

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 COSTCO WHOLESALE
5 CORPORATION,
6 *Petitioner,*

7
8 and
9

10 HENRY KANE,
11 *Intervenor-Petitioner,*

12
13 vs.
14

15 CITY OF BEAVERTON,
16 *Respondent.*

17
18 LUBA No. 2005-044
19

20 WELLS REAL ESTATE FUNDS, INC.,
21 *Petitioner,*

22
23 vs.
24

25 CITY OF BEAVERTON,
26 *Respondent.*

27
28 LUBA No. 2005-046
29

30 BOLD, LLC,
31 *Petitioner,*

32
33 and
34

35 HENRY KANE,
36 *Intervenor-Petitioner,*

37
38 vs.
39

40 CITY OF BEAVERTON,
41 *Respondent.*

42
43 LUBA No. 2005-050

1 C.E. JOHN COMPANY, INC.,
2 *Petitioner,*

3
4 and

5
6 HENRY KANE,
7 *Intervenor-Petitioner,*

8
9 vs.

10 CITY OF BEAVERTON,
11 *Respondent.*

12
13 LUBA No. 2005-053

14
15
16 FINAL OPINION
17 AND ORDER

18
19 Appeal from City of Beaverton.

20
21 Joseph S. Voboril, Portland, filed a petition for review and argued on behalf of
22 petitioner Costco Wholesale Corporation. With him on the brief were M. Sean Munger and
23 Tonkon Torp, LLP.

24
25 Dana L. Krawczuk, Portland, filed petitions for review and argued on behalf of
26 petitioners Wells Real Estate Funds, Inc. and Bold, LLC. With her on the briefs were Jack L.
27 Orchard and Ball Janik, LLP.

28
29 Roger A. Alfred, Portland, filed a petition for review on behalf of petitioner C.E. John
30 Company, Inc. With him on the brief was Perkins Coie, LLP.

31
32 Henry Kane, Beaverton, filed a petition for review and argued on his own behalf.

33
34 Alan A. Rappleyea, City Attorney, Beaverton, filed the response brief and argued on
35 behalf of respondent. With him on the brief was Theodore R. Naemura.

36
37 DAVIES, Board Chair; BASSHAM, Board Member, participated in the decision.

38
39 HOLSTUN, Board Member, concurring.

40
41 AFFIRMED

10/27/2005

42
43 You are entitled to judicial review of this Order. Judicial review is governed by the
44 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal Ordinance Nos. 4338 (LUBA Nos. 2005-044 and 2005-046), 4339
4 (LUBA No. 2005-050) and 4340 (LUBA No. 2005-053), which annex several properties
5 owned by petitioners as “island” annexations under ORS 222.750.

6 **STANDING**

7 On March 26, 2005, intervenor-petitioner Henry Kane (intervenor or Kane) moved to
8 intervene on the side of petitioner in LUBA Nos. 2005-044, 2005-050 and 2005-053. There
9 was no objection to intervenor’s motion to intervene and, on May 31, 2005, we issued an
10 order granting the motion. OAR 661-010-0050(1) provides, however, that “the Board may
11 deny [intervention] status at any time.” In its response brief, the city objects to intervenor’s
12 standing as follows:

13 “* * * [Intervenor] fails to allege how he is connected to the property
14 annexed, whether [he] owns any annexed property at all, and how the City’s
15 decision adversely affects [his] substantial rights.” Respondent’s Brief 1.

16 Intervenor responds, correctly, that he “is not required to allege how he is connected
17 to the annexed property, whether he owns annexed property, or how he is adversely
18 affected.”¹ See ORS 197.830(7)(b).² Intervenor is not required to establish that he is

¹ “Intervenor’s Response to Objection to Intervenor’s Standing” was filed after oral argument, on September 5, 2005. The city does not object to the form or timing of the “response” as presented, and we will consider it.

² ORS 197.830(7) provides, in pertinent part:

- “(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.
- “(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:

1 adversely affected in order to have standing to intervene in these consolidated appeals. *See*
2 *Doob v. Josephine County*, 41 Or LUBA 569, 571-72 (2001) (the standing requirements to
3 appeal a local government land use decision to LUBA are established by ORS 197.830, and
4 the statute does not require that a petitioner establish that the challenged decision will have a
5 practical effect on petitioner).

6 Intervenor appeared before the city council orally and in writing. Accordingly, we
7 conclude that intervenor has stated facts that establish his standing to intervene in this appeal.

8 **INTERVENOR’S MOTIONS**

9 Petitions for review were due in this appeal on June 20, 2005. Following submittal of
10 his petition for review, intervenor filed numerous motions, some before the response brief
11 was filed and some after. After oral argument the city filed a response to those motions. We
12 address each motion and the city’s responses to them separately below.

13 **A. Intervenor’s Motion that Board Accept Citations and Brief in Support of**
14 **Motion**

15 On June 28, 2005, intervenor filed a motion entitled, “Intervenor’s Motion that Board
16 Accept Citations and Brief in Support of Motion.” The motion appears to be an attempt to
17 provide additional legal authority in support of the arguments presented in his petition for
18 review. As far as we can tell, this motion is merely an attempt to file a supplemental petition
19 for review. Accordingly, we deny it.

20 This motion is denied

“(A) The applicant who initiated the action before the local government, special district or state agency; or

“(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

“* * * *”

1 **B. Intervenor’s Motion that Board Accept Citations and Report of**
2 **Washington County Sheriff**

3 On June 30, 2005, intervenor filed “Intervenor’s Motion that Board Accept Citations
4 and Report of Washington County Sheriff.” The city argues that the motion should be
5 denied because the material intervenor seeks to submit, a written report of the Washington
6 County Sheriff, is not in the record, and intervenor indentifies no rule that would allow this
7 Board to consider it. We agree with the county.

