

FILED: May 13, 2020

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CITY OF CORVALLIS, an Oregon municipal corporation,
Plaintiff-Appellant,

and

LEAGUE OF OREGON CITIES,
Plaintiff-Intervenor below,

and

CITY OF PHILOMATH,
Intervenor-Appellant,

v.

STATE OF OREGON; KATE BROWN, Governor of Oregon;
BEV CLARNO, Secretary of State; and
JIM RUE, Oregon Department of Land Conservation and Development;
and CALDWELL FARMS, LLC,
Defendants-Respondents,

and

MICHAEL GALPIN et al.,
Defendants.

Benton County Circuit Court
16CV17878

A164595

Matthew J. Donohue, Judge.

Argued and submitted on July 13, 2018.

James K. Brewer argued the cause for appellants. On the briefs were David E. Coulombe and Fewel, Brewer & Coulombe.

Peenesh Shah argued the cause for respondents State of Oregon, Kate Brown, Bev Clarno, and Jim Rue. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

No appearance for respondent Caldwell Farms, LLC.

Philip Thoennes filed the brief *amicus curiae* for League of Oregon Cities.

Before Ortega, Presiding Judge, and Aoyagi, Judge, and Powers, Judge.*

AOYAGI, J.

Vacated and remanded for entry of a judgment that declares the rights of the parties.

*Aoyagi, J., *vice* Garrett, J. pro tempore.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

- 1 No costs allowed as to Respondent Caldwell Farms LLC.
2 Costs allowed, payable by Appellants as to Respondents State of Oregon,
3 Kate Brown, Bev Clarno, and Jim Rue.
4 Costs allowed, to abide the outcome on remand, payable by

5

1 AOYAGI, J.

2 In this declaratory judgment action, plaintiffs the City of Corvallis
3 (Corvallis) and the City of Philomath (Philomath) seek to have ORS 222.127 declared
4 unconstitutional on its face or as applied to them. ORS 222.127 provides that, if certain
5 conditions are met, the legislative body of a city "shall annex" certain territory within its
6 urban growth boundary, "without submitting the proposal to the electors of the city." In
7 plaintiffs' view, the statute impermissibly interferes with the procedures of municipal
8 governments and thus violates the "home rule" provisions of the Oregon Constitution.¹

9 The trial court granted the state defendants'² motion for summary judgment,
10 as well as their motion to strike certain declarations from the summary judgment record,
11 and it denied plaintiffs' cross-motions for summary judgment. For the reasons that
12 follow, we affirm all those rulings on the merits. However, because the existing
13 judgment contains no declarations, which is improper in a declaratory judgment action,
14 we vacate and remand for entry of a judgment that declares the rights of the parties.

15 I. OVERVIEW OF "HOME RULE"

16 A basic understanding of "home rule" is necessary context for the parties'
17 arguments, so we begin by providing a very general overview.

18 Under federal constitutional law, municipal corporations are "convenient

1 ¹ Corvallis filed the action, and Philomath and the League of Oregon Cities (LOC)
2 joined later as plaintiffs-intervenors. On appeal, LOC appears *amicus curiae* but is not a
3 party. Because we address only Corvallis's and Philomath's claims in this opinion, we
4 use "plaintiffs" to refer only to Corvallis and Philomath, excluding LOC.

5 ² The state defendants are the State of Oregon, Governor Brown, Secretary of State
6 Clarno, and Oregon Department of Land Conservation and Development Director Rue.

1 agencies" of their respective states. *Hunter v. City of Pittsburgh*, 207 US 161, 178-79, 28
2 S Ct 40, 52 L Ed 151 (1907). As such, states enjoy every prerogative to add or withdraw
3 authority from their municipalities, merge municipalities, or abolish a municipality
4 altogether, "unrestrained by any provision of the Constitution of the United States." *Id.*
5 It follows that cities lack inherent authority and possess only those powers affirmatively
6 granted by the state. That principle, known as "Dillon's Rule"--referring to an influential
7 treatise on municipal law--dominated American legal scholarship in the nineteenth and
8 early twentieth centuries. *See City of Corvallis v. Carlile*, 10 Or 139, 141 (1882). Thus,
9 in Oregon, prior to 1906, the state retained all power over local affairs and had the
10 exclusive authority to adopt and amend city charters, to establish and alter municipal
11 boundaries, and to grant and remove legislative authority. *See id.* at 140-41 (recognizing
12 the lack of constitutional restraint on state authority over municipal corporations and
13 stating that municipal corporations are "subordinate branch[es]" of the state).

14 In 1906, riding a wave of home-rule amendments in other states, Oregon
15 voters amended the Oregon Constitution to endow cities with home-rule authority and
16 limit the power of the state legislature over local matters. Specifically, Article XI,
17 section 2, was amended to preclude the state legislature from enacting, amending, or
18 repealing "any charter or act of incorporation for any municipality, city or town" and to
19 grant to municipal voters the "power to enact and amend their municipal charter, subject
20 to the Constitution and criminal laws of the State of Oregon." Further, Article IV, section
21 1, was amended to reserve initiative and referendum powers "to the qualified voters of

1 each municipality and district as to all local, special and municipal legislation of every
2 character in or for their municipality or district."

