



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

January 9, 2006

Representative Jerry Krummel
7544 SW Roanoke Drive N
Wilsonville OR 97070

Re: Annexation

Dear Representative Krummel:

This opinion supersedes our opinion on the same topic dated December 15, 2005. Our answer to question 1 is basically unchanged. Our answer to question 2 is modified; however, we still reach a substantially similar result.

You asked two questions relating to landowner consent to annexation. You and your constituents provided several documents¹ for our review of specific concerns relating to the City of Tigard and an unincorporated area known as Bull Mountain.

First, you asked whether a local government may require a landowner to consent to annexation as a condition for the delivery of an urban service.

Generally, the answer is yes. Annexation is one of the planning tools addressed in ORS chapter 195, which requires local governments to enter into cooperative agreements for land use planning and urban service agreements for the delivery of urban services. However, in this specific instance, the documents show electors rejected an annexation plan² that, if approved, would have authorized annexation of Bull Mountain by the City of Tigard based on the delivery of urban services to the area.

Second, you asked whether a local government may require a landowner to consent to annexation as a condition for the issuance of a building permit.

Generally, the answer is that a local government may require consent to annexation for providing extraterritorial services. We note, however, that building inspection is not a service generally provided extraterritorially. In unincorporated areas, the county is responsible for providing building inspection services, not a city. When a city operates a building inspection program in unincorporated areas pursuant to an intergovernmental agreement with the county, the city does not deliver its own services; rather, the city acts as an agent of the county, delivering services on behalf of the county to the unincorporated territory. A city may require

¹ A list of documents reviewed is attached as Appendix 1.

² ORS 195.215 requires approval of an annexation plan by a majority of the electors of the city and a separate majority of electors in the territory to be annexed. A majority of electors in the City of Tigard approved the annexation plan; however, the annexation plan was rejected because a majority of electors in the Bull Mountain area did not approve the plan.

consent to annexation only for delivering its own services, not for acting as an agent of the appropriate service provider.

Urban Service Agreements

ORS chapter 195 provides generally for coordination of comprehensive planning and urban service delivery among local governments. ORS 195.065 defines "urban services" as sanitary sewers, water, fire protection, parks, open space, recreation and streets, roads and mass transit. Counties³ are directed to coordinate the process of establishing cooperative agreements between the county, cities and special districts that provide an urban service.⁴ Pursuant to the cooperative agreement, local governments that provide an urban service are directed to establish urban service agreements.⁵

Local governments must establish in their cooperative agreement "the role and responsibilities of each party to the agreement with respect to city or county approval of new development."⁶ Pursuant to an urban service agreement, a city or a special district that provides an urban service may develop an annexation plan that provides for the timing and sequence of future annexations of territory, the standard of service availability required as a precondition of annexation and the planned schedule for providing urban services as described in the annexation plan.⁷ An annexation plan must be submitted to electors for approval.⁸ Once an annexation plan is approved by the electors, subsequent urban services annexations take effect according to the plan.⁹ Urban service annexations pursuant to an annexation plan under ORS 195.205 to 195.225 are in addition to other methods of annexation.¹⁰

In this instance, your question relates specifically to the City of Tigard and efforts to annex territory within the unincorporated area known as Bull Mountain. We reviewed the Tigard Urban Service Agreement, dated November 26, 2002, and the official election results for City of Tigard Ballot Measure 34-98, which proposed an annexation plan relating to Bull Mountain. Annexation by a city or a special district that provides an urban service pursuant to an annexation plan adopted as part of an urban service agreement and approved by electors is a part of the public policy enacted in ORS chapter 195. However, because electors rejected the annexation plan for the Bull Mountain area in November 2004, the City of Tigard may not rely on the provision of urban services consistent with the unapproved annexation plan as a legal basis for annexation.

Annexation as a Condition of Issuance of a Building Permit

ORS chapter 455 establishes authority for the Director of the Department of Consumer and Business Services to establish building codes and other related specialty codes by administrative rule.¹¹ The state building code preempts local ordinances, rules or regulations that relate to the same matters encompassed in the state building code unless the different local

³ For the area within a metropolitan service district, ORS 195.020 assigns to the district the coordinative functions otherwise assigned to a county.