8 This motion is denied.

9 **C. Intervenor’s Motion that Board Accept Brief and Documents, and Brief**
10 **in Support of Motion**

11 **D. Intervenor’s OEC Rule 202(1) Motions to Take Judicial Notice and Allow**
12 **Additional Intervenor to Submit Written Argument**

13 Intervenor filed the above motions on July 5, 2005 and September 1, 2005
14 respectively. Both motions are attempts by intervenor to add arguments to his petition for
15 review. Accordingly, both motions are denied.³

16 **FACTS**

17 The facts relevant to this appeal are similar to the facts in a recent challenge to other
18 annexations adopted by the city. *See Kane v. City of Beaverton (Kane)*, ___ Or LUBA ___
19 (LUBA No. 2005-018, June 17, 2005). In that case we explained the circumstances leading
20 to the island annexations appealed in that case as follows:

21 “In a series of decisions over many years, the City of Beaverton has annexed a
22 number of streets and highway rights-of-way in the area of the Highway 26
23 and Highway 217 interchange, including stretches of Cedar Hills Boulevard
24 and NW Barnes Road. The effect of these annexations is that the city
25 boundaries surround or nearly surround large areas of urbanized and
26 urbanizable land within Washington County.” *Id.*, slip op 2.

³ Intervenor also filed with the Board a copy of a public record request, which the city responds to. We address that issue below under our discussion of petitioners’ first assignments of error, section B.2 below.

1 Although different properties are involved in this appeal, and different stretches of annexed
2 right-of-way are implicated, the effect is the same; *i.e.*, “the city boundaries surround or
3 nearly surround large areas of urbanized and urbanizable land within Washington County.”

4 In this case, the challenged annexation territory includes three sub-areas located in
5 different parts of these urbanized and urbanizable lands. The Elmonica and Merlo Light Rail
6 Station Areas Annexation (Ordinance No. 4338) involves property located near the northwest
7 boundary of the city in the area near SW Jenkins Road, 158th Avenue and Baseline Road.
8 This sub-area includes the Costco Wholesale Corp. (Costco) and Wells Real Estate Funds,
9 Inc. (Wells) properties. The Sunset Highway/Cornell Road Area Island Annexation
10 (Ordinance No. 4339) includes properties located along Highway 26. This sub-area includes
11 the Bold, LLC (Bold) property. The Millikan Way Station Area Island Annexation
12 (Ordinance No. 4340) includes properties located south of the Tectronix site near the
13 Millikan Way Light Rail Station.⁴ This sub-area includes the C.E. John Company, Inc. (C.E.
14 John) property.

15 As explained in more detail below, ORS 222.750 allows the city to annex land that is
16 surrounded by a city’s corporate boundaries and a “stream, bay, lake or other body of water”
17 without the consent of the residents or property owners of property within the territory. The
18 three sub-areas of territory involved in this appeal lie within a larger “island” that the city
19 contends is bordered on all sides by city boundaries.

20 On December 23, 2004, the city mailed individual notice to property owners within
21 the territories proposed to be annexed. On February 7, 2005, the city conducted a combined
22 public hearing on all four annexation ordinances. The Elmonica and Merlo Light Rail
23 Station Areas Annexation (Ordinance No. 4338) initially included property owned by Nike
24 International (Nike). After the public hearing, Ordinance No. 4338 was amended to exclude

⁴ Another ordinance, Ordinance No. 4341, involves a fourth sub-area, and is not appealed here.

1 the property owned by Nike. The challenged ordinances became final on March 1, 2005.
2 These consolidated appeals followed.

3 **COMPLIANCE WITH ORS 222.750⁵**

4 As explained above, the challenged annexations were approved as “island”
5 annexations, pursuant to ORS 222.750. ORS 222.750 provides:

6 “When territory not within a city is surrounded by the corporate boundaries of
7 the city, or by the corporate boundaries of the city and the ocean shore or a
8 stream, bay, lake or other body of water, it is within the power and authority
9 of that city to annex such territory. However, this section does not apply when
10 the territory not within a city is surrounded entirely by water. Unless
11 otherwise required by its charter, annexation by a city under this section shall
12 be by ordinance or resolution subject to referendum, with or without the
13 consent of any owner of property within the territory or resident in the
14 territory.”

15 Petitioners argue that the challenged annexations do not comply with ORS 222.750 in several
16 respects.

17 **A. “Surrounded”⁶**

18 First, petitioners argue that the city misconstrued the meaning of the term
19 “surrounded” for purposes of determining that the challenged annexations are “island”
20 annexations subject to ORS 222.750. The findings adopted by the city provide:

21 “The subject properties are within islands defined by the City’s corporate
22 limits. Some of the properties that are the subject of this proposed annexation
23 constitute only part of an island. The statutory provision cited above [ORS
24 222.750] does not require annexation of an entire island.” Record 46.

⁵ We generally organize our final opinions according to the parties’ assignments of error. However, the number of petitioners involved in this appeal, the number of assignments of error, and the parties’ choice to incorporate portions of other petitioners’ briefs, would make that format extraordinarily confusing in this case. We therefore organize the first portion of the opinion by the issues raised. We will indicate in the footnotes which assignment of error relates to the issue being addressed and which petitioner or petitioners raise that particular assignment of error. Wells’ third assignment of error and Kane’s first, second and third assignments of error will be organized by assignment of error, consistent with our usual practice.

