

Additional Supplemental Oppositional Testimony

The Development Review Commission is being asked to apply the facts to the law to resolve the land use conflict between the voters' home rule Charter Amendment to retain and preserve the city parks natural areas from loss and the staff conditions to extend a sewer line through the natural areas of a park for connection to sewer facilities in the park in order to provide for the private development of five residential lots as follow up to an annexation of the land.

Home rule city voters have the authority to determine the scope of the powers of what their government can do. *Art. XI, section 2 and Art IV, section 1(5), Oregon Constitution*. The caveat to this power is whether there is statutory or constitutional authority expressly or impliedly preempting the home rule governing power that was exercised, usually in the form of an ordinance. See the attached Exhibit 1 excerpt review of the tests of home rule preemption and applying them to uphold the greater city ordinance protections for mobile home owners upon park closure over the state statute protections, *Thunderbird Mobile Home Club, LLC v City of Eugene, 234 Or 457, rev den 348Or 524 (2010)* and the cited case, *State ex rel Haley v City of Troutdale, 281 Or 203, 210-211 (1978)* where the Oregon Supreme Court upheld a home rule ordinance providing for double wall construction protection against the cold, east winds through the Columbia Gorge over the single wall construction requirement of the state building code even though ORS 456.775(1) stated: "the state building code shall be applicable and uniform throughout this state and in all municipalities therein, and no municipality shall enact or enforce any ordinance, rule, rule, or regulation in conflict therewith." The clear point is that the exercise of home rule authority that is not expressly preempted is given broad interpretation in applied situations to find consistency with state statutes addressing the same area, especially in the area of public protections.

However, in this hearing, there is no state statute that is being cited as contrary to the home rule provisions. Rather, there are state statutes delegating land use authority to the city. The purpose of retaining and protecting the natural resource areas of the city's parks is consistent with the state's delegation of power. Cities are authorized to protect and conserve their natural resources and open spaces, including parks, for current and future generations under statewide planning goal 5. ORS 197.175 (1) provides that a city exercise planning and zoning responsibilities in accordance with statewide planning goals. ORS 197.175(2)(a) provides the city's duty is to adopt a comprehensive plan consistent with statewide planning goals.

In accordance with the aforementioned delegation of power, the city adopted Ordinance No. 2687, effective January 14, 2016, *An Ordinance Of The Lake Oswego City Council Amending The Comprehensive Plan And Zoning Maps, The Comprehensive Plan Text, The Community Development Code, And Related Cross References, To Create Changes To The Natural Resource Program And Sensitive Lands Implementing Regulations And Adopting Findings (LU 15-0019)*.

In the attached Exhibit 2, ATTACHMENT B to Ordinance 2687, under the sections Urban Forest

and Vegetation, p 12-13 and Open Spaces, p 18-19, the same benefits from natural areas for public health, air, water, animals, and habitat that I provided in my initial written testimony are enumerated, but even more comprehensively described.

Equally compelling in this matter under the staff findings of “major issues” on pages 7 and 8 of attachment B: “Historically, new development and construction of utilities, especially sanitary sewers [emphasis added] lead to removal of vegetation, erosion, and degradation of streams.” and “natural resource protection and conservation are integral to the City’s overall water quality compliance program.”

Consistent with the delegated authority to cities to govern its land use planning and comprehensive plan in accordance with goal 5, the home rule voters, being the ultimate city authority to tell its government what to do, have done so. In the Charter, Chapter X, Park Development Limitation, have limited city government from what they may authorize to be develop in the natural areas and habitat in order that they be retained, preserved, and protected from loss. The only sanitary facilities authorized must be for the benefit of the park users and visitors.

It is easily deduced from the public record and city ordinances that city staff and the City Council knew 1) that new development and construction of sanitary sewers lead to removal of vegetation, erosion, and degradation of streams, 2) that natural resource protection and streams are integral to the city’s overall water quality compliance program, 3) the voters found the Amendment necessary to manage protection of its parks natural areas and habitat from development and as the campaign literature suggests, in response to what the voters saw as the failure of the city government to manage its land use authority to protect natural resources in the face of development, 4) the voters rejected staff’s drafted measure the City Council referred that ostensibly would allow a more nuanced approach for staff and the City Council to develop the parks natural areas through future ordinances, 5) an owner of a parcel of land outside the city boundary and adjacent to Waluga Park- West of land proposed to annex the parcel, seek a land division for 5 lots, and initially proposed using septic systems for the lots as it was discussed at the November 2, 2021 City Council meeting, and 6) alternative sewer systems are subject to DEQ regulations and exemption requirements for permitting of septic systems would be difficult to meet.

However, after the voter Amendment passed, staff drafted sewer connection regulations to the detriment of the voters’ protection intent, Ordinance 2890, adopted March 17, 2022, effective April 1, 2022, and which has subsequently been codified into the development code. The staff could have easily followed the voters’ intent and purpose by providing a limited exception to protect the parks natural spaces from loss by sewer line development that did not benefit the users and visitors of the park. The city has recognized it has exclusive management and control of its sewer system and their connections. LOC 38.04.010. In fact, staff did employ the use of limited exceptions for connections. Staff provided some limited exception alternatives subject to

further limitation under the DEQ administrative rules for alternative sewer systems for single-family lots within 300 feet of a sewer line in Ordinance 2980.

