Bateman Seidel

MEMORANDUM

TO: Honorable Mayor and Oregon City Commission

FROM: William K. Kabeiseman

DATE: November 14, 2019

RE: SB 1573 and Voter Approved Annexations

INTRODUCTION

The Oregon City Charter provides that "[u]nless mandated by law, the city shall include all territory encompassed by its boundaries as they now exist or hereafter are modified by the voters." This provision was approved by a vote of the citizens in May 18, 1999 and requires annexations to receive voter approval in most circumstances. The 2016 Oregon Legislature adopted Senate Bill 1573 ("SB 1573"), which purports to eliminate voter approval requirements in cities in Oregon.

The effect of SB 1573 in Oregon City was discussed extensively in 2017 and, at that time, the Commission settled on a policy of following SB 1573, and not challenging that law. Since that time, the membership of the Commission has changed and the new Commission has expressed interest in reconsidering its options regarding annexations. This memorandum is designed to provide the Commission with the information necessary to do so.

BACKGROUND

Rather than repeat information that has been provided to the Commission in the past, attached to this memorandum are the following documents:

1. History of Oregon City Annexations Since SB 1573
2. Senate Bill 1573
3. Benton County Decision in *Corvallis v. State of Oregon*
4. LOC Home Rule in Oregon Cities Guide
5. Memorandum from Carrie Richter dated July 12, 2018
6. Memorandum from Carrie Richter dated January 25, 2017

In addition, the City Attorney's office has obtained the briefs submitted by the parties in the appeal of the *Corvallis* decision, but those briefs are lengthy and legally dense, so they are not included with this material, but are available if any Commissioner is interested in reviewing those documents. Oral argument was held in that case on July 13, 2018, almost a year and a half ago. The Court of Appeals has not yet issued an opinion in that case, but it could be issued at almost any time.

DISCUSSION

In early 2017, the Commission reviewed the issues related to voter-approved annexations and SB 1573 and concluded that the appropriate course was to follow the requirements of that law. Accordingly, since that time the City has processed multiple annexations, as large as 150 acres and as small as one acre without sending those annexations to the voters. However, until there is a binding decision regarding the constitutionality of SB 1573, the City could choose to reconsider its policy choice and pursue a different course on future annexations. What follows are several options the Commission could consider.

Declaratory Judgment or Validation Suit.

One option the Commission may consider is to follow a course similar to the City of Corvallis. In 2017, after SB 1573 went into effect, the City of Corvallis sued the State of Oregon seeking a declaration from the courts that SB 1573 unconstitutionally infringed on the City's home rule authority. Although the Benton County Circuit Court disagreed with Corvallis on that issue, the Clackamas County Circuit Court is not bound by that decision and could reach a contrary decision. Alternatively, the City could approve an annexation and set an election on that measure, and promptly file a "validation" suit under ORS 33.710.[1] This process allows a city to take an action and then seek court review to ensure the legality of the action.

What the City may not do is simply ignore the state law and act as if it does not exist or has no force or effect. This path was taken by the Multnomah County Board of Commissioners in *Li v. State of Oregon*, 33 Or 376, 110 P3d 91 (2005). In that case, the Board of Commissioners became convinced that the state law that limited marriage to a male and female[2] was unconstitutional. The Oregon Supreme Court concluded that, because the law applied state-wide, the county did not have the authority to remedy the perceived constitutional defect. Instead, the Supreme Court noted that "[t]he legislature has such authority [to remedy the perceived defect] and, in an appropriate adversary proceeding, the courts have

[1] ORS 33.710(2) authorizes the following:

> "(2) The governing body [of a municipal corporation] may commence a proceeding in the circuit court of the county in which the municipal corporation or the greater part thereof is located, for the purpose of having a judicial examination and judgment of the court as to the regularity and legality of:
>
> "(g)Any ordinance, resolution or regulation enacted by the governing body, including the constitutionality of the ordinance, resolution or regulation."

[2] ORS 106.010 provides as follows:

> ""Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.""

it as well. But there is no source of law from which the county could claim such authority." 110 P3d 102.

Both options would place this issue in front of a court of competent jurisdiction that would review the arguments regarding the matter. However, as demonstrated by the Corvallis case, this course of action can be lengthy and take a significant amount of time to reach a final resolution. Additionally, this course of action can also incur significant costs in attorneys' fees before reaching resolution.

