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OREGON ANNEXATION LAW AND THE DELIVERY OF URBAN SERVICES: A PRIMER

INTRODUCTION

The House Committee on Land Use, meeting jointly with the Senate Committee on Rural Communities and Economic Development, has requested a briefing on annexation laws and their relationship to land use laws in Oregon. The Committee further inquired about the closely related and critical financial implications inherent in the provision of needed infrastructure to enable the delivery of urban services to annexed areas.

This paper and the accompanying presentation will cover the three following topics identified by Committee staff as being of interest to the Committee:

- Legal methods of City and Special District boundary change by annexation;
- Relationship between annexation and land use laws; and
- Financing of infrastructure, and its relationship to annexation and service delivery.

A. ANNEXATION TO CITIES

1. Overview

Annexation is the process by which a city extends its boundaries to include additional land. City annexations of territory must be undertaken consistent with the procedures in ORS 222.111 to 222.183. There are five broad mechanisms by which annexation can be accomplished; these are listed as a quick reference in Appendix A.

A decision that annexes territory inherently involves land use objectives, and the Oregon Supreme Court long ago determined that annexation decisions are statutory land use decisions by nature[1]. ORS 197.175(1) makes all annexations subject to the statewide planning goals. As land use decisions, annexation decisions are reviewable by the Land Use Board of Appeals and in turn appealable to the Oregon Court of Appeals[2]. In addition, in the Portland Metropolitan region, Metro has authority to impose requirements for boundary changes within its jurisdiction Pursuant to ORS 268.354(1).

Case law has also embellished the legislative scheme, and has resulted in additional limitations and requirements. One of the most fundamental of these

[1] *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977).
[2] *Cape v. City of Beaverton*, 187 Or App 463, 68 P3d 261 (2003).

requirements is that the annexation be "reasonable." The Oregon Supreme Court and Court of Appeals have clarified that this means the annexation must comply with applicable land use laws, and must not be arbitrary as measured by a variety of factors discussed below.[3]

2. Authority to Annex

Cities in Oregon enjoy broad home rule power, offered to the voters of each City in the Oregon Constitution[4] as affirmed in judicial decisions dating back at least as far as 1910, and continuing to the present day. The voters of each City accept this offer of authority in the Constitution when they enact a home rule charter. Despite this broad authority, it is important to remember that home rule cities do not have the inherent power to annex territory, since this power is by definition exercised outside the City's boundaries. The inherent power to change local government boundaries remains with the Oregon legislature. For this reason, the requirements and procedures for annexing territory set forth in the ORS govern the local process of adding territory to a city.

Although undertaking the annexation is authorized by state law, the manner in which each City chooses to proceed with annexation may be further dictated in the City charter. ORS 222.111(1) states, "a proposal containing the terms of annexation is approved in the manner provided by the charter of the annexing city" or under the applicable statutory provisions. The most common charter requirement is a requirement for voter approval of annexation.[5]

As will be shown below, there are broadly speaking two processes by which annexation may occur. The fundamental principle these two processes have in common is significant: property owners either consent in writing to annexation in some manner (by petition or annexation agreement), or a vote is conducted. The only exceptions to these requirements are island annexations[6] and health hazard annexations[7].

3. Territory to be Annexed

The scope of a City's authority to annex territory is limited in two ways: based on the location of the subject territory, and based on its configuration and relationship to the City's planning objectives.

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[3] *Portland General Electric Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952); *Morsman v. City of Madras (Morsman II)*, 191 Or App 149, 81 P3d 711 (2003).
[4] Oregon Constitution, Article IX, Section 2, and Article IV, Section 1(5) (initiative and referendum powers reserved).
[5] At present 31 Oregon cities have voter approval requirements in their City Charters, according to the Oregon Communities for a Voice in Annexation website, www.ocva.org, last visited on June 10, 2013.
[6] ORS 222.750.
[7] ORS 222.840, et seq.

a. Contiguity and Islands

Territory proposed for annexation must be contiguous to the city or separated only by a public right of way or a stream, bay, lake or other body of water. ORS 222.111(1). The territory may lie wholly or only partially within the same county as the city.

