



CITY OF OREGON CITY PLANNING COMMISSION AGENDA

Commission Chambers, 625 Center Street, Oregon City
Monday, October 12, 2020 at 7:00 PM

This meeting will be held online via Zoom; please contact planning@orcity.org for the meeting link.

CALL TO ORDER

PUBLIC COMMENT

Citizens are allowed up to 3 minutes to present information relevant to the City but not listed as an item on the agenda. Prior to speaking, citizens shall complete a comment form and deliver it to the City Recorder. The Citizen Involvement Committee does not generally engage in dialog with those making comments but may refer the issue to the City Manager. Complaints shall first be addressed at the department level prior to addressing the Citizen Involvement Committee.

PUBLIC HEARING

1. GLUA 20-00033 LEG-20-00001 Public Works Code Amendments. Request for a continuance to October 26, 2020: Proposed code revisions to the Geologic Hazards Overlay District and other ancillary Public Works related development code & standards such as refinements to Public Utility Easements (PUE), requirements for undergrounding utilities, sanitary sewer standards, and the adoption of policies relating to sidewalk obstructions and undergrounding of utilities.

GENERAL BUSINESS

2. Update on Senate Bill 1573 and Associated Court Decisions
3. Provide Policy Advice and/or Project Requests to the City Commission for the Next Biennium Budget

COMMUNICATIONS

ADJOURNMENT

PUBLIC COMMENT GUIDELINES

Citizens are allowed up to 3 minutes to present information relevant to the City but not listed as an item on the agenda. Prior to speaking, citizens shall complete a comment form and deliver it to the Staff Member. When the Chair calls your name, proceed to the speaker table and state your name and city of residence into the microphone. To assist in tracking your speaking time, refer to the timer on the table.

As a general practice, the Planning Commission does not engage in discussion with those making comments.

Electronic presentations are permitted but shall be delivered to the City Recorder 48 hours in advance of the meeting.

ADA NOTICE

The location is ADA accessible. Hearing devices may be requested from the City Staff Member prior to the meeting. Individuals requiring other assistance must make their request known 48 hours preceding the meeting by contacting the City Recorder's Office at 503 657 0891

Agenda Posted at City Hall, Pioneer Community Center, Library, City Web site.

Video Streaming & Broadcasts: The meeting is streamed live on Internet on the Oregon City's Web site at www.orcity.org and available on demand following the meeting. The meeting can be viewed live on Willamette Falls Television on channel 28 for Oregon City area residents. The meetings are also rebroadcast on WFMC. Please contact WFMC at 503 650 0275 for a programming schedule



CITY OF OREGON CITY

Staff Report

625 Center Street
Oregon City, OR 97045
503-657-0891

To: Planning Commission **Agenda Date:** 10/12/2020
From: Community Development Director Laura Terway

SUBJECT:

Update on Senate Bill 1573 and Associated Court Decisions

STAFF RECOMMENDATION:

No recommendation.

EXECUTIVE SUMMARY:

The Assistant City Attorney will provide an update on the status of City of Corvallis v. State of Oregon case and its impact on voter approved annexation in the City.

BACKGROUND:

Section 3 of the Oregon City Charter identifies “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”. However, the Legislature passed Senate Bill (SB) 1573 which allowed an option for annexations to bypass voter approval if certain criteria are met. The cities of Corvallis and Philomath included provisions in their Charter that required voter approval “unless mandated by law” and challenged the Bill in a trial court in Benton County. The trial court upheld the passage of SB 1573 and the court’s decision was appealed to the Oregon Court of Appeals.

The Assistant City Attorney is providing a brief update on the status of City of Corvallis v. State of Oregon case and its impact on voter approved annexation in the City. On May 13, 2020, the Court of Appeals rejected the appeal of the cities of Corvallis and Philomath (the “Cities”) and upheld the trial court’s decision declaring that SB 1573 did not violate the “home rule” protections set forth in the Oregon Constitution. The time for seeking review by the Oregon Supreme Court has passed and the Cities did not seek review. Therefore, the Court of Appeals decision is now final and controls annexation requests pursued within Oregon City.

