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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)	SUPPLEMENT TO MEMORANDUM
)	
v)	
City of Lake Oswego,)	
Defendant.)	

Michael E. Kohlhoff, through his attorney, supplements his previously submitted Memorandum with exhibits. On January 29, 2024 he had surgery and is doing well. He is not released from his doctor, however. He will undoubtedly try to be at the hearing on Friday the 9th, but there is a chance that it is unwise.

Therefore as a precaution he supplements his Memorandum with the following exhibits directly from the Defendant's file on LU 23-0002, located at <https://www.ci.oswego.or.us:443/Tools/download/?5733>.

Ex 3 Voters' Pamphlet, before election held November 2, 2021 (Ex from Defendant)

Ex 4 City Council Meeting November 2, 2021 with emphasis (Ex from Defendant)

Ex 5 Covenant recorded February 23, 2022 (Ex from Defendant)

PAGE 1 SUPPLEMENT TO MEMORANDUM

Theresa M. Kohlhoff, Attorney at Law OSB #80398
7512 N. Berkeley, Portland, Oregon 97203
Phone: 503-286-1346 theresakohlhoff@gmail.com

1
2 Ex 6 Kohlhoff before DRC: Expanded discussion includes Home Rule authority,
3 annexation ordinance does not supersede Charter

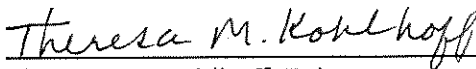
4 Ex 7 and 7A Kohlhoff before DRC: Expanded discussion includes DEQ Regs have
5 exemptions that are met, LOC 38.04.010 provides usable exemptions. Ex 7A
6 exhibits to Ex 7.

7 Ex 8 Kohlhoff before DRC: Expanded discussion includes Charter consistent with
8 Goal 11-allows sanitary sewer for park use only, Heritage showing electorate could
9 be local government and discussion of significant land use test
10

11 Ex 9 Kohlhoff before DRC: Expanded discussion includes City made final land use
12 decision even before annexation

13 Ex 10 Kohlhoff before DRC Expanded discussion includes rebuttal to applicant's
14 objection of new evidence

15 Ex 11 Order finding new evidence received into record
16

17 

18 Theresa M. Kohlhoff, February 5, 2024

19 Prepared and Submitted by:
20 Theresa M. Kohlhoff
21 Attorney for Intervenor
22 Author and Trial Attorney
23 OSB #803981
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Portland, Oregon 97203
Phone: 503-286-1346, theresakohlhoff@gmail.com
PAGE 2 SUPPLEMENT TO MEMORANDUM

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BALLOT DROP SITES

Please review the list below as several drop box locations have changed.

Canby Civic Building
222 NE 2nd Ave.
Canby, OR 97013

Canby - Arnesan Garden
249 S Sequoia Parkway
Canby, OR 97013

Gladstone Civic Center
18505 Portland Ave.
Gladstone, OR 97027

Estacada City Hall
475 SE Main St.
Estacada, OR 97022

Estacada Public Library
825 NW Wade
Estacada, OR 97022

Lake Oswego City Hall
****Box access in parking lot off 4th Ave.*
380 A Ave
Lake Oswego, OR 97034

Lake Oswego - Westlake Park
****Box has been moved to lane that connects
Bunick and Melrose parking lot.*
14165 Bunick Dr
Lake Oswego, OR 97035

Oregon City City Hall
625 Center St.
Oregon City, OR 97045

West Linn City Hall
22500 Salamo Road
West Linn, OR 97068

West Linn Public Library
1595 Burns St.
West Linn, OR 97068

Wilsonville City Hall
29799 Town Center Loop E
Wilsonville, OR 97070

Clackamas County Elections 1710 Red
Soils Ct, Suite 100 Oregon City, OR 97045

Voted ballots may be dropped off at any Drop
Site until 8:00 pm on November 2, 2021.



VOTERS' PAMPHLET

SPECIAL ELECTION
NOVEMBER 2, 2021

City of Lake Oswego

City of West Linn

Lake Oswego School District

Tualatin Valley Fire & Rescue District

Not all Measures in this pamphlet will appear
on your ballot. Your residence address determines
the districts for which you may vote.

Sherry Hall
County Clerk

Please  Recycle

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Tualatin Valley Fire & Rescue District	
Measure 34-308	Page 21

Not all measures in this Voters' Pamphlet will be on your ballot.

Your residence address determines the districts for which you may vote.

Your official ballot will contain the issues which apply to your residence.



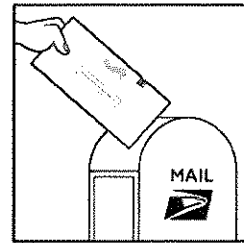
Measure filings appear in the order which they will appear on the ballot, as instructed by the Secretary of State.

Arguments in favor/opposition to a measure appear in order in which each type of argument was received at the County Elections Division.

Returning Your Ballot

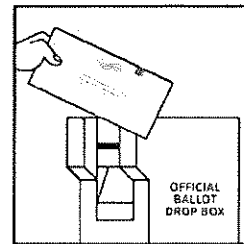
by Nov. 2, 2021 at 8:00 pm

Mail: Postage is **NOT** required. All Ballots must be received by 8 pm on Election Day. Mailing your ballot after Oct. 27th is not recommended. Postmarks do not count!



Drop Site: 24-Hour Outdoor Ballot Drop Boxes for convenient and secure deposits. Available Oct. 13th until Election Day at 8 pm.

Please check locations on cover as some boxes have been moved.



Your voted ballot may be dropped off at any official drop site in the State.

