

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

WKL INVESTMENTS AIRPORT, LLC  
and MIKE KELLEY,  
*Petitioners,*

vs.

CITY OF LAKE OSWEGO,  
*Respondent.*

LUBA No. 2019-056

FINAL OPINION  
AND ORDER

Appeal from City of Lake Oswego.

Garrett H. Stephenson, Portland, filed the petition for review and reply brief and argued on behalf of petitioners. With him on the brief were Michael C. Robinson and Schwabe, Williamson & Wyatt, P.C.

Evan P. Boone, City of Lake Oswego, filed a response brief and argued on behalf of respondent. With him on the brief was David D. Powell.

RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board Member, participated in the decision.

AFFIRMED

09/25/2019

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal the city’s May 7, 2019 adoption of Ordinance No. 2812, which annexes a 1.5-acre property pursuant to ORS 222.750.

**BACKGROUND**

Petitioners WKL Investments Airport, LLC, and Mike Kelley (collectively petitioner) own a 1.5-acre property (the property) located in Clackamas County (the county). The city sought to annex the property as well as the five parcels immediately to the south and the portions of the Meadows Road right of way immediately to the north of the property (collectively, the territory) pursuant to the “island annexation” statute, ORS 222.750, which authorizes a city to annex territory that is completely encompassed by a city’s boundaries without the affected property owners’ consent.<sup>1</sup> Petitioner agreed with the city that the

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<sup>1</sup> As we explain in more detail below, ORS 222.750 was recently amended on May 30, 2019. We refer to the version of ORS 222.750 in effect on the date Ordinance No. 2812 was adopted, May 7, 2019, unless otherwise noted.

ORS 222.750 provides, in part:

- “(2) When territory not within a city is surrounded by the corporate boundaries of the city, or by the corporate boundaries of the city and the ocean shore, a river, a creek, a bay, a lake or Interstate Highway 5, the city may annex the territory pursuant to this section after holding at least one public hearing on the subject for which notice has been mailed to each record owner of real property in the territory proposed to be annexed.

1 territory was surrounded by the city’s boundaries and subject to island  
2 annexation. Petitioner maintained, however, that all properties in the territory  
3 must have the same effective annexation date.

4 The property is zoned Campus Industrial (CI) but the five parcels to the  
5 south are zoned Low Density residential (R-8.5). The city delayed the effective  
6 date of the annexation of the residentially-zoned properties for ten years, pursuant  
7 to ORS 222.750(5) and (6).<sup>2</sup> Petitioner argued that assigning different effective

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“(3) This section does not apply when the territory not within a city:

“(a) Is surrounded entirely by water; or

“(b) Is surrounded as provided in subsection (2) of this section, but a portion of the corporate boundaries of the city that consists only of a public right of way, other than Interstate Highway 5, constitutes more than 25 percent of the perimeter of the territory.”

<sup>2</sup> ORS 222.750(5) and (6) provide:

“(5) For property that is zoned for, and in, residential use when annexation is initiated by the city under this section, the city shall specify an effective date for the annexation that is at least three years and not more than 10 years after the date the city proclaims the annexation approved. The city recorder or other officer performing the duties of the city recorder shall:

“(a) Cause notice of the delayed annexation to be recorded by the county clerk of the county in which any part of the territory subject to delayed annexation is located within 60 days after the city proclaims the annexation approved; and

1 annexation dates to the properties in the territory would defeat a requirement that  
2 the property be surrounded by the city’s boundaries on the date the property’s  
3 annexation became effective. Petitioner requested that the property be given the  
4 same, delayed annexation effective date as the residential properties.

5 The city rejected petitioner’s request.

6 This appeal followed.

7 **STANDARD OF REVIEW**

8 Our review of the city’s interpretation of state law is subject to ORS  
9 197.835(9)(a)(D) and we will reverse or remand the land use decision if the city  
10 improperly construed applicable law. In construing the law, we will consider the  
11 text, context and legislative history of the law at issue in order to determine the  
12 intent of the enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or  
13 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-172, 206  
14 P3d 1042 (2009).