⁶ This issue is raised in Costco’s first subassignment to its first assignment of error, and in C.E. John’s, Wells’ and Bold’s first assignments of error.

1 According to the city, as long as an “island” exists, the city may annex property constituting
2 only a portion of that island. Petitioners argue:

3 “The only correct interpretation is that, to be ‘surrounded’ by a city, the
4 territory subject to the annexation must have on all its boundaries either the
5 city limits or a body of water. There are no partial islands. Surrounded means
6 pervasively encompassed.” Wells Petition for Review 9.

7 They argue that ORS 222.750 requires that the property to be annexed must be “adjacent” to
8 the city boundaries on all sides.

9 As the city points out, this issue was argued slightly differently and on drastically
10 different facts in *Kane*. In that case, the city chose not to annex the eastern portion of an
11 islanded property because the western half of a parcel fell outside the island. To “avoid
12 splitting the parcel between two jurisdictions,” the city chose not to annex any of the parcel.
13 *Id.* at 3. Although the facts were different in that case, the legal issue was the same. We
14 held:

15 “While ORS 222.750 requires that an ‘island’ exist, *i.e.*, land that is
16 surrounded either by city boundaries or by city boundaries and a body of
17 water, the statute does not explicitly require the city to take an all-or-nothing
18 approach to annexation of such islands. We do not understand petitioners to
19 dispute that, had the city also annexed the eastern portion of the parcel that
20 straddles Cedar Mill Creek, the entire resulting territory would constitute a
21 proper ‘island’ for purposes of ORS 222.750. Because the statute clearly
22 authorizes the city to annex the entire island, and nothing in the statute
23 prohibits piece-meal annexation of the island, petitioners have not established
24 that the city erred in proceeding under ORS 222.750.” *Kane*, slip op 15.

25 In order for the statute to apply, there must be territory not within the city that
26 touches, or is adjacent to, the city boundaries or a body of water on all sides. However, the
27 statute does not require, as petitioners assert, that the *property to be annexed* be adjacent to
28 the city boundaries or a body of water on all sides. We adhere to our previous interpretation
29 of ORS 222.750 and, specifically, the meaning of the term “surrounded.”

1 **B. Reliance on Strip Annexations**⁷

2 Although the exact location of the corporate boundaries the city relies upon in
3 making its determination that the subject properties are “surrounded” is unclear, the city
4 apparently relies to a large extent on previous city actions that annexed various rights-of-
5 way.⁸ Petitioners argue that, even if the city correctly interpreted ORS 222.750, the
6 challenged annexations must be remanded because those “strip annexations” are invalid.⁹
7 Their argument appears to be twofold: first, that there is not substantial evidence that the
8 subject properties are “surrounded” and, second, that some of the annexations upon which
9 the city appears to rely are invalid.

10 **1. Validity of Murray Boulevard and Walker Road Annexations**

11 Petitioners Costco and Wells argue that the city’s conclusion that the subject property
12 is surrounded is based on strip annexations of Murray Boulevard between Jenkins Road and
13 Highway 26, and that portion of Walker Road lying west of Murray Boulevard. Those
14 annexation decisions were appealed to LUBA. LUBA No. 2004-212. Wells alleges:

15 “Until the legal challenge to the validity of the annexation of Murray
16 Boulevard and other right-of-ways are resolved, Respondent cannot rely on
17 those right-of-ways to surround the territory or ORS 222.750 to annex the
18 territory.” Wells Petition for Review 10.

⁷ This issue is raised in Costco’s second subassignment to its first assignment of error, and in in C.E. John’s, Wells’ and Bold’s first assignments of error.

⁸ Bold presumes that the city relies on Highway 26 to form the northern boundary and on Cornell Road to form the eastern boundary of the Sunset Highway/Cornell Road Area Island. Bold Petition for Review 4. C.E. John presumes that the city relies upon SW Jenkins Road to form the northern boundary and Cornell Road to form the eastern boundary of the Millikan Way Station Area Island. C.E. John Petition for Review 5-6. We do not see that Cornell Road, which runs generally east/west to the north of Highway 26, could form the eastern boundary of either island. We note here only the parties’ assumptions about the rights-of-way upon which they believe the city relies. Costco and Wells presume that the city relies on Murray Boulevard and Walker Road as part of the eastern boundary of the Elmonica and Merlo Light Rail Station Areas Island. Wells Petition for Review 8; Costco Petition for Review 10.

⁹ This issue is raised in Costco’s second subassignment to its first assignment of error, and in C.E. John’s, Wells’ and Bold’s first assignments of error.

1 The appeal of the Murray Boulevard and Walker Road annexation has since been
2 dismissed. *Nike v. City of Beaverton*, ___ Or LUBA ___ (LUBA No. 2004-212, September
3 21, 2005). Accordingly, petitioners’ argument on this point is moot, and we do not address it
4 further.

5 Petitioners also argue that the city did not have authority to annex certain streets,
6 roads and highways based on consent of Washington County or the Oregon Department of
7 Transportation, because those governmental entities did not own fee title to the underlying
8 right-of-way and therefore did not have authority to consent to annexation of that land. The
9 city argues that any challenge to the ordinances approving annexations that are relied upon in
10 the challenged decision is an impermissible collateral attack. We agree with the city that the
11 validity of prior annexations upon which it relies cannot be challenged in this appeal. *See*
12 *Kane*, slip op 14. (“The annexations that largely encircle the annexation territory at issue in
13 this appeal were accomplished by a series of ordinances for which the appeal period has long
14 run.”).

