BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HENRY KANE,
Petitioner,

and

MARIAM JANE CORBY
and SCOTT MONSON,
Intervenors-Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2005-018

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Henry Kane, Beaverton, filed the petition for review and argued on his own behalf.

Mariam Jane Corby and Scott Monson, Beaverton, represented themselves.

Alan A. Rappleyea, City Attorney, Beaverton, filed the response brief and argued on behalf of respondent.

BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 06/17/2005

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals Ordinance 4334, which annexes approximately 163 acres in 60 parcels,
4 as an "island" annexation under ORS 222.750.

5 **FACTS**

6 In a series of decisions over many years, the City of Beaverton has annexed a number of
7 streets and highway rights-of-way in the area of the Highway 26 and Highway 217 interchange,
8 including stretches of Cedar Hills Boulevard and NW Barnes Road. The effect of these annexations
9 is that the city boundaries surround or nearly surround large areas of urbanized and urbanizable land
10 within Washington County.

11 The proposed annexation territory consists of four sub-areas running roughly parallel to and
12 north of Highway 26. Two of the sub-areas lie between Highway 26 and NW Barnes Road, and
13 are bisected by Cedar Hills Boulevard. The two remaining sub-areas lie north of NW Barnes
14 Road. Cedar Mill Creek bisects NW Barnes Road and Highway 26 to the west of the annexation
15 area. The annexation territory is within a larger "island" that is bordered on all sides either by city
16 boundaries or Cedar Mill Creek. ORS 222.750 allows the city to annex land that is surrounded by
17 the corporate boundaries of the city and a "stream, bay, lake or other body of water," without the
18 consent of residents or property owners within the territory.[1]

19 The annexation area is within the city's Assumed Urban Services Area, as depicted on a
20 map (Figure V-1) of the Beaverton Comprehensive Plan (BCP). BCP Policy 5.3.1(d) states that
21 "[t]he City shall seek to eventually incorporate its entire Urban Services Area." In November

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[1] ORS 222.750 provides, in relevant part:

> "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 or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. * * * [A]nnexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory."

1 2004, the city initiated a proceeding to annex the subject area. Because the westernmost parcel
2 within the larger "island" straddles both sides of Cedar Mill Creek, the city chose not to annex the
3 eastern portion of that parcel, to avoid splitting the parcel between two jurisdictions. The city
4 provided individual notice to property owners within the annexed territory. The city conducted a
5 public hearing on December 6, 2004, and ultimately adopted Ordinance 4334 on January 3, 2005.
6 This appeal followed.

7 **MOTION TO FILE REPLY BRIEF**

8 The city filed its response brief on May 18, 2005. Oral argument was scheduled for 15
9 days later, on June 2, 2005. On June 1, 2005, one day before oral argument, petitioner moved for
10 leave to file a reply brief pursuant to OAR 661-010-0039, accompanied by a 15-page reply brief.[2]
11 The proposed reply brief includes 39 pages of appendices.

12 The city objects to the proposed reply brief, arguing that it was not filed "as soon as
13 possible" after respondent's brief was filed, and is not confined solely to "new matters" raised in the
14 response brief. The city also argues that a 15-page reply brief is unwarranted, and that some of the
15 documents included in the appendices are not in the record nor subject to official notice.[3]

16 Untimely filing of a reply brief is a basis to reject the brief only if the untimely filing
17 prejudices other parties' substantial rights, which in turn depends on the proximity to oral argument

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[2] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

[3] The city also objects to allowing petitioner to amend the petition for review to include page six, part of the summary of material facts that was omitted from the copies filed with the Board and served on the city. Several days prior to oral argument the Board requested that petitioner supply the missing page to the Board and parties, and petitioner did so. The city received the missing page the day before oral argument. The Board received it the day of oral argument. Because the missing page involves only the summary of material facts, and the city does not explain why it was unable to respond adequately to page six at oral argument, we see no prejudice to the city's substantial rights in allowing the belated correction to the petition for review.

and the length of the proposed reply brief. OAR 661-010-0005; *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 322, *aff'd* 163 Or App 592, 988 P2d 422 (1999) (32-page reply brief filed one month after the response brief and two days before oral argument is untimely and prejudicial to respondent). Filing a 15-page brief with 39 pages of appendices one day before oral argument clearly prejudices respondent's substantial rights. The motion to file a reply brief is denied.[4]

MOTION TO AMEND SIGNATURE PAGE

In an order dated April 6, 2005, the Board allowed the motion of Mariam Jane Corby and Scott Monson (intervenors) to intervene in this appeal on the side of petitioner. Both intervenors allege that they own property within the annexation territory. Petitioner Kane filed a petition for review on April 27, 2005, the date it was due. The signature page included only petitioner's signature. Intervenors did not file a separate petition for review, or join in petitioner's.

