Petition for Review, App-15 (Testimony, Senate Government Operations Committee, HB 3498, June 7, 1991, Ex F (statement of Roger Rutan)). Senator Bunn, who later carried HB 3498 to the Senate floor explained to the committee at its June 7, 1991 hearing that "[w]e're creating one window for a group of people that want to be annexed, and we're not bringing anyone else into it. If it's a hostile annexation, then they're not covered by the bill; it doesn't apply." Petition for Review 20.

Before the full Senate the issue regarding use of contract consents in annexations that include nonconsenting property owners arose again, and resulted in the following exchanges:

> "**Sen. Shoemaker**:
>
> "You stated that the annexation [that] this bill would provide…would extend to those which would be negotiated between a city and a property owner. Isn't it also true that it would apply to the double majority annexation – that is wherever you have a form of consent of property owners and not just to individually negotiated annexation?
>
> "**Sen Smith:**
>
> "No, it is not true that it would and, if I can recall, there is a provision in the bill that specifically addresses that. Maybe there is someone who can help me.
>
> "**Pres. Kitzhaber:**
>
> "Sen. Bunn can you provide some assistance here.
>
> "**Sen. Bunn:**

[4] Double majority annexations (a majority of electors and a majority of property owners) are authorized by ORS 222.170(2), which immediately follows the ORS 222.170(1) authority for triple majority annexations. Like triple majority annexations, double majority annexations do not require an election.

> "Yes, I would bring your attention to the senate amendments to the bill, which insert 'for properties whose owners who have signed such consents to annexation.' We require that the owner must willingly sign that consent for it to happen.
>
> "**Sen Shoemaker:**
>
> Only those owners who specifically agree with the city upon annexation of their property are affected by this bill, Senator?
>
> "**Sen. Bunn:**
>
> "That is correct."

Petition for Review, App-24 (transcript of Tape Recording, Senate Floor Proceeding, HB 3498, June 15, 1991, Tape 157, Side B).

Petitioners contend the above "removes all doubt" and makes it absolutely clear that ORS 222.115 contract consents may not be used in an ORS 222.170(1) triple majority annexation to annex non-consenting property owners. Petition for Review 8.

The city argues the major focus of HB 3498 was to authorize cities and districts to approve annexations that would not take effect for up to ten years.[5] According to the city, the isolated pieces of legislative history on the secondary part of HB 3498 that was ultimately codified at ORS 199.487(2) should not be given preclusive weight in deciding what ORS 199.487(2) means:

> "'Reading the tea leaves of legislative history always is risky business.' *State v. Walker*, 192 Or App 535, 545, 86 P3d 690 (2004). That is so true in this case. The legislative history is confusing and often contradictory. That alone makes it unreliable and insufficient to override the language of the annexation statutes. The only clear thread is that the focus was on a situation in which a

[5] For example, ORS 222.180(1) specifies an annexation is "complete from the date of filing with the Secretary of State of the annexation records as provided in ORS 222.177 and 222.900." However, ORS 222.180(2) provides:

> "For annexation proceedings initiated by a city, the city may specify an effective date that is later than the date specified in [ORS 222.180(1)]. If a later date is specified under this subsection, that effective date shall not be later than 10 years after the date of a proclamation of annexation described in ORS 222.177."

> city negotiated an agreement with a property owner to annex now and develop but defer the effective date annexation until as much as 10 years out. To the extent, if any, that these discussions are sufficient to judicially rewrite the language of ORS 222.115 and ORS 222.170, such a rewrite should be limited to the context of deferred effective date agreements." Respondent's Brief 10.

3. *Johnson v. La Grande*

The legislative history cited by petitioner does lend support to their reading of the statute. However, the issue presented in the first assignment of error has already been presented to LUBA and the Court of Appeals and resolved against petitioners' interpretation of the statute by both LUBA and the Court of Appeals. In *Johnson v. La Grande*, LUBA rejected the argument petitioners make to us in this appeal, concluding that "the statute is clear on its face." 37 Or LUBA at 405.