Unincorporated territory surrounded by the city may be annexed but must meet the requirements of ORS 222.750 (the island annexation law). This is one of only two forms of annexation that can be accomplished without the approval of the affected property owners or electors and for this reason has been the subject of controversy.

In a recent decision from the Oregon Supreme Court, the island annexation statute has been interpreted to require annexation of the entire island, because the Court determined that to allow annexation of a portion of an island does not comply with the contiguity requirement.[8]

Legislative changes to the island annexation statute in 2007 also create special new limitations on annexation of islands:

1) limitation of the use of roadways as the factor creating contiguity to 25% of the perimeter of the territory;
2) requiring delay of a minimum of three years in the effective date of annexation of residential lands (except upon transfer of ownership of the property);
3) requiring that such annexations be by non-emergency ordinance, subject to referendum; and
4) requiring a vote of *both* the city residents and the territory to be annexed if the city charter requires voter approval of annexation.[9]

b. Reasonableness

The second factor that an annexation must meet is that it must be "reasonable." This requirement is most commonly associated with the shape of the proposed annexation territory and its physical relationship to the City. Oddly shaped parcels and cherry stem annexations are challenged most frequently, though both are generally upheld.[10] The standard has been labeled a "low bar" and "notoriously lax" by reviewing courts, compared to the traditional prohibition against "arbitrary" governmental actions in the context of the Due Process Clause of the Fourteenth Amendment to the US Constitution.[11]

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[8] *Costco Wholesale, et al v. City of Beaverton*, 343 Or 18, 161 P3d 926 (June, 2007).
[9] Limitations that affect specific properties in the state have also been enacted by the 1987 and 2005 legislatures, and will sunset in 2035. The notes appearing before ORS 222.111 describe these properties and each was enacted by request of the affected property owner.
[10] The classic "cherry stem" case is *DLCD v. City of St. Helens*, 138 Or App 222, 907 P2d 259 (1995), though many others have been decided since that time, including in the Madras cases cited herein.
[11] *Kampstra v. Salem Heights Water District*, 237 Or 336, 391 P2d 641 (1964).

Nevertheless, “cherry stem” annexations and other annexations that create irregular City boundaries are – like island annexations - controversial from a political standpoint, and can add bases to land use appeals of annexation decisions. A “cherry stem” annexation is one in which a noncontiguous target parcel together with the territory between that parcel and the City (typically, a road) are packaged together to achieve contiguity for a proposed annexation. In addition to compliance with applicable land use standards, discussed below, to be reasonable an annexation will be measured on a case by case basis, evaluating whether the properties represent actual planned growth beyond City boundaries (typically, within an established urban growth boundary), context in light of existing City planning documents, the availability of the properties for urbanization, the ability to provide needed urban services, and similar factors.

4. Procedures

a. Initiating Annexation

A proposal for annexation may be initiated by a city council or by petition of the owners of real property in the territory to be annexed. ORS 222.111(2). The type of annexation determines the content and scope of the petition request. Some cities have substantive requirements for annexations that are included in the city's ordinances or comprehensive plan. Like a development request, an annexation petition needs to address these substantive requirements.

In addition, any applicable urban planning agreements and the general coordination requirements under Goal 2 require notice to the affected county for its review and recommendation. Compliance with land use standards is discussed more fully below.

b. Taxation of Annexed Territory

An annexation proposal may provide for a special rate of taxation for up to ten years. ORS 222.111(3). The proposed special rate must be at a specified ratio of the highest rate of taxation for other property in the city (e.g. three-quarters or one-half of the highest rate of taxation) and may not exceed the highest rate of taxation for other property in the City. The rate may increase from year to year and is effective no earlier than the first fiscal year following the effective date of annexation.

The assessed value of the annexed property may be included in revenues for the current fiscal year by a supplemental budget or incorporated into the taxes for the following fiscal year. The county assessor must provide the assessed value of the property within 20 days upon official request. Verification of proposed revenue by the Department of Revenue must be coordinated with the county assessor's office after annexation. ORS 222.030.

c. Effective Date of Annexation

An annexation is effective on the date that the annexation records are filed with the Secretary of State.[12]

If an annexation is initiated by a city, the city may specify an effective date up to ten years later than the date of filing the annexation records with the Secretary of State. Where a city chooses to establish an effective date greater than one year after the date of a proclamation of annexation, the city must also send notice to the county clerk.[13]

5. Annexation Consent and Election Requirements

a. Consent

State law provides a series of options to demonstrate support in both the territory to be annexed and in the city. Put simply, the law requires a combination of signed petitions or consents to annexation; otherwise a vote is required. The options for obtaining consent are summarized in Appendix A.