Nevertheless, the Ordinance provides “all land use divisions for structures and buildings normally used or inhabited by persons shall connect to an existing sewer line or main.” As structured by staff, this would place the extension of the sewer line for private development through the park’s natural area to connect to the existing sanitary facilities in the park.

Ordinance 2890’s failure to protect from the known loss to the natural areas and habitat that would be caused by a sewer line that benefits only private development outside the park, is contrary to goal 5, the eco protections of the city’s Comprehensive Plan, and the voters’ intent to limit development that would otherwise bring destruction and loss to the parks’ natural areas and habitat.

Like management of city owned parks, no one seriously questions that the city has the authority to control and manage its own sewer system. What is at play is the hierarchy of that control and management. The law clearly places the ultimate authority with the voters. The voters can and have managed their parks natural areas to allow sewer facilities for the benefit of the park users and to retain and conserve those natural areas from further loss from sewer lines that benefit private development located outside of its parks. The effect of the Amendment’s language protections can be read together with Ordinance 2890 to impose a limited exception: Sewer lines that only benefit private development and would cause loss of natural areas and habitat in the designated parks may not be connected to park sewer facilities. This gives the liberal interpretation that is called for in the purpose statement to preserve the parks’ Natural Reserve protections. It is in keeping with the rules of statutory construction for consistency in reading two provisions dealing with the same subject matter together, in *pari materia*. This allows single family lot and land division connection provisions of Ordinance 2890 to otherwise remain intact.

If they cannot be read in *pari materia*, as the legal authorities cited in my earlier written testimony hold, municipal charter provisions supersede and preempt contrary ordinances that can not be read as being consistent.

I respectfully submit under either of the above interpretations, the law requires that the sewer line conditions be held invalid and the application as conditioned should be denied.

Cordially submitted,



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EXHIBIT 1

JUSTIA

Thunderbird Mobile Club v. City of Wilsonville

FILED: March 24, 2010

IN THE COURT OF APPEALS OF THE STATE OF OREGON

THUNDERBIRD MOBILE CLUB, LLC,

Plaintiff-Respondent
Cross-Appellant,

v.

CITY OF WILSONVILLE,

Defendant-Appellant
Cross-Respondent.

Clackamas County Circuit Court

CV05110027

A134750

Eve L. Miller, Judge.

Argued and submitted on January 22, 2009.

Paul A. Lee argued the cause for appellant - cross-respondent. With him on the briefs were Michael E. Kohlhoff and City of Wilsonville.

William Dickas argued the cause for respondent - cross-appellant. With him on the briefs was Kell, Alterman & Runstein, LLP.

Thomas Sponsler, Nancy L. Werner, and Beery, Elsner & Hammond, LLP filed the brief amicus curiae for League of Oregon Cities.

Before Wollheim, Presiding Judge, and Brewer, Chief Judge, and Sercombe, Judge.*

SERCOMBE, J.

General judgment reversed on appeal and on cross-appeal and remanded; supplemental judgment for costs and attorney fees vacated and remanded.

* Brewer, C. J., vice Edmonds, P. J.

SERCOMBE, J.

Plaintiff, the owner of a mobile home park, filed a declaratory judgment action against the City of Wilsonville (city) to invalidate the city's ordinances that regulate the conversion of mobile home parks to other uses. Following a trial, the trial court entered a judgment declaring that those ordinances are preempted by state law and violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The city appeals and contends that the controversy is not justiciable, the ordinances are not preempted, and the ordinances are not invalid as a matter of substantive due process. The city also asserts that the trial court erred in awarding attorney fees under 42 USC section 1988.

Plaintiff disputes the city's contentions and cross-appeals, assigning as error the trial court's failure to invalidate the ordinances for additional reasons. Plaintiff asserts that the trial court should have found that the operation of the ordinances effects an uncompensated taking of plaintiff's property and money, that the operation of the ordinances unconstitutionally impairs the obligations of lease agreements between defendant and its tenants, and that the operation of the law to affect only mobile home parks within the city boundaries violates uniformity policies in the state and federal constitutions.

We conclude that the issues raised in the city's appeal are justiciable and that the ordinances are not preempted under state law or facially unconstitutional under the Due Process Clause. We also conclude that the trial court erred in failing to determine whether the ordinances are invalid on their face for the alternative reasons plaintiff advances in its cross-appeal, and we remand for a determination on the justiciability and merits of those

It is true, as the city points out, that plaintiff has not sought to close the park, avoid the ordinance requirements, or gain relief under the ordinance's provisions. Nor has plaintiff entered into a sale contract conditioned on compliance with the ordinance. But none of those are steps that plaintiff is required to take to pursue his challenges to the lawfulness of the ordinance on preemption or substantive due process grounds, so long as the facts otherwise indicate that the mere enactment of the ordinance has affected plaintiff's legal interests. Because the facts in this case demonstrate that plaintiff has already reached the point at which his legal interests "are affected" by the ordinance, we conclude that the trial court did not err in holding plaintiff's preemption claim to be justiciable and that jurisdiction exists to determine both the preemption and due process clause claims on appeal.(3)