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“(b) Notify the county clerk of each county in which any part of the territory subject to delayed annexation is located not sooner than 120 days and not later than 90 days before the annexation takes effect.

“(6) Notwithstanding subsection (5) of this section, property that is subject to delayed annexation becomes part of the city immediately upon transfer of ownership.”

1 **FIRST ASSIGNMENT OF ERROR**

2 “[C]ities do not have inherent, home-rule authority to extend their borders  
3 to annex unwilling property owners and make them subject to municipal  
4 obligations.” *Costco v. City of Beaverton*, 343 Or 18, 25-26, 161 P3d 926 (2007)  
5 (*Costco III*). A city may, however, approve an island annexation of an unwilling  
6 owner’s property as set forth in ORS 222.750.

7 The parties agree that the effective date of an annexation is established at  
8 least in part by ORS 222.180. Petition for Review 20; Response Brief 16. ORS  
9 222.180 provides that:

10 “(1) The annexation shall be complete from the date of filing with  
11 the Secretary of State of the annexation records as provided in ORS  
12 222.177 and 222.900. Thereafter the annexed territory shall be and  
13 remain a part of the city to which it is annexed. The date of such  
14 filing shall be the effective date of annexation.

15 “(2) For annexation proceedings initiated by a city, the city may  
16 specify an effective date that is later than the date specified in  
17 subsection (1) of this section. If a later date is specified under this  
18 subsection, that effective date shall not be later than 10 years after  
19 the date of a proclamation of annexation described in ORS  
20 222.177.”<sup>3</sup>

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<sup>3</sup> ORS 222.177 provides:

“When a city legislative body proclaims an annexation under ORS 222.125, 222.150, 222.160 or 222.170, the recorder of the city or any other city officer or agency designated by the city legislative body to perform the duties of the recorder under this section shall transmit to the Secretary of State:

1 ORS 222.180(2) therefore grants cities an *option* to delay the effective date of an  
2 annexation of any property for up to ten years. ORS 222.750(5) *mandates*,  
3 however, a delayed effective date for annexed land which is residentially zoned  
4 and in residential use. As noted, ORS 222.750(5) provides in part:

5 “For property that is zoned for, and in, residential use when  
6 annexation is initiated by the city under this section, the city shall  
7 specify an effective date for the annexation *that is at least three*  
8 *years and not more than 10 years after the date the city proclaims*  
9 *the annexation approved.*” (Emphasis added.)

10 As indicated above, the city annexed the property pursuant to the authority  
11 provided in ORS 227.750. ORS 227.750(2) provides:

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“(1) A copy of the resolution or ordinance proclaiming the annexation.

“(2) An abstract of the vote within the city, if votes were cast in the city, and an abstract of the vote within the annexed territory, if votes were cast in the territory. The abstract of the vote for each election shall show the whole number of electors voting on the annexation, the number of votes cast for annexation and the number of votes cast against annexation.

“(3) If electors or landowners in the territory annexed consented to the annexation under ORS 222.125 or 222.170, a copy of the statement of consent.

“(4) A copy of the ordinance issued under ORS 222.120(4).

“(5) An abstract of the vote upon the referendum if a referendum petition was filed with respect to the ordinance adopted under ORS 222.120(4).”

1           “When territory not within a city is surrounded by the corporate  
2           boundaries of the city, or by the corporate boundaries of the city and  
3           the ocean shore, a river, a creek, a bay, a lake or Interstate Highway  
4           5, the city may annex the territory pursuant to this section after  
5           holding at least one public hearing on the subject for which notice  
6           has been mailed to each record owner of real property in the territory  
7           proposed to be annexed.”

8           The territory or “island” surrounded by the city boundaries and relied upon by  
9           the city for this island annexation is defined by the property, the five residentially  
10          zoned parcels to the south, and the Meadows Road right of way. Petitioner alleges  
11          that the annexation of the property is not consistent with state law because the  
12          property will become part of the city on the 2019 effective date of its annexation,  
13          long before the effective date for the annexation of the residentially zoned land  
14          adjacent to it. Petitioner essentially argues that the adjacent properties must be  
15          annexed at the same time that the petitioner’s property is annexed, otherwise the  
16          petitioner’s property is not “surrounded by the corporate boundaries of the city,”  
17          as required for island annexation. In other words, petitioner argues that the  
18          adjacent properties must be concurrently annexed immediately, or else  
19          petitioner’s property may not be annexed until 2029, when the ordinance states  
20          that the adjacent properties will be annexed, absent prior conveyance. The city  
21          responds, and we agree, that the city’s annexation of the property is consistent  
22          with ORS 222.750.

