

OPPOSITION TESTIMONY TO DEVELOPMENT APPLICATION LU 23-0002

CONTENTION: The sewer line development conditions of LU 23-0002 are contrary to the provisions of City Charter, Chapter X, Park Development Limitation, as amended, causing the use of the Waluga Park - West to be maintained and managed in manner to lose a portion of its natural treed area and deterioration of habitat rather than be retained and preserved; therefore, the sewer line conditions are invalid and the application must be denied as conditioned.

ARGUMENT: The voters' have the decision - making authority in how to maintain and manage parks. In the context of the purpose and other provisions of the city's home rule Charter, Chapter X amendments, the use of the term "preserve" is instrumental in interpreting the amending language. Its use is in keeping with the long history of land use planning in Oregon. The Land Conservation and Development Commission established under Senate Bill 100, adopted effective January 25, 1975, among 14 goals, statewide planning goal 5, Natural Resources, Scenic and Historic Areas and Open Spaces. It defined "preserve" to mean "to save from change or loss and reserve for a special purpose." This is exactly what the voters intended when they used the terms *retain, preserve, and Natural Preserves* in amending the Chapter X language to limit development to retain and preserve the natural resource areas within the designated parks under the designation of Natural Preserves. It was for the purpose of preserving the natural areas of the city owned park lands from loss against the overreach of development by anyone within the natural areas of the park. It is intended for the city to maintain and manage the use of public lands to preserve natural areas in the form of Natural Preserves for the public. This becomes even more important in light of the march of private development desecration and loss of the city's natural area resources such as trees and habitat one development application at a time- just like the old Pac Man game one bite at a time - until all will be gone. *See the amendment measure's background as provided by the initiators of the amendment, LoveLOParks, filed in the record in separate opposition to LU 23-0002.*

This is just not hyperbole, but reality as evidenced in the listing in staff's 43- page report of approved development applications in which staff's interpretation of the staff's tree code standards over neighborhood objections is followed by the hearing bodies; thereby, allowing treed resources to be stripped away and not preserved in favor of development, one development application at a time.

The law of home rule charters in Oregon and the clear language of the amendment to the home rule Charter of Lake Oswego, Chapter X, Park Development Limitation clearly prohibits the city's governmental authority to impose the sewer line conditions of development due to the consequential loss to the Waluga Park - West's natural area, thereby invalidating the conditions.

The Oregon Municipal Handbook-Chapter 2: Home Rule and Its Limits, at page 4 provides a basic primer of the law of home rule in Oregon as follows:

“Taken together these two changes to the Oregon Constitution –Article XI, Section 2 and Article IV, Section 1(5) respectively guarantee cities a certain degree of local autonomy. The amendments do this in a peculiar fashion; unlike the powers of state and federal government, the powers of cities under the Oregon Constitution are not clearly enumerated. [footnote 13 citing to above Articles omitted] In fact neither one of these 1906 amendments mentions the authority of *cities* at all – the amendments actually give power to city voters. [footnote 14, Id. omitted] However, with the power to ‘enact . . . any charter’ comes the ability to set the chartered government’s substantive authority. [footnote 15 omitted] So, rather than conferring power on the cities directly, Oregon’s home rule amendments leave it to the voters to decide what their city governments can do.” [footnote 16 omitted]

On November 2, 2021, Lake Oswego voters were presented with two charter amendments to its home rule Charter, Chapter X, Park Development Limits. One was initiated by the citizens and approved by over a 60% vote, Measure 3-568. This amendment provided for park development to be limited in order to preserve the natural areas and prevent the deterioration of habitat within 15 designated parks, including Waluga Park - West. *See attachment 1, the full excerpt of Chapter X as amended.* The language clearly creates an affirmative duty on the city government to maintain and manage the designated parks so their natural areas are preserved as Natural Preserves. The other amendment, Measure 3-575, was drafted by city staff and referred by the city council to the voters, and ultimately delegated authority to the city council to govern development of the parks natural areas through future ordinances adopted by the city council, which could allow loss of the natural area through development. This amendment was defeated by the voters.

