



CITY OF BEND

M E M O R A N D U M

To: Septic to Sewer Advisory Committee
From: Mary A. Winters, City Attorney
Elizabeth Oshel, Associate City Attorney
Re: 1998 Urban Service Provider Annexation in Bend and Planned Provision of Sewer Service to Annexed Areas—Analysis of Financing and Timing and Annexation Process
Date: January 26, 2018

QUESTION

The unsewered areas in the Southeast Bend/Kings Forest neighborhood were annexed from Deschutes County into the City of Bend. In the documents the City adopted to plan for that annexation and presented to the voters for their approval of the annexation, what plans were made, if any, for the City of Bend to provide for the extension of sewer service to unsewered areas? What tools are available for enforcing any of the plans supporting the 1998 annexation?

SHORT ANSWER

The 1998 annexation was supported by an annexation plan, a joint management agreement between the City of Bend and Deschutes County, and the 1991 Sewer Master Plan adopted by the City of Bend. These planning documents called for extension of major sewer infrastructure lines as engineering and capital improvement budgets allowed. The 1991 Master Plan did not plan for extension of lateral lines to individual neighborhoods, but assumed that the unsewered areas would be served by sewer before the City reached a population of 132,000. The extension of major infrastructure was proposed to occur sometime between 1991 and when the City reaches a population of 132,000. The Southeast Interceptor is the major infrastructure that provides service to this area.

The 1998 General Plan and the current Comprehensive Plan call for the city to assist or work with neighborhoods to extend sewer service. The current Septic to Sewer process to determine how the City and residents with septic systems will share the cost of extending sewer service via lateral lines to neighborhoods is compliant with the Comprehensive Plan, the 1998 Annexation Plan, Urban Service Agreements, and 1991 Sewer Master Plan that was the basis for provision of sewer service under the 1998 Annexation Plan. As twenty years have passed since the annexation of these unsewered areas, many elements of the plans that supported the 1998 annexation have since been replaced with new plans. The time to protest or appeal any of these adopted plans and annexation documents has long passed.

DISCUSSION

In 1993, the Oregon legislature created a new method of annexation called urban service provider annexations. ORS 195.205, *et seq.* In 1991, the City of Bend declared a policy to annex the entire urban growth boundary, and in 1998 adopted an annexation plan to meet the requirements of the urban service provider annexation rules and annex the remaining areas outside the City in the Urban Growth Boundary. This memo is intended to outline the requirements and intent of an urban service provider annexation, and the planned provision of urban services, specifically sewer service, to annexed areas in the Annexation Plan.

ORS 195.205 requires urban service agreements among urban service providers within the territory to be annexed, and ORS 195.220 requires an annexation plan, including local standards of urban service availability and the planned schedule for providing urban services to the annexed territory. The 1998 Annexation Plan adopted by City Council in preparation for annexing the territory in the urban growth boundary identified the City and private companies as the providers of sewer and water service in the annexed territory. For a planned schedule for providing urban services, the Annexation Plan and the Joint Management Agreement relied on the City's utility master plan and capital improvements budget. Neither the Master Plan, Joint Management Agreement, nor Annexation Plan included plans or guarantees for moving individual homes or specific neighborhoods from septic systems to the sanitary sewer system.

1. Urban Service Provider Annexations, ORS 195.205, et seq.

A City or other urban service provider may annex territory that is within an urban growth boundary and “is contained within an [adopted] annexation plan”. ORS 192.205. The territory covered by an annexation plan must be subject to ORS 197.065 urban service agreements among the appropriate counties, cities, and providers of urban services. *Id.* The annexation plan must be adopted by the City Council and submitted to the electors of the city and the electors of the territory proposed to be annexed.

The City of Bend adopted Resolution 2239 on August 5, 1998, including the Annexation Plan and urban service provider agreements between the City and Bend Parks and Recreation, the City and the Rural Fire Protection District, and the City and Deschutes County. The plan was put to the voters in Bend and in the territory to be annexed on November 3, 1998, pursuant to ORS 195.205 to 195.220. The measure passed by both sets of voters, and the annexation was effective July 1, 1999.

2. 1998 Annexation Plan

The City of Bend adopted an annexation plan for annexing all the land outside the then-existing urban growth boundary on July 15, 1998. The Annexation Plan provided for local standards for service availability and a planned schedule for provided urban services to the annexed territory, as required by ORS 195.220.¹

With regards to standards for sewer service availability, the Annexation Plan provided, “The City is a provider of sanitary sewer and water to a majority of the UGB.” Annexation Plan, 3. “Parts of the UGB are provided sanitary sewer and water by private providers and have or can enter into franchise agreements for their service areas.” *Id.* The local standards were set by the “sewer and water master plan that provides a framework for the extension of these facilities to the UGB.” Annexation Plan, 4.

