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

CALDWELL FARMS, LLC and LYNN NORDHAUSEN,
Petitioners,

vs.

CITY OF CORVALLIS,
Respondent,

and

LESTER OEHLER,
Intervenor-Respondent.

LUBA No. 2019-114

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was the Law Office of Bill Kloos PC.

David E. Coulombe, Deputy City Attorney, filed a response brief and argued on behalf of respondent. With him on the brief was Fewel, Brewer & Coulombe.

Steve Elzinga, Salem, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Sherman, Sherman, Johnnie & Hoyt LLP.

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

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

AFFIRMED 05/11/2020

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal the city council's decision denying petitioners' application for annexation of their property.

FACTS

Petitioners own a 16.45-acre property located within the city's urban growth boundary. The property is located west of the intersection of an arterial street (53rd Street) and a collector street (West Hills Road).[1] The property abuts the city's borders to the north, and to the west.

On April 9, 2016, petitioners submitted to the city their application for city annexation of the property. On December 6, 2017, the planning commission held a public hearing on the annexation application. On December 20, 2017, the planning commission deliberated and voted to recommend that the city council place the annexation request on the May 2018 ballot.

On January 16, 2018, the city council held a public hearing on the annexation request. On February 5, 2018, the city council deliberated on the application and voted to reopen the hearing to receive new information. On

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[1] The city's comprehensive plan explains that an arterial street "[c]onnects the State highways, linking major commercial, residential, industrial, and institutional areas." Corvallis Comprehensive Plan (CCP) 50-15. A collector street "[p]rovides both access and circulation within residential neighborhoods and commercial/industrial areas. Generally, it results in a greater intensity of development along their routes or at major intersections with other collectors or arterials." *Id.*

February 20, 2018, the city council voted to deny the annexation request but directed staff to investigate creation of an agreement addressing the city council's concerns related to the consistency of an annexation with various city infrastructure plans.

On August 19, 2019, the city council held a public hearing to consider whether to approve an annexation agreement staff negotiated with petitioners. On September 16, 2019, the city council deliberated, voted against entering into the annexation agreement and directed staff to draft findings denying the annexation application. On October 7, 2019, the city council adopted findings denying the application.

This appeal followed.

MOTION TO TAKE EVIDENCE NOT IN THE RECORD

Intervenor asserts in his motion to dismiss, addressed below, that the appeal should be dismissed because petitioners failed to properly serve their notice of intent to appeal (NITA) because the NITA was not served on individuals provided notice of the city's decision by email. OAR 661-010-0045(1) provides in part:

> "The Board may * * * upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

Petitioners ask that we take as evidence not in the record, a series of emails between petitioners' representative and the city concerning petitioners' request for the addresses of those to whom the city sent a copy of the city's decision on

appeal. OAR 661-010-0045(2) provides that a motion to take evidence must state with particularity the facts the party seeks to establish, how those facts pertain to the grounds to take evidence and how those facts affect the outcome of the proceeding. Petitioners' motion complies with OAR 661-010-0045(2) because it explains that the record does not contain the mailing list and that petitioners attempted to obtain the city's mailing list, that the city refused to provide petitioners with email addresses used to provide notice of the decision, and that petitioners believe the case should not be dismissed based upon actions taken by the city that limited petitioners' ability to serve the NITA.

The motion to take evidence is granted.

MOTION TO DISMISS

ORS 197.830(9) requires that a notice of intent to appeal a land use or limited land use decision be filed no later than 21 days after the date the decision to be reviewed becomes final. OAR 661-010-0015(1)(a) provides in part that:

> "The [NITA], together with two copies, and the filing fee and deposit for costs required by section (4) of this rule, shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3)-(5)."

OAR 661-010-0015(3)(f)(D) requires that the NITA include the name, address and telephone number of any:

> "person to whom written notice of the land use decision or limited land use decision was mailed, either through the United States Postal Service or by electronic mail, as shown on the governing body's records. The telephone number may be omitted for any such

person."

OAR 661-010-0015(2) provides:

> "The Notice shall be served on * * * all persons identified in the Notice as required by subsection (3)(f) of this rule on or before the date the notice of intent to appeal is required to be filed. Service of the Notice as required by this section may be in person or by first class mail. However, where the local government provides only an electronic mail address for a person identified in the Notice as required by subsection (3)(f)(D), service shall be by electronic mail. The date of serving such notice shall be the date of personal service, mailing, or electronic mailing."