On appeal of LUBA's decision, the respondents in that appeal argued that "ORS 199.487(2) makes it very clear that contractual consents cannot be used for an annexation [that includes] non-consenting owners." *Johnson v. La Grande*, 167 Or App at 40. After quoting respondents' elaboration of that argument at some length, the Court of Appeals squarely rejected those arguments:

> "Assuming that the 1991 amendment to ORS 199.487(2) could mean what respondents understand it to mean, if it were read in isolation, it cannot be understood to have that meaning when the statutory context is taken into account. ORS 199.487(2) does not purport to establish substantive requirements for annexation proposals or petitions, or to establish territorial limits on the property that may ultimately be annexed, or to make the territorial scope of a proposal or petition separable from that of the consummated annexation. Rather, ORS 199.487(2) expressly incorporates four other statutes—ORS 198.855, ORS 199.490(2), ORS 222.125 and, the applicable statute here, ORS 222.170—that do govern those matters under the various circumstances to which they pertain. None of the four statutes contemplates the type of fundamental territorial deviation between the annexation petition or proposal and the consummated annexation that respondents ascribe to ORS 199.487(2); indeed, three of the four provide for the proclamation of the annexation as the culmination of the same process by which it is proposed.
>
> "More importantly, three of the four statutes, including ORS 222.170, expressly provide for the annexation of more properties than those whose

> owners consent to the annexation. Indeed, the *sine qua non* of the statutes is to allow annexations without elections in circumstances where consent is obtained from specified *majorities* of the property or persons in the area to be annexed. Respondents' understanding that ORS 199.487(2) makes universal consent within the affected territory a condition precedent to annexation would put it in conflict with the basic operating prerequisites of the four statutes that it incorporates. Contrary to that understanding, we interpret ORS 199.487(2) to mean that the consents obtained pursuant to ORS 222.115 may count toward the majorities required by ORS 222.170 and the other incorporated statutes, and the phrase 'for properties whose owners have signed such consents' to mean the properties upon whose consent or at whose instance the annexation petitions or proposals are formulated. The phrase does not limit the territory that may be annexed to the specific properties for which consents have been given." *Johnson v. La Grande*, 167 Or App at 42-43 (footnotes omitted).

Petitioners argue in this appeal that LUBA erroneously concluded in *Johnson* that the text of ORS 199.487(2) unambiguously allows use of ORS 222.115 contract consents in an ORS 222.170(1) triple majority annexation that includes non-consenting property owners, and therefore erroneously declined to consider the legislative history of HB 3498.[6] Petitioners similarly read the Court of Appeals' decision to be based strictly on the text and context of ORS 199.487(2). The petitioners point out that LUBA's and the Court of Appeals' decisions in *Johnson* were decided prior to 2001 amendments to ORS 174.020 and prior to *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009). Before the 2001 amendment to ORS 174.020 and *Gaines*, statutory construction under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), started with text and context and did not proceed further, if the reviewing body found the legislature's intent was obvious from an analysis of the statutory text and context. "If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history to inform the court's inquiry into legislative intent." *PGE*, 317

[6] Our decision in *Johnson* regarding the assignment of error concerning the permissibility of using ORS 222.115 contract consents to annex non-consenting property owners stated "[w]e need not look to legislative history to resolve this assignment of error, because the statute is clear on its face." 37 Or LUBA at 405.

Or at 611-12. The 2001 amendment to ORS 174.020 specifically provided that "[a] court shall give the weight to the legislative history that the court considers to be appropriate." In *Gaines*, the Supreme Court held in construing a statute a reviewing body may consider any legislative history that is offered and, "determine, as a discretionary matter, what weight, if any, to give that legislative history." *Gaines*, 346 Or at 170-71. Petitioners urge LUBA not to view the Court of Appeals' decision *Johnson* as binding and to agree with their interpretation of ORS 199.487(2), based on the legislative history set out above.

If we were to adopt petitioners' interpretation of ORS 199.487(2), we would be adopting an interpretation that is inconsistent with the Court of Appeals' interpretation in *Johnson*. As the city points out, the respondent in *Johnson* submitted legislative history to the Court of Appeals. That legislative history appeared at pages 29 and 30 of the respondent's brief, immediately after the arguments that the Court of Appeals quoted in its decision and then rejected. Respondent's Brief Appendix 5-6. Some of that legislative history is the same legislative history that petitioners rely on in this appeal.