OPTIONS:

1. No action needed.

BUDGET IMPACT:

Amount: N/A

FY(s): N/A

Funding Source(s): N/A



MEMORANDUM

TO: Honorable Mayor and City Commission
FROM: Carrie Richter
DATE: October 5, 2020
RE: SB 1573 and Voter Approved Annexation Update

Executive Summary

Section 3 of the Oregon City Charter identifies “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”. However, the Legislature passed Senate Bill (SB) 1573 which allowed an option for annexations to bypass voter approval if certain criteria are met. The cities of Corvallis and Philomath included provisions in their Charter that required voter approval “unless mandated by law” and challenged the Bill in a trial court in Benton County. The trial court upheld the passage of SB 1573 and the court’s decision was appealed to the Oregon Court of Appeals.

The City Commission requested a brief update on the status of *City of Corvallis v. State of Oregon* case and its impact on voter approved annexation in the City. On May 13, 2020, the Court of Appeals rejected the appeal of the cities of Corvallis and Philomath (the “Cities”) and upheld the trial court’s decision declaring that SB 1573 did not violate the “home rule” protections set forth in the Oregon Constitution. The time for seeking review by the Oregon Supreme Court has passed and the Cities did not seek review. Therefore, the Court of Appeals decision is now final and controls annexation requests pursued within Oregon City.

Oregon City’s Approach

The City Attorney’s Office has briefed the Commission about this case on multiple occasions. Discussion of the issue was included in each staff report the City Commission considered as well as in a series of memos such as the attached. The City Commission first considered SB 1573 in 2016, when a proposed annexation of .5 acre on S. Columbine Court came before the City. At that time, the Cities’ challenge was pending review before the trial court in Benton County and no decision had been made, even at the trial court level. Though the City Commission expressed frustration with SB 1573, the .5 acre annexation was approved by the Commission and the Commission followed SB 1573 and did not require voter approval of the annexation. The annexation applications continued to be submitted and six months later, a more controversial annexation came before the City Commission – the Oregon City Golf Course’s request to annex 117 acres. At the public hearing to consider this proposal, the City Attorney’s office briefed the Commission and explained that the Commission could either follow SB 1573

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approving the annexation or require voter approval, perhaps accompanied by an action for declaratory judgment from the Clackamas County Court to confirm the City's approach. The Commission again expressed frustration with SB 1573 but decided to follow the Senate Bill and not require voter approval. Since that time the City Commission reviewed a number of additional annexations.

Representatives from the City Attorney office briefed the Commission about the trial court's decision in Benton County shortly thereafter. The trial court upheld SB 1573 and the court's decision was thereafter appealed to the Court of Appeals. The League of Oregon Cities, of which Oregon City is a member, participated as an amicus in support of cities' home rule authority. The City Attorney's office has periodically briefed the Commission since then.

Most recently in November, 2019, the City Attorney provided some detail on options while it awaiting a decision by the appellate court. Although the Commission acknowledged that there were no good options, the City Attorney's office was not instructed to take any action with respect to the options. Rather, the City Commission proclaimed that until the Court of Appeals rules, it would not approve annexations without a vote of the people, with the exception of emergency sewer annexations. Since adopting this policy, the City has not received annexation applications.

The Court of Appeals Opinion

The opinion of the Court of Appeals includes a significant amount of nuance that is not particularly relevant to the court's ultimate disposition with respect to home rule.¹ Rather than delve into all of the technicalities, this summary focuses on the specific legal question of interest to the Commission: To what extent are decisions about annexation subject to local control? As the Commission knows, 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."²

¹ Given the length of the opinion, the level of legal nuance, and the number of attachments to this memo, the opinion is not attached. However, it can certainly be provided to any Commissioner who would like a copy.

² The Court of Appeals decision notes that 32 other cities in the state have enacted charter or ordinances requiring some level of voter-approved prior to annexation. The charter provisions in Corvallis and Philomath are very similar to the one in Oregon City. Section 53 of the Corvallis Charter provides:

Vote on Annexation. 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.

Section 11.1 of the City of Philomath Charter provides:

Annexations by majority vote. Unless mandated by state law, annexations to the city of Philomath may only be approved by a prior majority vote among the electorate.

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The Court of Appeals decision opens with a lengthy history of home rule regulation in relation to annexation. What may interest the Commission is that the court points out a long-established tenant of home-rule authority distinguishing between “intramural” and “extramural” authority. Where voters take an action that affects only activities within city boundaries, the activity is intramural. Actions affecting activities beyond city boundaries is extramural authority. The Court of Appeals also discussed a line of case that dates as far back as 1912, in which the Oregon Supreme Court has held that the power to annex land into a city comes from the state and is not an outgrowth of home-rule authority. As a result of those cases and the intramural/extramural distinction, the Court of Appeals concluded that the state may impose conditions on a municipality’s act of annexing property. This is what gives the state authority to set forth the annexation procedures set forth in ORS 222. The Cities invited the court to overturn this long-standing precedent but the court demurred, noting that it did not have the authority to overturn precedent established by the Oregon Supreme Court.