The city filed its response brief on May 18, 2005, in which the city took the position that because petitioner does not live in or near the annexation territory, petitioner lacks standing to invoke the Court of Appeals' jurisdiction under *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), *rev dismissed* 335 Or 217 (2003). The city also states that intervenors "have not filed briefs and have not demonstrated any interest in the case." Respondent's Brief 1.

In response, on May 21, 2005, intervenors mailed letters to LUBA and the parties stating, essentially, that they wish to join the petition for review. On the same date, petitioner submitted a request to amend the petition for review to add a new signature page that includes intervenors' signatures. The signature page is attached to the motion. Petitioner states that the signature page was actually signed by petitioner and intervenors on the day before the petition for review was due,

[4] We need not address the other bases for the city's opposition, although we tend to agree that most if not all of the reply brief consists either of embellishments of arguments made in the petition for review or arguments that are not confined to "new matters" raised in the response brief.

but petitioner was unable to integrate it into the petition in time for filing. Petitioner argues that allowing the amendment will effectively moot the city's anticipated *Utsey* challenge.

The city objects to allowing intervenors to join the petition for review. The city characterizes the effect of allowing the motion as tantamount to allowing intervenors to file a late petition for review, contrary to OAR 661-010-0030(1) (providing that failure to file a petition for review within the 21-day period prescribed by the rule shall result in dismissal of the appeal). While the city does not seek to dismiss intervenors as parties, it argues that allowing intervenors to join the petition is a substantive change in the petition for review that would "significantly alter the parties' legal standing and remedies." Response to Motion 2.

OAR 661-010-0030(2)(i) states that "[i]n cases where multiple unrepresented petitioners or intervenors-petitioner file a single petition for review, the petition for review shall be signed by all petitioners or intervenors-petitioner who wish to join the petition for review." Under certain circumstances, the Board may allow an amended petition for review to be filed "in accordance with OAR 661-010-0005." OAR 661-010-0030(6). OAR 661-010-0005 provides:

> "These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation."

We disagree with the city that allowing amendment of the signature page of a timely filed petition for review to add intervenors' signatures is tantamount to allowing a late petition for review. The petition for review that intervenors seek to join was timely filed. Intervenors' violation of OAR 661-010-0030(2)(i) is a "technical violation" that shall not interfere with our review, unless it affects the substantial rights of the parties. As far as LUBA's rules and procedures are concerned, the only consequence to allowing intervenors to join the petition for review is that intervenors may

1 then present oral argument. OAR 661-010-0040(1) (only parties who have submitted briefs shall
2 be allowed to present oral argument to the Board). However, intervenors did not seek to present
3 oral argument and, even if they had, their arguments would have been limited to the arguments in the
4 petition for review. *Id.* It is difficult to see how allowing intervenors to join the petition for review
5 could possibly prejudice the city's substantial rights in this review proceeding.

6 The city's real concern, apparently, is that allowing intervenors to join the petition for review
7 may give them standing to appeal LUBA's decision to the Court of Appeals, standing that petitioner
8 Kane may lack under *Utsey*. It is not clear to us that *Utsey* standing depends on a party's
9 participation in the briefing during the proceedings before LUBA, but that is a question only the
10 court can answer. For purposes of this review proceeding, the city has not established a basis to
11 deny intervenors' request to join the petition for review.[5] The request and the motion to amend the
12 petition for review are allowed.

13 **MOTIONS TO TAKE OFFICIAL NOTICE**

14 At oral argument, petitioner Kane requested that we take official notice of (1) a city map,
15 and (2) Beaverton Development Code (BDC) 10.35. Petitioner also objected to ordinances
16 attached to the response brief, arguing that the ordinances are not subject to official notice. The city
17 objects to our consideration of the city map, does not object to taking official notice of the BDC
18 provisions, and argues that the ordinances attached to its brief are properly subject to notice under
19 Oregon Evidence Code (OEC) 202(7) (allowing official notice of an "ordinance, comprehensive
20 plan or enactment of any county or incorporated city").