It is possible that the Court of Appeals in *Johnson* followed the *PGE* methodology and did not consider the legislative history that respondent provided in that appeal. But the Court of Appeals' decision does not say whether the Court considered the legislative history that was before the Court in the respondents' brief. It is therefore also possible that the Court of Appeals simply did not find the legislative history persuasive, or did not find it so persuasive that it overcame the text and context that the Court of Appeals relied on to reject the argument that petitioners make in this appeal regarding the meaning of ORS 199.487(2). Given that uncertainty about the Court of Appeals' consideration of relevant legislative history, we believe it would be inappropriate for LUBA to interpret ORS 199.487(2) differently than the Court of Appeals did in *Johnson*. If *Johnson* is to be overruled based on legislative history, the Court of Appeals, not LUBA, is the appropriate tribunal to do so.

This subassignment of error is denied.

B. Validity of Consents

Petitioners' second subassignment of error is set out below:

> "The City lacked substantial evidence sufficient to conclude that the consents it relied on are valid." Petition for Review 9.

In support of this subassignment of error, petitioners argue that "[e]ven if LUBA determines that the City can rely on consents obtained under ORS 222.115 to annex the entire Roads End Area * * * the City's decision should still be reversed or remanded to address the validity of those consents." *Id.*

Petitioners first contend that "at least 136 property owners" submitted documents in which they took the position that the consents were "coerced * * * or that the property owner was revoking the consent, or both." *Id.*[7] With these revocations, petitioners argue, the city lacked the requisite number of consents for a triple majority annexation.

Petitioners next argue that the city's decision to withhold water service to landowners who were already receiving water service unless the landowners executed and recorded contract consents to annexation constitutes coercion, and that "there can be no mutual agreement if one party is under duress or was subject to coercion." Petition for Review 11.

Finally, petitioners argue the contract consents are too indefinite and are not supported by sufficient consideration. In support of their contention that the contract

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[7] By our count there are 134 documents in which parties to the contract consents complain about the way the city obtained those consents. Record 345-510. The relevant wording of those documents is not entirely uniform, but many of the documents include the following text:

> "**Dear Mayor and Members of the City Council:**
>
> "The 'consent' to annex and 'agreement' waiving time limit documents regarding the above-referenced property were signed under duress. There was and is no voluntary or mutual agreement. There was and is 'no meeting of the minds.' Property without water is virtually worthless. Your threat to turn off my water left us with **no choice** but to involuntarily sign. You coerced us.
>
> "**In sum, please consider this formal notice that our 'consent' to annex and 'agreement' waving time limit were forced, and are hereby revoked**.'" Record 345 (boldface and underlining in original).

consents are too indefinite regarding the obligations of the city, petitioners cite the following language:

> "The City's provision of water service to the Property hereunder is only as a special service and not as a common utility service; the City retains the right to reduce or entirely discontinue water service to the Property at any time and for any reason at the discretion of the City * * *." Petition for Review, ER-44; Record 598.[8]

Finally, petitioners argue that because the property owners threatened with shutoff of their water if they did not execute contract consents were already receiving water service at the time the city demanded that the property owner execute and record the contract consents, the property owners never received any consideration and the contract consents are invalid for that reason as well.

In *Roads End Sanitary District, v. City of Lincoln City*, 48 LUBA 126 (2004), the district petitioners in this appeal appealed the city's 2004 decision that amended the city code to permit the city to require consents to annexation when the name on the water bill of existing water service customers changes. In that appeal petitioners argued that because the amendment authorized the city to terminate water service if the property owner refused to execute a contract consent when the name on the water bill changed, the amendment violated a contract the city had with the United States Department of Agriculture Farm Home Administration (FHA). We rejected the argument:

> "Even assuming petitioners are correct that the challenged ordinance authorizes the city to take actions prohibited under the FHA contract, petitioners fail to explain how that allegation falls within our limited scope of review set out in ORS 197.835. As far as we can tell or petitioners advise us, whether the ordinance is inconsistent with the city's obligations under the FHA contract is presumably a matter of interpreting the FHA contract. Petitioners cite no authority that allows LUBA to resolve disputes regarding

[8] Record 598 is a placeholder page that explains that the 519 contract consents that the city relied on to annex Roads End are included on a digital disk that is included at the back of volume 2 of the Record. The City's January 30, 2013 transmittal letter explains that those contract consents are approximately 5,000 pages long.

> the parties' obligations under a contract. *See Carlsen v. City of Portland*, 39 Or LUBA 93, 100 (2000) (discussing LUBA's limited authority to review non-land use matters)." 48 Or LUBA at 131.