With respect to the authority of the charter, the Cities argued that prohibiting voter annexation would effectively eliminate voter approval in nearly all cases and deprive citizen-voters of the opportunity to self-determine their own city boundaries. The Cities argued that the “unless mandated by state law” clause in the controlling charter provisions was not intended to encompass any and all future state laws, but was intended to address a particular state law - annexations mandated by law due to a health hazard such as emergency sewer annexation. According to the Cities’ arguments, to construe this clause more broadly to include any state law relating to annexation in the future would force cities to “annex territory against their will.” The Court responded that cities are only required to do exactly what the voters set forth in charter, which required voter approval except where state law mandates doing something else. Cities who may be dissatisfied that their charter is not adequate protect their interests may amend their charter or seek to invalidate those same provisions. The Court of Appeals did not provide any further guidance on the scope of that amendment or invalidation effort.

The deadline for seeking further review by the Oregon Supreme Court passed in late June, 2020, no further appeal was filed, and that decision is now final and controlling statewide. It may interest the Commission to note that only those parties who participate in a proceeding before the Court of Appeals had standing to seek further review.

Conclusion and Next Steps

In summary, the Court of Appeals has determined that SB 1573 is constitutional with respect to a charter containing the “unless mandated by law” provision, like the one in Oregon City. This provides a statewide ruling that the mandatory annexation statute – SB 1573 – is constitutional and the City must follow it and cannot require voter approval where the statute-required qualifications are met. Refusal to follow SB 1573 and requiring voter approval could be met with a request that the trial court issue a writ of mandamus ordering the City to approve an annexation without a vote that could carry with it the recovery of attorney fees.

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The court does not offer any indication of how it would view a charter provision that did not include the “unless mandated by law” provision. To the extent the Commission wishes, it could direct staff and the City Attorney’s office to begin work on a charter amendment to eliminate that provision. This may well give rise to additional litigation. The City Attorney’s office is not aware of any other city in Oregon that has pursued this effort but did not undertake an exhaustive survey to confirm that this is the case.

Recent conversations with the League of Oregon Cities’ general counsel indicates that voter approval for annexation has largely taken a back seat to more pressing matters such as revenue shortfalls, wildfire and pandemic recovery and prevention efforts. As a result, no changes or repeal of SB 1573 appeal on the horizon.



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

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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 female² 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."

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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.

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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.



History of Oregon City Annexations Since SB 1573

Senate Bill 1573 requires the City to annex the territory without submitting the proposal to the electors of the city if certain criteria are met. No annexation has been referred to the voters since SB 1573. A total of 12 annexations have been approved since this time, including 4 emergency annexations and 8 non-emergency annexations. A summary of annexations decisions since SB 1573 is provided below. Note that the summary was updated since it was last presented to the City Commission.

1. AN 16-0001 (ORD 16-1009) 0.5 acres
City Commission Date for 2nd Reading: September 21, 2016
19358 S. Columbine Ct
Annexation and zone change of one property of approximately 0.5 acres into the City of Oregon City. The site is within the Oregon City Urban Growth Boundary and has a Comprehensive Plan designation of LR – Low Density Residential. The property is zoned Clackamas County FU-10. The applicant also requested to rezone the property to R-10.
2. Emergency Annexation AN 16-0002 (ORD 17-1008) 0.92 acres
City Commission Date for 2nd Reading: July 19, 2017
19763 S. Parrish Rd
Emergency annexation of one 0.92 acre property due to a certified failing septic system. The property will retain its existing FU-10 zoning.
3. AN 16-0003 (ORD 17-1003 & 17-1004) 51.41 and 63.82 acres for a total of 115 acres
City Commission Date for 2nd Reading: April 5, 2017
20124, 20118, & 20130 S Beaver creek Rd
Annexation of Oregon City Golf Course (115 acres) and approximately 2000 square feet of Abutting Beaver creek Road Right-of-Way into Oregon City. The 117 acre site is within the Oregon City Urban Growth Boundary and has a Comprehensive Plan designation of FU- Future Urban. The property is within the area of the Beaver creek Road Concept Plan. No zone change was proposed at the time and no changes in use are proposed or will be authorized by this application. The annexation was bifurcated into two separate Ordinances.
4. AN 16-0004 / ZC 16-0001 (ORD 17-1005 & 17-1006) 35.65 acres
City Commission Date for 2nd Reading: May 3, 2017
North of Holcomb Blvd and west of Winston Drive
Annexation and Zone Change of six properties north of Holcomb Blvd and west of Winston Drive totaling 35.65 acres into Oregon City. The subject territory is within the Oregon City Urban Growth Boundary, and has a Comprehensive Plan designation of LR – Low Density Residential. Applicant also requested a Zone Change to R-10 Single Family Residential.