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[5] We note, in passing, that Oregon Rules of Appellate Procedure (ORAP) 5.77(3) allows a party who has not signed a brief filed by another party to join in that brief by (1) obtaining the consent of the party who filed the brief, (2) paying a filing or first appearance fee, and (3) submitting a letter to the court, copied to all parties, stating that the party joins in the brief. Thus, the ORAPs apparently allow a party to join another party's brief, even after that brief is filed.

1 We agree with the city that the map is not an "ordinance, comprehensive plan or enactment"
2 subject to judicial notice under OEC 202(7). The cited BDC provisions and the city ordinances
3 attached to the response brief clearly are, and we grant the requests to take notice of them.

4 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

5 As noted, ORS 222.750 allows a city to annex territory that is surrounded by city
6 boundaries or by city boundaries and a body of water, so-called "island" annexations, without
7 consent of any owners of property or residents within the territory annexed.[6] ORS 222.750 is part
8 of a statutory scheme that includes ORS 222.111(5), which as relevant here requires the city to
9 submit certain annexation proposals to the electors of the territory.[7] ORS 222.111(5) lists several
10 exceptions to that requirement, most pertinently ORS 222.170 and ORS 222.840 to 222.915.
11 ORS 222.170 includes the so-called "triple-majority" and "double-majority" provisions, that allow
12 annexation without an election of the residents of the territory in specified circumstances.[8]

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[6] We provided a partial quote of ORS 222.750 at n 1. We quote it here in full:

> "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 or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. However, this section does not apply when the territory not within a city is surrounded entirely by water. Unless otherwise required by its charter, annexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory."

[7] ORS 222.111(5) provides:

> "The legislative body of the city shall submit, except when not required under ORS 222.120, 222.170 and 222.840 to 222.915 to do so, the proposal for annexation to the electors of the territory proposed for annexation and, except when permitted under ORS 222.120 or 222.840 to 222.915 to dispense with submitting the proposal for annexation to the electors of the city, the legislative body of the city shall submit such proposal to the electors of the city. The proposal for annexation may be voted upon at a general election or at a special election to be held for that purpose."

[8] ORS 222.170 provides, in relevant part:

> "(1) The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if more than half of the owners of land in the territory, who also own more than half of the land in the contiguous territory and of real property therein representing more than half of the assessed value of all real

1 ORS 222.840 to 222.915 sets out the so-called "health hazard" annexation process, under which
2 territory may be annexed without vote or consent in the affected territory under specified
3 circumstances. ORS 222.855.

4 Petitioners[9] contend that ORS 222.750 violates Article I, section 20, of the Oregon
5 Constitution,[10] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to
6 the United States Constitution.[11] Reduced to essentials, we understand petitioners to argue that
7 annexations under ORS 222.750 violate the state and federal constitutions because other provisions
8 of ORS chapter 222 grant the electors and landowners of the territory in non-island annexations a
9 privilege—the right to vote on or withhold consent to annexation—that is denied to the electors and
10 landowners in island annexations.

11 Petitioners cite to a number of federal court decisions for the proposition that there is a
12 fundamental right to vote on annexation proposals. Even if there is no such fundamental right, we

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property in the contiguous territory consent in writing to the annexation of their land in the territory and file a statement of their consent with the legislative body * * *

"* * * * *

"(2) The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if a majority of the electors registered in the territory proposed to be annexed consent in writing to annexation and the owners of more than half of the land in that territory consent in writing to the annexation of their land and those owners and electors file a statement of their consent with the legislative body * * *:

"* * * * *"

[9] For convenience, we hereafter refer to petitioner and intervenors-petitioner collectively as "petitioners."