15 **2. Substantial Evidence**

16 Petitioners also argue that the city’s failure to clearly identify which property it relies
17 upon in determining that the subject properties are surrounded by the corporate limits
18 requires remand. They argue that the challenged decisions are not supported by substantial
19 evidence because the record does not include an explanation of how the territories being
20 annexed are “surrounded.”

21 The city argues that the legal or ordinance history of all previous annexations is not
22 required to support its conclusion that the territories are surrounded. All that is required is
23 that the challenged decisions be supported by substantial evidence. Substantial evidence is
24 evidence a reasonable person would rely upon in reaching a decision. *City of Portland v.*
25 *Bureau of Labor and Industries*, 298 Or 104, 119, 690 P2d 475 (1984).

1 The day after oral argument, intervenor provided the city with a public records
2 request for documents demonstrating that the city has annexed the Tri-Met light rail right-of-
3 way. A copy of that request was provided to this Board. The request was apparently
4 triggered by discussion at oral argument regarding the reliance on the Tri-Met right-of-way
5 as a city boundary for purposes of determining island status for the Elmonica and Merlo
6 Light Rail Station Area. The city responded by providing copies of ordinances that annexed
7 land that the city alleges constitutes a border around the Elmonica and Merlo Light Rail
8 Station Area. The city argues that, even without the documents, there is substantial evidence
9 that the property is “surrounded” by the city for purposes of ORS 222.750. Our review is
10 generally limited to the record. ORS 197.835(2)(a). However, the city alleges that this
11 Board may take official notice of the ordinances pursuant to Oregon Evidence Code 202,
12 presumably as further evidence that the Elmonica and Merlo Light Rail Station Area is
13 “surrounded.”¹⁰

14 In a similar context, we explained that annexation resolutions were potentially the
15 types of laws subject to official notice. *See Friends of Deschutes County v. Deschutes*
16 *County*, ___ Or LUBA ___ (LUBA No. 2004-160 March 28, 2005) slip op 4. We also
17 explained, however, that LUBA does not have authority to take official notice of adjudicative
18 facts. *Id.* (citing *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995)
19 (a resolution subject to official notice does not thereby become part of the local record which
20 may provide evidentiary support for the challenged decision)). As far as we can tell, the city
21 in this case submits the ordinances as evidentiary support for its conclusion that the
22 properties being annexed are surrounded by city property. We may not consider the
23 documents for that purpose.

¹⁰ OEC 202(7) provides that law subject to official notice includes:

“An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom * * *”

1 We do not see that those ordinances, however, are crucial to our resolution of this
2 issue. The city argues that the annexation map depicting the city limits and the previously
3 annexed properties is substantial evidence.¹¹ The map clearly shows the city limits and the
4 subareas in relation to those corporate boundaries. Other than petitioners' arguments that the
5 annexed right-of-ways are invalid, which we reject above, they do not explain why that map
6 in not sufficient to describe how the annexed territories are surrounded for purposes of ORS
7 222.750. We agree with the city that the map is substantial evidence upon which it was
8 entitled to rely in basing its decision.

9 **C. Due Process¹²**

10 Costco argues that because the subject properties are not surrounded by the city's
11 corporate limits, the city was required to provide for a vote prior to annexation. The city's
12 failure to provide that vote, it alleges, violates the due process clause of the 14th Amendment
13 to the United States Constitution. This subassignment of error is contingent on our
14 sustaining Costco's first subassignment of error. Because we deny that subassignment of
15 error, Costco's due process argument fails.

16 The first assignments of error of Wells, Costco, Bold and C.E. Johns are denied.

17 **REASONABLENESS¹³**

18 Petitioners make numerous arguments that the challenged decision is unreasonable
19 and arbitrary under the analysis set out in *Portland General Elec. Co. v. City of Estacada*,
20 194 Or 145, 241 P2d 1129 (1952). In that case, the Oregon Supreme Court stated:

¹¹ At oral argument, it came to light that the map contained several minor errors. However, we do not see that that fact alone is sufficient to render the map insubstantial evidence. The city explained that the map's depiction of a portion of the Elmonica and Merlo Light Rail Station Area lying outside the city boundary was a mapping error and indicated other maps in the record that made clear that that property was not part of the territory to be annexed.

¹² This issue is raised in Costco's third subassignment to its first assignment of error.

¹³ This issue is raised in Costco's, C.E. John's, Wells' and Bold's second assignments of error and in Kane's fourth and fifth assignments of error.

1 “[T]here is implied within the legislative grant that such cities must legislate
2 reasonably and not arbitrarily, and such reasonableness is a part of the
3 legislative grant to the same extent as if it were written into the statute. * * *
4 It would be absurd to think that the Legislature intended that a city would
5 have carte blanche authority to reach out its tentacles like an octopus and
6 envelop property which in no wise could be considered as beneficial to the
7 city or to the property annexed. If this were not so, there would be nothing to
8 prevent the cities from attaching to themselves territory far removed from the
9 city environs by a narrow ribbon strip, so long as the property attached was
10 contiguous.” *Portland General Elec. Co.*, 194 Or at 159-60.

11 The parties disagree regarding whether the city is arbitrarily “reaching out its tentacles” in
12 this case, or whether it is legislating reasonably.