Thus, the voters empathetically and intentionally decided what the city’s government can and must do. A review of the attached language of the Charter, Chapter X as amended, clearly directs that the substantive authority of the city government is to retain and preserve the natural area of Waluga Park - West, to prevent the deterioration of habitat within the natural area, to limit to the benefit of park users what may be developed, such as sanitary facilities, and to prohibit all development that otherwise does not preserve the natural area of the park. Moreover, it also provides that the liberal interpretation be given to its purpose to preserve natural areas. *See attachment 1, Charter, Chapter X, Park Development Limitation as amended.*

The staff’s recommended sewer line conditions would overturn the voters’ decision to retain and preserve the natural areas of the parks by causing permanent loss. In recommending approval of private development in LU 23-002, city staff conditioned its approval on extending a sewer line through the natural area of Waluga Park - West, and if approved with this condition, the city’s government would be acting contrary to the clear language of Chapter X and its purpose of preserving natural areas in the designated parks as Nature Preserves, including that of Waluga Park - West. From the City’s staff report dated November 17, 2023, and its exhibits, it is known that a significant number of trees along with accompanying habitat in the park’s

natural area will be respectively destroyed and deteriorated by the construction trenching and the maneuvering of the heavy machinery necessary to develop the ditch and for the staging and laying of the pipe within it. In point of fact, a condition for a swath through the natural area for a construction easement 17- feet wide and 525 feet long is being proposed. This is the equivalent by comparison to a wide, city traffic lane two and a half city blocks long. The staff labels this a temporary easement as if temporary means the loss will go away. The loss is permanent. First, one does not reforest over the top of a sewer line as it would prevent access for maintenance and insert into the mix potential tree root infiltration. Second, sewer lines need to be maintained over time when such events as water infiltration occur or when pipe sections or joints need to be repaired or replaced. It is common sense that an access roadway or trail must be maintained above ground over the barren surface and given the vagaries of maintenance and or replacement, the probabilities are that motorized equipment and vehicles will be needed. New roads and trails for motorized access are expressly prohibited under the amendment.

The trees to be removed, which are mainly mature and of large caliber, as well as the habitat, are present both above and below ground, benefit the users and visitors by providing scenic beauty of the northwest, passive recreational opportunity, better air and temperature by sequestration protection from climate changing carbon emissions, and mitigation of flooding by providing surface water run off protection. As noted above, reforestation will not occur and habitat will remain deteriorated above and over the surface of the entrenched sewer line to accommodate both the sewer line and an access roadway/motorized trail above ground to maintain the sewer line and accompanying manholes. The full enjoyment of this portion of the natural area will never again be available to benefit the city's residents and visitors as the voters intended. It is neither retained or preserved.

Staff's arguments to justify the sewer line conditions misinterpret the Chapter X amending language. To the extent sanitary facilities may be provided within a Nature Preserve, they are preconditioned by the express language of being "[t]o facilitate public access and use". As noted in the staff report, the park already is serviced by existing sanitary facilities for the benefit of park users and visitors. The sewer line in question is being sought not to service the users of the park, but to serve private development outside of the park. Thus, no reasonable person could conclude the development of this sewer line is for the benefit of the users and visitors of the park or for the purpose of maintaining and preserving the park's natural area or to prevent the deterioration of its habitat. The result of the development of the sewer line extension is contrary to the very purpose of the Charter Amendment and the voters deciding what their city government can do to maintain and manage the retention and preservation of its parks' Natural Preserves.

