

MEMORANDUM

TO: Oregon City Commission
FROM: Carrie A. Richter
DATE: January 25, 2017
RE: Procedural Issues Associated with the City Commission's Review
Oregon City Golf Course Annexation - AN-16-0003

As the Commission reviews this application, it should be aware of several issues that were raised before the Planning Commission that could benefit from further explanation than found in the final decision.

Although the City has processed numerous annexation requests in the past, this is the first significant application since voter approved annexations were added to the Charter, in which the applicant is proposing annexation without seeking voter approval. The applicant seeks annexation without voter approval under Senate Bill 1573, adopted in 2016. This memorandum is not intended to summarize or respond to all of the arguments presented before the Planning Commission about whether this annexation should be approved. For a discussion of the substantive review standards, you should review the materials submitted by the applicant, the staff report, or the memorandum prepared by our office dated January 6, 2017, already in the record.

Senate Bill 1573 authorizes a city to annex lands, under certain circumstances, without voter approval, notwithstanding any city charter limitation to the contrary. A copy of the bill is attached to this memorandum. Should the Commission approve this annexation proposal, the Commission will then have to decide whether to send it to the voters, in compliance with the City Charter, or simply forward it on to the Secretary of State for confirmation of the new city boundaries. Should you decide to do the latter, eliminating the voter-approval component consistent with SB 1573, this land use review will be the only public forum to review this request.

Scope of the City Commission's Review

The first question that must be answered is what type of procedure controls the City Commission's review. The OCMC does not assign a procedure for annexations. There are two options: legislative or quasi-judicial. There is no bright-line test for classifying decisions as one or the other; instead, there are several factors focusing whether the activity is more akin to policy-making or adjudicative. These factors include (1) whether the action is likely to result in a decision, (2) whether there are set criteria, and (3) the area of land affected or the number of individuals affected. In this case, there are several elements that make this decision appear legislative. Those elements include the size of the subject property – 117 acres, the discretionary nature of the approval standards and, removal of the voter-

approval requirement may have the effect of placing a political gloss on this entire review. However, there are other elements that make this decision appear quasi-judicial. Although the property is large, there are a small number of owners. The owner did file an application, suggesting that the City will make a decision and, although they are discretionary, there are specific criteria that the Commission must apply. The City has historically treated annexations as quasi-judicial decisions and the Planning Commission followed quasi-judicial procedures during its review. Given the uncertainty surrounding this question, the most conservative course would be to assume that the decision is quasi-judicial and to act accordingly.

Quasi-judicial decisions are subject to the procedural guarantees including recitation of the land use statement at the beginning of the hearing, disclosure of all ex parte contacts and conflicts of interest and, as provided in OCMC 17.50.030(D), review by the City Commission is on the record and only issues raised before the Planning Commission may be raised before the City Commission. The only difficulty with following quasi-judicial procedures is that nothing in the written notice, the staff report, or the proceedings before the Planning Commission, indicated that no new evidence would be considered during the City Commission's review.

In an effort to avoid a procedural challenge that participants were denied an opportunity to present evidence before the City Commission, coupled with the uncertainty of characterizing the decision as legislative, where new evidence would be permitted per OCMC 17.50.170, we recommend that the City Commission process this decision as a quasi-judicial decision but allow new evidence to come in as part of its review. LUBA has never upheld a procedural challenge where the City provides too much process, rather it is where there is a lack of sufficient process that causes concern. For this reason, we recommend that the City accept new evidence into the record during the hearing.

SB 1573, Charter limitations and the Corvallis case

During the proceedings before the Planning Commission, a number of individuals raised concerns that approval of this annexation request without voter approval, as provided in SB 1573, would violate Section 3 of the Oregon City Charter and provisions of the Oregon Constitution, which reserve local government authority to adopt a charter through initiative and limits legislative authority to amend or repeal local charter provisions.