[10] Article I, section 20, of the Oregon Constitution provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[11] The Fourteenth Amendment to the United States Constitution states, in relevant part:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1 understand petitioners to contend, once the legislature creates a right to vote on annexation matters,
2 it violates the cited state and federal constitutional clauses to extend that right to some citizens while
3 restricting or denying it to others, without a showing that the restriction furthers a compelling state
4 interest. In support of the latter proposition, petitioners rely principally on the reasoning in *Mid-*
5 *County Future Alt. v. Port. Metro Area LGBC*, 82 Or App 193, 728 P2d 63 (1986), *rev*
6 *dismissed* 304 Or 89, 742 P2d 47 (1987), in which the Court of Appeals held that the "triple-
7 majority" provisions of ORS 199.490(2) violate Article I, section 20 of the Oregon Constitution.[12]
8 With respect to whether there is a fundamental right to vote on annexations, *Mid-County*
9 *Futures Alt.* itself states that there is no federal constitutional right to vote on municipal annexations,
10 and the court assumed, without deciding, that the Oregon Constitution confers no greater right. 82
11 Or App at 200. In a related case, the Oregon Supreme Court subsequently affirmed that there is
12 no federal or state constitutional right to vote on municipal annexations. *Mid-County Future*
13 *Alternatives v. City of Portland*, 310 Or 152, 166, 795 P2d 541 (1990).
14 With respect to Article I, section 20, the "balancing" test that was applied in the Court of
15 Appeals' *Mid-County Futures Alt.* decision quoted in part at n 12 has since been abandoned and,

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[12] The triple-majority annexation procedure that is initiated under ORS 199.490(2) applies where a local government boundary commission has jurisdiction to approve annexation proposals. The ORS 199.490(2) triple-majority provision is similar to the triple-majority provision that appears at ORS 222.170(1). In *Mid-County Future Alt.*, the court held, in relevant part:

> "* * * [ORS 199.490(2)] permits a 'triple majority' of the landowners, regardless of whether they are electors registered in, or even residing in, the territory to be annexed, to decide in favor of annexation, submit their consents to the governing body and thereby foreclose the election process if the proposed annexation is approved. No similar privilege is accorded to electors who are not landowners. The state's justification for denying that privilege to nonlandowners is, presumably, its interest in eliminating the administrative burden of an election 'where consent procedures had already established that annexation was the clear will of the property owners in the affected territory.' *Peterson v. Portland Metropolitan Boundary Comm.*, supra, 21 Or App at 429. Applying the 'balancing' test described in *Olsen v. State ex rel Johnson*, 276 Or 9, 19, 554 P2d 139 (1976); *see also Planned Parenthood Assn. v. Dept. of Human Res.*, 63 Or App 41, 56, 663 P2d 1247 (1983), *aff'd* 297 Or 562, 687 P2d 785 (1984), we conclude that that justification is not sufficient when it is weighed against the privilege to vote in a matter of general concern to electors registered in the territory to be annexed and that the 'triple majority' provision violates Article I, section 20, of the Oregon Constitution." 82 Or App at 199-200.

1 as a result, that case is no longer "good law." *Sherwood School Dist. 88J v. Washington Cty.*
2 *Ed.*, 167 Or App 372, 388, 6 P3d 518, *rev den* 331 Or 361, 19 P3d 354 (2000) (rejecting claims
3 that a statute that alters the boundaries of a school district without providing a right of remonstrance
4 violates Article I, section 20).[13] According to *Sherwood School Dist. 88J*, the correct analysis
5 under Article I, section 20 turns on whether the disparate treatment of classes is supported by a
6 "rational basis," unless the disparity is a result of a "suspect" classification, in which case a more
7 demanding standard is applied. *Id.* at 385-86.[14]
8 Petitioners do not argue that ORS 222.750 distinguishes between classes of persons based
9 on a "suspect" classification. Therefore, ORS 222.750 must be upheld if there is a "rational basis"
10 for treating electors or landowners within an "island" differently with respect to annexations than
11 electors or landowners not within an "island." Rational basis is established where the classification
12 involved "bears some relationship to a legitimate end." *Id.* at 386 (quoting *Withers v. State of*
13 *Oregon*, 163 Or App 298, 309, 987 P2d 1247 (1999)). In conducting that inquiry, we consider

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[13] The court held in *Sherwood School Dist 88J*:

> "Our decision in *Mid-County* is not to the contrary. At issue in that case was the constitutionality of a statute that permitted the annexation of an area without an election upon the satisfaction of three conditions: (1) that half of the *landowners*--not the residents--in the affected area provided written consent to the annexation; (2) that those landowners owned more than half the land in the affected area; and (3) that the value of those lands represented more than half of the assessed value of all lands in the affected area. The plaintiffs, residents who did not own land in the affected area, challenged the constitutionality of the statute under Article I, section 20. We held that the statute was unconstitutional, but we did so because, on balance, the interest of the state was simply not sufficiently compelling when weighed against the right to vote in annexation matters that ordinarily is available to residents of an affected area. *Mid-County*, 82 Or App at 199-200. The sort of balancing test that this court employed in *Mid-County* has since been explicitly abandoned. *Hale* [*v. Port of Portland*] 308 Or [508,] 524, 783 P2d 506 [1989] ('This is a test drawn from federal equal protection doctrine (and akin to 'balancing') that for the purposes of Article I, section 20, has been suspended by our more recent decisions.'). *Mid-County* no longer can be regarded as good law. We therefore conclude that the trial court did not err in holding that Section 22 does not violate Article I, section 20."