To the extent petitioners are asking that LUBA agree with them that the contract consents have been revoked, or were never valid in the first place because they were coerced, are too indefinite, or lack consideration, we again conclude that LUBA lacks authority under ORS 197.835 to rule on the validity of contracts. If those executed and recorded contract consents are to be declared invalid *ab initio* or unilaterally revoked by landowners, persons with standing to do so will need to seek such a declaration in Lincoln County Circuit Court.

As to petitioners' argument that the city's decision is not supported by substantial evidence, because the city did not respond to the contract consent parties' contentions about the contracts or their unilateral attempts to revoke those contracts, we have a similar response. The contracts were all executed and have been recorded. There is nothing on the face of those documents that calls their validity as properly executed and recorded contract consents into question. They are substantial evidence that the city has the required number of consents. The city has no jurisdiction to independently resolve the parties' contract dispute, and it did not err by failing to attempt to do so. Neither do the not-yet-litigated contentions of those land owners so undermine the contract consents that they cannot be viewed as substantial evidence of the required consents.

The second subassignment of error is denied.

The first assignment of error is denied.[9]

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[9] The parties engage in a lengthy debate about the merits of petitioners' contentions that the contract consents were coerced, lack consideration, are too indefinite, and have been revoked. The city also argues that petitioners lack standing to challenge consent agreements that they are not parties to and that petitioners arguments are precluded by the LUBA appeal noted in the text and the U.S. District Court ruling that validated the city's demands for contract consents under the 2004 change to the municipal code. Our resolution of this subassignment of error makes it unnecessary to resolve those questions and we express no view on the merits of those questions.

SECOND ASSIGNMENT OF ERROR

The parties in this appeal agree that Lincoln City's acknowledged comprehensive plan and land use regulations do not include any "substantive standards or other applicable policies or provisions that guide [the] city's determination whether or not to annex land" and therefore does not "control" this annexation. OAR 660-014-0060; *Patterson v. City of Independence*, 49 Or LUBA 589, 595 (2005).[10] Therefore the city was bound to comply with any relevant Statewide Planning Goal requirements in annexing Roads End.

A. Goals for Which the City Adopted No Findings

Petitioners contend the city failed to adopt any findings concerning several goals. The city responds, and we agree, that because the city was not bound to make a decision in this matter and the decision concerns over 900 different properties, it is therefore legislative, rather than quasi-judicial under the three-part inquiry set out in *Strawberry Hills 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979).[11] Because the city's decision is legislative rather than quasi-judicial, the city's failure to adopt findings specifically addressing some statewide planning goals, alone, is not a basis for remand. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122, 132 (2008). We consider below the

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[10] 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." (Emphasis added.)

[11] Those three inquiries were described in *Hood River Valley v. Board of Cty. Commissioners*, 193 Or App 485, 495, 91 P3d 748 (2004) as follows:

> "First, does 'the process, once begun, [call] for reaching a decision,' with that decision being confined by preexisting criteria rather than a wide discretionary choice of action or inaction? Second, to what extent is the decision maker 'bound to apply preexisting criteria to concrete facts'. Third, to what extent is the decision 'directed at a closely circumscribed factual situation or a relatively small number of persons'?" (Citations to *Strawberry Hill* omitted.)

petitioners arguments and the city's responses concerning the Goals for which the city adopted no findings. *Id*.

1. Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces)

Citing OAR 660-023-0250(3), petitioners first contend the annexation may allow uses that will conflict with Goal 5 resources.[12] Petitioners then argue:

> "The City should have first identified what Goal 5 resources exist within the annexation area, then identified the new uses that will be allowed in the annexation area. Only then could the City have determined whether such uses conflict with Goal 5 resources. Because the City failed to perform this analysis and make findings, it was impossible for the City to demonstrate that the Annexation Order is consistent with Goal 5." Petition for Review 15 (footnote omitted).

The city responds that the cited rule only applies to post-acknowledgment comprehensive plan or land use regulation amendments. The ordinance on appeal is not such a decision, and the county comprehensive plan and land use regulations designations for all the annexed properties remain unchanged. The city also contends that petitioners fail to demonstrate that the annexation ordinance does any of the things that under OAR 660-023-0250(3)(a) through (c) could require the city to apply Goal 5. We agree with the city.

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

> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(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."

2. Goal 9 (Economic Development)

Goal 9 requires, among other things, that "[c]omprehensive plans for urban areas shall" "[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies." Petitioners argue "[t]he Annexation Order has an impact on economic development in the City. Specifically, the City's decision will subject Roads End vacation rental dwellings to new license requirements." Petition for Review 16. Petitioners contend the annexation ordinance should be remanded for the city to determine how subjecting Roads End vacation rentals to city licensing is consistent with Goal 9.