5. Emergency Annexation AN 17-0001 (ORD 17-1009) 0.95 acres
 City Commission Date for 2nd Reading: October 3, 2017
 18851 S. Rose Road
 Emergency annexation of one 0.95 acre property due to a certified failing septic system. The property will retain its existing FU-10 zoning.

6. AN 17-03 / TP 17-03 / ZC 17-02 (ORD 18-1002) 6.33 acres
 City Commission Date for 2nd Reading: January 3, 2018
 19701 S Leland Road
 Annexation of a 6.33 acre property into the city limits of Oregon City. The site is within the Oregon City Urban Growth Boundary and has a Comprehensive Plan designation of Low Density Residential. The applicant also requested a Zone Change from Clackamas County Future Urban 10-Acre (FU-10) Zone to "R-6" Single-Family Dwelling District and a Subdivision of 28 lots, w/ one Stormwater Facility Tract.

7. AN 17-0004 / ZC 17-0005 (ORD 18-1007) 92 acres
 City Commission Date for 2nd Reading: July 5, 2018
 South of Holcomb Blvd and north of S. Livesay Rd
 Annexation and Zone Change of 14 tax lots located on the south side of Holcomb Blvd and north of S. Livesay Rd and totaling approximately 92 acres into Oregon City. The subject territory is within the Oregon City Urban Growth Boundary, and has Comprehensive Plan designations of LR – Low Density Residential, MR – Medium Density Residential and MUC -Mixed Use Corridor. Applicant also requested a Zone Change from County FU-10 to City R-10 Single Family Dwelling District, R-5 Single Family Dwelling District, and NC Neighborhood Commercial District.

8. AN 17-05 / TP 17-09 / ZC 17-06 (ORD 18-1006) 2.98 acres
 City Commission Date for 2nd Reading: June 6, 2018
 Leland Road
 Annexation of a 2.98 acre property into the city limits of Oregon City. The site is within the Oregon City Urban Growth Boundary and has a Comprehensive Plan designation of Low Density Residential. The applicant additionally requested approval for a Zone Change from Clackamas County Future Urban 10-Acre (FU-10) Zone to "R-6" Single-Family Dwelling District and a Subdivision of 12 lots, w/ one Stormwater Facility Tract.

9. Emergency Annexation AN-18-0001 (ORD 18-1011) 0.96 acres
 City Commission Date for 2nd Reading: August 15, 2018
 S. South End Rd
 Emergency annexation of one approximately 0.96 acre property due to a failing septic system. The property retained its existing FU-10 zoning.

10. GLUA 18-00020 / AN 18-0002 / ZC 18-00001 / MP 18-00004 (ORD 18-1031) 0.76 acres
 City Commission Date for 2nd Reading: Dec 19, 2018
 14530 S Maplelane Rd
 Annexation of a 0.76 acre property into the city limits of Oregon City. The site is within the Oregon City Urban Growth Boundary and has a Comprehensive Plan designation of Low Density Residential. The applicant also requested approval for a Zone Change from Clackamas County

Future Urban 10-Acre (FU-10) Zone to “R-6” Single-Family Dwelling District and a Minor Partition of thee (3) lots.

- 11. GLUA-19-00012: AN-19-00001 (Ord 19-1019) 0.299 acres
City Commission Date for 2nd Reading: Dec 18, 2019
19420 s Pease Rd Oregon City or 97045
Emergency Sewer Annexation of a 0.299 acre property into the city limits of Oregon City. The applicant desires to provide the property with city services due to the failing septic system on the property. Annexation is required as a condition of connecting to the city sewer system. This proposal does not include a request for development approval, rezoning or change in use. The decision on annexation to the City does not authorize or prevent any specific use of land. Current county zoning and planning designations will remain on the property until the Applicant takes action to rezone the property.