III. PREEMPTION AND MUNICIPAL AUTHORITY ISSUES

The city contends that the trial court erred in concluding that the mobile home park conversion ordinances were preempted by portions of the Residential Landlord Tenant Act. It argues that no preemption occurred because the state law does not expressly preempt local legislation and because the local law can operate concurrently with state law. Plaintiff asserts, however, that the municipal ordinances cannot prohibit what state law expressly permits--the conversion of mobile home parks on the payment of certain benefits and without obtaining a local permit. Plaintiff alternatively claims that the city's exercise of this kind of legislative authority is beyond its home rule powers under the state constitution. We conclude that the adoption of the ordinances was within the city's authority under Article XI, section 2, of the Oregon Constitution and that the ordinances are not preempted by state statutes.

The city's power to adopt the ordinances and any preemptive effect of state law on those ordinances are regulated by provisions of the Oregon Constitution that provide "home rule" for cities and towns that adopt municipal charters. Those provisions were adopted in 1906 by an initiative amendment to the constitution. Article XI, section 2, provides, in part:

"The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon * * *."

A companion amendment amended Article IV, section 1, of the Oregon Constitution that "reserved" the initiative and referendum powers of voters for state laws to "further reserve[] to the qualified voters of each municipality and district as to all local, special and

municipal legislation of every character in or for their municipality or district." Or Const, Art IV, § 1(5).

The primary purpose of the home rule amendments was "to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the amendments." *LaGrande/Astoria v. PERB*, 281 Or 137, 142, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978). The home rule amendments also carve out some limited autonomy for municipal ordinances from overriding state law, but otherwise do not limit the primacy of state legislation over inconsistent municipal enactments. As the Supreme Court explained in *LaGrande/Astoria*:

"Outside the context of laws prescribing the modes of local government, both municipalities and the state legislature in many cases have enacted laws in pursuit of substantive objectives, each well within its respective authority, that were arguably inconsistent with one another. In such cases, the first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive. It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by statewide law unless that intention is apparent."

Id. at 148-49 (footnote omitted). *LaGrande/Astoria* sets out principles for resolving conflicts between a state statute and a municipal law:

"When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.

"Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization."

Id. at 156 (footnote omitted).

Within the area of civil regulation, then, a chartered city can enact substantive policies in an area also regulated by state statute unless the local regulation is "incompatible" with state law either in the sense of being "clearly" preempted by express state law or because "both [state law and local law] cannot operate concurrently." Incompatible state and city laws are then assessed under the conflict resolution principles in *LaGrande/Astoria*. But it is presumed that the legislature did not mean to impliedly repeal the provisions of a city's civil or administrative law, and courts should seek to reconcile the operation of both state and local laws if possible.

Applying those principles, plaintiff first argues that the city's ordinances are expressly preempted by ORS 90.115, which sets out the scope of the Oregon Residential Landlord and Tenant Act. ORS 90.115, however, declares only the intended operation of state law. It does not explicitly limit the applicability of municipal law. *LaGrande/Astoria* and its progeny require an expressly stated intent to preempt particular municipal enactments in order for a state statute to have that effect. Thus, in *State ex rel Haley v. City of Troutdale*, 281 Or 203, 210-11, 576 P2d 1238 (1978), the Supreme Court rejected the contention that city building code requirements that exceeded the standards of the state building code were preempted by ORS 456.775(1), a statute that provided:

"The state building code shall be applicable and uniform throughout this state and in all municipalities therein, and no municipality shall enact or enforce any ordinance, rule or regulation in conflict therewith."

The court stated that it was "reluctant to assume that the legislature meant to confine the protection of Oregon residents exclusively" to the state code requirements "and to place these beyond the power of local communities to provide additional safeguards[.]" *Id.* at 211. The court found that the statutory text lacked manifest preemptive intent:

"Certainly, that intention is not unambiguously expressed. Until it is, we conclude that local requirements compatible with compliance with the state's standards are not preempted[.]"

Id.

This court decided an analogous preemption issue in *AT&T Communications v. City of Eugene*, 177 Or App 379, 35 P3d 1029 (2001), rev den, 334 Or 491 (2002). There, telecommunications companies sought to enjoin the operation of a city ordinance that imposed registration and licensing fees on providers of telecommunications services within the city. *Id.* at 381-84. The plaintiffs argued that the ordinance was preempted by ORS

759.030(1), which provided that "the Public Utility Commission shall have authority to determine the manner and extent of regulation of telecommunications services within the State of Oregon." *Id.* at 394. We first noted that, "when the legislature wishes to preempt local government regulation in a particular field, it knows how clearly to do so." *Id.* at 394-95.(4) We added that the use of the word "preempt" is not necessary to state a preemptive effect, noting a number of state statutes that explicitly displace local regulation. *Id.* at 395.(5) Given the requirement from LaGrande/Astoria that the legislature's preemptive intentions be clearly stated, we concluded that ORS 759.090 was not a "clear and unequivocal statement of preemptive intent" because "that is not what the statute says. While it confers authority on the PUC, it does not expressly confer exclusive authority on the PUC." *Id.* at 397 (emphasis in original). In *Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624, 634-35, 4 P3d 748, rev den, 331 Or 429 (2000), we similarly required clear legislative intent ("an express or otherwise clearly manifested intention that the state's legislation is to be exclusive") to displace county civil regulation of water well construction.(6)

Tested by those standards, the city's ordinances are not expressly preempted by ORS 90.115. The statute contains neither text stating an express preemption (e.g., "the State of Oregon hereby preempts") nor a clearly manifested intention that the operation of state law be exclusive (e.g., "no city, town, county or other political subdivision of this state shall adopt or enforce any ordinance, rule or regulation regarding" a particular subject area). Instead, ORS 90.115 merely states the territorial scope of the Residential Landlord and Tenant Act (as applicable to "a dwelling unit located within this state"). That is insufficient to state an "apparent" intent to preempt under LaGrande/Astoria.