1           **A. Determination of Whether a Territory is Surrounded by the**  
2           **City’s Boundaries and Annexable under ORS 222.750**

3           The threshold question for annexing property under ORS 222.750(2) is  
4 whether or not the property to be annexed is in fact “surrounded by the corporate  
5 boundaries of the city, or by the corporate boundaries of the city and the ocean  
6 shore, a river, a creek, a bay, a lake or Interstate Highway 5[.]” Oregon’s Supreme  
7 Court discussed what constitutes “surrounded by” in the context of a previous,  
8 similarly worded version of ORS 222.750 in *Costco III*, 343 Or 18.

9           In *Costco Wholesale Corp. v. City of Beaverton*, 50 Or LUBA 476 (2005)  
10 (*Costco I*), the city identified an island: an area of land not within a city,  
11 surrounded by city boundaries. The annexation decision did not, however,  
12 purport to bring all of the island into the city of Beaverton. Rather, the city  
13 selected one segment of the island for annexation. The owner of the annexed  
14 property appealed the annexation and LUBA affirmed. The Court of Appeals  
15 reversed, concluding that, under the applicable statute, ORS 222.750, “the  
16 territory to be annexed must be completely enclosed by and contiguous with the  
17 corporate boundaries of the annexing city or the corporate boundaries of the  
18 annexing city and a body of water.” *Costco Wholesale Corp. v. City of Beaverton*,  
19 206 Or App 380, 398, 136 P3d 1219 (2006) (*Costco II*). The Supreme Court  
20 affirmed the Court of Appeals’ decision. The version of ORS 222.750 considered  
21 by the court provided in part, *Costco III*, 343 Or at 22-23:

22           “When territory not within a city is surrounded by the corporate  
23           boundaries of the city, or by the corporate boundaries of the city and



1 the ocean shore or a stream, bay, lake or other body of water, it is  
2 within the power and authority of that city to annex such territory.”  
3 ORS 222.750 (1985), *amended by* Or Laws 2007, ch 654, §1, ch  
4 706, §1; Or Laws 2019, ch 197, §1.

5 The court explained that in order to be “surrounded,” city boundaries must  
6 encircle the territory—the “island” surrounded by the city boundaries and  
7 identified by the city for island annexation—completely and contiguously. In  
8 concluding that the governing body was required to annex the entire territory the  
9 court noted:

10 “ORS 222.750 provides that, when ‘territory’ is surrounded by city  
11 boundaries, the city may annex ‘such territory.’ ‘Such’ refers to  
12 something previously mentioned and indicates that it is the identical  
13 thing. *See Webster’s [Third New Int’l Dictionary (unabridged ed*  
14 *2002)]* at 2283 (defining ‘such,’ in part, as ‘previously characterized  
15 or specified: AFOREMENTIONED’). The most straightforward  
16 reading of the statute, and the interpretation that we adopt, is that the  
17 territory that is encircled, completely and contiguously, to form the  
18 island in the first instance, is the territory that may be annexed—no  
19 more and, also, no less.” *Costco III*, 343 Or at 25.

20 The court concluded that the annexation ordinance before it did not reflect an  
21 intent to engage in incremental annexation because the city was not attempting  
22 to annex the entire island. *Costco III*, 343 Or at 27 n 7. The court went on to  
23 opine, however, that incremental annexation of territory was not allowed under  
24 the version of ORS 222.750 (1985) that applied at the time:

25 “As a slight variation on the argument that, once an island is  
26 contiguously and completely surrounded, a city may annex all or  
27 part of that island, the city and *amicus* League of Oregon Cities  
28 argue that, even if cities eventually must annex an island in its  
29 entirety, no statute prohibits them from proceeding to that end in

1 incremental steps. The answer to that argument is the same as the  
2 answer to the partial annexation argument: While no statute  
3 expressly prohibits partial or incremental island annexation, the  
4 legislature’s use of the term ‘such territory’ requires that the territory  
5 that forms the island be the territory that is annexed.” *Costco III*, 343  
6 Or at 27.