If the requisite number of consents to annexation is obtained under ORS 222.120, 222.125 or 222.170, a city is not required to submit the annexation to the voters in the territory to be annexed, or to city voters unless required to do so by the city charter. ORS 222.120(2) requires a hearing when the city council does not call an election, unless all owners and at least one-half of the electors consent in writing to annexation. A hearing also may be required to fulfill due process considerations for individual applications or to satisfy the hearing requirements in ORS 197.763 for a decision on a land use application.

The level of consent required to dispense with an election may consist of either all owners and at least one-half of the electors residing in the territory to be annexed (ORS 222.125 – the "double majority"), or consent from one-half of the owners who own at least one-half of the area to be annexed and which area comprises at least one-half of the assessed value of the territory to be annexed (ORS 222.170 – the "triple majority"). Though the "triple majority" consent approach to annexation had been held

[12] Except island annexations of residential land pursuant to 2007 changes to ORS 222.750, which cannot take effect for at least three years absent a transfer of ownership.

[13] Annexation records include: (1) a copy of the resolution or ordinance proclaiming the annexation; (2) an abstract of the vote in both the city and the territory showing the number of electors voting on the annexation, the number of votes cast for annexation and the number of votes cast against annexation; (3) if a consent annexation was approved, a copy of the statement of consent; (4) a copy of the ordinance declaring annexation; and (5) an abstract of the vote upon the referendum if a referendum petition was filed. ORS 222.177

unconstitutional in 1987, it has been revived by the Oregon Court of Appeals in a recent decision out of the City of Madras.[14]

Consent to annexation can be either a consent form alone, or an agreement to annex obtained in exchange for the extraterritorial extension of city services. By statute, consents are valid for one year unless the consent or written agreement provides for a longer time period. A city cannot use the promise of service to be provided by a special district – and not the city itself – to support a requirement that a property owner consent to annexation.[15] If an elector or property owner requests information about the annexation, the city must provide that information, including the proposed tax rate, the proposed city services to be provided, and the boundaries of the territory to be annexed.[16]

b. Elections

Annexation elections may be held at general or special elections in compliance with election law requirements as provided by ORS 222.130 through 222.160. The annexation election requires a ballot title and notice. The ballot title must state the "major effect" of the annexation on the city. The ballot titles must also include a description of the boundary using streets and other generally recognized features. Notice of annexation must also include a map showing the boundaries of the territory proposed for annexation. Notice for a simultaneous election in the territory and the city is satisfied by providing these basic requirements.

After notice and an election, if a majority of city voters favors annexation, ORS 222.160 requires a proclamation of the annexation by resolution or ordinance including a legal description of the territory. If an election in the territory favors annexation but the city council has not submitted the issue to city voters (but has provided notice and a hearing), then a resolution or ordinance setting the final boundaries including a legal description must be included in the city's annexation proclamation. Where both a city vote and a territory vote are required, they can occur at the same time or at different times within one year.

6. Impact on Service Districts

When the proposed territory for annexation includes less than the entire area of certain special service districts, the proposal may provide that the part of the service district inside the territory is withdrawn from the district.[17] Unless the service district is a water supply, a water control or a sanitary district, the effective date of withdrawal is the effective date of annexation. The dates for formal withdrawal of domestic water supply

[14] *Morsman v. City of Madras*, 203 Or App 546, 126 P3d 6, *review denied*, 340 Or 483 (2006). The earlier decision was *Mid-County Future Alt. v. Port. Metro. Area LGBC*, 82 Or App 193, 199-201, 728 P2d 63 (1986), *review dismissed*, 304 Or 89, 742 P2d 47 (1987).
[15] *Bear Creek Valley Sanitary Authority v. City of Medford*, 130 Or App 24, 880 P2d 486 (1994).
[16] ORS 222.175.
[17] ORS 222.510 and 222.520.

districts, water control districts, or sanitary districts after annexation are determined under ORS 222.465, which provides for a delayed effective date in some cases to allow for needed service delivery planning.