Plaintiff next contends that the city's ordinances are implicitly preempted by state law because the ordinances supplement the requirements of the Residential Landlord and Tenant Act. Plaintiff argues that the additional requirements of the city's ordinances--beyond the one-year notice of termination, or at least 180-days notice of termination together with "space acceptable to the tenant to which the tenant can move" and payment of moving expenses, or \$3,500, whichever is less, required by ORS 90.630(5) (2005)--prohibit conversions of mobile home parks that were otherwise unrestricted under state law and are therefore "incompatible" with state law. Under LaGrande/Astoria, however, the occupation of a field of regulation by the state has no necessary preemptive effect on the civil or administrative laws of a chartered city. Instead, a local law is preempted only to the extent that it "cannot operate concurrently" with state law, i.e., the operation of local law makes it impossible to comply with a state statute. Here, the provision of any tenant displacement benefits required by the city ordinances still allows compliance with the less-

generous requirements of the Residential Landlord and Tenant Act and both policies can operate concurrently.

We have consistently held that a civil regulation of a chartered city will not be displaced under Article XI, section 2, merely because state law regulates less extensively in the same area. Thus, in *Oregon Restaurant Assn. v. City of Corvallis*, 166 Or App 506, 508-09, 999 P2d 518 (2000), we upheld a city prohibition on smoking in all enclosed public places, notwithstanding the less extensive regulations of the Oregon Indoor Clean Air Act, ORS 433.835 to 433.875. We concluded that "we are reluctant to assume that the legislature, in adopting statewide standards, intended to prohibit a locality from requiring more stringent limitations within its particular jurisdiction." *Id.* at 511. We summarized the applicable principles in *Springfield Utility Board v. Emerald PUD*, 191 Or App 536, 541-42, 84 P3d 167 (2004), *aff'd*, 339 Or 631, 125 P3d 740 (2005):

"A local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state, nor because the ordinance and the state law deal with different aspects of the same subject. Rather, we generally assume that the legislature did not mean to displace local regulation of a local condition unless its intent to do so is apparent."

(Citations omitted.) Thus, we conclude that the city's ordinances are not implicitly preempted as incompatible with state law because the ordinances impose greater requirements on owners of mobile home parks than mandated by the Residential Landlord and Tenant Act.

Plaintiff nonetheless asserts that the ordinances "conflict" with state law because they prohibit, without a permit and the provision of tenant benefits, what state law allows--the conversion of a mobile home park after one year's notice to tenants. Plaintiff relies on *Ashland Drilling, Inc.*, where, in analyzing the preemption of a county civil regulation by state law, we stated that the "relevant question is whether the ordinances 'conflict' with state law, i.e., that the local legislation prohibits what the state legislation permits or permits what the state legislation prohibits." 168 Or App at 635 (citing *City of Portland v. Jackson*, 316 Or 143, 146-47, 850 P2d 1093 (1993)). We then upheld some of the county regulations using the LaGrande/Astoria analysis applicable to civil laws, notwithstanding state regulation in the same area. *Id.* at 648.

The preemption test referenced in *Ashland Drilling, Inc.* and relied on by plaintiff is one that applies to the preemption of local criminal laws by a state criminal statute. The preemptive effect of a state criminal statute is determined by a different test than the

LaGrande/Astoria standards for preemption of civil regulations. As noted earlier, Article XI, section 2, refers to municipal charters as being "subject to the Constitution and criminal laws of the State of Oregon." As Professor Diller observes:

"Under a hyper-literal interpretation, one might conclude that only charter provisions, and not municipal ordinances, need conform to the constitution and criminal laws of Oregon. This argument is perhaps so self-evidently absurd that it has not been seriously argued. Additionally, one might conclude that charter provisions must conform only to the state's constitution and its criminal laws, but not to the state's civil laws. While this argument has also never been seriously pressed, the amendment's specific mention of 'criminal laws'--and the absence of any specific mention of 'civil laws'--has led to an important distinction in Oregon local government law: the amendment establishes a rebuttable presumption that municipal criminal ordinances are invalid, whereas civil ordinances are presumed valid."

Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 Or L Rev 939, 945 (2009) (footnotes omitted).