The City's staff report also notes that there are other sewer lines outside of the park that could service the proposed development but discounts them as too shallow to allow gravity service. Nowhere does the staff address the use of a pump station(s) to pump to these lines to service

some if not all of the proposed lots. The staff discounts the use of today's modern septic systems because the city requires hooking into a sewer line if lawful and available. By providing for a sewer line extension to be developed through the park's natural area that ties into the park's existing facilities, staff finds that sewer facilities are lawful and available. However, the lawful decision of the voters for their government to maintain and manage in a manner to retain and preserve the natural areas from loss prohibits the sewer line. To not maintain and manage the natural area of the park as decided by the voters is unlawful. Clearly, the sewer line development, the development of the swath of a 17-foot-wide by 525-foot construction easement, and the permanent need to have an access road or trail for motorize vehicles to maintain the line, either together or individually, will cause the very loss to the Natural Preserve that is intended to be protected from loss by the Charter, Chapter X amendment. Therefore, the "lawful and available" standard needed to provide for the sewer line is not present and septic systems or pumping are available as alternatives.

It should be noted that staff in reciting the decision in the matter of the tennis center in Springbrook Park, LU 20-0027, omitted that a formal compromise was entered into, which among other things, resolved the objection to the loss of trees staff sought to be removed by retaining them through the use of an alternative location and design to that of the initially conditioned drainage system. Thus, there also is precedent for the Development Review Commission to replace the design and location of utility systems to save the loss of natural resources.

The staff report also attempts to distinguish and interpret the Charter Amendment using the term *proprietary*. To the extent the common meaning of proprietary means ownership, clearly the citizen voters have exercised their ownership rights to approve, through the Charter Amendment, the manner in which the designated fifteen parks owned by the citizens are to be maintained and managed by the city governing body. It clearly designates the use of the Natural Reserves to be managed or maintained to be retained and preserved as natural areas. Under a liberal interpretation any ambiguity in this regard should be resolved to give the greatest latitude to retention and preservation.

Staff interprets the term *proprietary* to carry over to defining the limitation on development to be that only of the City's development within the parks and not of private development. Surely, the city cannot mandate a private developer to do what the city cannot do. That would clearly be an impermissible delegation of power. The city's strict interpretation undercuts the very purpose of preserving the natural areas, does not interpret the amending language liberally and does not give justice to the preservation purpose and amendment language. Moreover, it ignores the provision in Section 43, Chapter X of the Charter Amendment, which states: "The City of Lake Oswego shall insure [ensure, sic] that all (emphasis added) development within a Natural Preserve is consistent with the preservation of the natural area for public enjoyment." Not only is the clear meaning of the quoted language as to "all development" within a Natural preserve inclusive of private development, it is inclusive of underground development as well.

Therefore, it also undercuts the staff argument because the amendment language prohibits above ground development, it doesn't preclude underground development.

How does the City's interpretation to allow the development of the sewer line for a private purpose because it ostensibly is underground even though it causes consequential major destruction of the natural area meet the city's governmental obligation to ensure retention and preservation of its Natural Preserves? It doesn't.

The Development Review Board does not have the authority to overturn the voters' decision to maintain and manage the parks to retain and preserve the natural areas of the city parks by allowing its loss. It should also be remembered a City Charter is like a constitution and its provisions preempt any ordinance that is contrary or inconsistent with the Charter. See, *Canfield v Sullivan*, 774 F2d 1466 (9th Cir. Court of Appeals, 1985). The court stated: "The general rule is that an ordinance is invalid if it conflicts with a city charter." In the case of *St. Croix v Superior Court*, 228 Cal App. 434 (2014), the appellate court found that the San Francisco charter's incorporation of the attorney client privilege of the Evid. Code, sec. 954 for the city's communication superseded an ordinance purporting to compel disclosure of privilege communication between the San Francisco Ethics Commission and the city attorney. See also, the above reference Chapter 2, *Oregon Municipal handbook for a discussion of the standard applicable to civil preemption involving home rule city charters*. The Charter amendment was adopted November 2, 2021. Subsequently, Ordinance 2874 was adopted March 17, 2022, to amend the city's boundary to include the property for the five- lot subdivision to be able to hook into city sewer and other city utilities. Therefore, to the extent city may want to rely on Ordinance 2874 to otherwise site the sewer line, it is superseded and preempted as being subsequent to and contrary to and inconsistent with retaining and preserving the natural areas of Waluga Park - West under the provisions of the Chapter X as amended. Like an ordinance, under the facts of this matter, a decision by the Development Review Board, to uphold the proposed sewer conditions would be contrary to the Charter, Chapter X, Park Development Limitations, superseded and be invalid.