3 The passage of the home-rule amendments laid the foundation for what has
4 now been over a century of legal disputes regarding the scope of local government
5 authority *vis-à-vis* state authority. *See State v. Port of Astoria*, 79 Or 1, 17, 154 P 399
6 (1916) (by 1916, "[t]he language employed in Article XI, Section 2," had already "been
7 the subject of much discussion").

8 In the resulting case law, a seminal home-rule decision of the modern era is
9 *La Grande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204, *adh'd to on recons*, 284 Or 173,
10 586 P2d 765 (1978). In *La Grande*, the Supreme Court crafted a two-part test to
11 determine where state authority ends and local authority begins. In short, if a state statute
12 addresses "the structure and procedures of local agencies," it "impinges on the powers
13 reserved by the amendments to the citizens of local communities" and must be justified
14 "by a need to safeguard the interests of persons or entities affected by the procedures of
15 local government." *Id.* at 156. Conversely, if it is "a general law addressed primarily to
16 substantive social, economic, or other regulatory objectives of the state," a state statute
17 "prevails over contrary policies preferred by some local governments, if it is clearly
18 intended to do so, unless the law is shown to be irreconcilable with the community's
19 freedom to choose its own political form." *Id.*³

1 ³ In their second assignment of error, plaintiffs request that we "revisit and limit" or
2 "abandon" *La Grande's* methodology. Even if we were inclined to do so, which we are
3 not, we have no authority to overrule Supreme Court precedent. *State v. Turner*, 235 Or
4 App 462, 466, 234 P3d 993 (2010) ("[W]e remain bound by Supreme Court precedent
5 until such time as that court reconsiders and disavows it."). We reject plaintiffs' second

1 Another significant home-rule principle is the distinction between
2 intramural and extramural authority. "When the legal voters of a city enact municipal
3 legislation [that] operates only on themselves and for themselves, and [that] is confined
4 within and extends no further than the corporate limits, then such voters are exercising
5 intramural authority." *Port of Astoria*, 79 Or at 17. But when "the legal voters of a city
6 attempt to exercise authority beyond the corporate limits of their municipality, they are
7 using an extramural power." *Id.* While cities have "inherent, home-rule authority" to
8 exercise intramural power, the same is not true of exercising extramural power. *Costco*
9 *Wholesale Corp. v. City of Beaverton*, 343 Or 18, 25, 161 P3d 926 (2007).

10 Finally, with respect to annexation in particular, the power to annex
11 territory into a municipality comes from the state and does not derive from home-rule
12 authority. *Thurber v. McMinnville*, 63 Or 410, 414-15, 128 P 43 (1912), *abrogated on*
13 *other grounds by State ex rel. Heinig v. Milwaukie et al*, 231 Or 473, 373 P2d 680 (1962).
14 Annexation is an extramural act. *Id.* at 415-16. As such, it is well settled that the state
15 may impose conditions on a municipality's act of annexing territory into the municipality.
16 *See, e.g., Morsman v. City of Madras*, 203 Or App 546, 555, 126 P3d 6 (2006) (holding
17 that the state has the authority to decide whether the residents of property subject to
18 annexation get to vote on the annexation). What is not well settled--in that it was
19 identified as an open question in 1990 and has yet to be answered--is whether some
20 aspects of annexation are subject to exclusively local control:

1 assignment of error without further discussion.

1 "Even though a city must follow a legislatively-approved procedure to
2 annex territory, it does not follow that the legislature can decree any
3 annexation for any reason. There is still room to argue, * * * that the
4 borders of a municipal corporation are an integral part of the corporate
5 charter which cannot be altered by the legislature."

6 *Mid-County Future Alternatives v. City of Portland*, 310 Or 152, 163-64, 795 P2d 541
7 (1990).

8 II. FACTS

9 With that basic understanding of home rule in mind, we turn to the facts of
10 this case. "On review of cross-motions for summary judgment, we view the record for
11 each motion in the light most favorable to the party opposing it to determine whether
12 there is a genuine issue of material fact and, if not, whether either party is entitled to
13 judgment as a matter of law." *O'Kain v. Landress*, 299 Or App 417, 419, 450 P3d 508
14 (2019).

15 In early 2016, the legislature enacted SB 1573, now codified at ORS
16 222.127. *See* Or Laws 2016, ch 51, § 2. As relevant here, it provides:

17 "(1) This section applies to a city whose laws require a petition
18 proposing annexation of territory to be submitted to the electors of the city.

19 "(2) *Notwithstanding a contrary provision of the city charter or a*
20 *city ordinance, upon receipt of a petition proposing annexation of territory*
21 *submitted by all owners of land in the territory, the legislative body of the*
22 *city shall annex the territory without submitting the proposal to the electors*
23 *of the city if:*

24 "(a) The territory is included within an urban growth
25 boundary adopted by the city or Metro, as defined in ORS 197.015;

26 "(b) The territory is, or upon annexation of the territory into
27 the city will be, subject to the acknowledged comprehensive plan of
28 the city;

1 (c) At least one lot or parcel within the territory is
2 contiguous to the city limits or is separated from the city limits only
3 by a public right of way or a body of water; and

4 (d) The proposal conforms to all other requirements of the
5 city's ordinances."

