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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

State et rel. New Look Development)
LLC) NO. 24CV03746
Plaintiff, Relator) INTERVENOR SUPPLEMENTAL
) MEMORANDUM
v)
City of Lake Oswego,)
Defendant.)

SUMMARY Chapter X (Chapter Amendment) falls within ORS 197.015. The language of the Chapter X is municipal regulatory legislation. It regulates the use of land. Therefore, when the Citizens Initiative was certified for the ballot by the City Council it was a final land use decision regulating land. The fact it was never appealed also makes it a final land use regulation regulating land. Additionally, the fact its provisions have a significant impact on park lands now and in the future make it a final land use regulation regulating land. Thus, the Charter Amendment is of the same class and type of regulation as in and included in ORS 197.015 (10).

DISCUSSION Intervenor hereby replies to Plaintiff’s Memorandum. Plaintiff’s Supplemental Memorandum fails to correctly interpret ORS 197.015. It seeks to interpret it

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2 in a manner that would amend the voters home rule authority to restrict and control the
3 governing powers of the City Council and to preempt contrary local ordinances.

4 To start with, Plaintiff misinterprets ORS 197.015 (10) as being exclusive to the
5 subdivisions (i)-(iv). It is not.

6 ORS 197.015 is subsection (10) (a) states:

7 “‘Land use decision’:

8 (a). *Includes*:

9
10 (A). A final decision or determination by a local government or special district that

11 concerns the adoption, amendment or application of:

12 (i) The goals;

13 (ii) A comprehensive plan provision;

14 (iii) A land use regulation; or

15 (iv) A new land use regulation.”

16
17 In legislation, it is commonly understood that the term “includes” is used to specify
18 some examples of a class or type of thing, but not to limit the scope of the definition. In
19 other words, the examples are not exhaustive and other things of the same class or type
20 can also be included.

21 As set forth in Intervenor’s Legal Memorandum, under the state constitution’s home
22 rule articles, the voters are the ultimate local government with authority over local matters,
23 including municipal park land and sewage waste facilities. Or Const, Art. IV, subsection I(5)

PAGE 2 INTERVENOR SUPPLEMENTAL MEMORANDUM

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2 (“The initiative and referendum powers are reserved to the qualified voters of each
3 municipality and district as to all local, special, and municipal legislation of every character
4 in and for the municipality and district.”). The voters decision approving how the Nature
5 Preserve areas of City park land were to be developed and used, including the type of
6 sewer use allowed to be developed and used in the Nature Preserves is municipal
7 regulatory legislation. As stated above: the fact of it being certified and placed on the
8 ballot were final decisions by the City Council concerning a land use decision. The fact it
9 was never appealed makes it a final land use regulation. The fact its provisions have a
10 significant impact on park lands now and in the future make it a final land use decision and
11 ultimately land use regulation. Thus, the Charter Amendment is of the same class and type
12 and is included in ORS 197.015 (10).

13 . Clearly, the home rule Charter Amendment is a “land use decision” that is a “final
14 decision or determination” by a “local government” that “concerns” the “application of” the
15 statewide “goals” 5 and 11, the Healthy Eco Systems, and Utility Chapters of the
16 acknowledged comprehensive plan, and is “adopted” municipal legislation regulating land
17 use that implements the comprehensive plan by clear and objective standards and
18 “amends” certain other land use regulations and Facility sewer master Plan facility location
19 by preemption. Thus it ties directly to ORS 197.015(10) (a) (A) (i) through (iv).

20 The Charter Amendment’ legislative regulation cannot be denied on the basis the
21 legislature intended under ORS 197.015 to exclude the home rule power to make land use
22 decisions for its land under its local control. ORS 197.015 neither does so by express

23 preemption nor by implied preemption as the Amendment can clearly be read as

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2 consistent with applicable goals and statutes as set forth In Intervenor's Legal
3 Memorandum.

4 Moreover, if the statute were interpreted to limit the voters' authority over local
5 control, it would be an unconstitutional legislative attack on the home rule of the voters to
6 provide the structure and control (in this case to restrict control) over its City Council.
7 LaGrande/Astoria v PERB, 281 Or 137 (1978) and its progeny cited in the Intervenor's Legal
8 Memorandum.