7 Here, the comparable language in the version of the statute applicable to  
8 the present annexation is found in ORS 222.750(2) and does not reference “such  
9 territory but rather references “the territory,” providing that:

10 “When *territory not within a city* [meets certain standards], the city  
11 may annex *the territory* pursuant to this section after holding at least  
12 one public hearing on the subject for which notice has been mailed  
13 to each record owner of real property in the territory proposed to be  
14 annexed.” (Emphases added.)

15 We understand, and the parties do not dispute, that ORS 222.750 still requires  
16 that the entire territory identified for purposes of the statute be annexed. Although  
17 the applicable version of ORS 222.750 no longer refers to “such territory,” there  
18 is no apparent reason for us to read “the territory” language in the applicable  
19 statute more narrowly than the former “such territory.”

20 **B. Establishing Point in Time when the City’s Boundaries Must**  
21 **Surround the Territory**

22 The requirement that all the territory be annexed provides the basis for  
23 petitioner’s argument. Petitioner agrees that on the date the city adopted the  
24 challenged ordinance approving the annexations, the territory was surrounded by  
25 the city’s boundaries. However, petitioner argues, because the annexation of the  
26 residential properties to the south of petitioner’s property will not be effective

1 until May 2029, petitioner’s parcel was not “surrounded by” the city’s boundaries  
2 on the effective date of annexation, June 6, 2019. Rather, according to petitioner,  
3 the petitioner’s property was only a part of the identified island subject to  
4 annexation.

5 Petitioner’s argument focuses on the effective date of the annexation and  
6 relies on *Costco III*, 343 Or at 24-25 and ORS 222.180. Petition for Review 20.  
7 Upon review of the cited pages in *Costco III*, we find no reference to the  
8 annexation’s effective date in that case. Although the annexation ordinance at  
9 issue in *Costco III* did not identify other properties to be annexed over time and  
10 therefore did not attempt an incremental annexation, the court did state that  
11 “[w]hile no statute expressly prohibits partial or incremental island annexation,  
12 the legislature’s use of the term ‘such territory’ requires that the territory that  
13 forms the island be the territory that is annexed.” *Costco III*, 343 Or at 27. We do  
14 not, however, find in *Costco III* any reasoning supporting a conclusion that an  
15 impermissible incremental annexation results from different effective dates in  
16 one annexation ordinance. As explained below, subsequent amendments to ORS  
17 222.750 specifically require incremental and delayed effective dates “[f]or  
18 property that is zoned to allow residential use as a permitted use in the zone and  
19 is in residential use when annexation is initiated.” ORS 227.750(5).

20 Petitioner’s argument also relies on ORS 222.180(1), which provides that:

21 “The annexation shall be complete from the date of filing with the  
22 Secretary of State of the annexation records as provided in ORS  
23 222.177 and 222.900. Thereafter the annexed territory shall be and

1 remain a part of the city to which it is annexed. The date of such  
2 filing shall be the effective date of annexation.”

3 Petitioner argues that annexation under ORS 222.750 is complete and  
4 properly measured from the ORS 222.180(1) date of filing. However, we find no  
5 reference in ORS 222.750 to ORS 222.180(1) to completion of the annexation.  
6 Moreover, we agree with city that under ORS 222.750, the determination of  
7 whether the property is part (or all) of a territory surrounded by the city’s  
8 boundaries is made at the time the annexation is authorized by the governing  
9 body, and not at the time of the effective date of the annexation.

10 The version of ORS 222.750 (1985) that applied to the city’s annexation  
11 in *Costco III* did not provide for notice of a hearing to property owners prior to  
12 annexation.<sup>4</sup> The version of ORS 222.750 that applies here sets forth a public  
13 annexation procedure. The applicable version of ORS 222.750(2) provides that  
14 “the city may annex the territory pursuant to this section after holding at least one  
15 public hearing on the subject for which notice has been mailed to each record  
16 owner of real property in the *territory proposed to be annexed.*” (Emphasis  
17 added.) We agree with the city that this new language supports the conclusion  
18 that the boundaries of the territory are considered as of the time the local  
19 government is evaluating an annexation proposal.