6 ORS 222.127 (emphasis added).

7 As described in the legislative history, SB 1573 was intended to prevent
8 local voters from unilaterally preventing the development of land that was placed within
9 the urban growth boundaries of cities for the purpose of development. *See* Audio
10 Recording, Senate Committee on Rules, SB 1573, Feb 24, 2016, at 39:43 (statements of
11 John Van Landingham and Sen Lee Beyer), <http://olis.oregonlegislature.gov> (accessed
12 Apr 22, 2020). The statute applies only to annexations of territory within the urban
13 growth boundary that is subject to or will be subject to the city's acknowledged
14 comprehensive plan. *See* ORS 222.127(2)(a) - (b). Additionally, the territory must
15 satisfy the contiguity requirements of ORS 222.127(2)(c), and, per ORS 222.127(2)(d),
16 the annexation proposal must conform to all other requirements in the city's ordinances.

17 Corvallis, Philomath, and at least 33 other Oregon cities have city charters
18 or city ordinances that require voter approval of some or all municipal annexations.
19 Corvallis's charter provision, which is the result of a voter referendum and resulting 1976
20 charter amendment, provides:

21 "Section 53. Vote on Annexations. Unless mandated by State law,
22 annexation, delayed or otherwise, to the City of Corvallis may only be
23 approved by a prior majority vote among the electorate."

1 Corvallis Charter of 2006, ch 10, § 53.⁴ Philomath's charter provision, which is the result
2 of a voter referendum and resulting 1995 charter amendment, similarly provides:

3 "Section 11.1. Annexations by majority vote. Unless mandated by state
4 law, annexations to the city of Philomath may only be approved by a prior
5 majority vote among the electorate."

6 Philomath Charter of 1987, ch 11, § 11.1.

7 On April 18, 2016, the Department of Land Conservation and Development
8 (DLCD) sent a letter to local governments regarding "2016 Land Use Legislation," citing
9 DLCD's obligation under ORS 197.646 to notify local governments of certain types of
10 new statutory requirements. The letter included notice that SB 1573 was "[o]ne of the
11 bills that may require changes to city acknowledged comprehensive plans and/or land use
12 regulations" and might also "affect city charters and other codes." The letter and attached
13 report also addressed other new legislation.

14 About a week later, Corvallis received two separate annexation petitions--
15 one from Caldwell Farms, LLC, and another from a group of eight landowners--seeking
16 annexation pursuant to ORS 222.127. Corvallis directed its staff to comply with the city's
17 charter provisions and disregard "contrary interpretations" of ORS 222.127.

18 Subsequently, Corvallis filed this declaratory judgment action, seeking to have ORS
19 222.127 declared unconstitutional, either on its face or as applied, because it conflicts
20 with the home-rule provisions of the Oregon Constitution. Philomath soon joined as a
21 plaintiff-intervenor.

1 ⁴ The trial court construed the Corvallis Charter of 2006, so all references herein are
2 to the 2006 charter. The charter has since been amended, in 2017, but those amendments
3 do not affect the provision at issue.

1 The state defendants moved for summary judgment on all claims, making a
2 variety of arguments as to why plaintiffs' claims fail as a matter of law, including an
3 argument regarding the specific language of Corvallis's and Philomath's charter
4 provisions. Plaintiffs opposed the state defendants' motion and filed their own cross-
5 motions for summary judgment. Plaintiffs' summary judgment materials included 10
6 declarations from Corvallis and Philomath voters and a declaration from the former
7 deputy city attorney of Corvallis, regarding their understanding of the specific language
8 of Corvallis's charter provision. The state moved to strike all 11 declarations as
9 inadmissible on various grounds under the Oregon Evidence Code.

10 After a hearing, the trial court granted the state defendants' motions and
11 denied plaintiffs' motions. The court provided its reasoning in a detailed letter opinion.
12 The court struck the declarations as irrelevant for purposes of construing the charter, as
13 containing inadmissible hearsay, and as not based on personal knowledge. As to the
14 summary judgment motions, the court first addressed plaintiffs' as-applied constitutional
15 challenge, concluding that the state had not engaged in any enforcement action against
16 plaintiffs that would permit an as-applied challenge. The court then addressed plaintiffs'
17 facial challenge and determined that, at a minimum, ORS 222.127 is not unconstitutional
18 as to cities such as Corvallis and Philomath, whose charters' annexation provisions
19 contain specific language--"[u]nless mandated by state law"--that avoids any potential
20 conflict between the statute and the charter. Finally, the court addressed the
21 constitutionality of ORS 222.127 as to cities whose charters do not include such

1 language, as relevant to another plaintiff,⁵ and concluded that ORS 222.127 does not
2 violate the home-rule provisions of the Oregon Constitution as to those cities either.

3 The trial court entered a written order consistent with its letter opinion. It
4 then entered a general judgment. The general judgment refers to the summary judgment
5 order, states that there are "no further factual or legal issues to resolve," and grants
6 judgment "to defendants"; it contains no declarations. Plaintiffs appeal.