Additionally, there are other legal theories to deny the application. Contrary to staff's position, the Chapter X amendment provisions, may be viewed substantively as an enforceable, final land use final decision under ORS 192.015 (a) as the language, in effect, applies the Goal 5 natural resources protection provisions of the City's adopted Comprehensive Land Use Plan, and was not appealed. The application as conditioned violates the Chapter X provisions as a land use matter.

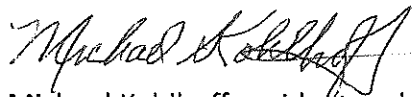
The provision could also be viewed as a restrictive covenant by the voters as how ownership of the Natural Preserves of the designated parks must be maintained and managed to retain and preserve the natural areas. The sewer line conditions do the opposite of that by creating a loss of the natural area and violating the restriction, thereby subverting the will of the people. The voters have not waived that restriction.

The application further fails because the voters, as the ultimate owner of authority, have not given their voter approval to the application as conditioned for a sewer line as a property - specific change to the approved charter amendment. Note, on November 2, 2021 under the title "Citizen's Initiative 3-568 Passes", the office of the city manager put out a press release subsequently published in the Lake Oswego Review, which stated among other things: "Through voter approval, the city will amend Chapter X of the Lake Oswego Charter to include additional protections of our natural areas. Any further property specific changes will include voter approval." No such further voter approval has occurred.

Finally, the reasons and rational presented by Scott Handley and the LoveLOParks opposition statement submitted in the record to deny the application are incorporated herein by reference.

Respectfully, Development application LU 23 – 0002 sewer conditions are invalid and the application as conditioned must be denied.

Cordially,



Michael Kohlhoff, resident and park user

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CHAPTER X. PARK DEVELOPMENT LIMITATION

Section 41. Purpose.

The purpose of this Chapter is to preserve all designated Nature Preserves that are owned by the City of Lake Oswego, inclusive of the fifteen natural parks specified in this Chapter, as natural areas for the enjoyment of all residents of and visitors to Lake Oswego. This Chapter shall be interpreted liberally to achieve this purpose.

(Amended November 7, 1978; November 2, 2021.)

Section 42. Definitions.

As used in this Chapter:

Athletic Facility means any area, field, or building which is graded, leveled, constructed, or equipped for use in sports or athletics. Fields for baseball, soccer, or football and courts of tennis are examples of Athletic Facilities.

Bryant Woods Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Bryant Woods Park" (19.7 acres, more or less, to the North of Childs Road located at the corner of Childs Road and Canal Road at 4301 Childs Road).

Canal Acres means the park land owned by the City of Lake Oswego which is commonly referred to as "Canal Acres" (27.3 acres, more or less, to the South of Childs Road, to the West of Canal Road, and to the East of Sycamore Avenue, located at 19300 Canal Road).

Cooks Butte Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Cooks Butte Park" (43 acres, more or less, located at 2100 Palisades Crest Drive).

Cornell Natural Area means the park land owned by the City of Lake Oswego which is commonly referred to as "Cornell Natural Area" (3.2 acres, more or less, to the East of Cornell Street, to the South of Larch Street, located at 16920 Cornell Street).

Glenmorrie Greenway means the park land owned by the City of Lake Oswego which is commonly referred to as "Glenmorrie Greenway" (1.3 acres, more or less, to the East of Pacific Hwy, to the North of Glenmorrie Terrace, located at 16540 Pacific Hwy).

Hallinan Woods means the park land owned by the City of Lake Oswego which is commonly referred to as "Hallinan Woods" (3.8 acres, more or less, located at 1103 Obrien Street).