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<sup>4</sup> The Supreme Court issued its opinion in *Costco III* on June 7, 2007. This was 20 days before the governor signed House Bill (HB) 2760 (the bill amending ORS 222.750) on June 27, 2007, and after the public hearings and work sessions were held on HB 2760. Petition for Review 15.

1 Similarly, as the city notes, the version of ORS 222.750 (1985) that applied  
2 when the city made the decision that was reviewed by the court in *Costco III* did  
3 not include the provisions in ORS 222.750(5) mandating a delay in the  
4 annexation of residential properties measured from the date annexation is  
5 proclaimed. As noted, ORS 222.750(5) provides:

6 “For property that is zoned for, and in residential use when  
7 annexation is initiated by the city under this section, the city shall  
8 specify an effective date for the annexation *that is at least three*  
9 *years and not more than 10 years after the date the city proclaims*  
10 *the annexation approved.*” (Emphasis added.)

11 When we interpret a statute, we will not insert what has been omitted or omit  
12 what has been inserted. ORS 174.010. ORS 222.750(5) by its terms limits the  
13 delay of the effective date to properties zoned for and in residential use.  
14 Commercially zoned land is not addressed. The legislature could have easily  
15 stated that if the territory contains residential land in residential use, the  
16 annexation of the entire territory will be delayed. The legislature could have  
17 omitted the limiting reference to residential zoning and residential use. The  
18 legislature did neither. The language the legislature selected treats residential  
19 land in residential use differently than other properties. The focus is on the status  
20 of property on the date of the city’s proclamation of annexation.

21 Petitioner argues that our focus must be on ORS 222.750(2) and that such  
22 a focus should lead us to conclude that whether the property is surrounded by city  
23 boundaries on the effective date of annexation is determinative. Other provisions

1 of the same statute enacted at the same time or prior to the provision in question  
2 provide relevant context. *Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997).  
3 ORS 222.750(5)(a) references recording notice of the delayed annexation with  
4 the county clerk of a county “in which *any part* of the territory subject to delayed  
5 annexation is located.” (Emphasis added.) Similarly, ORS 222.750(5)(b) requires  
6 notice to the county clerk in advance of the date a delayed annexation takes effect  
7 for “*any part* of the territory subject to delayed annexation.” (Emphasis added.)  
8 We read this language to support a conclusion that some parts of the territory may  
9 not be subject to delayed annexation. We assume that where the legislature uses  
10 different words it does so intentionally and the reference to “any part of the  
11 territory subject to delayed annexation” as opposed to “the territory” was  
12 intentional. *State v. Holloway*, 138 Or App 260, 908 P2d 324 (1995) (assume  
13 legislature intended consistent use of words).

14 In interpreting a statute we are to give all parts meaning if possible. *State*  
15 *v. Stamper*, 197 Or App 413, 106 P3d 172 (2005) (give effect to related statutes).  
16 ORS 222.750(6) provides that a conveyance of property will result in immediate  
17 annexation, the provision for delay under section (5) notwithstanding.<sup>5</sup> The city  
18 provided the following example illustrating the inconsistency of section (6) with  
19 petitioner’s preferred interpretation of ORS 222.750:

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<sup>5</sup> ORS 222.750(6) provides: “Notwithstanding subsection (5) of this section, property that is subject to delayed annexation becomes part of the city immediately upon transfer of ownership.”