7 III. ANALYSIS

8 Plaintiffs raise three assignments of error on appeal, only two of which we
9 address. See ___ Or App at ___ n 3 (slip op at 4). In their first assignment of error,
10 plaintiffs argue that the trial court erred in rejecting their facial challenge to ORS
11 222.127. In their third assignment of error, plaintiffs argue that the trial court erred in
12 rejecting their as-applied challenge to ORS 222.127 and in striking the 11 declarations
13 from the summary judgment record.

14 As the state correctly notes, plaintiffs' assignments of error do not comport
15 with ORAP 5.45(3). See *AS 2014-11 5W LLC v. Caplan Landlord, LLC*, 273 Or App
16 751, 769, 359 P3d 1225 (2015) ("Under ORAP 5.45, each assignment of error should
17 identify one--and only one--ruling that is being challenged." (Internal quotation marks
18 omitted.)).⁶ Nonetheless, it is clear from the opening brief which rulings plaintiffs are

1 ⁵ As previously noted, LOC was a plaintiff-intervenor but is not a party on appeal.
2 The trial court therefore had to resolve LOC's claims, whereas we do not.

3 ⁶ As we intermittently remind parties, legal conclusions and points of legal analysis
4 are not "rulings" to be divided into multiple assignments of error. *E.g., Rutter v. Neuman*,
5 188 Or App 128, 132, 71 P3d 76 (2003). Conversely, challenges to multiple rulings
6 should not be combined into a single assignment of error. *E.g., Landauer v. Landauer*,

1 challenging, and it is evident from the answering brief that the state defendants' ability to
2 respond has not been compromised. We therefore proceed to the merits. *See Village at*
3 *North Pointe Condo. Assn. v. Bloedel Constr.*, 278 Or App 354, 359-61, 374 P3d 978,
4 *adh'd to as modified on recons*, 281 Or App 322, 336, 383 P3d 409 (2016).

5 In doing so, we understand the first assignment of error to challenge two
6 rulings, as related to plaintiffs' facial challenge to ORS 222.127: the grant of the state
7 defendants' motion for summary judgment and the denial of plaintiffs' motions for
8 summary judgment. We understand the third assignment of error to challenge three
9 rulings, as related to plaintiffs' as-applied challenge to ORS 222.127: the grant of the
10 state defendants' motion for summary judgment, the grant of the state defendants' motion
11 to strike, and the denial of plaintiffs' motions for summary judgment.

12 A. *Facial Challenge to ORS 222.127*

13 A statute is facially unconstitutional if it "is incapable of constitutional
14 application in any circumstance." *Jensen v. Whitlow*, 334 Or 412, 421, 51 P3d 599
15 (2002); *see also State v. Christian*, 354 Or 22, 40, 307 P3d 429 (2013) ("Our analysis of
16 defendant's facial challenge is limited to whether the ordinance is capable of
17 constitutional application in any circumstance."); *Northrup v. Hoyt*, 31 Or 524, 529,
18 49 P 754 (1897) (if a statute may constitutionally operate upon certain persons or cases, it
19 is not unconstitutional simply because there may be persons or cases to whom it
20 constitutionally cannot apply). The state contends--and the trial court agreed--that

1 221 Or App 19, 23-24, 188 P3d 406 (2008) ("The grouping of a trial court's rulings under
2 a single assignment of error hinders evaluation of each individual ruling on its merits and
3 is a practice that should not be followed.").

1 ORS 222.127 is not facially unconstitutional, because, at a minimum, it is capable of
2 constitutional application as to cities whose charters do not conflict with ORS 222.127.

3 As discussed in more detail later, the Supreme Court and we have
4 repeatedly held that charter language requiring a vote of the city's electorate on
5 annexations does not conflict with state statutes requiring annexation in particular
6 circumstances, so long as the city's charter contains language allowing for state-mandated
7 annexations. *See Pieper v. Health Division*, 288 Or 551, 553, 557-58, 606 P2d 1145
8 (1980) (holding that state health division's order requiring Corvallis to annex territory in
9 accordance with a state statute did not conflict with Corvallis charter provision requiring
10 electorate to vote on annexations, because the charter provision allows for annexations
11 "mandated by state law"); *Mid-County*, 310 Or at 163-64 (rejecting constitutional
12 challenge to state statute on which local boundary commissions relied to order certain
13 annexations to two cities, where both cities' charters contained language that effectively
14 allowed the state legislature to alter their borders without city approval); *Hunter v.*
15 *Portland Metro. Area Local Boundary Com.*, 160 Or App 508, 510-12, 981 P2d 1276
16 (1999) (relying on *Mid-County* to conclude that there was no conflict between a state
17 statute and a city charter, where the city charter expressly permitted annexation without
18 voter approval if "mandated by state law").