Reconsider the Policy in an Appropriate Proceeding.

As noted above, the issue presented by SB 1573 were addressed by the City in the annexation of the Oregon City Golf Course, and the requirement for a vote has been touched on in other annexations. However, no one has raised the constitutionality of SB 1573 in an appeal of any of those annexation decisions and, therefore, the issue has not been brought to LUBA or any other competent court.[3] Should the Commission decide to reconsider its approach to SB 1573, it could make that decision in the course of a future annexation application.

However, the Commission should exercise care in changing its position on this issue. LUBA has reviewed several instances when a local government has changed its interpretation of an approval criterion and, although concluded it is possible, it should be done with care:

> "That does not mean that local governments have unfettered discretion to change prior existing interpretations. . . Depending on circumstances, reinterpretation of an approval criterion that has already been applied in proceedings on a particular application may run afoul of law of the case principles described in *Beck v. City of Tillamook*, 105 Or App 276, 278, 805 P2d 144 (1991), *aff'd in part, rev'd in part*, 313 Or 148, 831 P2d 678 (1992). Where the new interpretation has the effect of allowing the local government to change positions in the same proceeding with respect to what criteria are applicable approval standards, as in *Holland*, ORS 227.178(3) applies. Further, as discussed further below, a local government may not change an existing interpretation where such reinterpretation is "the product of a design to act arbitrarily or inconsistently from case to case[.]" *Alexanderson v. Clackamas County*, 126 Or App at 552. Finally, where a local government changes a pre-existing interpretation in the course of a permit proceeding, it must provide participants the opportunity to address the reinterpretation and, in some circumstances, must re-open the evidentiary record to allow the parties the opportunity to present new evidence with respect to whether the application complies with applicable approval standards, as reinterpreted. *Gutoski v. Lane County*, 155 Or App 369; *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995)."

[3] In the *Li v. State* case, the Supreme Court noted that one of the other methods that constitutional issues could arise is when an official has judicial, or quasi-judicial, authority. The court in that case noted that the Multnomah County Board had relied on language from *Cooper v. Eugene School District 4J*, 301 Or 358, 364-65, 723 P2d 298 (1986) , to conclude that it had a "duty to follow the Constitution regardless of whether a court has ruled" on a particular issue. In *Li*, the Court noted that *Cooper* involved an exercise of quasi-judicial authority, which had the power to resolve the question, unlike the Board in *Li*. However, neither *Li* or *Cooper* ever held that a judicial or quasi-judicial decision-maker had some overarching obligation to consider and decide any and all constitutional questions, including ones that were not presented to the decision-maker. In other words, there was no violation of an oath when a quasi-judicial decision-maker does not address every issue, whether it is raised or not.

Although, these cases involve the re-interpretation of local approval criteria, rather than state law, it is likely that some of the same considerations would come into play when considering future annexation approvals.

Do Not Process Annexations.

Another option would be to do nothing on an annexation proposal; take no action that would approve or deny the proposed annexation. Such a course was suggested in the *Li* case; that the County could have refused to issue marriage permits entirely and "leave it to a party aggrieved by that action to seek a contested case decision or judicial intervention through mandamus or declaratory judgment proceedings." 338 Or 384. However, unlike most land use decisions, annexations are not "permits" as defined by ORS 227.160(2) and, therefore are not subject to the 120-day rule. *Clark v. City of Albany*, 142 Or App 207, 921 P2d 406 (1996). Thus, it may take some time before a particular application would be ripe to pursue mandamus or declaratory relief.[4] Nonetheless, in the interim, it is possible that the Court of Appeals issues its opinion in the *Corvallis* case, resulting in more certainty on this issue.

CONCLUSION

SB 1573 resulted in a significant change to the processing of annexation applications and the City has, to this point, followed SB 1573 in no longer setting annexations for a public vote. The City has several options it could follow should it wish to reconsider that approach, and City staff is available to work through each option.

[4] Often annexations are consolidated with other applications, such as zone changes or subdivisions. In those cases, the other applications are still subject to the 120-day rule; however, because the other applications are dependent on the annexation occurring first, to the extent an applicant tried to use the 120-day rule to force a decision, it would almost necessarily result in a denial of the other applications.