The master plans and capital improvement budget set the planned schedule for providing urban sewer service:

¹ In areas subject to the jurisdiction of a local government boundary commission, ORS 195.225 requires a boundary commission to conduct an advisory review of an annexation plan. Bend is not subject to a local government boundary commission, so there was no advisory review of the annexation plan under ORS 195.225.

“The City together with several private utility companies will provide sewer and water to the urban area. Sewer service lines will be extended by new development or by use of local improvement districts. Major trunk lines will be extended by the City according to the utility master plan. ... The City’s system of major infrastructure facilities will be extended according to its master plans and capital improvement budget.” *Id.*

The Annexation Plan did not specify when or how particular areas or individual parcels would be hooked up to sewer service, aside from stating that sewer service lines would be provided by either new development or local improvement district, as quoted above.

3. Urban Service Agreement between City of Bend and Deschutes County

The Annexation Plan included urban service agreements with the Bend Parks and Recreation District, the Rural Fire District, and Deschutes County. The agreement with Deschutes County was titled the Joint Management Agreement, and provided for Comprehensive Plan and zoning for the annexed areas, sewer boundaries, annexation policies, urban services (including sewer and water), jurisdiction over roads, public works construction standards, and special district coordination.

The Joint Management Agreement provided that the 1991 Sewer and Water Master Plan would be the controlling guideline for future sewer and water system construction within the annexed areas until more detailed engineering consistent with the Master Plan’s intent was available. Joint Management Agreement, 8.

The Joint Management Agreement was replaced with a new Joint Management Agreement in June 2017, to guide the annexation process following the 2016 UGB expansion.

4. 1991 Sewer Master Plan

The 1991 Sewer and Water Master Plan (“Master Plan”) included plans for the areas of the urban growth boundary annexed in the 1998 annexation. The populations in the annexed areas, both existing and projected growth, were included in the analysis of what sewer capacity the City needed for the planning period, reflecting an assumption that residences relying on septic would convert to sewer service by the end of the

planning period. The Master Plan set a plan for building sewer infrastructure to serve Bend when its population reached 132,413 (referred to in the Master Plan as “build out”). The Master Plan assumed Bend would reach that population sometime between 2015 and 2035. Bend’s population in 2017 is around 90,000.

The Kings Forest area consists of sewer basins 58 and 63. Those basins had existing populations of 772 and 726 in 1991, and were assumed to grow to populations of 865 and 3,416 at “build out,” or a maximum assumed City population of 132,413 between 2015 and 2035. Master Plan, Population Trends and Projections, II-2 – II-7. Both the current and projected population numbers were used in calculating projected sewer flows to determine needed capacity and sewer infrastructure projects in the master plan. Master Plan, Sewer Line Data (Exhibit B, 3).

The Master Plan described the City’s existing collection system as having four types of sewerage systems: City sewer with subsequent treatment, septic tanks with drainfields, septic tanks with drill-holes, and Juniper Utilities pressure sewer system. The Master Plan was “based on the ultimate elimination of all septic systems and connection to the City collection and treatment system.” Master Plan, III-1. The Master Plan contemplated collection and conveyance improvements for the South Central and East areas, including the Kings Forest area and basins 58 and 63, as the Brosterhous Interceptor (planned for Brosterhous Road to American Lane and east along Desert Wood Drive) and the Southeast Interceptor (joining with the planned Brosterhous Interceptor, continuing northerly to Reed Market Road), the 27th Street Interceptor (continuing north on 27th Street), and the East Interceptor (north to Neff Road, east to Eagle Road, then north along Eagle Road). These interceptors would join a planned secondary line running north on 27th Street for the area around Mountain View High School east of 27th Street. These interceptors would flow into the existing Interceptor A2. Master Plan, III-7.

The Southeast Interceptor is anticipated to be complete in early 2018, consistent with the plans of the 1991 Master Plan and Annexation Plan to build sewer infrastructure over time, as the population increased toward 132,000, and according to available capital improvement budget. Annexation Plan, 4.

The Master Plan did not include plans for moving individual homes or specific neighborhoods from septic systems to the sanitary sewer system.

5. 1998 General Plan and Comprehensive Plan

The 1998 Bend Area General Plan, as amended in 2001, provided policies guiding development within the urban growth boundary, including the lands annexed in 1998. Policy 6 in Chapter 8 – Public Facilities and Services, provided, “To reduce the reliance on individual sewage disposal systems within the Urban Growth Boundary the city will assist established neighborhoods that commit to a sewage collection system by extending pressure or gravity lines to the subdivision.” This finding was added after an appeal of the General Plan to LUBA and LUBA’s remand to the City for additional policies or findings regarding urbanizable land, under Goal 14. Bend Ordinance No. 1799.