13 Wells and Bold rely upon the passage of SB 887¹⁴ in support of their argument that
14 the city’s approval of these annexations is unreasonable.¹⁵ They argue that the Oregon
15 legislature, in passing SB 887, answered the question whether the city acted unreasonably
16 when it annexed the subject properties.¹⁶ The legislature singled out the city in Section 1,
17 they allege, “because the Legislature determined that Beaverton had unreasonably and

¹⁴ SB 887 provides, in part:

“SECTION 1. The City of Beaverton may not annex territory as provided in ORS 222.750 and, notwithstanding any charter provision to the contrary, the City of Beaverton may not annex territory in any manner that does not require the city to obtain approval of the residents of or the property owners in the territory.

“* * *

“SECTION 10. Sections 1, 3 and 4 of this 2005 Act are repealed on January 2, 2008.”

¹⁵ On August 30, 2005, Wells, Bold and Costco filed a Joint Motion to Take Judicial Notice and Submit Additional Written Argument. The motion requested permission to provide supplemental written argument if SB 887 were signed by the governor. The day after oral argument, SB 887 was signed by the governor. On September 14, 2005, we issued an order allowing the parties an opportunity to “provide written arguments regarding the relevance of SB 887 to this appeal.”

The parties subsequently provided supplemental briefing on that question. Petitioners’ argument regarding the relevance of SB 887 relates directly to their argument that the challenged annexations are unreasonable.

¹⁶ We do not understand petitioners to argue that the language of SB 887 itself answers the reasonableness inquiry. SB 887 is not retroactive, and does not apply to the challenged decisions. Rather, we understand them to argue that the fact that the legislature singled out the city means that it considered the city’s recent past annexation actions to be unreasonable.

1 arbitrarily misused its island annexation authority.” Petitioners’ Supplemental Argument
2 Addressing SB 887 1. They cite to commentary indicating that certain legislators may have
3 believed the city’s actions in annexing certain properties were not completely in keeping
4 with the intent of the annexation statutes.

5 The city disagrees with petitioners regarding the relevance of SB 887 to this appeal.
6 The city first summarizes the legislation. Section 1, it explains, sunsets on January 1, 2008.
7 See n 14 (Section 10). Section 4 establishes an interim legislative committee to study
8 annexations. Sections 5, 6 and 7 provide exemptions from annexations, absent consent of the
9 property owners, for specific properties. The city explains that petitioners lobbied the
10 legislature to be included among exempted properties described in Sections 5, 6 and 7.
11 Further, the legislature had before it our opinion in the *Kane* case and proposed legislation
12 that would have amended ORS 222.750. However, it chose not to adopt the proposed
13 legislation and declined to legislatively overrule our decision in *Kane*. The legislature could
14 have taken that opportunity to amend ORS 222.750, the city argues, but it chose not to. We
15 agree with the city that the passage of SB 887 has no direct bearing on the reasonableness of
16 the city’s actions in adopting the ordinances challenged in these appeals.

17 In any event, the reasonableness determination is a judicially created inquiry that is
18 dependent on the specific facts of a particular case. The Court in *Portland General Electric*
19 *Co.* set forth a number of factors relevant to that determination. *Portland General Electric*
20 *Co.*, 194 Or at 165. The parties disagree about the importance of those factors in this case.

21 The city addressed the factors set forth by the Court and made the following findings:

22 “If a reviewing court does not find these types of annexation per se
23 reasonable, it will examine several factors, all of which are met here. The first
24 factor is whether the contiguous territory represents the actual growth of the
25 city beyond its city limits. As all of these properties are currently surrounded
26 by the City, this factor is clearly met. The second factor is whether the
27 property is valuable by reason of its adaptability for prospective town uses.
28 All of these properties having zoning designations that will be matched with
29 similar City zoning designations. The current and future uses will be
30 adaptable to the City’s approved comprehensive plan and zoning maps. The

1 third factor is whether the land is needed for extension of streets or to supply
2 utilities. As these properties are already surrounded, this factor is not
3 relevant. The fourth factor is whether the property and City will mutually
4 benefit from the annexation. The property will receive additional public
5 services and the City will make its boundaries more conforming and receive
6 additional tax revenue. The Court of Appeals has found a ‘cherry stem’
7 annexation of more than 1,500 feet of road way to reach a parcel of land was
8 reasonable. Clearly, the proposed island annexations meet this standard.”
9 Record 131-32.

10 Petitioners argue that the city “grotesquely” distorted the *Portland General Electric Co.*
11 factors. Costco Petition for Review 15.

12 The Court of Appeals has clarified that the factors listed in *Portland General Electric*
13 *Co.* are not exclusive, but are merely illustrative of factual considerations that render a
14 decision reasonable or unreasonable. *Dept. of Land Conservation v. City of St. Helens*, 138
15 Or App 222, 226-27, 907 P2d 259 (1995). Ultimately, “each case must depend on its own
16 facts.” *Portland General Electric Co.*, 194 Or at 165.

17 Petitioners rely on three main factors to support their theory that the challenged
18 annexations are unreasonable: 1) that the boundary created by the challenged annexations is
19 chaotic, 2) that other large areas within the island are skipped over without any discussion or
20 reasoning, 3) the city is “cherry-picking” the large, expensive properties in an attempt to
21 increase its tax base, and 4) the annexed properties derive no benefit from the annexations.¹⁷

22 Addressing the final argument first, the parties set forth in great detail the benefits or
23 lack of benefits the city will provide in the way of services (fire, police, waste disposal, etc.).
24 Petitioners claim that the full range of services is already available to them and that
25 annexation provides no benefit to the annexed properties. The city counters that one of its

¹⁷ With respect to the second item listed, petitioners argue that the annexations are “unfair” because they treat the annexed properties differently than other similarly situated properties—specifically the Nike property. As the city notes, there is no requirement that an annexation be “fair.” However, the city’s choice to annex some properties, and not others, may be a factor in determining whether the annexation is reasonable.