19 It is not clear whether the constitutional challenges in *Mid-County* and
20 *Hunter* were viewed as facial or as-applied challenges, to the extent that they required
21 consideration of the plaintiffs' specific charter provisions. Here, the trial court construed

1 Corvallis's and Philomath's charters as part of resolving plaintiffs' facial challenge to
2 ORS 222.127, but plaintiffs and the state defendants address it as part of the as-applied
3 challenge. The latter approach has intuitive appeal, in that the analysis is specific to these
4 plaintiffs, as is typically the case for an as-applied challenge. Because it does not affect
5 our disposition, we address plaintiffs' charter language as part of the as-applied analysis,
6 consistently with how the parties present it. Our construction of plaintiffs' charters is
7 relevant to the facial challenge, however, in that it demonstrates at least two instances in
8 which city charters do not conflict with ORS 222.127.⁷

9 B. *As-Applied Challenge to ORS 222.127*

10 Having concluded that ORS 222.127 is not unconstitutional on its face, so
11 long as it may constitutionally be applied at least to cities whose charter provisions do not
12 conflict with it, we next consider plaintiffs' claim that ORS 222.127 is unconstitutional as
13 applied to them. We first address the state defendants' argument that, because the
14 executive branch has not taken enforcement action against them, plaintiffs cannot assert
15 an as-applied challenge. We next address plaintiffs' assertion that, in construing
16 Corvallis's and Philomath's charters, we should consider 11 declarations that the trial
17 court struck from the summary judgment record. Lastly, we construe Corvallis's and
18 Philomath's charter provisions to determine whether the "[u]nless mandated by state law"
19 language defeats plaintiffs' as-applied challenge.

1 ⁷ Notably, it is apparent from the statutory language that the legislature meant ORS
2 222.127 to apply to all cities, including those whose charters *conflict* with the statute. *See*
3 ORS 222.127(2) ("Notwithstanding a contrary provision of the city charter or a city
4 ordinance, * * *."). That does not change our analysis. If plaintiffs' charters do not
5 conflict, it is possible for the statute to be constitutionally applied, at least as to them.

1 1. *Lack of enforcement action*

2 A prerequisite to challenging the constitutionality of a law *as applied* is that
3 the law has been applied. That is, as relevant here, the law must have been enforced
4 against the complainant. *City of Eugene v. Lincoln*, 183 Or App 36, 41, 50 P3d 1253
5 (2002) ("A facial challenge asserts that lawmakers violated the constitution when they
6 enacted the ordinance; an as-applied challenge asserts that executive officials, including
7 police and prosecutors, violated the constitution when they enforced the ordinance.").
8 The state defendants successfully argued to the trial court that that prerequisite was not
9 met in this case.

10 Plaintiffs argue that the letter that they received from DLCD in April 2016
11 constituted executive enforcement action. The trial court correctly rejected that
12 argument. The letter is a statutorily required notice from DLCD regarding recently
13 enacted land use laws that may affect local governments. *See* ORS 197.646(2)(a). It
14 does not require anything, nor does it impose any penalty for noncompliance. Moreover,
15 the final subsection of ORS 197.646 expressly provides that a local government's failure
16 to take necessary action in response to new land use requirements "is a basis for *initiation*
17 of enforcement action pursuant to ORS 197.319 to 197.335." ORS 197.646(3) (emphasis
18 added). A notice regarding the existence of new land use requirements does not itself
19 initiate an enforcement action.

20 Alternatively, plaintiffs rely on the annexation petitions that they received
21 after the enactment of ORS 222.127. The trial court also correctly rejected that

1 argument. Plaintiffs cite no persuasive authority for the proposition that a landowner's
2 mere filing of an annexation petition with a city, under circumstances that require the city
3 to decide whether to comply with a state statute or disregard it, satisfies the prerequisite
4 for bringing an as-applied challenge against the state. It cannot be enough for an as-
5 applied challenge for a party to be *considering* not following a state law, because, until
6 the law is actually applied in an enforcement action, it remains to be seen how it will be
7 applied to that party, and the crux of an as-applied challenged is the individual
8 application. Notably, the petitioning landowners could have sought an enforcement order
9 from Land Conservation and Development Commission (LCDC), but no such order is in
10 the record. *See* OAR 660-045-0030 (permitting a person to petition LCDC for an
11 enforcement order against a local government).

12 Normally, that would conclude our analysis of plaintiffs' as-applied
13 challenge to ORS 222.127. For the reasons discussed earlier, however, ___ Or App at
14 ___ (slip op at 12), the facial challenge and the as-applied challenge are closely
15 intertwined in this case, so it is necessary to proceed to an analysis of plaintiffs' charters.

16 2. *Stricken declarations*

17 Because it is relevant to what we will consider in construing Corvallis's and
18 Philomath's charters, we next address whether the trial court erred in striking the 11
19 declarations from the summary judgment record. In support of their own interpretation of
20 their charters, plaintiffs submitted 11 declarations: nine declarations from current or
21 former Corvallis residents who voted on the 1976 charter amendment, a declaration from

1 a current Philomath resident who voted on the 1987 charter amendment, and a declaration
2 from the former deputy city counsel who proposed the "[u]nless mandated by state law"
3 language included in Corvallis's 1976 charter amendment. The trial court struck all 11
4 declarations as irrelevant and otherwise inadmissible under the Oregon Evidence Code.

5 Even if we assume that the trial court's exclusion of the declarations was
6 erroneous, any error was harmless. We may reverse a judgment only when an error
7 "substantially affect[ed] the rights of a party," *i.e.*, was not harmless. ORS 19.415(2); *see*
8 *also* OEC 103(1) ("Error may not be predicated upon a ruling which admits or excludes
9 evidence unless a substantial right of the party is affected[.]"). Here, plaintiffs offered the
10 11 declarations as legislative history, which, under the applicable construction rules, is
11 the only way that we could consider them. *See State v. Gaines*, 346 Or 160, 171-72, 206
12 P3d 1042 (2009) (describing the three-step construction process of analyzing text,
13 context, and any useful legislative history). But even assuming that we *could* consider
14 the 11 declarations as legislative history of the charter amendments--a contested issue on
15 which we express no opinion⁸--we *would not* consider them.