ORS 222.520 and 222.524 provide the process when a proposed annexation constitutes less than an entire district listed in ORS 222.510. Those districts include rural fire districts, water districts, park and recreation districts, and county service districts. The net effect of these and other related statutes are to provide for the financial impacts related to the annexation.

There has been and continues to be a tension on this aspect of annexation law – as the Committee will hear in testimony and has experienced in recent legislative sessions. Special service districts and county service districts have been instrumental in providing service to unincorporated areas, typically at a reduced tax rate than a City which provides a more broad range of services. One of the direct impacts that may result from an annexation is a decrease in the size and funds available to an affected special district. As also noted below, special districts can add territory only with the consent of the county commission – a very different process than for city boundary changes.

B. ANNEXATION TO AND WITHDRAWAL FROM SPECIAL DISTRICTS

1. Special District Annexation

A special district also may annex new territory. Territory may be annexed to a special district in two ways: (1) unincorporated territory or territory within a city may be annexed to a district (ORS 198.850 – 198.860); and (2) a city that meets certain qualifications may be annexed to a district to receive service from the district (ORS 198.866 – 198.867).

Annexation to a special district is governed by provisions of ORS and, in the Portland Metropolitan region, the Metro Code. ORS 198.850(3) authorizes the County Board of Commissioners to initiate an annexation to a special district. ORS 198.850(2) establishes limited criteria that apply, to-wit: (1) the local comprehensive plan for the area, and (2) any service agreement executed between a local government and the affected district. Thus, there is a significant policy tie to the availability of services as a fundamental requirement to add territory to a special district.

Unlike annexation to a city, annexation to a special district need not be contiguous to the district. If any property sought to be annexed by a district is in a city, the annexation petition must be accompanied by a resolution from the city council approving the annexation. Following the public hearing, the county board will determine whether the annexation of the affected properties should be approved under the above criteria. ORS 198.805(1) grants discretion to the county board to "alter the boundaries set forth in the petition to either include or exclude territory."

There is also the potential that 100 electors in the proposed annexation area, or 15 percent of the electors (whichever is less), could file written requests for an election with the County. Those requests need to be filed at or before the hearing. It is noteworthy that absentee owners who do not live on the property in question would not be able to trigger the election, since the statute refers to *electors* and not property owners being able to refer the matter to a vote.

2. Withdrawal from District by City

A city may withdraw territory from a special district at the time of an annexation or later. ORS 222.120 states the requirements for withdrawal concurrent with annexation; ORS 222.524 states the requirements for withdrawal after annexation.

Under ORS 222.520(1), whenever property that constitutes a part of (i.e., less than all) a public service district is annexed to a city, the city has the choice *at that time* to withdraw that area in accordance with ORS 222.120. ORS 222.120(1) provides: "If the territory . . . is a part less than the entire area of a district named in ORS 222.510, the ordinance may also declare that the territory is withdrawn from the district on the effective date of the annexation or on any subsequent date specified in the ordinance."

When a city does not withdraw territory from a special district at the time the territory was annexed, the annexed territory remains part of the district. However, under ORS 222.520(1), the city retains the ability to later withdraw the area as long as it is done consistent with ORS 222.524.

ORS 222.524 requires a city to do the following:

1. Set a date, time, and place certain for a public hearing to consider the withdrawal of the annexed territory from the district.
2. Publish notice for two (2) successive weeks in a newspaper "...of general circulation..." and post weatherproof notices in at least four places within the city boundaries.
3. Prepare an ordinance declaring the annexed area withdrawn from the district for the city to consider at the public hearing.

The city may withdraw from all of such districts at the same time in one proceeding under this section or may withdraw from each district in separate proceedings at different times.

A noteworthy change to these statutes was enacted in HB 2618 (2013), which now makes it very clear that before a City may withdraw territory from a special district, it must intend to provide service, either directly or by contract – i.e. the city must intend to fund the service.