The 1998 General Plan has since been amended and renamed the Comprehensive Plan, in 2006 and 2016. The Comprehensive Plan contemplates construction of the Southeast Interceptor, Phase 1, required in the short term, and Southeast Interceptor, Phase 2, as required in the long term. “Capital Improvement Program,” Comprehensive Plan, Chapter 8. Policy 6 from the 1998 General Plan, quoted above, has been amended and is included in the Comprehensive Plan as Policy 8-3: “To reduce the reliance on individual sewage disposal systems within the Urban Growth Boundary the city will work with unsewered neighborhoods to find solutions for sewer service.”

6. State Review

Review of the Annexation Plan for compliance with the statewide planning goals, Comprehensive Plan (1998 General Plan, 2006 amendments, or 2016 amendments), or state law could occur under periodic review, through an enforcement order, or potentially in Circuit Court. The time for appealing the Annexation Plan or 1991 Master Plan to LUBA for compliance with the statewide planning goals has long passed.

1. Periodic Review

In 1998, ORS 195.085 required Urban Service Agreements by the first periodic review after 1993.² Periodic review is the process through which by the Land Conservation and Development Commission (LCDC) confirms the City's plans and land use regulations remain in compliance with the statewide planning goals and make adequate provision for economic development, needed housing, transportation, public facilities and services, and urbanization. ORS 197.628. For cities in a metropolitan planning organization (MPO), periodic review is required every seven years between the completion of one work program and the beginning of the next. For cities outside an MPO with a population of more than 10,000, the interval for periodic review is 10 years. ORS 197.629. The Bend MPO was created in 2002, as Bend's population grew large enough. Therefore, the first periodic review for Bend after 1993 occurred on the 10-year timeline. Planning and scoping for periodic review began around 1996, and resulted in the 1998 General Plan. As the Urban Service Agreements entered into as part of the Annexation Plan occurred during toward the end of the 1996-1998 periodic review, and were not made part of the General Plan, they were not reviewed LCDC as part of periodic review.

Bend has not been through periodic review since 1998. The ten-year non-MPO timeline would have put review in 2008 and the MPO timeline would have put periodic review in 2005 (ten and seven years from the completion of the 1998 General Plan, respectively). The 1998 General Plan was appealed to LUBA and remanded for amendments and additional findings, with the City adopted in 2001, Ordinance no. 1799. That appeal and remand resulted in additional policies related to provision of sewer service and urbanization, addressed above.

Bend began the process of expanding its urban growth boundary and comprehensive plan to implement the urban growth boundary around 2008, when the next periodic review would have otherwise begun. As part of expanding the UGB, Bend

² ORS 195.085 was amended in 2014 to allow LCDC to adjust the deadline for compliance when cities and counties party to an urban service agreement are scheduled for periodic review at different times, or, if local governments and special districts were parties to an agreement in effect on November 4, 1993, which provided for the future provision of an urban service, to allow those local governments to demonstrate compliance with ORS 195.065 no later than the date such agreement expires or the second periodic review that begins after November 4, 1993, whichever comes first.

was required to submit the proposed UGB and associated planning documents to LCDC. LCDC issued a remand order in 2010 for the City to bring its proposed UGB and planning documents into compliance with the statewide planning goals. The remand order did not address the Annexation Plan or associated urban service agreements.

2. LUBA Review

LUBA has exclusive jurisdiction over land use decisions, but the circuit courts retain the ability to determine the meaning of statutes or ordinances and to declare the rights and duties of the parties thereunder. *Leupold & Stevens, Inc. v. City of Beaverton*, 226 OrApp 374, 378 (2009). “A local government body's decision to annex particular property is a land use decision.” *Id.* at 379. “The decision by a city or other governing body that *proposes* an annexation is an act of planning that must comply with the land use laws; however, the subsequent acts that are necessary to *finally adopt or reject* the proposal, generally a popular vote under the ORS chapter 222 procedures, are not controlled by or subject to the land use laws. Rather, they are subject to the state statutes and complying local legislation that pertain to annexation procedures.” *Bear Creek Valley Sanitary Authority v. City of Medford*, 130 OrApp 24, 28-29 (1994).

Interested citizens could have appealed the Annexation Plan to LUBA for compliance with the comprehensive plan, statewide planning goals, and land use planning statutes and rules. The deadline for providing a notice of appeal of the Annexation Plan to LUBA was 21 days after the Plan became a final land use decision. ORS 197.830. The Annexation Plan became final when it was referred to the voters on August 5, 1998. An interested citizen could not now seek LUBA review of the Annexation Plan and associated Urban Service Agreements.