The city notes once again that the county's comprehensive plan and land use regulations were not changed by the challenged decision. The city points out that its vacation rental dwelling licensing requirements are not part of the city's land use regulations, and the city took action to phase in application of its vacation rental licensing requirements.[13]

We have held that decisions that call into question the adequacy of the inventory of lands planned for commercial or industrial use may implicate Goal 9. *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403, 412, *remanded on other grounds* 243 Or App 612, 259 P3d 1007 (2011), *aff'd* 352 Or 648, 290 P3d 803, (new overlay zone and vegetative enhancement requirements for industrial land implicate Goal 9); *Volny v. City of Bend*, 37 Or LUBA 493, 510, *aff'd* 168 Or App 516, 4 P3d 768 (2000) (plan amendment increasing required arterial minimum right-of-way width and reducing inventoried land available for

[13] The city found:

> "LCMC § 5.1[5] requirements for vacation rental dwelling licenses shall take effect with regard to property in the annexation area on December 1, 2013, and applications for vacation rental dwelling licenses are required to be submitted to the City no later than January 31, 2014. Vacation rental dwellings lawfully existing on the effective date of this annexation shall not be subject to the ownership limitation in the definition of 'person' in LCMC 5.14.020(B) and set forth in LCMC 5.14.060(D). Notwithstanding this provision, the city retains the right to impose such a limitation or other requirements in the future." Record 21.

commercial development implicates Goal 9); *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 691 (1995) (plan and land use regulation amendments that allow residential development on industrially designated lands and require site review for industrial development implicate Goal 9). But petitioners must do more than simply fault the city for failing to adopt findings that address the potential Goal 9 impacts of subjecting vacation rental dwellings in the annexed area to the city's vacation rental dwelling licensing requirements. While the fact that the city's vacation rental dwelling licensing requirements are not land use regulations does not mean they might not have Goal 9 implications, petitioners make no attempt to identify either specific or general requirements of the vacation rental dwelling licensing requirements that might have Goal 9 implications.[14] In view of that failure on petitioners' part, and in view of the highly speculative and at most very indirect effect those licensing requirements might have on any Goal 9 based requirement for an adequate supply of vacation rental dwellings or lands available for such dwellings, we decline to remand the city's annexation ordinance for Goal 9 findings.

3. Goal 10 (Housing)

Petitioners next argue the annexation ordinance should be remanded because the city adopted no findings demonstrating that the annexation is consistent Goal 10. The only requirement of Goal 10 that petitioners cite is a portion of Goal 10, Guideline 2, which provides in part: "Plans should be developed in a manner that insures the provision of appropriate types and amounts of land within urban growth boundaries." Petitioners argue:

> "The city * * * conducted no analysis and made no finding on whether the changes to its Comprehensive Plan resulting from the annexation are consistent with Goal 10. Without such an analysis and findings, it was impossible for the City to demonstrate that the Annexation Order is consistent with Goal 10." Petition for Review 16.

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[14] That was not the case in *Gunderson*, *Volny* or *Opus*, where the petitioners did demonstrate that the decision had the potential to reduce the inventory of lands available for commercial or industrial use. *Gunderson*, 62 Or LUBA at 412; *Volney*, 37 Or LUBA at 510; *Opus*, 28 Or LUBA at 691.

The only substantive requirement that petitioners specifically cite is a Guideline, which is not a mandatory Goal requirement. *Downtown Comm. Assoc. v. City of Portland*, 80 Or App 336, 722 P2d 1258 (1986). That problem aside, petitioners' Goal 10 argument suffers from the same problem as their Goal 5 argument, and the city's response is similar to its response to petitioners' Goal 5 arguments. The annexation ordinance adopts no changes to either the city's or the county's comprehensive plan—the very same county residential comprehensive plan and zoning designations that applied before the annexation continued to apply following annexation. We understand the city to contend there may be Goal 10 implications when the city applies city comprehensive plan and land use regulations within Roads End to replace the county designations in the future, but the annexation itself has no Goal 10 implications. Absent some argument from petitioners to the contrary, we agree with the city and find that remand is not warranted for findings to address Goal 10.