1 purposes is “tax fairness and the need for urban unincorporated property owners to start
2 paying a fair share.” Respondent’s Brief 30.

3 Regarding the irregular boundaries, petitioners argue that the Court of Appeals has
4 indicated that “an irregularly shaped parcel raises a red flag as to the reasonableness” of an
5 annexation. *Rivergate Residents Assn v. Portland Metro Area*, 70 Or App 205, 211, 689 P2d
6 326 (1984). In that case, a residents’ association appealed the annexation of property
7 contiguous to its members’ property, arguing that the annexation, which resulted in the
8 creation of an island of its’ members’ property, was unreasonable. The Court treated the
9 irregularity in that case as merely a factor to consider in determining the reasonableness of
10 the annexation and concluded that the resulting irregular boundaries was justified.

11 The city explains that it has entered into an interim boundary agreement with
12 Washington County “which sets out a partial urban services area in which the County has
13 consented to annexations by Beaverton.” Respondent’s Brief 2. The city’s comprehensive
14 plan describes this area as the “Assumed Urban Services Area.” Comprehensive Plan Figure
15 V-I. The city has committed to incorporate its entire urban services area. Comprehensive
16 Plan policy 5.3.1(d).¹⁸ In this case, the city argues, the challenged annexations are only a
17 step toward achieving its ultimate goal of annexing its entire urban services area.

18 On November 1, 2004, the city adopted its “Urban Service Area and Corporate Limits
19 Annexation Policy.” The policy recognized that the Washington County 2000 policy of the
20 mid 1980’s stated that the county should not be a long-term municipal service provider and
21 sought to more aggressively annex properties that fell within the urban services area. The
22 policy included the following objectives:

- 23 “• Minimize the confusion about the location of City boundaries for the
24 provision of services;

¹⁸ Policy 5.3.1(d) provides: “The City shall seek to eventually incorporate its entire Urban Services Area.”

- 1 “• Improve the efficiency of city service provision, particularly police
2 patrols;
- 3 “• Control the development/redevelopment of properties that will
4 eventually be within the City’s boundaries;
- 5 “• Create complete neighborhoods and thereby eliminate small pockets of
6 unincorporated land; and
- 7 “• Increase the City’s tax base and minimize increasing the City’s mill rate.”

8 In furtherance of this policy, the city proposed the challenged annexations.

9 While the issues raised by petitioners might, in different circumstances, render an
10 annexation unreasonable, we do not agree that the facts in this case support petitioners’
11 contention that the challenged annexations are unreasonable. Certainly, one of the city’s
12 motives is to increase its tax base. That motive is listed as an objective in the city’s “Urban
13 Service Area and Corporate Limits Annexation Policy.” However, we do not see that it is
14 the city’s “sole” motive. *Portland General Electric Co.*, 194 Or at 173 (Rossman, J.,
15 concurring) (property cannot be annexed for the “sole” purpose of taxing it). Of extreme
16 importance in this case is the city’s policy to annex its entire urban services area, in which
17 the subject properties lie. The fact that the city chose to annex these properties, and not other
18 properties within the urban services area, does not render the annexations unreasonable. The
19 city’s policy is to ultimately annex all property within the urban services area. It is perfectly
20 reasonable for the city to choose certain properties to annex at this time and to wait until a
21 later date to annex other properties within the urban services area.

22 It appears that petitioners’ reasonableness argument would have been more
23 appropriately directed at the city’s annexations of the rights-of-way that surrounded the
24 subject properties in the first instance. Petitioners seem to take issue with the city’s alleged
25 intentional encircling of the urban services area so that it could annex properties as “island”
26 annexations without a vote pursuant to ORS 222.750. As explained previously in this

1 opinion, however, any challenge in this appeal of those previous annexations is barred as a
2 collateral attack. We conclude that the challenged annexations themselves are reasonable.

3 Kane's fourth and fifth assignments of error and Bold's, Costco's, C.E. John's and
4 Wells' second assignments of error are denied.

5 **THIRD ASSIGNMENT OF ERROR (WELLS)**

6 Wells argues that the findings fail to demonstrate compliance with the statewide
7 planning goals.¹⁹ OAR 660-014-0060 provides:

8 "A city annexation made in compliance with a comprehensive plan
9 acknowledged pursuant to ORS 197.251(1) or 197.625 shall be considered by
10 the commission to have been made in accordance with the goals unless the
11 acknowledged comprehensive plan and implementing ordinances do not
12 control the annexation."

13 Wells argues that the only comprehensive plan provision cited in the findings, policy
14 5.3.1(d), is merely aspirational and therefore does not "control" the annexation, pursuant to
15 OAR 660-014-0060. *See* n 18. Accordingly, Wells argues, the statewide planning goals are
16 directly applicable. *See Cape v. Beaverton*, 187 Or App 463, 467, 68 P3d 261 (2003) (where
17 a local government's comprehensive plan and implementing ordinances do not "control" an
18 annexation, the statewide planning goals apply directly). The city argues that policy 5.3.1(d)
19 and Figure V-1, the map depicting the Urban Service Area, are both acknowledged, that they
20 "control" the annexation within the meaning of OAR 660-014-0060, and that the statewide
21 planning goals therefore do not apply directly to the challenged decision.