Intervenor argues that despite the fact that a footnote in his Motion to Intervene put petitioners on notice that the NITA's service was flawed, petitioners failed to complete service on those the city emailed a copy of the final decision. Intervenor argues that this case must be dismissed because petitioners failed to properly serve the NITA. We conclude that the petitioners met their service obligation.

"It is well established that the 21-day deadline for filing a [NITA] is jurisdictional." *Bruce v. City of Hillsboro*, 32 Or LUBA 382, 386 (1997). Service of copies of the NITA is also jurisdictional. *Id.* We have held, "[h]owever, the 21-day deadline for *service* of the notice is not jurisdictional, and late service of the notice will not result in dismissal, absent substantial prejudice to the parties." *Id.* at 387 (emphasis added). The notice list in *Bruce* was lengthy and petitioners objected to complying with LUBA's rules. *Id.* Petitioners stated, "When we are in receipt of proof that the 'parties' truly did request notification and the City provides us with a legible corrected mailing list and when the Board replies to our question, we will, if the Board still so directs, notify the interested parties."

Id. at 386. We provided petitioners an opportunity to correct the failure of service on non-parties late in the case. Petitioners failed to do so and instead attempted to shift the burden to the city. We dismissed the appeal. Here, petitioners attempted to serve those who had received notice of the decision but were thwarted by the city's response that it would not release email addresses.

As evidenced by the email chain attached to petitioners' Motion to Take Evidence, the city declined to release the electronic addresses of those individuals to whom the city sent a copy of the final decision by email. Thus, petitioners served the NITA "as shown on the governing body's record" to the extent the governing body was willing to share that information. OAR 661-010-0015(3)(f)(D).[2] We agree with petitioners that nothing in our rules requires petitioners to search more broadly for contact information for participants in the proceedings below or other recipients of the final decision.

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[2] OAR 661-010-0015(3)(f)(D) provides that the Notice of Intent to Appeal shall contain:

> "(f) The name, address and telephone number of each of the following:
>
> "* * * * *
>
> "(D) Any other person to whom written notice of the land use decision or limited land use decision was mailed, either through the United States Postal Service or by electronic mail, as shown on the governing body's records. The telephone number may be omitted for any such person."

Furthermore, we have held that we will not dismiss a case based upon a technical violation of our rules unless the rights of a party are substantially prejudiced. Intervenor's rights were not prejudiced by the limited service. Intervenor was one of the individuals to whom the city sent notice of the decision via email and, because the city did not provide petitioners with intervenor's email address, intervenor did not receive a service copy of the NITA. Intervenor's counsel asserts, in the body of the motion to dismiss, that intervenor only learned of the NITA from a neighbor and had to scramble to file his motion to intervene within the deadline.[3] Motion to Dismiss 3. By whatever means intervenor ultimately learned of the NITA, his motion to intervene was timely filed and his rights were not prejudiced.

The motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

A. ORS 222.127

ORS 222.127 provides in part:

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[3] Petitioners point out that, although it was not addressed to intervenor, the NITA was mailed to intervenor's address. Intervenor participated in the proceedings below, both alone and with an individual named Rachel Oester. Intervenor's written submissions below provide that intervenor's mailing address was the same as Oester's. In this appeal, petitioners served a copy of the NITA to Oester's address, and addressed the mail to Oester. We will not, however, presume service on a co-occupant of a residence is sufficient.

"(1) This section applies to a city whose laws require a petition proposing annexation of territory to be submitted to the electors of the city.

"(2) Notwithstanding a contrary provision of the city charter or a city ordinance, upon receipt of a petition proposing annexation of territory submitted by all owners of land in the territory, the legislative body of the city shall annex the territory without submitting the proposal to the electors of the city if:

"(a) The territory is included within an urban growth boundary adopted by the city or Metro, as defined in ORS 197.015;

"(b) The territory is, or upon annexation of the territory into the city will be, subject to the acknowledged comprehensive plan of the city;

"(c) At least one lot or parcel within the territory is contiguous to the city limits or is separated from the city limits by only a public right of way or a body of water; and

"(d) The proposal conforms to all other requirements of the city's ordinances."

ORS 222.127 applies to the city because the city charter generally requires annexations to be submitted to the electors. As explained in Corvallis Land Development Code (LDC) 2.6.10:

"The purpose of land Annexation allows for the orderly expansion of the City and adequate provision for public facilities and services. *The City Charter requires voter approval of an Annexation unless an Annexation is mandated by state law.* For example, Health Hazard Annexations are mandated by state law and do not require voter approval." (Emphasis added).