[14] The Article I, section 20 analysis also requires a showing that (1) the plaintiffs are members of a true "class" of citizens, (2) the statute discriminates against the class on the basis of characteristics that define the class, and (3) the discrimination is not justifiable, under the rational basis or strict scrutiny standard, whichever is applicable. *Id.* at 385. We assume for purposes of this opinion that the first two elements of the test are met.

1 whether there is *any* rational basis for the statute, whether or not that basis is set out in the statute or
2 its legislative history, and even if the legislature did not consider that basis. *Id.* at 388.
3 ORS 222.750 was adopted in 1963, and direct evidence of its legislative purpose is not
4 available to us. Presumably, the legislature chose not to require elections or consents to annex
5 "island" areas, and yet require elections or consents for other areas, because it wanted to make it
6 easier for a city to annex lands that are surrounded or largely surrounded by existing city
7 boundaries, *i.e.*, lands that are subject to county jurisdiction, but geographically isolated from other
8 lands within the county's jurisdiction. The apparent legislative preference is for such areas of county
9 jurisdiction to be incorporated into the surrounding city. Several quite legitimate reasons support
10 that legislative preference. An obvious reason is to reduce jurisdictional confusion, a concern that is
11 generally not present in more ordinary annexations of contiguous lands. Other reasons are to
12 improve administrative efficiency or provide municipal services more efficiently. As discussed
13 below, petitioners argue that the residents of the annexed territory will not enjoy better or more
14 efficient municipal services than they currently receive, and the only benefit will be to the city, in
15 collecting additional property taxes at rates higher than the county's. Putting aside that question for
16 the moment, it is not hard to imagine that in most if not all cases, establishing city rather than county
17 jurisdiction over an area that is entirely surrounded by the city or the city and a body of water will
18 tend to promote administrative and service efficiency, to the benefit of both the city and the residents
19 of the territory. Whether this particular annexation will in fact do so is immaterial. Reducing
20 jurisdictional confusion, and improving administrative and service inefficiencies caused by islands are
21 legitimate ends. The legislature's choice to make it easier for cities to annex islands certainly bears a
22 relationship to those ends. Because there is a rational basis for disparate treatment with respect to
23 annexation of islands compared to non-islands, petitioners have not established that ORS 222.750
24 violates Article I, section 20.
25 Petitioners' arguments under the federal Due Process and Equal Protection Clauses fare no
26 better. Petitioners do not explain why ORS 222.750 violates the Due Process Clause. The Equal

Protection Clause analysis is similar to that required under Article I, section 20. *Sherwood School Dist. 88J*, 167 Or App at 390. Because there is a rational relationship between the differential treatment and one or more legitimate legislative purposes, petitioners have not demonstrated that ORS 222.750 violates the Equal Protection Clause.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the challenged annexation is not "reasonable" under the analysis set out in *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). According to petitioners, the city's sole motivation in annexing the territory is to increase tax revenues, and the annexation provides no benefits or improved services to the residents and landowners in the territory. Petitioners argue that such an annexation is not "reasonable" under *Portland Gen. Elec. Co.*.

The city responds that an island annexation is *per se* reasonable. Even if island annexations require analysis under *Portland Gen. Elec. Co*., the city explains the "reasonableness" standard is based on, or akin to, the general reasonableness requirement that the United States Supreme Court imposes on legislation under the Due Process Clause of the Fourteenth Amendment. *Morsman v. City of Madras*, 191 Or App 149, 154, 81 P3d 711 (2003). That requirement, in turn, is "notoriously lax" with respect to social and economic legislation. *Id.* In any case, the city argues, the record reflects that the challenged annexation will benefit both the city and the territory:

> "* * * The City and the County entered into an Urban Services Boundary Agreement, as called for in ORS Chapter 195. This agreement clearly delineates where the City will be providing future services and addresses the first three factors of the reasonableness test. The City also had a similar agreement with the sewer provider, Clean Water Services, that specified that the City would be providing the service. * * * The record reflects clearly the benefit of increased levels of police service [from] .9 officers per thousand in the County to 1.5 officers per thousand within the City limits. The City will also take over sewer service provision, storm water maintenance, planning services and maintenance of the local and collector roads. The main benefit to all citizens is to equalize benefits. Property owners in 'islands' already receive many of the benefits of incorporation without paying for

1 them, such as increased safety through increased levels of police protection and
2 prosecutions in municipal court, storm water control, sewer line maintenance, road
3 construction and maintenance, planning and administration and library services. The
4 legislature recognized the 'reasonableness' of these annexations for leveling the
5 playing field by making these island annexations non-consent annexations. The
6 legislators realized that 'islands' would never consent to annexation because the
7 residents would never agree to pay for services they already get for free."
8 Respondent's Brief 10-11.

9 We generally agree with the city that the record indicates that the annexed territory as well
10 as the city will benefit, at least to some extent, from annexation, and that petitioners have not
11 established that the annexation is not "reasonable" under the "notoriously lax" *Portland Gen. Elec.*
12 *Co.* standard.

13 As the city points out, the annexation territory is within the city's urban services area, an
14 area in which the city and county have agreed that the city will ultimately be responsible for
15 providing and maintaining urban services. It is entirely reasonable for the city to annex territory for
16 which it has assumed, or obligated itself to assume, the responsibility of providing and maintaining
17 urban services, even if those urban services are at the same level and quality that the county
18 currently provides. In any case, as the city notes, the city offers higher levels of police protection
19 per capita than does the county. Petitioners complain that they already enjoy all the police
20 protection needed, due in part to a reciprocal agreement between the city and the county in which
21 city police officers are authorized to respond to calls in the county, if city police are the closest
22 responder. However, that complaint merely underscores the city's point that persons within
23 "islands" often benefit from city services without paying for them.

24 The third assignment of error is denied.

25 **FOURTH, FIFTH, SIXTH AND EIGHTH ASSIGNMENTS OF ERROR**

26 In these assignments of error, petitioners argue that the record does not include the written
27 consents necessary to annex the streets and rights-of-way that largely surround the annexation
28 territory, or other sufficient evidence that those annexations were valid.

1 The city responds, and we agree, that the arguments under these assignments of error are
2 essentially collateral attacks on ordinances not before us. The annexations that largely encircle the
3 annexation territory at issue in this appeal were accomplished by a series of ordinances for which
4 the appeal period has long run. We are aware of no obligation, and petitioners cite none, for the
5 city to determine, in this decision, whether those annexations were proper, or to include in the
6 present record evidence that required consents were in fact obtained for those prior annexations.
7 The fourth, fifth, sixth and eighth assignments of error are denied.

8 **SEVENTH ASSIGNMENT OF ERROR**

9 As noted, the western-most portion of the annexed area extends to a parcel that straddles
10 Cedar Mill Creek, but the annexed area does not include the portion of that parcel east of the
11 creek, because the city did not wish to impose split jurisdiction on the property owner.
12 Petitioners contend that the annexation territory does not qualify as an "island" for purposes
13 of ORS 222.750, because the entire annexed area is not contiguous with either city boundaries or a
14 body of water. To qualify as an "island," petitioners argue, the annexed territory must be
15 "surrounded" by or in immediate contiguity with, city boundaries or a body of water on all sides.
16 *See* n 6. Because the city failed to annex all the way to Cedar Mill Creek, we understand
17 petitioners to argue, the annexation cannot proceed under ORS 222.750.
18 The city responds that there is no obligation under ORS 222.750 for a city to annex the
19 entirety of an otherwise proper "island" in a single ordinance, in order to annex under that statute.
20 We agree. While ORS 222.750 requires that an "island" exist, *i.e.*, land that is surrounded either
21 by city boundaries or by city boundaries and a body of water, the statute does not explicitly require
22 the city to take an all-or-nothing approach to annexation of such islands. We do not understand
23 petitioners to dispute that, had the city also annexed the eastern portion of the parcel that straddles
24 Cedar Mill Creek, the entire resulting territory would constitute a proper "island" for purposes of
25 ORS 222.750. Because the statute clearly authorizes the city to annex the entire island, and nothing

1 in the statute prohibits piece-meal annexation of the island, petitioners have not established that the
2 city erred in proceeding under ORS 222.750.
3 The seventh assignment of error is denied.
4 The city's decision is affirmed.