The presumptive invalidity of municipal criminal laws that are inconsistent with state criminal laws was established in *City of Portland v. Dollarhide*, 300 Or 490, 501, 714 P2d 220 (1986). That rule was later refined in *Jackson*, 316 Or at 149-51. In *Dollarhide*, the defendant challenged a city's mandatory minimum sentence for the crime of prostitution that was more onerous than the sentence allowed under state law. 300 Or at 493. The court held that, under the wording of Article XI, section 2, it was "left with the inescapable conclusion that the voters who adopted Article XI, section 2[,] envisioned a stricter limitation on the lawmaking power of cities in respect of criminal laws than with regard to civil or regulatory measures." *Id.* at 497. The test for whether a local criminal ordinance conflicts with state law was "whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits." *Id.* at 502 (footnote omitted). The court explicitly stated that this same test was not to be applied to the preemption of civil or administrative laws:

"The present decision limits only the cities' use of 'criminal laws' within the meaning of Article XI, section 2. As long as a city ordinance employs civil or administrative procedures and sanctions lacking punitive significance, the validity of the ordinance must meet only the tests stated in *LaGrande/Astoria* * * *, for substantive city policies generally, rather than the more stringent constraints of the phrase in Article XI, section 2, that expresses the dominance of state criminal laws over the creation and punishment of local criminal offenses."

Id. at 503 (citation and footnote omitted).

In Jackson, the court refined the meaning of circumstances where a state law permits what a local criminal ordinance prohibits, concluding that, "[w]hen a local criminal ordinance prohibits conduct, unless the legislature has permitted that same conduct, either expressly or under circumstances in which the legislative intent to permit that conduct is otherwise apparent, the ordinance is not in conflict with state criminal law and is valid under Article XI, section 2, of the Oregon Constitution." 316 Or at 149.

Again, the formulation of preempting laws that prohibit conduct that state law permits arises solely in the context of preemption of municipal criminal laws. We therefore disavow the dictum in Ashland Drilling, Inc. that suggests the application of the Jackson test for preemption of local criminal laws to municipal civil regulations and conclude that, here, the city's authority to regulate mobile home park conversions was not preempted by state law.

Plaintiff alternatively contends that the city lacks authority to regulate the conversion of mobile home parks because that authority is not municipal in character as reserved by the home rule amendments, but instead conflicts with "substantive areas of private law which are the sole domain of the state legislature." Plaintiff reasons that regulation of the landlord-tenant relationship is a traditional function of state government and immune from local policy controls in much the same way as marriage legalization was found to be outside the authority of counties to regulate in *Li v. State of Oregon*, 338 Or 376, 110 P3d 91 (2005). In *Li*, the Supreme Court concluded that a county lacked authority to adopt policies on the issuance of marriage licenses because "the state and, more specifically, the legislature, is the locus of power over marriage-related matters in Oregon." Id. at 392. The court determined that the state power "is broad enough to preempt * * * policies generated by a political subdivision of this state, such as the county." Id.

The decision in *Li* is not analogous in a number of respects. First, the authority of a chartered county to regulate in the face of competing state law under the county home-rule provision in the state constitution, Article VI, section 10, may be different than the balance struck in *LaGrande/Astoria* under the city home-rule provision of Article XI, section 2. See ___ Or App at ___ n 6 (slip op at 17 n 6). At least as to conflicts between substantive laws of a home-rule city and the state, the *LaGrande/Astoria* court eschewed conflict resolution on the basis of whether the area of conflict was predominantly of statewide or local concern, overruling in part the legal test for preemption previously used by the court in *State ex rel Heinig v. Milwaukie et al*, 231 Or 473, 479, 373 P2d 680 (1962). That type of comparison, according to the court, "must often involve a choice among values that have no common

denominator either in or outside the constitution. * * * Such choices are the essence of political, not judicial, decision." LaGrande/Astoria, 281 Or at 148. Instead, under the principles set out earlier, a substantive civil law of a home-rule city is displaced by state law when it is incompatible with state policy "either because both cannot operate concurrently or because the legislature meant its law to be exclusive." Id. at 148-49. The city's ordinances are not incompatible with state policy in those respects.(7)

Finally, to whatever extent Li suggests that there are inherent limits to city home-rule authority to regulate transactions or relationships that are traditionally and exclusively regulated under state law, such as laws relating to marriage, the city's ordinances do not fit that category of laws. Unlike marriage legalization, the city's regulation of plaintiff's land uses in general, and preservation of low-income housing in particular, are well within the city's longstanding delegated authority under state statutes and administrative rules. See, e.g., ORS 227.090(1)(C) (authority of city planning commission to establish zoning districts); ORS 227.215(1) (authority of city to adopt development ordinances that regulate "making a material change in the use * * * of * * * land"); ORS 197.175(1) (obligation of city to exercise planning and zoning responsibilities in accordance with statewide planning goals), ORS 197.175(2)(a) (city duty to adopt comprehensive plan consistent with statewide planning goals), and OAR 660-15-0000(10) (statewide planning goal 10, requiring that cities "encourage the availability of adequate numbers of needed housing units" and defining "needed housing units" to include "manufactured homes, whether occupied by owners or renters"); ORS 197.295 - 197.314 (statutory policies on city provision of "needed housing" in urban areas); ORS 197.475 - 197.490 (statutory policies on placement and restrictions on mobile home or manufactured dwelling parks by cities). Cf. ORS 100.320 ("A city or county may adopt an ordinance that requires a declarant to pay the moving expense of a tenant vacating a conversion condominium unit."). The area of commerce regulated by the city's ordinances, then, is not within the "locus of power" traditionally and exclusively reserved to the state under applicable case law.