Upon enactment of SB 1573 and after receiving numerous annexation applications without voter approval, the City of Corvallis adopted a resolution explaining its intent to refer all annexation requests to the voters, notwithstanding SB 1573, and around that same time, it filed a complaint in Benton County Circuit Court, seeking a declaratory judgment asking the court to determine whether SB 1573 or the City's charter should control.¹ After speaking with the Corvallis city attorney, it is our

¹ Section 3 of the Oregon City Charter provides in relevant part:

"Unless mandated by law, the city shall include all territory encompassed by its boundaries as they now exist or hereafter are modified by the voters."

For comparison purposes, the relevant portion of the City of Corvallis charter provides:

understanding that oral arguments on a motion for summary judgment took place last week and although no firm decision date was identified, it will likely be a few weeks before a decision is rendered. Regardless of the decision, unless it is reviewed on appeal by the Oregon Court of Appeals, which will take months, if not a year, the Corvallis decision will not be binding on annexations occurring in Clackamas County. We understand that similar efforts may be unfolding in the Cities of Jefferson and Philomath.

Although SB 1573 relates to the political component of annexation, as opposed to the land use component, which is the matter currently before the Commission, any ordinance approving this annexation request will need to include instructions to staff about how to proceed. In the case of Planning File AN 16-01, an approximate 0.5 acre annexation of Columbine Court which is the only annexation approved since SB 1573, staff followed SB 1573 and the city's boundaries have been changed. The City Commission has the following options if it approves this request:

- Follow SB 1573 and instruct staff to file the necessary documentation with the Oregon Secretary of State to acknowledge a change in the city boundaries.
- Not follow SB 1573 by instructing staff to process the annexation in compliance with the City's Charter and either moving forward with placing the matter on the ballot for consideration by the voters at the next election and/or directing the city attorney's office to take legal action necessary to defend the City Charter either through a declaratory judgment, similar to the one pursued in Corvallis, or through a validation suit.

The Status of the Beaver Creek Road Concept Plan and its Acknowledgment

One of the requirements for qualification for annexation without voter approval is that the subject "territory is, or upon annexation of the territory into the city will be, subject to the acknowledged comprehensive plan." The comprehensive plan that will affect development of the area subject to this annexation is the Beaver Creek Road Concept Plan ("BRCP"). As this Commission is aware, the BRCP was re-adopted in 2015 and appealed to the Land Use Board of Appeals ("LUBA") for review. In November, 2016, LUBA issued a decision affirming the City's adoption of the BRCP and that decision has been appealed to the Oregon Court of Appeals. Although all of the briefing before the appellate court has been completed, it could be weeks or months before the court reaches a decision.

Another state law, ORS 197.625 provides that "acknowledgment" does not occur until the resolution of all appeals.² In other words, in order to take advantage of the authorization contained in SB 1573, the

"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."

² ORS 197.625 provides, in relevant part:

(1) A local decision adopting a change to an acknowledged comprehensive plan or a land use regulation is deemed to be acknowledged when the local government has complied with the requirements of ORS 197.610 and 197.615 and either:

BRCP must be acknowledged. As a result, the applicant included a request that any ordinance approving the annexation not take effect until the BRCP is acknowledged. In other words, assuming the Commission instructs staff to follow SB 1573, the annexation cannot be sent to the Oregon Secretary of State in compliance with state law until the BRCP is acknowledged. However, after the Planning Commission adopted its decision, the applicant has requested that the annexation take effect immediately upon adoption. Notwithstanding this more recent request by the applicant, the city attorney's office recommends that any ordinance approving this application include a delayed effectiveness provision.

Conclusion

As you can see, the change in the law with regard to SB 1573 has added a number of additional components into the City's decision-making when considering an annexation.

We look forward to discussing these issues further with you at the hearing next week.

(a) The 21-day appeal period set out in ORS 197.830 (9) has expired and a notice of intent to appeal has not been filed; or

(b) If an appeal has been timely filed, the Land Use Board of Appeals affirms the local decision or, if an appeal of the decision of the board is timely filed, an appellate court affirms the decision.

(2) If the local decision adopting a change to an acknowledged comprehensive plan or a land use regulation is affirmed on appeal under ORS 197.830 to 197.855, the comprehensive plan or the land use regulation, as modified, is deemed to be acknowledged upon the date the decision of the board or the decision of an appellate court becomes final.