The city challenged the constitutionality of ORS 222.127 in *City of Corvallis v. State of Oregon et al.*, Benton County Circuit Court Case No. 16CV17878.[4] In its March 21, 2017 order, the Benton County Circuit Court granted the state's motion for summary judgment and concluded that the provisions found in SB 1553 and ORS 222.127 restricting the way in which annexation requests are forwarded to voters was constitutional. The city appealed the circuit court decision and that appeal is pending. The city council decided, however, based upon the circuit court decision, to make the final decision on annexation rather than refer petitioners' application to voters. The city's annexation approval criteria are found in LDC 2.6.30.01.

B. LDC 2.6.30.06

The city council concluded that ORS 222.172 prohibited referral of the annexation application to voters but that the city's approval of the annexation

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[4] In its complaint, the city described its action as one:

> "[F]or declaratory relief from the State of Oregon's unconstitutional enactment of Oregon Law, Chapter 51, 2016, commonly known as Senate Bill 1573. Senate Bill 1573 is intended to prevent cities like the City of Corvallis from submitting annexation decisions to the voters of the City. Senate Bill 1573 does not comply with provisions of the Oregon Constitution limiting legislative authority and reserving the right of initiative and referendum, and the right of local voters to enact and amend their own city charters. This lawsuit seeks declaratory relief that Senate Bill 1573 is unconstitutional on its face and as applied to the City of Corvallis." Record 260.

required a showing that the criteria in LDC 2.6.30.06(a)-(e) are met. LDC 2.6.30.06 provides in part:

> "Requests for Annexations shall be reviewed to ensure consistency with the applicable polices of the Comprehensive Plan, particularly Article 14, and other applicable policies and standards adopted by the City Council and State of Oregon.
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> "Annexations can only be referred to the voters when the proposed Annexation site is within the City's Urban Growth Boundary (UGB), and where the findings below are made. * * *
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> "* * * * *
>
> "**c. The site is capable of being served by urban services and facilities required with development** - The developer is required to provide urban services and facilities to and through the site. At a minimum, both Minor and Major Annexations shall include consideration of the following:
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> "1. Sanitary sewer facilities consistent with the City's Sanitary Sewer Master Plan and Chapter 4.0 - Improvements Required with Development;
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> "2. Water facilities consistent with the City's Water Master Plan, Chapter 4.0 - Improvements Required with Development, and fire flow and hydrant placement;
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> "3. Storm drainage facilities and drainageway corridors consistent with the City's Stormwater Master Plan, Chapter 2.11 - Floodplain Development Permit, Chapter 4.0 - Improvements Required with Development, Chapter 4.5 - Floodplain Provisions, Chapter 4.13 - Riparian Corridor and Wetland Provisions, and Chapter 4.14 - Landslide Hazard and Hillside Development Provisions;

"4. Transportation facilities consistent with the City's Transportation Plan and Chapter 4.0 - Improvements Required with Development; and

"5. Park Facilities consistent with the City's Parks Master Plan."

"* * * * *

"e. **Compatibility** - The application shall demonstrate compatibility in the following areas as applicable[.]"

The city council explained:

> "The City Council interprets [LDC 2.6.30.06] to be an ordinance requiring an annexation proposal to demonstrate that the site is capable of being served by urban services and facilities required with development as a threshold requirement for the City Council to approve the annexation." Record 15.

Petitioners argue in their first assignment of error that these code provisions are not applicable.

C. Preservation of Error

Petitioners argue that the criteria provided in LDC 2.6.30.06(a)-(e) only apply when an annexation application is referred to voters and because ORS 222.127 does not allow referral of petitioners' application to voters, the criteria in LDC 2.6.30.06(a)-(e) may not be applied. The city and intervenor (collectively respondents) argue that petitioners failed to preserve this assignment of error. We agree with respondents.

ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record

> at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."[5]

Petitioners argue that an issue that appears for the first time in the findings "need not be preserved for appeal because, absent a crystal ball, the party does not know in advance what legal error will be reflected in the findings." Petition for Review 7. The applicability of the standards is not, however, an issue that came up for the first time in the city council findings. Rather, petitioners argued below that the standards were met. See Record 779-82. In *Boucot v. City of Corvallis,* 56 Or LUBA 662 (2008) we held that a petitioner waived the issue of compliance with standards applicable to natural drainage ways where "the only position taken by the applicant, staff or opponents below was that the west drainageway was not a natural drainage way" so the criteria did not apply. *Id.* at 674. The issue petitioners now seek to raise, that the criteria do not apply at all, was not preserved. Accordingly, we deny this assignment of error.