We conclude that the trial court erred in determining that the city's ordinances were preempted or otherwise displaced by state law.

IV. SUBSTANTIVE DUE PROCESS

In the city's third assignment of error, it argues that the trial court erred in concluding that the ordinances violated the substantive due process component of the Fourteenth Amendment. Specifically, the trial court concluded:

Urban Forest and Vegetation

Background

Many factors contribute to a high quality of life in Lake Oswego. Few things contribute more to Lake Oswego's livability than its natural beauty. The abundant tree groves, flourishing street trees, densely wooded parks and open spaces attest greatly to the City's charm and character. Trees contribute generously to private landscapes, and provide privacy and noise buffers between land uses. The mere presence of trees puts people at ease, as evident in multiple studies that show people maintain more vigorous health and mental faculties when trees are present in their neighborhoods or visible from their windows.

"Urban Forest" refers to the trees and vegetation in urban and suburban areas—street trees, landscape trees and plants, and the remnants of the wild forest. The urban forest functions as an ecological unit and provides important benefits to urban residents. Community Forestry is a collaborative approach to managing the urban forest. It brings together City government, residents, and other local stakeholders to shape the policies and practices that affect our forest resources. Community Forestry promotes education, dialogue, and voluntary stewardship to protect the health and integrity of the urban forest.

Lake Oswego's Community Forestry Program began in 2006 as a grant-funded project through Northwest Service Academy, which has provided AmeriCorps members to manage the program. The City, with the AmeriCorps member organized a series of public events to create public dialogue on forestry issues and identify priorities for the program. This feedback, along with interdepartmental efforts among City staff resulted in the Urban and Community Forestry Plan adopted by City Council in February, 2008. The plan synthesizes existing tree-related policies and procedures, best management practices, expert knowledge and citizen input to create a vision for the future of Urban and Community Forestry in Lake Oswego.

In 2009, as recommended by the Urban and Community Forestry Plan, the City prepared its first State of the Urban Forest Report, which analyzed the structure, function and value of the City's street tree population and provided basic information about City-wide tree canopy cover. This report identifies the benefits of maintaining a healthy urban forest, as summarized below.

Economic Vitality

The aesthetic value of the City's urban forest extends to the community's economic vitality. Research by the organization American Forests shows that investment in green infrastructure is cost effective for communities. Communities that invest in urban forests alongside traditional infrastructure are more livable in the long term. Studies have also correlated tree canopy cover to real estate values; trees along streets and on private property can increase property values up to 20%. Other studies show that consumers spend more and shop longer in retail areas where trees are present. Yet even these methods of quantification cannot account for benefits

such as crime reduction, business district success, public health improvement, and wildlife habitat.

Reduce Energy Costs

Shade from trees can reduce the need for air conditioning in summer by up to 30%. By breaking the force of winds in the winter, trees can reduce heat loss from residences by up to 50%; effectively lowering energy bills. The cooling shade from trees can also help extend the life of outdoor infrastructure; keeping pavement shaded can reduce urban temperatures by up to 9 degrees Fahrenheit and lengthen pavement life.

Clean the Air

Trees reduce the impact of greenhouse gases by removing carbon dioxide and releasing oxygen. They improve air quality by reducing the formation of smog and capturing airborne dust particles on their leaves. By reducing the heating and cooling needs of homes and buildings, they also effectively reduce emissions that contribute to the greenhouse effect.

Slow Runoff and Prevent Erosion

Leaves break the force of rain, allowing water to percolate into soils (where soils allow) or slowing the rate of surface water runoff, reducing flooding. Trees play a crucial role in holding the soil in place on steeper hillsides, preventing erosion and improving water quality.

Attract Wildlife

Trees provide habitat for many types of desirable wildlife in urban settings. Along with shrubs and other plants, they create protection from the elements and predators, a place to rest and sleep, and nesting sites for rearing their young. Many animals, including birds, mammals, bees and other pollinators, use tree foliage, flowers, nuts, and fruit as a source of sustenance.

Water Quality

In addition to controlling erosion and reducing the potential for flooding, trees help protect water quality by reducing heat pollution. Tree canopy over impervious surfaces reduces pavement temperature. During a rainfall event, thermal energy is transferred from impervious surfaces to storm water runoff, causing the runoff to become warmer. This high temperature runoff can be harmful to cold water habitat in receiving waters. Second, canopy cover over streams reduces direct heat gain by streams from solar radiation. In 2009, the average canopy cover in the City's stream corridors using a 100-foot buffer was 70.2% and 77.2% using a 50-foot buffer. According to Metro studies, the City's streamside canopy cover within 50 feet of streams is about 15% above the regional average. (Source: Lake Oswego State of the Urban Forest Report, 2009).

Summary of Issues

The following are some of the issues, changed circumstances, and conditions which were considered in the update of the Urban Forest and Vegetation section of the Comprehensive Plan.