9 Likewise, given that ORS 197.015 (10) otherwise includes the home rule municipal
10 regulation, Plaintiff's reliance on the definitions within ORS 197.015 (11), as exclusive fails on
11 several fronts as well.

12 First, it is a list which doesn't say its exclusive.

13 Second, there is the definition of a land use decision which uses the term "includes"
14 and therefore what is included is not restricted to just the four subdivisions in the statute,
15 ORS 197.015 (10). All land use regulations flows from at least one land use decision.
16 Therefore it is not possible that a land use regulation is restricted to only City Council
17 adopted ordinances. If a land use decision is not exclusive then a land use regulation
18 cannot be entirely confined to the ORS 197.015(11) as the Plaintiff would interpret it.

19 Third, An ordinance is simply a type of municipal legislation adopted by a legal
20 authority. The Charter Amendment is presumptively consistent with state statute and as a
21 land use regulation adopted by the voters, is consistent with the nature of a general
22 ordinance which the voters control, not the City Council. Certainly, one only has to read
23 the voter pamphlet submissions to see there was more notice and discussion than any
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2 ordinance receives let alone receiving almost a 62% approval by the voters as the legal
3 governing body limiting authority. To the extent the three noted implementing areas of
4 sensitive lands and sewer connection code and the sewer master plan fig 6-14 would be in
5 conflict, the Amendment preempts them. (As an aside, the City Council did not nor did it
6 want to endorse the Citizens Initiative but rather offered a competing Referendum.
7 Thereafter it did not apply it in the face of its decision to run the Plaintiff's sewer through
8 the Nature Preserve. The likelihood that the City Council would have enacted any
9 ordinance based on the Charter Amendment was slim to none.)

10 Finally, to interpret ORS 197.015 (11) as Plaintiff proposes would affect a statutory
11 limitation on the constitution power of the voters contrary to LaGrande/Astoria, supra. It
12 would impermissibly restrict the control and power of the voters to structure and control
13 their City Council.

14 **CONCLUSION** Chapter X did not need to be an ordinance, in order for
15 Intervenor to prove that the City violated "a substantive provision of the local
16 comprehensive plan or land use regulations as those terms are defined in ORS 197.015."
17 Chapter X does come under the definition of ORS 197.015. It was municipal regulatory
18 legislation - i.e. a land use regulation - adopted by the constitutional legal authority of the

19 ////

20 ////

1
2 voters. To repeat: "The initiative and referendum powers are reserved to the qualified
3 voters of each municipality and district as to all local, special, and municipal legislation of
4 every character in and for the municipality and district." Or Const, Art. IV, subsection I(5)
5
6

7 *Theresa M. Kohlhoff*

8 Theresa M. Kohlhoff, February 12 2024

9 This Memorandum was written largely by the Intervenor but
10 reviewed and adopted by the attorney.

11 Prepared and Submitted by:
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

State et rel. New Look Development))	
LLC)	NO. 24CV03746
Plaintiff, Relator)	
)	CERTIFICATE OF SERVICE
)	
v)	
City of Lake Oswego,)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby declare that on the date shown below, I served a true and correct copy of the INTERVENOR SUPPLEMENTAL MEMORANDUM with all exhibits on February 12, 2024 to

Evan P. Boone, OSB #781518
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13 *E-MAIL SERVICE CONSENT AGREEMENT Pursuant to ORCP 9 G

14 by first class mail, postage prepaid.
15 by overnight mail.
16 by hand delivery.
17 by facsimile transmission.
18 by facsimile transmission and first class mail, postage prepaid.
19 [X]by electronic transmission by consent of attorneys
20 by electronic transmission and first class mail, postage prepaid.

21 I, Theresa M. Kohlhoff, hereby declare that the following declaration is true
22 to the best of my knowledge and belief and that I understand it is made for use as
23 evidence in court and is subject to the penalty for perjury.

24 Theresa M. Kohlhoff February 12, 2024
25 Theresa M. Kohlhoff OSB #80398

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