We also agree with respondents on the merits and conclude that the LDC 2.6.30.06 (a)-(e) are applicable. Our review of the city council's interpretation of

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[5] *See also* ORS 197.835(3), which provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by * * * ORS 197.763[.]"

state law is subject to ORS 197.835(9)(a)(D), which requires that LUBA shall reverse or remand the land use decision if the city "[i]mproperly construed the applicable law." In construing the law, we will consider the text, context and legislative history of the law at issue in order to determine the intent of the enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). We are required to affirm a city council's interpretation of the LDC unless it is "inconsistent with the express language of the comprehensive plan or land use regulation. " ORS 197.829(1)(a).

The plain language of ORS 222.127 provides that the provision of local annexation regulations that is not applicable is the voter referral requirement.[6] This is consistent with the legislative history. Senator Beyer stated during the Senate Committee on Rules discussion of Senate Bill (SB) 1573 (2016) and ORS 222.172 that:

> "[annexation] has to conform with many requirements. There's no restriction on those requirements. Most cities have requirements on phasing of developments; they have requirements on density. * * * And certainly they have freedom under the act to do as much as they need to do that." Video Recording, Senate Committee on Rules, SB 1573, Feb 24, 2016, at 45:05 (comments of Sen Lee Beyer), https://olis.leg.state.or.us (accessed May 8, 2020).

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[6] We understand that the city has appealed the circuit court's determination that ORS 222.127 is constitutional to the Court of Appeals. That appeal is pending and we will not address the constitutionality of ORS 222.127.

We interpret ORS 222.127 to prohibit the city from imposing a voter referral requirement to an annexation covered by the statute but to otherwise not restrict the criteria that the local government would otherwise apply to an annexation.

Petitioners allege that the code provision only applies "when the matter is to be referred to voters," stating that "[t]he City acknowledged that limitation, but it then decided to apply the standards in this instance anyway when the matter is not to be referred to voters." Petition for Review 13 (emphasis in original). Under petitioners' view, if there is no referral to voters, these criteria fall away. The city council concluded that the criteria remain. The city's charter requires referral of all annexations, other than those annexations mandated by state law, to the electorate. Complying with ORS 222.127, the city did not refer the annexation request to the electorate. The city did impose its other criteria. The LDC establishes prerequisites to referral of an annexation request to voters. The city concluded that those prerequisites remain approval criteria, even if the city is no longer able to refer the annexation question to voters.

ORS 197.829(1) requires that we affirm a governing body's interpretation of a local land use regulation, unless the interpretation is "inconsistent with the express language, purpose," or "underlying policy" of the regulation, or is "contrary to a state statue or land use goal." "[W]hen a local government plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, that interpretation must be affirmed * * * unless the interpretation is inconsistent with *all* of the 'express

language' that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations." *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (emphasis in original). The city's interpretation is consistent with the code text. If we omit the "referred to the voters" language in LDC 2.6.30.06, it leaves "Annexations can only be * * * when the proposed Annexation site is within the City's Urban Growth Boundary (UGB), and where the findings below are made. * * *." This reading requires the city apply LDC 2.6.30.06(a)-(e).

Petitioners' interpretation fails to address the charter provision that the city will refer all annexations, not mandated by state law, to voters. City Charter section 53, "Vote on Annexations" provides:

> "Unless mandated by State law, annexation, delayed or otherwise, to the City of Corvallis may only be approved by a prior majority vote among the electorate."

Under petitioners' interpretation, the LDC 2.6.30.06(a)-(e) approval criteria would never apply. The legislative history is clear that the legislature did not intend to strip all authority to manage annexations from the cities. Rather, the legislature sought to limit local voter referral requirements. The city's interpretation of its code is consistent with the text and context of the city's code. It is also consistent with the legislative history of the enactment of ORS 227.127.

This assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioners argue that the city erred in finding that the application did not comply with the requirement found in ORS 222.127(2)(d) that, "The [annexation] conforms to all other *requirements* of the city's ordinances." (Emphasis added.) Petitioners argue that the city's interpretation of "requirements" is not entitled to deference because the term is found in state law. *See Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992) (LUBA owes no deference to the local governing body's interpretation of state statutes and rules). This issue was not raised below. ORS 197.763(1); ORS 197.835(3).