- 12. GLUA-19-00021 (AN-19-00002 / SUB-19-00001 / ZC-19-00002 / VAR-19-00005) & PR-135-2019 (Ord 19-1018) 1 acre
City Commission Date for 2nd Reading: December 4, 2019
14576 S Maplelane Rd, Oregon City, Oregon 97045
Annexation of one 1-acre parcel and abutting right-of-way, zone change from County FU-10 to City R-3.5 zone district, subdivision for seven (7) lots. Property is located on the south side of S. Maplelane Rd, approximately 0.5 miles north of S. Beaver creek Rd and 0.3 miles east of OR Hwy 213 into Oregon City, totaling approximately 1.25 acres. The subject territory is within the Oregon City Urban Growth Boundary and has a Comprehensive Plan designation of MR – Medium Density Residential.

Note two emergency sewer annexation applications have been submitted, but have yet to go before the Planning or City Commission.





MEMORANDUM

TO: Honorable Mayor Holladay and City Commissioners
FROM: Deputy City Attorney Carrie A. Richter
DATE: July 12, 2017
RE: Home Rule, Voter Approval for Annexation and SB 1573

In 2016, the Oregon Legislature adopted Senate Bill 1573, which requires a city to annex lands without voter approval, notwithstanding any city charter limitation to the contrary, in cases where:

- The annexation includes unanimous consent from the owners seeking to annex;
- The land is already included within a city or Metro urban growth boundary;
- Upon annexation, the area will be subject to a city acknowledged comprehensive plan;
- At least one parcel is contiguous with the city limits; and
- The proposal complies with all other city requirements.

A copy of the bill is attached to this memorandum.

Some citizens have expressed concern that the City's processing of annexations pursuant to SB 1573 is a violation of, not only the City Charter, but also the Oregon Constitution, which protects a municipal home rule authority from state inference, in certain cases. This issue is currently the subject of litigation between the Cities of Corvallis and Philomath and the State of Oregon. Although the City Commission has been briefed on this case previously, this memorandum offers a more robust summary of the issues along with an update follows in an effort to respond to these citizen concerns.

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. Around that same time, it joined the City of Philomath in filing a declaratory judgment action in Benton County Circuit Court, asking the court to determine whether SB

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1573 or the City's charter should control.¹ As part of the complaint, the cities alleged that annexation was a matter of local concern, protected by a number of provisions of the Oregon Constitution, including Article XI, § 2,² and that SB 1573 constitutes an unconstitutional intrusion into local governance.

In February of 2017, the cities moved for summary judgment asking the court to rule on the constitutionality of the law. The circuit court ruled in favor of the state in upholding SB 1573. The court's reasoning gets complicated quickly but in summary, the court found that the local charters do not conflict with SB 1573 because those provisions allow for annexation without a vote if required by state law. In other words, the "unless mandated by state law" clause in the charter makes clear that state law may identify circumstances when a vote is not required. In specifically considering Article XI, § 2, the court found that cities do not have home rule authority to annex lands outside their boundaries but derive that authority from state law. Because the legislature provides the authority for annexation, the court reasoned, it may also provide the procedures a city must follow. The court went on to find that these procedures do not truncate a city's internal decision-making processes because it had the opportunity to evaluate the suitability of the land for inclusion in the urban growth boundary and also to evaluate whether an annexation satisfies local land use regulations.

The cities appealed this adverse decision to the Oregon Court of Appeals. The League of Oregon Cities has filed an amicus brief on behalf of the cities.³ The briefs have been filed and oral argument is scheduled for July 13, 2018. There is no deadline for when the court must rule but the parties have surmised that it will be a year or two before there is a ruling. The City of Oregon City is not bound by the Benton County ruling but it will be bound by the Court of Appeals decision, once issued.

¹ The City of Oregon City's Charter requiring voter approval is nearly identical to the one at issue in Corvallis and Philomath. 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.

Section 53 of the Corvallis City Charter 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.

Section 11.1 of the Philomath City Charter provides:

Unless mandated by state law, annexations to the city of Philomath may only be approved by a prior majority vote among the electorate.

² Oregon Constitution Article XI, § 2 provides, in relevant part:

The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town.