1 ⁸ The state argued, and the trial court agreed, that declarations of a handful of
2 individual voters and a former deputy city attorney provided 40 years after the fact do not
3 qualify as legislative history. *See State v. Allison*, 143 Or App 241, 251, 923 P2d 1224,
4 *rev den*, 324 Or 487 (1996) (stating that the legislative history of a voter-initiated charter
5 amendment "includes statements contained in the voters' pamphlet" and "other
6 contemporaneous sources such as newspaper stories, magazine articles and other reports
7 from which it is likely the voters would have derived information about the initiative"
8 (internal quotation marks omitted)); *see also Salem-Keizer Assn. v. Salem-Keizer Sch.*
9 *Dist.* 24J, 186 Or App 19, 27, 61 P3d 970 (2003) (explaining that courts "are all the more
10 loath" to determine the intentions of a group by reference to isolated statements by
11 individuals when those statements are generated after the fact, rather than
12 contemporaneously). Plaintiffs disagree and argue that we can consider the declarations
13 as legislative history.

1 That is, even assuming that the declarations qualify as "legislative history"
2 that we may consider under *Gaines*, we are only required to consider "useful" legislative
3 history, and "the extent of the court's consideration of that history, and the evaluative
4 weight that the court gives it, is for the court to determine." *Id.* at 172. Applying that
5 standard here, we would not give any evaluative weight to the 11 declarations stricken by
6 the trial court, and their consideration would not affect our disposition. Any error in
7 striking the declarations therefore was harmless.

8 3. *Plaintiffs' charters*

9 That brings us to the content of plaintiffs' charters. Charter amendments
10 are the product of local legislation and are "to be interpreted by the same means as other
11 legislation." *DeFazio v. WPPSS*, 296 Or 550, 569, 679 P2d 1316 (1984). That is, we
12 consider the text, context, and any useful legislative history offered by the parties.
13 *Gaines*, 346 Or at 171-72. In this instance, we do not find any legislative history
14 provided by the parties to be useful, so we limit our discussion to text and context,
15 recognizing that text is always "primary" in the analysis. *Id.* The relevant text is brief.

16 As previously described, Corvallis's charter provides that, "[u]nless
17 mandated by State law, annexation, delayed or otherwise, to the City of Corvallis may
18 only be approved by a prior majority vote among the electorate." Corvallis Charter of
19 2006, ch 10, § 53 (emphasis added). Similarly, Philomath's charter provides, that,
20 "[u]nless mandated by state law, annexations to the city of Philomath may only be
21 approved by a prior majority vote among the electorate." Philomath Charter of 1987, ch

1 11, § 11.1 (emphasis added).

2 The state defendants argue that ORS 222.127 does not conflict with
3 plaintiffs' charter provisions, because those provisions allow for annexation without a
4 citizen vote if mandated by state law. The trial court agreed. Relying on *Pieper* and
5 *Mid-County*, the trial court concluded that "Section 53 of the Corvallis Charter and
6 Section 11.1 of the Philomath [Charter] do not conflict with [ORS 222.127] because both
7 specifically allow for annexation without a citizen vote if it is mandated by statute."

8 *Pieper* involved the same provision of Corvallis's charter that is at issue in
9 this case. 288 Or at 553. In *Pieper*, the state health division ordered Corvallis to adopt
10 an ordinance annexing certain territory to the city, pursuant to ORS 222.855, which
11 provides for territory to be annexed "without any vote" if the state health division finds
12 that conditions in the territory pose a danger to public health that can be removed or
13 alleviated by provision of sanitary, water, or like facilities ordinarily provided by
14 incorporated cities. *Id.* at 553, 556. Corvallis challenged the order, citing ORS 222.915,
15 which provides that the health-danger annexation statutes "do not apply to proceedings to
16 annex territory to any city if the charter or ordinances of the city conflict with or are
17 inconsistent with" them. Corvallis argued that the statutory scheme conflicted with its
18 charter, because its charter required a vote of the electorate on all annexations. *Id.* at 553.

19 We affirmed, as did the Supreme Court. *Id.* at 558. The court rejected
20 Corvallis's argument that an annexation without the vote of the people would conflict
21 with the intent of its charter, explaining that it arose from a false premise--"the express

1 desire of Corvallis residents to vote on *all* annexations"--that was contrary to the express
2 charter language, which "specifically provides that annexations 'mandated by state law'
3 need not be approved by such a vote." *Id.* at 555 (emphasis in original). Given the
4 express language of the charter, the "only remaining question" was "whether this
5 annexation is one 'mandated by state law.'" *Id.* The court concluded that it was. *Id.* at
6 557. Because the annexation was "mandated by state law," it did not require a vote of the
7 Corvallis electorate, and there was no conflict between the statute and the charter. *Id.*