22 Wells appears to believe that the requirement that a plan provision or implementing
23 regulation "controls" the annexation means that such plan provision or implementing
24 regulation must be a mandatory approval criterion for the annexation. *See Neuharth v. City*
25 *of Salem*, 25 Or LUBA 267, 278 (1993) (local government's failure to establish compliance

¹⁹ Wells argues that Statewide Planning Goals 1, 9 and 11 should have been addressed.

1 with aspirational plan provision does not provide a basis for remand). However, we have not
2 interpreted the language that narrowly. In a recent case, we commented:

3 “the reference to the ‘acknowledged comprehensive plan and implementing
4 ordinances’ that ‘control the annexation’ is a reference to substantive
5 standards or other applicable policies or provisions that guide a city’s
6 determination whether or not to annex land.” *Patterson v. City of*
7 *Independence*, ___ Or LUBA ___ (LUBA No. 2004-220, July 21, 2005) slip
8 op 6.

9 We concluded that the comprehensive plan policy at issue in that case “refers to annexations
10 and appears to provide *relevant guidance* with respect to annexations.” *Id.* at 7 (emphasis
11 added).

12 Although *Patterson* was concerned with a different issue, *i.e.*, distinguishing between
13 procedural and substantive policies, OAR 660-014-0060 does not require that the
14 comprehensive plan specifically include mandatory approval criteria for annexations.²⁰
15 Policy 5.3.1(d) certainly “guides the city’s determination whether or not to annex land.”
16 Accordingly, the comprehensive plan and implementing ordinances “control the annexation”
17 for purposes of OAR 660-014-0060, and the statewide planning goals do not apply.

18 Wells’ third assignment of error is denied.

19 **FIRST ASSIGNMENT OF ERROR (KANE)**

20 Although Kane presents a combined argument for his first and second assignments of
21 error, the assignments of error present different issues, and we address them separately.

22 Kane’s first assignment of error provides:

²⁰ In *Patterson*, we explained the historic context of OAR 660-014-0060 as follows:

“We observe initially that both OAR 660-014-0060 and 660-014-0070 were first adopted in 1978, at a time when few cities or counties had comprehensive plans or urban growth boundaries that were acknowledged to comply with the goals. In addition, it is likely, given the evolving nature of the goals and the acknowledgment process during that time, that some of the few acknowledged comprehensive plans had no provisions at all that would apply to or govern annexations. That historical understanding suggests that OAR 660-014-0060 and 660-014-0070 have a much more limited role in the present highly regulated environment than they did in 1978.” *Id.* at 6.

1 “Respondent’s refusal to allow property owners and residents of the annexed
2 territories at bar to vote on whether they wished annexation to Respondent
3 violated the Due Process and Equal Protection of the Laws Clauses of the
4 Fourteenth Amendment to the United States Constitution.” Kane Petition for
5 Review 12-13.

6 In a previous appeal, Kane made what appears to be the identical constitutional arguments
7 that he raises in this assignment of error.²¹ *Kane v. City of Beaverton, supra*. We
8 summarized the argument presented in that appeal as follows:

9 “Reduced to essentials, we understand petitioners to argue that annexations
10 under ORS 222.750 violate the state and federal constitutions because other
11 provisions of ORS chapter 222 grant the electors and landowners of the
12 territory in non-island annexations a privilege—the right to vote on or
13 withhold consent to annexation—that is denied to the electors and landowners
14 of island annexations.” *Kane*, slip op 8-9.

15 We fully addressed those arguments in the context of Article I, section 20 of the Oregon
16 Constitution in our final opinion in that case. *Id.* at 10-12. We will not restate our holding in
17 that case other than to summarize our reiteration of previous cases holding that there is no
18 federal or state constitutional right to vote on municipal annexations. *Id.* at 10 (citing *Mid-*
19 *County Future Alternatives v. City of Portland*, 310 Or 152, 166, 795 P2d 541 (1990)). We
20 also held that ORS 222.750 must be upheld if there is a “rational basis” for treating electors
21 or landowners within an island differently with respect to annexations than those not within
22 an island and went on to conclude that there was a rational basis supporting the legislation.
23 *Id.* at 11-12. We therefore disagree with Kane’s argument that the higher level of scrutiny,
24 strict scrutiny, applies in this case.²²

²¹ In *Kane*, Kane argued that ORS 222.750 violates Article I, section 20 of the Oregon Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Kane’s second assignment of error in this appeal raises only the federal constitutional claims. However, as explained in *Kane*, the analysis under the federal equal protection clause and the analysis under Article I, section 20 are essentially the same. *Kane*, slip op 12 (citing *Sherwood School Dist. 88J v. Washington Cty. Ed.*, 167 Or App 372, 388, 6 P3d 518, *rev den* 331 Or 361, 19 P3d 354 (2000)).

²² In *Kane*, we did not directly address Kane’s federal due process argument because he had failed to explain why ORS 222.750 violates that constitutional provision. Kane’s petition for review in this case is equally ineffectual in addressing that provision.

1 Kane's first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR (KANE)**

3 Kane's second assignment of error provides:

4 "Respondent's refusal to allow property owners and residents of the annexed
5 territories at bar to vote on whether they wished annexation to Respondent
6 violated the freedom of expression provision of the First Amendment to the
7 United States Constitution." Kane Petition for Review 13.