Iron Mountain Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Iron Mountain Park" (51 acres, more or less, to the North of Iron Mountain Blvd, located at 2401 Iron Mountain Blvd).

Kerr Open Space means the park land owned by the City of Lake Oswego which is commonly referred to as "Kerr Open Space" (10 acres, more or less, to the South of SW Stevenson Street, to the East of Grouse Terrace, to the North of Walking Woods Drive, to the West of Icarus Loop).

Lamont Springs Natural Area means the park land owned by the City of Lake Oswego which is commonly referred to as "Lamont Springs Natural Area" (0.5 acres, more or less, to the South of Lakeview Blvd, and to the East of Bryant Road, at the corner of Lakeview Blvd and Bryant Road, located at 4600 Lakeview Drive).

Nature Preserve means natural area parks or open spaces owned by the City of Lake Oswego that are managed or maintained to retain their natural condition and prevent habitat deterioration. Nature Preserves that are subject to the limitations of this Chapter, which upon ratification will initially include, Bryant Woods Park, Canal Acres, Cornell Natural Area, Cooks Butte Park, Glenmorrie Greenway, Hallinan Woods, Iron Mountain Park, Kerr Open Space, Lamont Springs Natural Area, River Run, Southshore Natural Area, Springbrook Park, Stevens Meadows, Waluga Park – West, and Woodmont Natural Park.

River Run means the park land comprised of two parcels (River Run East and River Run West), owned by the City of Lake Oswego, which is commonly referred to as "River Run" (10.8 acres, more or less, to the East of Canal Road, to the North of the Tualatin River, located at 19690 River Run Drive and 3770 Rivers Edge Drive).

Southshore Natural Area means the park land owned by the City of Lake Oswego which is commonly referred to as "Southshore Natural Area" (9.2 acres, more or less, located at 1201 South Shore Blvd).

Springbrook Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Springbrook Park" (52 acres, more or less, to the South of Country Club Road, to the West and North of Wembley Park Road, and to the East of Boones Ferry Road). The term "Springbrook Park" does not include the City of Lake Oswego existing indoor tennis facility and adjoining parking lot.

Stevens Meadows means the two park lands owned by the City of Lake Oswego, which is commonly referred to as "Stevens Meadows" and the "Stevens Homestead" (27.8 acres, more or less, located at 18600 Shipley Drive and 1551 Childs Road, respectively).

Telecommunications Facility means any area, field, or building which is graded, leveled, constructed, or equipped for use in telecommunications or broadband communication, Antennas, Cellular Towers, Radio Masts and Towers, Satellite Dishes, and Emergency Communications Systems are examples of Telecommunications Facilities. This includes Telecommunications Facilities for both public or private use.

Waluga Park – West means the park land owned by the City of Lake Oswego which is commonly referred to as "Waluga Park – West" (22.8 acres, more or less, to the East of Inverurie Drive, to the North of SW Oakridge Road, to the West of Waluga Drive).

Woodmont Natural Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Woodmont Natural Park" (6.8 acres, more or less, at the corner of Atwater Rd and Atwater Lane, located at 13600 Atwater Lane).

(Amended November 2, 2021.)

Section 43. Limitations on Development.

The City of Lake Oswego shall insure that all development within a Nature Preserve is consistent with the preservation of a Nature Preserve as a natural area available for public enjoyment.

To facilitate public access and use, the City of Lake Oswego may build trails for hiking, jogging, horseback and bicycle riding, may provide benches and interpretive displays, and may provide picnic and sanitary facilities within a Nature Preserve. To access and use particularly fragile habitats, boardwalks may be built; however, trails shall refrain from using hard surface materials, such as asphalt and concrete, in order to remain consistent with the natural conditions of a Nature Preserve.