4. Goals 16 (Estuarine Resources); Goal 17 (Coastal Shorelands); Goal 18 (Beaches and Dunes)

Petitioners' arguments under Goals 16, 17 and 18 similarly fail to appreciate that the county's comprehensive plan and zoning and other land use regulations, which apply to the annexed properties remain unaffected by the appealed annexation ordinance. For the same reasons we reject petitioners' contention that remand is required for Goal 5 and 10 findings we reject petitioners' contention that remand is warranted for Goal 16, 17 and 18 findings.

B. Goal 2 (Land Use Planning)

Petitioners contend the city's Goal 2 findings are inadequate. Goal 2 requires that plans be coordinated with all affected governmental units. We explained the nature of that obligation in *City of Portland v. Washington County*, 27 Or LUBA 176, 186-87 as follows:

> "Goal 2 requires that a county's comprehensive plan 'and related implementing measures shall be *coordinated* with the plans of affected governmental units.' (Emphasis added.) * * * The definition of 'comprehensive plan' contained in ORS 197.015(5) describes what is required for a comprehensive plan to be 'coordinated,' as follows:

> "'A [comprehensive] plan is 'coordinated' when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible.'
>
> "In *Rajneesh v. Wasco County*, 13 Or LUBA [202], 209-11 [(1985)], we explained the statutory obligation to coordinate involves essentially two steps:
>
> "'1. The makers of the plan [must engage] in an exchange of information between the planning jurisdiction and affected governmental units, or at least invite such an exchange.
>
> "'2. The jurisdiction [must use] the information to balance the needs of all governmental units as well as the needs of citizens in the plan formulation or revision.'"

Petitioners contend the city failed to engage in the required exchange of information and failed to balance the needs of the districts in annexing Roads End and withdrawing that territory from the districts. Petitioners argue the annexation leaves "[p]etitioners as two legal shells." Petition for Review 17. Petitioners identify the following need as the need the city failed to balance: "Foremost is the preservation of each District's lawfully created existence, consistent with state laws authorizing special service districts and implementing the vote of the District's constituents." Petition for Review 19.

The city points out that beyond submitting an application to the state Water Resources Department (WRD) seeking a water right for wells to provide water in Roads End, the districts have no plan that the city could coordinate with. We understand the city to contend that that application is not a plan that the city is required to coordinate with. The city also points to evidence in the record that the county has taken the position with WRD that the application is inconsistent with the county's comprehensive plan.

While RESD owns the sewer collection pipes in Road End, RESD has no facilities to treat the collected sewage and has no adopted plans to do so. The city maintains the sewage collection pipes and treats all the sewage. REWD has no facilities at all, and no adopted plan

to provide such facilities. The city has always provided water service within Roads End. The city argues:

> "[D]espite requests from the city, and 25 years to start providing service, neither district ever presented to the city any such plans nor does either deliver any services. Petitioners express no concerns about the quality of the services provided by the city or the city's capacity to serve the area. The city's Comprehensive Plan, UGB and ordinances, all have provided for annexation since at least 1984. * * *" Respondent's Brief 28.

The heart of the problem that gives rise to petitioners' Goal 2 coordination challenge is that the districts' desire to continue to exist conflicts with the city's desire to annex Roads End and withdraw their territory, and there is no way to resolve that conflict. If there is any way to reach a compromise regarding the city's desire to annex Roads End, now that it is providing water and sewer service and has the necessary consents to allow it to do so over the objections of some property owners, and the districts' desire to maintain their corporate identity and service areas, petitioners do not suggest what that compromise might look like. Finally, it is not accurate to say the city has not engaged in dialogue with the districts or asked to be provided with any plans the districts might have to directly provide water and sewer service in Roads End, although the exchanges have generally not been friendly. Record 231, 238, 242, 261, 525, 528, 551, 561. Given the nature of the longstanding dispute between petitioners and the city regarding whether the city should annex Roads End, we conclude that the city adequately coordinated its annexation decision with the districts.

C. Goal 12 (Transportation)

Petitioners' final goal challenge is a challenge to the city's Goal 12 findings. However, once again, petitioners' arguments are premised on the erroneous assumption that the challenged decision amends the applicable comprehensive plan and land use regulations. As we have already explained, the annexation ordinance makes no changes to the county comprehensive plan and zoning for Roads End. Petitioners offer no basis for concluding that the annexation ordinance might implicate Goal 12 in any way.

The second assignment of error is denied.

The city's decision is affirmed.