3. Withdrawal by Property Owners or Electors

ORS 198.870 provides that either owners of land or voters within a district may petition the county commission for withdrawal from a special district. The petitioners must give notice to the district secretary of the filing of the withdrawal petition with the county commission.

The statutes provide for a notice and hearing process for withdrawal proceedings. The county commission may approve the petition as presented or it may adjust the boundaries and approve the petition. However, ORS 198.870(4) also provides: "The petition shall be denied if it appears that it is, or would be, feasible for the territory described in the petition to receive service from the district."

The Oregon Attorney General has opined that a determination of denial of a withdrawal petition is final, and no election may be required. 36 Op Atty Gen 107 (1972). If a petition passes the hurdle of feasibility required by the statute, then an election is possible, but the voters of the entire district vote on the petition.

If written requests for an election are filed with the county commission at the time of the final hearing upon the withdrawal petition, the county commission must call an election in the ***district*** upon the question of withdrawal of the area. ORS 198.875(2) [Emphasis added]. Under ORS 198.810(3), an election will be held if requested by 15% of the District electors or 100 electors, whichever is the lesser number. If an election is called and a majority of the votes cast favor withdrawal, the county commission must enter an order withdrawing the area from the district. If a majority of the votes cast is against withdrawal, the county commission must enter an order declaring the election results.

C. LAND USE IMPLICATIONS OF ANNEXATION DECISIONS

As noted in the Overview above, an annexation decision (but not the vote, if one is held) is a land use decision. This characterization has resulted in what can only be described as a mountain of litigation beginning in 1977 with the Oregon Supreme Court's decision in *Petersen v. Klamath Falls*, *supra*, and continuing to the present day. Because of the complex interplay between urban growth boundaries and annexation, cities have been stymied in their efforts to obtain final approval for either amendments to those boundaries or for the subsequent planned annexation of territory in the affected areas.

1. The Statewide Goals

ORS 197.175 requires that annexation decisions be made in compliance with the statewide planning goals. However, if the annexation decision is made in compliance with an acknowledged comprehensive plan, that "controls the annexation" and the

statewide goals do not apply.[18] The problem is that where the line is drawn between plan policies specific enough to "control" an annexation and those that are not specific enough is not clear based on the most recent LUBA decisions.[19] Thus, most annexation decisions include findings and analysis of goal compliance. The inherent tension between some of the goals – for example, those directed at resource, farm and forest conversation vis-à-vis those directed at economic development, housing, and urbanization – also comes into play in annexation decisions as a result of this requirement.

2. Goal 11 – Public Facilities

Given the focus of the Committee's hearing, the most important statewide goal is Goal 11, which requires that cities provide adequate public infrastructure to accommodate growth over a 20-year planning horizon. At the time of annexation and the application of city zoning designations, the City frequently will not be considering a specific development plan. But often local plan policies require a showing of how adequate infrastructure is available or can be made available to serve the proposed annexation area, and such a showing must be made (and frankly, is usually critical to the development of the annexation area).

If the city is not the service provider for all urban services covered by Goal 11 (water, sewer, and transportation facilities), coordination of these services with the special districts that provide the services has been a long-standing source of complexity. ORS 195.065 to 195.085, enacted in 1993, were intended to relieve at least some of the uncertainty around the transition of service delivery upon annexation. However, most counties have not undertaken or completed the Chapter 195 process, which, frankly, is cumbersome and requires concurrence of all affected service providers in the county. Cities are still able to annex in the absence of such agreements although this option was not clearly available until a LUBA decision on the topic in 2003.[20]

3. Local Plan Implementation

Cities may annex property and either impose city zoning as part of the same proceeding or at a later date. Until city zoning is applied, county zoning applies.[21] In a situation where a city annexes new territory and applies city zoning at the same time, the statewide goals may apply to the zoning decision if the city's plan is not specific enough (for example, to clearly protect any affected Goal 5 resources). A common city code provision – a "matrix" that converts county comprehensive plan and zoning designations to the most similar corresponding city zone - is not sufficient.[22] A city would likely need to anticipate the addition of the specific land into the city to avoid direct application of