The State of the Urban Forest

There is a need to update the State of the Urban Forest Report (2009). This Report documents the condition of the urban forest and provides baseline data for which further monitoring and management. The report should be periodically updated so that the City can continue to make informed decisions and ensure the greatest return on the public's investment in urban forestry.

As Lake Oswego approaches build-out and its trees mature, there should be a greater emphasis on maintenance and management of the urban forest as a natural system. This would include removal of invasive plants, and other practices that promote forest health and diversity. Forest practices should help the City and property owners avoid or reduce the risk of catastrophic events, such as tree blow-down from wind storms, wildfires, landslides, pest infestations, and other plant diseases. This is also a public safety concern.

As identified in the 2009 Report, the City has a disproportionate number of small diameter street trees and half of the recommended large diameter trees in the public right-of-way. (The opposite is true for properties outside the right-of-way.) Due to their large sizes at maturity Douglas-fir and big-leaf maple are planted less often in the public rights of way. Unless these species are replaced (through increased stocking levels of young trees), the roadside canopy of mature trees will eventually decline.

Invasive plant species are another threat to the urban forest. The most pressing threat locally is English Ivy (*Hedera helix*). The City, Tryon Creek State Natural Area, and local Friends groups, among others, are actively engaged in the removal of invasive species.

Tree Code (LOC 55)

In 2015, the City Council amended the Tree Code (LOC 55) to provide a more flexible permit process for large forested parcels that is focused on urban forestry principles rather than individual tree regulations while still maintaining the wooded character of the City. The primary objective of amendment was to encourage and assist owners of large forested tracts in managing their property, while providing safeguards for neighborhood character, protection of water quality, and erosion control. The amendment created separate permitting processes for forested properties of one acre or larger.

In spring 2015, the City held a Community Forestry Summit, in part, to engage the community in a dialogue about the Tree Code. The City processes over one thousand tree removal permits annually, as well as over one hundred permits for tree protection during construction. In the City's 2013 Community Attitudes Survey, 51% of respondents said the Tree Code is overly restrictive. While this is only a slim majority, there is agreement that the permit process can be improved, and that the City should seek to reduce administrative costs while protecting the

wooded character of the community. The 2015 Community Attitudes Survey asked different questions, but feedback regarding the Tree Code was generally consistent with the 2013 survey.

Water Quality

The Willamette River and many of its tributaries, including Tryon Creek, exceed the maximum water temperature standard for the State of Oregon. Temperature standards were designed to protect certain fish species during critical periods when they use rivers for spawning, rearing, migration, or other life stages. The Federal Clean Water Act, as administered by the DEQ, requires that impaired water quality be addressed, for example, through DEQ's Total Maximum Daily Load (TMDL) provisions. One of the ways that the City does this is by maintaining streamside shading with tree canopy cover. Under the 2015 Sensitive Lands revisions, stream buffers are maintained in compliance with the Clean Water Act. The corrections the City made to the Sensitive Lands Map in 2015 (e.g., consistent application of buffers to both sides of RP district streams) are also helping to meet the City's TMDL targets for temperature by protecting riparian area shade.

Goal

Protect and enhance the functions and values of Lake Oswego's urban forest and beneficial vegetation.

Policies

1. Encourage the protection and enhancement of existing vegetation that has both natural resource value and aesthetic qualities, including mature trees and native plant communities.
2. Maintain development standards that preserve trees and other vegetation through innovative site and building design, including the clustering of buildings.
3. Maintain a voluntary Heritage Tree program to protect significant trees and tree groves.
4. Provide and maintain landscaping standards for new development to:
 - a. Visually enhance development projects;
 - b. Provide buffering and screening between differing land uses;
 - c. Reduce surface water runoff, maintain water quality, and maintain soil stability;
 - d. Reduce energy use by using vegetation for shade and windbreaks;
 - e. Encourage the use of native plants; and
 - f. Ensure the establishment and continued maintenance of landscape areas.

5. Require the establishment and maintenance of landscaped areas in parking lots to:
 - a. Provide shade and mitigate the negative visual, sound, and environmental impacts of parking lots; and,
 - b. Provide buffering and screening between parking lots and adjacent land uses.
6. Require street tree planting with new development.
7. Prohibit the use of invasive species in any new landscaping or street tree planting.
8. Preserve and enhance trees and vegetation within rights-of-way and public lands.
9. Maintain standards and permit procedures that protect trees during construction.
10. Update and maintain code standards and permit procedures for tree removal that protect the wooded character of the community and which are based on sound urban forestry principles. Maintain clear and objective standards for:
 - a. Forest management on large tracts of land, both public and private;
 - b. Tree protection during construction; and
 - c. Forest/tree management on developed lots.
11. Encourage the protection of tree groves and other significant vegetation within the unincorporated portion of the Urban Services Boundary (USB) through annexation policies, intergovernmental agreements, public education, and other methods.

Recommended Action Measures

- A. Permanently protect significant trees and tree groves through public acquisition, conservation easements, land donations, and other voluntary methods.
- B. Update and maintain the Tree Code to emphasize retention of overall tree canopy and to maintain the health and diversity of the urban forest, while balancing private property rights with community aesthetics and livability. (Note: The Tree Code is not a land use regulation but contains standards that are applied to development.)
- C. Develop programs and educational outreach materials that emphasize the contribution of trees and vegetation towards improved water quality, erosion control, slope stability, microclimate moderation, and community aesthetics.
- D. Develop an ongoing planting and maintenance program for trees and other vegetation that uses native plants where appropriate within rights-of-way and public lands.