³ Interestingly, the League of Women Voters argued in favor of the cities' position citing its strong support for home rule. However, it has since changed its position, arguing in favor of annexations as necessary to provide much needed housing.

Bateman
Seidel

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At the time of the circuit court ruling, Corvallis and Philomath filed for a stay with both the circuit court and the Oregon Court of Appeals, which would have allowed the cities to continue to follow their charters and municipal codes while the decision was on appeal. The stay requests were denied in both courts upon a finding that the cities failed to establish an irreparable harm would result from complying with the new law.

Although the city charters and municipal codes in Corvallis and Philomath require all annexation applications received be referred to the voters, given the decision by the Benton County Circuit Court and the lack of any court-ordered stay, the Corvallis / Philomath city attorney advised the city councils that these cities had no legal standing on which to send an annexation request received via application to the voters. At this point, the Corvallis and Philomath city councils are processing annexation requests consistent with SB 1573 and have expanded their boundaries without voter approval.

The City Commission has been briefed on these issues as the Corvallis case unfolded and as annexation applications have been reviewed. The Oregon City City Attorney's office has advised the Oregon City Commission that, unless it wishes to file its own separate declaratory judgment action in Clackamas County and seek a stay of enforcement request, it should continue to process annexation requests in the manner required by state law.



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-

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January 25, 2017

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:

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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 Beavercreek 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 Beavercreek 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:

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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.

SB 1573 vs Oregon City Charter

Senate Bill 1573 authorizes a city to annex lands, under certain circumstances, without voter approval, notwithstanding city charter limitations to the contrary.

Commission decisions:

1. Reject for land use reasons
2. Approve application and follow SB 1573:
Allow boundary change without approval by the voters, proclaim the annexation through ordinance and instruct staff to transmit records to the Secretary of State making the annexation effective.
1. Approve application and follow the Charter:
 - a. Impose condition of approval that annexation cannot be approved until affirmed by electors and instruct staff to seek court direction to resolve the conflict or await resolution of the Benton County case, assuming the Oregon Court of Appeals provides review; or
 - b. Instruct staff to take steps to place the matter on the ballot where it will be considered by electors at the next election

*Unrelated to the criteria, the Planning Commission recommended the City Commission allocate resources to join the on-going litigation in opposition of SB 1573.



CITY OF OREGON CITY

Staff Report

625 Center Street
Oregon City, OR 97045
503-657-0891

To: Planning Commission **Agenda Date:** 10/12/2020
From: Community Development Director Laura Terway

SUBJECT:

Provide Policy Advice and/or Project Requests to the City Commission for the Next Biennium Budget

STAFF RECOMMENDATION:

No recommendation.

EXECUTIVE SUMMARY:

In preparation for the next biennium budget, the Planning Commission has an opportunity to provide policy advise and/or project requests to the City Commission for their consideration. The existing city budget is projected through June 30, 2021, with a new two-year biennium budget expected to be adopted prior to expiration.

The purpose of this discussion is to identify if the Planning Commission would like to provide policy advise and/or project requests to the City Commission and identify such requests. Note that funding and staff capacity to implement such requests may be limited.

BACKGROUND:

The City of Oregon City budget covers a two-year duration. The existing city budget is projected through June 30, 2021, with a new two-year biennium budget expected to be adopted prior to expiration.

The following excerpt is provided from the existing budget:

The Budget is designed to enhance Core Services provided for the citizens of Oregon City. These core services include police protection, parks and recreation, community planning and safe buildings, maintenance of streets, and the provision of safe drinking water and sewer treatment services. In addition, Oregon City has an award-winning library and a growing tourism program.

Along with prioritization of core services, the City Commission is dedicated to improving livability in the community through the accomplishment of City Commission Goals and Priorities. The budget includes funding for several priorities that were established by the City Commission during their biennial goal setting workshop.

The purpose of this discussion is to identify if the Planning Commission would like to provide written policy advise and/or project requests to the City Commission for their consideration while assembling the budget. If so, this time will be used to preliminarily identify such requests. The City Commission must balance the needs of the City with overall availability of funds and limited staff resources. A prioritized list may be most beneficial for the City Commission.

OPTIONS:

1. Provide policy advise and/or project requests in the 2021-2023 biennium budget.
2. Do not provide policy advise and/or project requests in the 2021-2023 biennium budget.

BUDGET IMPACT:

Amount: Unknown
FY(s): 2021-2023
Funding Source(s): Unknown