8 Similarly, in *Mid-County*, local boundary commissions relied on ORS
9 199.534 to order the cities of Portland and Gresham to annex certain territory, and the
10 cities sought to have the statute declared unconstitutional under the home-rule provisions
11 of the Oregon Constitution. 310 Or at 155-56. The Supreme Court left "room to argue"
12 in a future case that the "borders of a municipal corporation are an integral part of the
13 corporate charter which cannot be altered by the legislature," but it concluded that
14 Portland and Gresham could not benefit from such an argument in *Mid-County*, given
15 their charter language. *Id.* at 163. The Portland charter allowed annexation "in any
16 manner permitted by statute," and the Gresham charter allowed the city's boundaries to be
17 modified by voters, the city council, or "any other agency with legal power to modify
18 them." *Id.* at 164. Given that language, regardless of whether the legislature could
19 amend a city's borders "against the municipality's will,"⁹ the court read Portland's and

1 ⁹ The state has indicated that, in its view, the legislature likely can amend a city's
2 borders against the municipality's will. Not surprisingly, plaintiffs disagree. However,
3 we need not reach that issue or those arguments given our disposition. That is, we need
4 not answer the question left open in *Mid-County*.

1 Gresham's charters "as permitting legislative alteration of their borders," and it rejected
2 the cities' constitutional challenge. *Id.* at 163; *see also Hunter*, 160 Or App at 510-12
3 (relying on *Mid-County* to conclude that West Linn charter did not conflict with state
4 law, where charter provision included "[u]nless mandated by state law" language).

5 Plaintiffs argue that this case is distinguishable from *Pieper* and *Mid-*
6 *County*, because, in their view, those cases involved state-mandated annexation, whereas
7 this case involves a state-mandated *process* for annexation. Like the trial court, we are
8 unpersuaded by the distinction that plaintiffs attempt to draw.

9 ORS 222.127(2) provides that, if specified criteria are met, "the legislative
10 body of the city *shall annex the territory* without submitting the proposal to the electors
11 of the city." (Emphasis added.) An annexation under that statute is no less mandatory
12 than an annexation under ORS 222.855, the statute at issue in *Pieper*. An annexation
13 under ORS 222.855 is mandatory if the state health division issues an order determining
14 that the specified criteria are met, while an annexation under ORS 222.127 is mandatory
15 if the legislative body of the city determines that the specified criteria are met.¹⁰

16 Although who determines whether the conditions are met is different, that does not
17 change the fact that both types of annexations are mandatory, so long as the conditions
18 are met. It is also notable that, even though the state health division makes the predicate

1 ¹⁰ Under ORS 222.127(2), the legislative body of the city "shall annex the territory"
2 if (a) it is included within an urban growth boundary adopted by the city or Metro; (b) is
3 or, upon annexation, will be subject to the acknowledged comprehensive plan of the city;
4 (c) at least one lot or parcel within the territory is contiguous to the city limits or is
5 separated from them only by a public right of way or a body of water; and (d) the
6 proposal conforms to all other requirements of the city's ordinances.

1 finding with respect to a health-hazard annexation, the legislative body of the city still
2 must issue an ordinance effectuating the annexation. *See* ORS 222.900(1) (requiring the
3 city to adopt an ordinance, meeting specified criteria, "upon receipt of the certified copy
4 of the finding as provided in ORS 222.880 (2) or (3) and certification of approval of
5 plans under ORS 222.898").

6 Plaintiffs next argue that the trial court's construction of "unless mandated
7 by state law" violates the rule against prospective delegation. *See Advocates for Effective*
8 *Regulation v. City of Eugene*, 160 Or App 292, 311-12, 981 P2d 368 (1999) (holding that
9 that rule applies to municipal charters). The rule against prospective delegation, as
10 relevant to municipal charters, comes from three constitutional provisions: (1) Article I,
11 section 21, which provides that no law shall pass, "the taking effect of which shall be
12 made to depend on any authority, except as provided in this Constitution"; (2) Article XI,
13 section 2, which empowers municipal voters to "enact and amend their municipal
14 charter[s]"; and Article IV, section 1, which provides, as relevant here, that the initiative
15 and referendum powers are "reserved to the qualified voters of each municipality and
16 district as to all local, special and municipal legislation of every character in or for their
17 municipality or district." *Id.*

18 There was no prospective delegation here. As was the case in *Pieper* and
19 *Hunter*, the plain language of plaintiffs' charter provisions demonstrates a complete
20 legislative policy to generally require voter approval of annexation proposals *except*
21 where state law mandates the annexation. Plaintiffs' charter provisions do not incorporate

1 the substance of state law. *Cf. Advocates for Effective Regulation*, 160 Or App at 313
2 (holding that city charter provision incorporating the definition of "hazardous substances"
3 from future federal regulations was an improper delegation of legislative authority).
4 There is no reason that a city cannot adopt a charter provision that favors the uniformity
5 of state law when state law exists. *See Mid-County*, 310 Or at 163 n 11, 164 (describing
6 city charter as giving "consent and approval" to legislative alteration of borders, and
7 recognizing that "[t]he initial power to decree an annexation still lies where it has always
8 been--with the legislature").