3. LCDC Enforcement Order

Although rarely exercised, the statutes do provide for later review of final land use documents through an enforcement order. ORS 197.320. LCDC can require a City to take action necessary to bring a challenged land use decision into compliance with the land use goals, comprehensive plan, or land use regulations, through an enforcement order if it has good cause to believe a local government is not making satisfactory progress toward meeting its obligations under the obligations listed in the statute, which

includes a reference to urban service agreements under ORS 195.065. ORS 197.320(11). ORS 197.319 also specifically lists the local comprehensive plan, land use regulations, special district cooperative or urban service agreements as types of decision-making processes for which an enforcement order is available. Neither section lists urban service annexation plans. Therefore, it is not clear that an urban service annexation plan is the type of “decision-making process” for which an enforcement order is available. In addition, the statutes contain procedures for enforcement--timelines (60 days for the request for a revision to the agreement), anticipate mediation, and then a request for an enforcement order, none of which occurred.

Most importantly regarding LCDC enforcement power after twenty years have passed, the Annexation Plan and Joint Management Agreement relied on the 1991 Master Plan for the planned provision of large infrastructure to provide sewer services. However, the City first repealed and replaced the 1991 Master Plan by Ordinance 2111 in 2009, based on its 2007 Collection System Master Plan. That Public Facility Plan was part of the UGB Remand and so was never acknowledged; it was ultimately again replaced with the 2014 Collection System Master Plan and attached Goal 11 Collection System Public Facility Plan. Ordinance 2230. The 2014 Goal 11 Collection System Public Facility Plan was sent to LCDC for review, as required as a post-acknowledgement comprehensive plan amendment. The City incorporated by reference and adopted the 2014 Plan and made it a part of the Comprehensive Plan, along with Findings and amendments to Chapter 8 of the Comprehensive Plan in December of 2014, and LCDC acknowledged the 2014 Plan as a public facilities plan in compliance with Goal 11.

Finally, LCDC’s authority, even if exercised, would have been to order the City to bring the 1991 Plan into compliance with the statewide goals. LCDC would have considered the 1991 Master Plan under Goal 11 criteria. The City already has a compliant public facilities plan that has replaced the 1991 Master Plan, which it is following. Therefore, an enforcement order may only be able to require the City to comply with its already adopted and acknowledged 2014 update to the sewer master plan, which the City is already doing.

4. Circuit Court Enforcement

The Circuit Courts have jurisdiction to grant declaratory, injunctive, or mandatory relief in proceedings arising from local government decisions that are not land use decisions, and in proceedings brought to enforce the provisions of an adopted land use regulation. ORS 197.825(3)(a).

In the urban service annexation process followed in 1998, the Resolution referring the Annexation Plan to the voters was the land use decision, because it was the final act of the local government proposing the annexation. The Annexation Plan was required to comply with the land use laws as well as the statutory provisions for urban service annexations. Circuit Court review was available for whether the City complied with the urban service provider annexation process, including whether the Annexation Plan and Urban Service Provider agreements complied with statutory requirements, but an action arising from any act or omission of a public body must be commenced within two years. ORS 30.275(9). Direct review of the Annexation Plan for compliance with ORS 195.220 is no longer available.

The writ of review statutes cover the decisions of the governing body of a municipal corporation acting in a judicial or quasi-judicial capacity and made in the transaction of municipal corporation business. ORS 34.102(2). The only judicial review now available would be of whether a current quasi-judicial action of the City complies with the adopted Annexation Plan.

Conclusion

The planning documents controlling the 1998 annexation and provision of sewer service to unsewered areas provided for extension of major sewer infrastructure lines, through the 1991 Master Plan, as engineering and capital improvement budgets allowed. The 1991 Master Plan did not plan for extension of lateral lines to individual neighborhoods, and planned for extension of major infrastructure sometime between 1991 and when the City reaches a population of 132,000. The more recent master plans continue to call for development of major sewer infrastructure, including the Southeast Interceptor, but do not provide for extension of lateral lines to specific neighborhoods. The 1998 General Plan and the current Comprehensive Plan call for the city to assist or

work with neighborhoods to extend sewer service. The current Septic to Sewer process to determine how the City and residents with septic systems will share the cost of extended sewer service is compliant with the Comprehensive Plan, the 1998 Annexation Plan, Urban Service Agreements, and 1991 Sewer Master Plan that was the basis for provision of sewer service under the 1998 Annexation Plan.