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[18] OAR 660-014-0060.
[19] *Costco Wholesale Corp v. City of Beaverton*, 50 Or LUBA 476, *rev'd on other grounds*, 343 Or 18 (2007); *Cape v. City of Beaverton*, 187 Or App 463, 68 P3d 261 (2003).
[20] *West Side Rural Fire Protection District v. City of Hood River*, 43 Or LUBA 546 (2003).
[21] ORS 215.130.
[22] *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

the statewide goals to the decision… an unlikely eventuality given the level of planning and data required to adequately address all applicable land use requirements.[23]

D. INFRASTRUCTURE FINANCING TO SERVE URBAN AND ANNEXED AREAS

The third area of inquiry from the Committee relates to the available methods to fund the infrastructure (transportation, water, sanitary sewer, storm sewer) improvements needed to allow development of annexed lands. This section of the memorandum addresses those questions.[24]

1. General Financial Considerations

Cities and special districts have been significantly impacted by the effects of Measures 5 and 50, now embedded in the Oregon Constitution as Article XI, Section 11(3)(b) and ORS Chapter 310. In simple terms, the measures, as the Committee undoubtedly knows, capped the permanent property tax rate for cities and districts at their 1997 rate. A new city or district can have a permanent rate approved by voters at the time of it is established, a significant undertaking under applicable state law. Special tax levies, which must be approved by the voters and are subject to a limit of five years in duration (or ten years if they are to fund capital projects)[25], are still an option.

2. Infrastructure Financing

Both because of the limited availability of funds from property taxes and also because as a policy matter it is equitable to require proposed development to "pay its fair share" of the cost of providing the infrastructure to serve that development, a number of financing tools available under state and/or local law have gained primacy as the funding mechanisms. In practice, creative solutions are also being implemented at the local level in all kinds of contexts beyond the scope of this discussion.

Following is a discussion of the most commonly employed financing options, and a brief description of how each works. In each case there are important applicable legal requirements that must be met in order to implement these options.

a. Local Improvement District ("LID") (ORS 223.387 to 223.395)

Under the Local Improvement District (LID), public improvements are financed by those properties that benefit from the improvements in a specific area. State law

[23] The Court of Appeals intimated as much in *Cape v. City of Beaverton*, 187 Or App 463, 68 P3d 261 (2003).
[24] Not included here are challenges related to or funding sources for parks, schools, planning services, police, fire suppression, emergency services, code enforcement and other services provided by cities, counties and special service districts to urban areas.
[25] ORS 280.060.

establishes the procedural requirements for forming an LID, which includes notice to affected property owners and a public hearing. The local government can and often does provide for additional procedures and other requirements in local legislation.

The local government typically constructs the improvements and the cost of the improvements is assessed to the benefiting properties. The assessment becomes a lien on the property and can be financed for a period of between 10 and 30 years, to be repaid in installments as provided in ORS 223.205 to 223.230. The local government can either carry the debt itself (most common) or can issue bonds to cover the cost of the debt, subject to additional state law requirements.

Local improvement districts, while effective, are employed less frequently than might otherwise be dictated by the need for infrastructure due to the complexity of the formation requirements, the risk of public opposition, and the reluctance to place a lien on property within the area. Because often the total cost of an improvement is not appropriately charged to properties within the area identified as benefited by the improvement, the local government forming a LID will often provide a share of the cost to reduce the overall cost to those properties.

A parallel process and means of assessing benefited properties for the cost of economic improvements – as contrasted with infrastructure improvements – is available to local governments pursuant to ORS 223.112 to 223.132, and follows the process required for formation of LIDs. And finally, a local government may be able to leverage public improvements in exchange for development approval where a mixed use development meets the statutory requirement for formation of a Vertical Housing Development Zone, allowing the developer to obtain a partial property tax exemption for qualifying developments and thereby reducing the overall cost of that development.[26]

b. Reimbursement District

Reimbursement districts are a local financing tool and a variation on the LID theme. This funding mechanism is required to be established in the local code. When a reimbursement district is formed, the developer builds the improvement(s), and makes application to the local government for formation of a reimbursement district. Using a process that is typically very similar to that utilized to form an LID – providing notice and a hearing before the governing body – the district is formed to include properties benefited by the developer's improvements. The properties that subsequently develop and use the improvements pay a reimbursement fee, which is collected by the local government and reimbursed to the developer.[27]

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[26] ORS 307.600 et seq.