8 Kane's allegation of a violation of the first amendment is based upon the following language
9 from a Ninth Circuit case:

10 "It is well established principle of constitutional law that the right to vote is
11 fundamental, as it is preservative of all other rights. See, e.g., *Yick Wo v.*
12 *Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)." *Weber v.*
13 *Shelley*, 347 F3d 1101, 1105 (9th Cir. 2003) (emphasis added by Kane).

14 Kane asserts that "all other rights" includes the first amendment right to freedom of speech
15 and expression. Kane's argument that the challenged decisions violate the first amendment,
16 therefore, is dependent upon his due process and equal protection allegation, which we
17 previously denied.

18 Kane's second assignment of error is denied.²³

19 **THIRD ASSIGNMENT OF ERROR (KANE)**

20 Kane argues that the challenged annexations are void because the city does not have
21 an intergovernmental agreement with Washington County and all urban service providers.
22 Kane appears to be arguing that the city is required to enter into an urban service agreement
23 before annexing the subject properties, pursuant to ORS 195.020 to 195.220.

24 The city explains that ORS 195.020 to ORS 195.220 provide an alternative method of
25 annexing under the "single vote" method of annexation. Under that alternative method, a

²³ Kane's sixth assignment of error provides: "The forced annexations at bar violate the First Amendment to the United States Constitution, hence 'reasonableness' is not a defense to the forced annexations." Kane Petition for Review 23. As far as we can tell, Kane's sixth assignment of error depends upon our sustaining his second assignment of error. Because we deny his second assignment of error, we also deny his sixth assignment of error.

1 city must first adopt an urban service boundary agreement, then adopt an annexation plan,
2 and finally, allow a single vote of the city and the area to be annexed. ORS 195.205. The
3 city further explains that there is no such requirement for an urban service boundary
4 agreement in the case of an island annexation pursuant to ORS 222.750. We agree with the
5 city. Accordingly, Kane’s third assignment of error does not provide a basis for reversal or
6 remand.

7 Kane’s third assignment of error is denied.

8 The city’s decision is affirmed.

9 Holstun, Board Member, concurring.

10 I write separately because petitioners make textual arguments that make what it
11 means to be “surrounded,” within the meaning of ORS 222.750, more complicated than it
12 really is. ORS 222.750 simply authorizes a city to take unilateral action to annex certain
13 territory without the consent of the owners of the annexed property and without an election if
14 one of two circumstances set out in the first sentence of the statute is present and the third
15 circumstance set out in the second sentence is not present.²⁴ If the statute is applied in
16 discrete steps, the statute is easy to understand and apply.

17 The first step is to identify a territory. The territory may be made up of a single lot or
18 parcel or a number of lots or parcels. If the territory is made up of a number of lots or
19 parcels, the exterior boundary of the territory must be identified.

²⁴ The first sentence of ORS 222.750 provides:

“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.”

The second sentence of ORS 222.750 provides:

“However, [ORS 222.750] does not apply when the territory not within a city is surrounded entirely by water.”

1 The second step requires the city to identify and consider the exterior boundary of the
2 identified territory. If the entire length of that exterior boundary borders or adjoins “the
3 corporate boundaries of the city,” the first of the two circumstances that make ORS 222.750
4 potentially applicable is present. If the entire length of that exterior boundary borders “the
5 corporate boundaries of the city and the ocean shore or a stream, bay, lake or other body of
6 water,” the second of the two circumstances that make ORS 222.750 potentially applicable is
7 present. But if any portion of that exterior boundary of the identified territory does not
8 border or adjoin (1) property that is already within the city or (2) a body of water, then
9 neither of the circumstances that make ORS 222.750 potentially applicable is present, and
10 ORS 222.750 does not apply.

11 Assuming at least one of the two circumstances set out in the first sentence of ORS
12 222.750 is present, the third step requires the city to determine whether the identified
13 “territory * * * is surrounded entirely by water.” If it is, ORS 222.750 does not apply.

14 Applying the first step in this case, the city has analyzed each of the disputed
15 properties as part of a larger contiguous territory that is made up of many lots and parcels.
16 That method of analysis is permissible under ORS 222.750.

17 Applying the second step in this case, there is no dispute that the properties that are
18 annexed by the challenged decision are part of larger contiguous territories that are
19 surrounded “by the corporate boundaries of the city.” While petitioners challenge the
20 underlying validity of some past city right of way annexations, if the validity of those
21 annexations is not subject to challenge in this appeal, as we conclude is the case, the subject
22 properties are part of a larger territory that is surrounded by the corporate boundaries of the
23 city.

1 Applying the third step in this case, the entire exterior boundaries of the relevant
2 territories do not border water, so the disqualifying circumstance set out in the second
3 sentence of the statute is not present.²⁵

4 If ORS 222.750 is applied as set out above, we essentially accept petitioners’
5 argument that the “territory” that qualifies for nonconsensual annexation under ORS 222.750
6 must share a boundary with or adjoin the “corporate boundaries of the city” or a body of
7 water for the entire length of the territory’s exterior boundary. However, as the majority
8 opinion explains, we do not agree with petitioners that such a surrounded territory must be
9 annexed in its entirety. Stated differently, there is nothing in ORS 222.750 that prohibits a
10 city from identifying a territory that qualifies for nonconsensual annexation under ORS
11 222.750 and then annexing a part of such a surrounded territory now and delaying
12 annexation of the balance of that surrounded territory to a later date.

²⁵ The full scope and meaning of the second sentence of ORS 222.750 and the precise circumstances that part of the statute was intended to address are not clear. However, this case does not require that we explore those questions.