For the reasons explained in the first assignment of error, we conclude that the issue is waived, and we deny the assignment of error.

This assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners' third assignment of error is that the city's findings are inadequate and not supported by substantial evidence. ORS 197.835(9)(a)(C). The city argues that petitioners failed to preserve this assignment of error. We conclude that the assignment of error was preserved.

The preservation requirement found in ORS 197.763(1) is applicable to an assignment of error arguing that the adopted findings are inadequate or not supported by substantial evidence. As we held in *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993):

> "In order to preserve the right to challenge at LUBA the adequacy of the adopted findings to address a relevant criterion or the evidentiary support for such findings, a petitioner must challenge the proposal's compliance with that criterion during the local proceedings. Once that is done, the petitioner may challenge the adequacy of the findings and the supporting evidence to demonstrate the proposal complies with the criterion. The particular findings ultimately adopted or evidence ultimately relied on by the decision maker need not be anticipated and specifically challenged during the local proceedings."

We explained in *Bruce Packing Company, Inc. v. City of Silverton*, 45 Or LUBA 334, 352, *aff'd*, 191 Or App 305, 82 P3d 653 (2003) that:

> "The critical considerations under *Lucier* and ORS 197.763(1) are whether issues were raised below regarding compliance with an approval criterion and, if so, whether those issues were 'raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond[.]'" *Id.* (quoting *Lucier*, 26 Or LUBA at 216).

LDC 2.6.30.06 provides:

> "Requests for Annexations shall be reviewed to ensure consistency with the applicable policies of the Comprehensive Plan, particularly Article 14, and other applicable policies and standards adopted by the City Council and State of Oregon."

Compliance with this provision was debated below. For example, Corvallis Comprehensive Plan (CCP) 14.3.2 provides that "Conversion of urbanizable land to urban uses shall be based on orderly, economic provision of public utilities, facilities and services." Petitioners argued below that CCP 14.3.2 was met, stating "Public utilities, facilities and services can be provided in an orderly economic fashion as described [in applicant's narrative] and as detailed in the

City's Facility Master Plans." Record 803. The city council disagreed, stating in its findings:

> "Water service is available from West Hills Road, but there is no existing Wastewater or Stormwater facilities serving the site in a manner that would be consistent with City Master Plans. To accommodate these facilities and plans, easements would need to be obtained from an adjoining property owner. That adjoining property owner has clearly expressed opposition to providing any such easements. The draft annexation agreement called for the City to obtain the easements, if the applicant is unable to do so. The draft agreement included express use of the City's power of eminent domain to obtain the easements. The City Council has rejected the annexation agreement, particularly the commitment to use eminent domain in this circumstance. The applicant has indicated that alternate engineering or alignments of wastewater would be possible, but these alternates are not consistent with the City's Master Plans and would increase the costs of maintenance and operation, and require future development or urbanization of neighboring properties to also deviate from the approved Master Plans in significant ways. The Council notes that the conversion of the property to urban uses would not be based on orderly, economic provision of public utilities, facilities and services, if the Master Planned facilities are not provided. The Council notes that the City and other jurisdictions are not capable of providing urban services and facilities required by the annexed area, when developed, without the required easements or rights of way. The Council finds this is a significant disadvantage to annexing the site." Record 12-13.

This assignment of error was preserved.

However, where a local government denies a land use application on multiple grounds, LUBA will affirm the decision on appeal if at least one basis for denial survives all challenges. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd*, 195 Or App 762, 100 P3d 218 (2004), *rev den*, 338

Or 17, 107 P3d 27 (2005). In that circumstance, the Board typically does not address challenges directed at other, alternate, bases for denial.

The city council's decision includes findings that LDC 2.6.30.06(c) and (e) are not met. Petitioners challenged the applicability of these standards in their first assignment of error, and we determined both that the first assignment of error is waived and even if not waived, that petitioners' argument fails on the merits because the standards apply. As intervenor observes, petitioners do not challenge the city's findings that these standards are not met. Intervenor's Response Brief 25. Petitioners concede that, "To prevail in this appeal the Petitioner must show that each reason for denial was in error." Petition for Review 3. Petitioners have not done so. Accordingly, we need not and do not address the third assignment of error.

The decision is affirmed.