1           “Assume all property within the area proposed to be annexed is  
2           zoned for, and in, residential use and is ‘surrounded by’ city  
3           boundaries. Following public hearing, the annexation ordinance is  
4           approved and declares all properties to be annexed, with an effective  
5           annexation date three years from the date of the annexation  
6           ordinance. But six months following adoption of the annexation  
7           ordinance, filing of the annexation record with the Secretary of  
8           State, and recordation of the notice of annexation pursuant to  
9           subsection (5), one parcel within the annexed territory is sold. Under  
10          Subsection 6 \* \* \* [t]he sold parcel would \* \* \* be immediately  
11          annexed but the other parcels’ effective date 2.5 years later is not  
12          altered. Under Petitioners’ theory, the sale of the one parcel would  
13          break the simultaneous effective annexation dates that Petitioners  
14          argue is needed for all parcels within the ‘territory proposed to be  
15          annexed[.]” Response Brief 13-14.

16          Section (6) must be given meaning, and we find no indication in the text or  
17          context that the legislature intended to create a process which would introduce  
18          substantial unpredictability into annexation by making the sale of one parcel call  
19          into question the status of other properties in the relevant territory.

20                 We will consider legislative history in interpreting a statute. *PGE*, 317 Or  
21          606; *Gaines*, 346 Or 160. Petitioner provided a transcript of Rep. Chris Edwards’  
22          statements at the May 29, 2007 Senate Hearing and Work Session on HB 2760,  
23          the 2007 bill amending ORS 222.750. Rep. Edwards stated:

24                 “‘This bill is before you today because some cities have a history of  
25                 subverting democratic processes in order to annex unincorporated  
26                 land. Perhaps the most egregious form of this type of annexation  
27                 without representative vote has been the practice of encircling entire  
28                 neighborhoods by annexing streets and roads. \* \* \* House Bill 2760  
29                 does \* \* \* [t]hree things[.] First, it limits the use of public rights-of-  
30                 way such as streets and roads and the formation of islands. Under  
31                 House Bill 2760A, no more than twenty-five percent of the  
32                 boundary of an island may be comprised solely of public rights-of-

1 way. Secondly, it requires cities to post public notice and conduct a  
2 prior hearing before annexing a bona fide island. And finally, the  
3 Bill specifies a minimum of a three-year deferment of annexation  
4 once a city makes a legitimate annexation using the island  
5 annexation statute.” Petition for Review, App 4.

6 This legislative history suggests that the legislature did not intend to make  
7 annexation easier for cities through the amendments. When the legislature  
8 amended ORS 222.750 in 2007, the legislature was acting to limit, not expand,  
9 local authority to aggressively annex property. However, the legislature clearly  
10 knew how to provide for delayed annexation dates. The statutory language  
11 ultimately adopted applies to properties in residential use with residential zoning.  
12 We see no indication in the adopted text that the legislature intended to extend  
13 the delay provision to nonresidential properties. We conclude that the city may  
14 include phased annexation effective dates in its annexation proclamation, even if  
15 as a consequence, as is the case here, part of the annexed territory will abut land  
16 outside the city’s boundaries on the effective date of its annexation.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Based on the premise that the city’s island annexation is invalid, as argued  
20 in the first assignment of error, petitioner argues in the second assignment of error  
21 that ORS 222.125 required the city to obtain the written consent of all of the  
22 owners of land in the annexed territory, as provided in ORS 222.125.<sup>6</sup> The county

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<sup>6</sup> ORS 222.125 provides:



1 owns a portion of the annexed Meadows Road right of way abutting petitioner's  
2 property. Petitioner argues that because the city did not obtain written consent  
3 from the county, the annexation is invalid. However, in annexing the territory,  
4 the city did not rely on ORS 222.125. Because we affirm the city's decision under  
5 ORS 222.750, and the challenged decision did not rely on ORS 222.125, any  
6 ruling on petitioner's second assignment of error would not result in reversal or  
7 remand and would constitute an advisory opinion. Thus, we do not reach the  
8 second assignment of error.

9 The city's decision is affirmed.

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“The legislative body of a city need not call or hold an election in the city or in any contiguous territory proposed to be annexed or hold the hearing otherwise required under ORS 222.120 when all of the owners of land in that territory and not less than 50 percent of the electors, if any, residing in the territory consent in writing to the annexation of the land in the territory and file a statement of their consent with the legislative body. Upon receiving written consent to annexation by owners and electors under this section, the legislative body of the city, by resolution or ordinance, may set the final boundaries of the area to be annexed by a legal description and proclaim the annexation.”