The City of Lake Oswego shall not construct or develop (or allow any person to construct or develop) any Athletic Facility, any Telecommunications Facility, or any parking lot, road, or trail for motorized vehicles within a Nature Preserve. The City of Lake Oswego shall not cut (or allow any person to cut) any tree in a Nature Preserve for the purpose of facilitating the construction or development of any Athletic Facility, any Telecommunications Facility, or any parking lot, road, or trail for motorized vehicles.

The City of Lake Oswego shall not construct or develop (or allow any person to construct or develop) any facility or any structure above ground that would impair or be inconsistent with the natural conditions of a Nature Preserve.

The City of Lake Oswego shall not cut (or allow any person to cut) any tree in a Nature Preserve for the purpose of commercial logging.

The City of Lake Oswego shall be allowed to maintain (or allow any person to maintain) a Nature Preserve for the purposes of ecological restoration that provides a safe and healthy natural area that is accessible for public enjoyment, provides a healthy habitat for wildlife, eliminates invasive species, restores native species, and mitigates fire hazards.

The City of Lake Oswego shall be allowed to maintain (or allow any person to maintain) any existing facility or existing structure, or any existing parking lot, road, or trail for motorized vehicles in a Nature Preserve constructed before November 2, 2021 that is above ground as long as that facility or structure, or parking lot, road, or trail for motorized vehicles is not altered in any manner that would further impair or be inconsistent with the natural conditions of a Nature Preserve.

The City of Lake Oswego shall be allowed to implement (or allow any person to implement) a park master plan for a Nature Preserve that was adopted before November 2, 2021.

(Amended November 7, 1978; November 2, 2021.)

Section 44. Effective Date.

This Chapter carries an effective date of November 2, 2021.

(Amended November 2, 2021.)

Section 45. Severability.

If a court should hold invalid or unconstitutional any clause or part of this Chapter, that holding shall not affect the remaining parts of this Chapter which are not held invalid or unconstitutional.

(Amended November 2, 2021.)

Section 46. Application to Other Park.

This Chapter shall apply to any other park (i) conveyed by property owners to the City of Lake Oswego with a "Nature Preserve" designation that shall carry with the property in perpetuity, (ii) nominated by the Parks, Recreation, and Natural Resources Board and/or the Director of Parks and Recreation designating such other park as a "Nature Preserve" and ratified by the City Council, (iii) ratified by voters specifically designating such other park as a "Nature Preserve," or (iv) acquired by a bond issued after the effective date of this Chapter if (and only if) the voters specifically designate such other park as subject to this Chapter. If any other park is designated as subject to this Chapter, then this Chapter shall apply to that park as if its name (preceded by the word "and") were added to the Nature Preserve definition of this Chapter.

(Amended November 7, 1978 [Note: from November 7, 1978 until June 30, 1980, this Chapter was numbered XXV and included Sections 102 through 107]; Renumbered Chapter on July 1, 1980; Amended November 2, 2021.)

Section 46A. Maximum Height of Structures in Residential Areas.

The City of Lake Oswego shall neither construct nor allow the construction of any structure which is more than 50 feet in height within a residential zone, except for the construction of a single symbolic appurtenance of a structure to 75 foot height. The City may, however, construct or allow the construction of a lighting structure which is more than 50 feet in height in a public park or school sports fields located in a residential zone. For purposes of this section the height of a structure or of a part or appurtenance of a structure shall be measured from the ground or sidewalk surface within a 5-foot horizontal distance of the exterior of the structure, provided such sidewalk or ground surface is not more than 10 feet above the lowest grade as defined by city ordinance; or, if such sidewalk or ground surface is more than 10 feet above lowest grade, height shall be measured from a point 10 feet higher than the lowest grade, to the top of the highest element of the building or structure.

(Amended May 19, 1987; March 24, 1992.)

The Lake Oswego Municipal Code is current through Ordinance 2922, and legislation passed through June 6, 2023.

Disclaimer: The City Recorder's Office has the official version of the Lake Oswego Municipal Code. Users should contact the City Recorder's Office for ordinances passed subsequent to the ordinance cited above.

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