[27] The local government typically charges a modest administrative fee to recover its costs of forming and managing the reimbursement district.

The chief difference between this financing tool and a LID is that there is no lien placed on benefited properties. This makes it an attractive option where a lien is not desirable. On the other hand, the absence of a lien and the delay in the repayment obligation to the future development of benefited properties means that there is no guarantee the developer will be fully reimbursed for the cost of the improvements.

The validity of reimbursement districts has been litigated and upheld by the Oregon Court of Appeals, in *Baker v. City of Woodburn.*[28]

c. Systems Development Charges (ORS 223.297 to 223.314)

Another source of funding for infrastructure is the statutorily authorized systems development charge (SDC), which can be imposed by cities, counties, and special districts.[29] SDCs are charged to developing properties based on their impact on five designated types of public infrastructure: transportation, water, waste water, storm water, and parks and recreation facilities. The statutes establish a public process to adopt a capital improvement plan, which then informs the calculation of the SDC and the amount of the charge. The idea of the program is to assure that development pays its share of the cost of needed improvements to serve that development; as such, if the developer contributes infrastructure greater than that needed to serve the specific development, the statutes require that the local government issue "credits" against future SDCs. These credits are typically transferable and are valid for up to ten years.

The SDC statutes have been amended almost every legislative session since their initial enactment in 1989. Similarly, local SDC programs can be controversial when the local government either adds projects to the capital improvement list or otherwise increases the charge amount. The statutes provide limitations to legal challenges in the SDC arena; for example, these decisions are not land use decisions but rather are subject to review by a circuit court with a limited appeal window. Finally, the statutes include restrictions on the expenditure of SDCs collected; they must be spent on public infrastructure that provides capacity for new users or in the case of a reimbursement fee, must reimburse the local government for making use of existing infrastructure that was previously built.

Important judicial rulings regarding SDCs have made clear that establishment of these charges are not subject to a constitutional takings challenge under *Dolan v. City of Tigard.*[30] When a local government imposes a charge, judicial precedent further dictates that the payment of money or the cost of building infrastructure imposed by a local

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[28] 190 Or App 445 (2003).

[29] School districts may also establish a construction excise tax, which is collected by the local government at the time of construction permit issuance. ORS 320.170 to 320.189, enacted in 2007.

[30] 512 US 374 (1994); *Rogers Machinery v. City of Tigard*, 181 Or App 369, 45 P3d 966, 971; *review denied*, 334 Or 492 (2002).

government as a condition of development approval is also not subject to the rough proportionality requirements of *Dolan*.[31]

d. Urban Renewal (ORS chapter 457)

Urban renewal agencies may be authorized by the governing body of a city or county to plan and build improvements designed to eliminate "blight" in the urban renewal area. The statutes establish a detailed public outreach process and procedural requirements for adoption of an urban renewal plan, and that plan dictates the permissible expenditure of urban renewal funds. While the workings of urban renewal financing are beyond the scope of this memorandum, in very broad overview the urban renewal agency captures property tax revenues as property increases in value within the urban renewal district boundaries, and properties in the district continue to pay property taxes at the rate they would otherwise have paid. As such, the increased revenues are diverted to the urban renewal agency for the purpose of repaying bonds issued to fund the infrastructure improvements it makes.

e. Bonds

Local governments in Oregon may also use their borrowing power to raise revenues for capital projects. Cities, counties and some special districts[32] may issue what are known as "general obligation" or "GO" bonds, since their repayment is guaranteed by the issuing government and the full faith and credit of the government is pledged to secure repayment.[33] GO bonds are subject to voter approval.

The other alternative to a GO bond is a revenue bond, where the revenue stream from a facility that is financed with bond funds is pledged to the repayment of those bonds.[34] Unless the local charter provides otherwise, revenue bonds are not subject to voter approval. Their use is more limited since there must be a revenue stream envisioned as sufficient to pay the cost of repaying the issued debt, and as such they involve some risk.