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- E. Ensure adequate right-of-way width to allow for sufficient space for tree planting.
- F. Evaluate tree canopy cover and update the State of the Urban Forest Report on a regular basis, at least every five years.
- G. Protect tree groves and other significant vegetation on City owned properties within the unincorporated portion of the USB.

Open Spaces

Background

Lake Oswego's character and identity are closely tied to its open spaces, which includes natural areas, parks, ball fields and golf courses. These natural and manmade assets provide habitat resources for wildlife, aesthetic and scenic resources. They also provide flood and water quality protection, as well as enhanced property values derived from the presence of trees, views (e.g., water bodies, wooded skyline, and mountains), or proximity to recreation facilities.

Lake Oswego's open spaces includes land in public and private ownership and consists of both natural areas and parks. These areas are important to Lake Oswego residents. In 1975, numerous community volunteers participated in the first natural resources inventory, called the Lake Oswego Physical Resources Inventory (LOPRI). The inventory data was used to create policies and development standards to protect open spaces and natural resources. Since the original Comprehensive Plan was approved in 1978, the City has acquired much open space. Lake Oswego voters approved a \$12 million open space bond issued in 1990 to fund the purchase of open space lands and to develop pathways.

In 2008, the City adopted Parks 2025, a long range plan for the City's parks and open space resources. As Lake Oswego approaches a fully developed state, there will be a need to place greater emphasis on managing, maintaining and enhancing the open spaces it now owns. In addition, the larger City open space lands that abut the City limits to the south of Lake Oswego represent an opportunity for the City, neighboring jurisdictions, and responsible agencies to preserve open spaces and to provide open space buffers as a transition between neighborhoods and communities far in advance of development pressure, consistent with the Urbanization chapter of the Comprehensive Plan.

Summary of Issues

The following are some of the issues, changed circumstances, and conditions which were considered in the update of the Open Spaces section of the Comprehensive Plan:

- There is a need to coordinate the City's plans for managing open spaces with efforts to enhance natural resources and implement sustainable urban forestry practices.
- As the community reaches build-out, there will need to be a greater emphasis on maintaining and enhancing existing open spaces as compared to acquiring more open space lands.

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HEALTHY ECOSYSTEMS COMPREHENSIVE PLAN CHAPTER

- Managers of private open space areas, such as homeowners associations, face many of the same maintenance and management issues that the City faces, and some are better equipped than others to carry out these responsibilities. The City should provide education and technical support where appropriate.
- Protection and proper management of open spaces is critical to maintaining water quality and watershed health.

(See also, the Community Culture Chapter – Recreation, for issues, goals, policies, and recommended action measures pertaining to recreation.)

Goal

Protect, enhance, maintain, and expand a network of designated open space areas and scenic resources within and adjacent to the Urban Services Boundary.

Policies

1. Establish and maintain an open space network of public land which:
 - a. Provides outdoor recreation activities and preserves natural areas in an intact or relatively undisturbed state;
 - b. Provides access to scenic resources and distinctive aesthetic qualities such as views of Mount Hood, Oswego Lake, the Willamette River, the Stafford Basin, the Tualatin Valley, and forested ridge lines;
 - c. Preserves areas valued for community identity benefits such as urban forest and rock outcroppings;
 - d. Protects the public from natural hazards, such as areas subject to flooding, geological instability, or high erosion potential;
 - e. Provides buffers between dissimilar uses;
 - f. Preserves fish and wildlife habitat; and,
 - g. Provides opportunities for pedestrian and bicycle linkages.
2. Where open space is required in new subdivisions, use dedications, deed restrictions, covenants, or other conditions of development approval, as appropriate.
3. Provide and maintain development standards that prioritize protection rather than mitigation of open space functions and values.
4. Require a higher level of regulatory protection for natural resources located on public open spaces and on private open space tracts created through the development process.
5. Establish and maintain open space buffers and protected view corridors between Lake Oswego and adjacent communities.

Recommended Action Measures

- A. Promote the voluntary dedication of open spaces through methods such as life estates, land donation, and conservation easements.
- B. Develop and implement management plans for public open spaces to control access and maintain a balance of protected natural areas and areas open to the public.
- C. Manage the public open space network to protect and enhance its existing tree canopy, water quality benefits, and wildlife habitat.
- D. Coordinate with homeowners associations and periodically review and update City code requirements to promote efficient and effective management of open space areas; provide education and technical support where appropriate.
- E. Identify opportunities for restoration* and planting of native trees and plants.
- F. Provide adequate funding and seek grants to enhance and restore natural resources on public lands.
- G. Utilize a volunteer coordinator to work with citizen “Friends” groups and other community volunteer organizations to assist with restoration*, maintenance and enhancement of public lands.
- H. Utilize the Lake Oswego Parks, Recreation and Natural Areas System Plan (Parks Plan 2025) to guide future open space acquisition and development. See also, the Community Culture Chapter, Recreation Section.
- I. Coordinate open space conservation efforts with area Friends groups.