⁴ ORS 195.020.

⁵ ORS 195.065.

⁶ ORS 195.020 (4)(c).

⁷ ORS 195.220.

⁸ ORS 195.205.

⁹ ORS 195.215.

¹⁰ ORS 195.235.

¹¹ ORS 455.020.

requirements are authorized by the director.¹² The director may authorize a local government to administer a building inspection program.¹³

As stated in ORS 455.020, the purpose of ORS chapter 455 is:

- 1) To "promulgate a state building code to govern the construction, reconstruction, alteration and repair of buildings and other structures and the installation of mechanical devices and equipment therein";
- 2) To "require the correction of unsafe conditions caused by earthquakes in existing buildings";
- 3) To "establish uniform performance standards providing reasonable safeguards for health, safety, welfare, comfort and security of the residents of this state who are occupants and users of buildings"; and
- 4) To "provide for the use of modern methods, devices, materials, techniques and practicable maximum energy conservation."

From this statement of purpose, it would appear that a requirement that property owners consent to annexation of property to obtain approval of a building permit for that property is beyond the scope of the building inspection program.

Following discussion with your constituents, we understand the question more precisely to be whether a city can require annexation as a condition of approval for a building permit when that requirement has not been legislatively adopted as an ordinance. Setting aside the issue of whether mandated annexation is the kind of local requirement that the Director of the Department of Consumer and Business Services may authorize within the scope of a building inspection program, we note that annexation is a legislative action. By extension, we believe that a general mandate of a municipality requiring consent to annexation for providing extraterritorial services likely also requires legislative action. We do not see that either the City of Tigard or Washington County has adopted an ordinance requiring annexation or that the director has authorized that local requirement for building permit approval.

Ultimately, however, the dispositive issue in this instance appears to be the nature of the services delivered. From our review of the documents identified in Appendix 1, it appears that the City of Tigard does not deliver city services to the unincorporated areas of Washington County. Rather, pursuant to intergovernmental agreements, the City of Tigard acts as an agent of Washington County and the Tigard Water District to provide building inspection services and water to residents of the county and district, respectively. Except for services delivered pursuant to its intergovernmental agreements to provide services on behalf of the county and the district, it does not appear that the City of Tigard provides city services to residents of Bull Mountain.

ORS 222.115 expressly authorizes a city to require a landowner to consent to eventual annexation in exchange for providing extraterritorial services to property. In *Bear Creek Valley Sanitary Authority v. City of Medford*, the Court of Appeals concludes:

In sum, reading ORS 222.115 in the context of the 1991 Act through which it was adopted, we interpret the statute to be the defining source of and limitation on city authority to obtain

¹² ORS 455.040.

¹³ ORS 455.148.

consents to annexation in exchange for extraterritorial services. We also interpret the statute to allow that procedure to be used by cities only when they are the providers of the services.¹⁴

Because the City of Tigard provides extraterritorial building inspection services to the residents of Bull Mountain pursuant to an intergovernmental agreement with Washington County, we conclude that the city may not use those services as a basis for requiring consent to annexation.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DAVID HEYNDERICKX
Acting Legislative Counsel

By
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¹⁴ 130 Or. App. 24, 30-31, 880 P.2d 486, 490 (1994).

Appendix 1

In preparing this opinion, we reviewed documents including but not limited to:

- Tigard Urban Service Agreement, dated November 26, 2002, and entered into by:
 - Washington County;
 - The City of Tigard;
 - The Metropolitan Service District ("Metro")
 - Clean Water Services;
 - Tigard Water District;
 - Tri-Met;
 - Tualatin Hills Park and Recreation District;
 - Tualatin Valley Fire and Rescue District; and
 - Tualatin Valley Water District.
- Urban Services Intergovernmental Agreement Between City of Tigard and Washington County, signed September 10, 2002.
- Washington County—Tigard Urban Planning Area Agreement, dated October 2003.
- Washington County Bull Mountain Community Plan, Volume X, dated May 27, 2004.
- Intergovernmental Agreement Between the City of Tigard and the Tigard Water District for Delivery of Water Service to Territory Within the District Boundaries, dated December 23, 1993.