CONCLUSION

This overview of the framework of governance and service delivery requirements demonstrates not only the complexity of the applicable network of regulations; it also demonstrates the significant political and financial implications at stake. Legislation proposed during the last few sessions and even during the 2013 session is a good barometer to measure the level of interest, complexity, and significance of these decisions to the state's economy and resources.

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[31] *West Linn Corporate Park LLC v. City of West Linn*, 349 Or 58 (2010).

[32] Authority for special district issuance of debt comes from the authorizing statute for each type of district. For example, park and recreation districts are authorized to issue debt pursuant to ORS 266.480.

[33] ORS 287A.050 to 287A.140.

[34] ORS 287A.150.

Under our system of land use regulations, the land use planning process is intricately woven with the planning of infrastructure, under statewide goal 11, as discussed earlier in this memorandum. The idea is that development should be provided with needed infrastructure in a timely and orderly fashion; public infrastructure decisions inherently follow from development. The existence of urban growth boundaries should be viewed as a mechanism to assure that services are provided efficiently and in the most cost effective way; annexation occurs within those boundaries and as a land use decision, it implicates either compliance with existing public facility plans, or modifying those plans to enable the provision of services. The tools discussed above, while seemingly robust, are not fully adequate to provide needed infrastructure, and local governments are increasingly looking for new and creative mechanisms to provide these systems, often in partnership with development interests.

Attachments: *Appendix A* – Overview of Annexation Methods
Appendix B – List of 2013 Bills Relating to Annexation and Service Extension Issues, with summaries, prepared by the League of Oregon Cities

Appendix A
Statutory annexation methods

Oregon statutes provide a range of consent or election-based annexation methods. They are summarized below.

Annexation with Election in Affected Area only (ORS 222.120(4)):
- Area election and approval from a majority of voters in the territory required for annexation.
- Public hearing prior to election required.
- No vote of city electors required.
- Subject to referendum.

Landowner Consent Annexation (ORS 222.125):
- Written consent from all property owners and majority of electors in the territory required.
- No prior public hearing required.
- No election required.
- Subject to referendum.

Double Majority Annexation (ORS 222.170(2)):
- Written consent from majority of electors who also own a majority of the territory required.
- No election required.
- Subject to referendum.

Triple Majority Annexation (ORS 222.170(1))
- Written consent from majority of landowners who also own a majority of the properties representing a majority of the assessed value within the territory required.
- No election required.
- Subject to referendum

By contrast, the island annexation statute allows annexation without either consent *or* an election in the circumstances provided by statute:

Island Annexation (ORS 222.750):
- No consent required.
- Election, if required by City charter, must include both city electors and electors in the island
- Subject to referendum and to other special statutory limitations.

Appendix B
List of 2013 Bills Relating to Annexation and Service Extension Issues

- HB 2028: prevents requiring non-remonstrance in exchange for extraterritorial services (heavily amended to limit to non "infrastructure" related services). *Passed House Land Use committee, but re-referred back from the floor (this is a Rep. Clem bill)*

- HB 2617: when an island is over 100 acres and voting is required, requires a double majority (island majority and resident majority) to approve annexation. *Passed House Land Use committee, but re-referred back from the floor (this is a Rep. Clem bill)*

- HB 2618: city must provide for services if seeking to withdraw territory from special district after annexation. *Signed by governor 6/4, effective 90 days after sine die*

- HB 3479: prevents The Dalles from charging a fee in lieu of a local improvement district or requiring non-remonstrance for LID when homeowner applies for residential partition. *Waiting for governor's signature*

- SB 743: allows non-contiguous annexation when city was under boundary commission jurisdiction in 2007 and owner had property interest since 1972 w/ sunset in 2014. *Sitting in Senate Rules (placeholder bill to address issues specific to Eugene negotiations with a park district)*

- SB 773: prohibits city from requiring non-remonstrance to annexation in exchange for extraterritorial services if services were previously provided to land, prohibits requiring consent to continue extraterritorial services when name on the account for services changes, undoes prior consents based on these circumstances. *Died without hearing by the Senate Rural Communities and Economic Development committee*

- SB 825: allows landowner within UGB to cause services to be extended to property upon demand, landowner pays for costs to connect and deliver services. *Died without hearing by the Senate Rural Communities and Economic Development committee (similar to HB 4090 from 2012, which moved through the House)*