9 We also reject plaintiffs' argument that the trial court's construction of ORS
10 222.127 would allow "the exception to swallow the rule." *See 1000 Friends of Oregon v.*
11 *LCDC (Tillamook Co.)*, 303 Or 430, 441, 737 P2d 607 (1987) (determining that it was
12 not the legislature's intent, when enacting a statute, to "allow[] the exception to swallow
13 the rule"). Given that plaintiffs' voters expressly excepted state-law-mandated
14 annexations from the vote requirement when they added that requirement to plaintiffs'
15 charters in 1976 and 1995, plaintiffs are not in a position to argue that their voters' intent
16 is being disregarded when the exception is applied. Plaintiffs contend that their voters
17 intended "[u]nless mandated by state law" to refer only to health-hazard annexations, but
18 that narrow reading cannot be squared with the charters' plain language.¹¹

1 ¹¹ Like the trial court, we also reject plaintiffs' argument that the "state law" language
2 in their charters should be construed to refer only to the state law that existed at the time
3 of the charter amendments, *i.e.*, 1976 for Corvallis and 1995 for Philomath. *See Seale et*
4 *al v. McKinnon*, 215 Or 562, 572, 336 P2d 340 (1959) (explaining that a statutory
5 provision that references another law with specificity should be construed to adopt the
6 law as it existed at the time of the legislative enactment, while a statutory provision that
7 refers to another body of law generally should be construed as incorporating both the law

1 Finally, Corvallis and Philomath protest that they are being compelled to
2 annex territory against their will. The difficulty with that argument is that plaintiffs are
3 only being compelled to do precisely what their voters provided for when they enacted
4 the charter provisions at issue: comply with state law regarding mandated annexations.
5 *Cf. Pieper*, 288 Or at 555 (Corvallis's argument that annexation without the vote of the
6 people would conflict with the intent of its charter was fallacious because it rested on the
7 false premise that Corvallis residents expressly desired to vote on all annexations, when
8 in fact the charter specifically provided that annexations "mandated by state law" did not
9 require voter approval). If plaintiffs' voters are dissatisfied with the existing charter
10 provisions, then amendment is always possible, or, as the state notes, plaintiffs could seek
11 to have their charter provisions invalidated.¹²

12 For all of those reasons, plaintiffs have not identified any grounds for
13 reversal with respect to their constitutional challenge to ORS 222.127 as applied to them.

14 IV. CONCLUSION AND DISPOSITION

15 Accordingly, we affirm the trial court's grant of the state defendants' motion
16 for summary judgment, grant of the state defendants' motion to strike, and denial of
17 plaintiffs' cross-motions for summary judgment.

18 The judgment is defective in one regard, however, which is that it does not

1 that existed at the time of enactment and any subsequent changes to the law).

2 ¹² On appeal, plaintiffs suggest that, if their charter provisions allow for application
3 of ORS 222.127, then those provisions are unconstitutional, while the state disagrees that
4 the charter provisions are unconstitutional but notes that plaintiffs "may seek to invalidate
5 those provisions," which they have not done in this case. We need not get into the
6 specifics of an issue that is not before us.

1 contain a declaration of the parties' rights. "If there is a justiciable controversy, the
2 plaintiff is entitled to a declaration of its rights, even if that declaration is directly
3 contrary to what it believes its rights to be." *Beldt v. Leise*, 185 Or App 572, 576, 60 P3d
4 1119 (2003). When a trial court dismisses a declaratory judgment claim after deciding it
5 on the merits, it is our practice to vacate and remand for correction of the judgment, even
6 if we are affirming on the merits. *Kramer v. City of Lake Oswego*, 285 Or App 181, 215-
7 16, 395 P3d 592 (2017), *aff'd in part and rev'd in part*, 365 Or 422, 446 P3d 1 (2019),
8 *adh'd to as modified on recons*, 365 Or 691, 455 P3d 922 (2019); *see also Doe v.*
9 *Medford School Dist. 549C*, 232 Or App 38, 46, 221 P3d 787 (2009) ("When the
10 dismissal of a declaratory judgment action was clearly based on a determination of the
11 merits of the claim * * *, our practice has been to review that determination as a matter of
12 law and then remand for the issuance of a judgment that declares the rights of the parties
13 in accordance with our review of the merits.").

14 Here, the trial court granted judgment to defendants, rather than dismissing
15 plaintiffs' claims, but the same principle applies. The correct disposition of a declaratory
16 judgment claim is to enter a judgment declaring the parties' rights. *De Lanoy v. Taylor*,
17 300 Or App 517, 520, 452 P3d 1036 (2019) (when a "party asks for a declaration, it is
18 incumbent on the court to declare the respective rights of the parties"). Plaintiffs are
19 entitled to a declaration, even if it is not the declaration they want. *Beldt*, 185 Or App at
20 576. Accordingly, we vacate and remand for the trial court to enter a judgment that
21 declares the rights of the parties. Any declarations should be consistent with this opinion

1 but need not be limited to the issues addressed in this opinion.¹³

2 Vacated and remanded for entry of a judgment that declares the rights of

3 the parties.

1 ¹³ In other words, the trial court may make declarations consistent with its own letter
2 opinion of February 2017, as appropriate, even if they go beyond the scope of this
3 opinion, so long as they do not conflict with this opinion.