The Secretary of State's drop box locator is:
www.oregonvotes.gov/dropbox

Please contact our office with any questions.
Clackamas County Elections
503-655-8510

VOTER INFORMATION

To Vote in Oregon, you must be registered in your county of residence.

To Register, you must be:

- A US Citizen
- A resident of Oregon
- At least 16 years of age*

**you will not receive a ballot to vote until the election on/after your 18th birthday.*

How to Register

1. Online at oregonvotes.gov
2. Mail/Deliver a registration form to
Clackamas County Elections
1710 Red Soils Court, Suite 100
Oregon City, OR 97045

New Registrations must be postmarked 21 days before Election Day.

If you make a mistake on your ballot, please make your choice obvious so that election officials can count it correctly. If you damage your ballot and need a replacement, or need further assistance, please contact the Elections Division at **503.655.8510** or email elections@clackamas.us.

If a ballot was delivered to your residence for someone who should no longer be receiving ballots at that address, please write "RETURN" on the unopened envelope and put it back in your mailbox.

If a ballot was sent to someone at your address who has passed away, please write "DECEASED" on the unopened envelope and place it in your mailbox to be returned to Elections.

Return your ballot to be received in our office or ballot drop site by 8:00 p.m. on Election Day, Tuesday, November 2, 2021. **If you return your ballot by mail, remember: the postmark does not count.**

Measure Text and Arguments (if any) are printed as filed; no spelling or grammatical corrections are made.

Election Result Postings

www.clackamas.us/elections/results.html

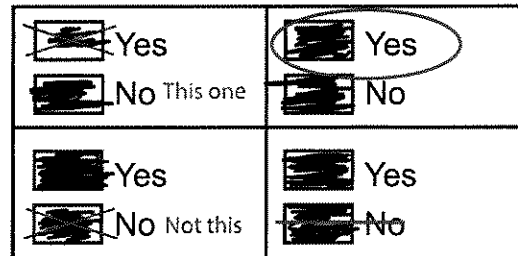
After 8:00 p.m. on Election Day, you can navigate to current election returns with just a few clicks of the mouse.

Did you make a mistake?

Don't tear up your ballot yet. You can fix it!

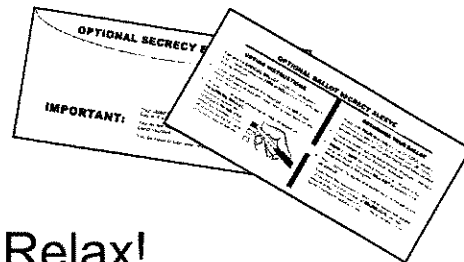
Please do NOT use corrective tape or white out.

Make your choice obvious so that election officials can count it correctly. Please review the examples of acceptable corrections.



For further assistance, contact our office at 503.655.8510.

Forgot your optional secrecy sleeve?



Relax!

Election workers will preserve the privacy of your ballot if you forget to enclose the secrecy sleeve and your ballot will still count.

City of Lake Oswego

Measure 3-568

Referred to the People by Initiative Petition

RESTRICTS IMPROVEMENTS ON CERTAIN LAKE OSWEGO PARK PROPERTIES

QUESTION: Should the Lake Oswego City Charter be amended to restrict improvements on certain city park properties?

SUMMARY: This Charter amendment was placed on the ballot through an initiative petition. Applies initially to Bryant Woods Park, Canal Acres, Cooks Butte Park, Cornell Natural Area, Glenmorrie Greenway, Hallinan Woods, Iron Mountain Park, Kerr Open Space, Lamont Springs Natural Area, River Run, Southshore Natural Area, Springbrook Park, Stevens Homestead, Stevens Meadows, West Waluga Park, and Woodmont Natural Park. Designates these properties as "Nature Preserves." Prohibits above-ground facilities or structures that would impair or be inconsistent with natural conditions. Also prohibits hard-surface trails, parking lots, athletic fields or facilities, roads, trails for motorized vehicles, tree-cutting for certain purposes, and telecommunications facilities. Previously-constructed facilities or structures may be maintained if not altered in any manner that further impairs or is inconsistent with natural conditions. Allows soft-surface trails, benches, interpretive displays, and picnic and sanitary facilities. Allows the city to implement previously-adopted park master plans. Applies the same restrictions to any park property acquired in the future, if designated as a "Nature Preserve" by the conveying property owners, the city, or voters.

EXPLANATORY STATEMENT:

Lake Oswego's City Charter currently does not contain development limitations for City-owned natural parks except for Springbrook Park, which has been protected under Chapter X - Park Development Limitation since 1978. This citizen-initiated measure repeals and replaces Chapter X to protect 15 additional natural parks with additional development limitations to preserve them as natural habitats accessible for public enjoyment.

Chapter X, which currently only applies to Springbrook Park:

- Prohibits athletic facilities, parking lots, and roads or trails for motorized vehicles.
- Allows trails for hiking, jogging, horseback, and bicycle riding.
- Allows picnic and sanitary facilities.

- Allows for restrictions to apply to any park property acquired by bond and designated by voters as subject to these restrictions.

A "yes" vote on Measure 3-568 would maintain and enhance Chapter X's development limitations:

- Designates these natural parks as "Nature Preserves:" Springbrook Park, Bryant Woods Park, Canal Acres, Cooks Butte Park, Cornell Nature Area, Glenmorrie Greenway, Hallinan Woods, Iron Mountain Park, Kerr Open Space, Lamont Springs Natural Area, River Run I & II, South Shore Natural Area, Stevens Homestead, Stevens Meadows, West Waluga Park, and Woodmont Natural Park.
- Prohibits athletic facilities, parking lots, and roads or trails for motorized vehicles.
- Prohibits telecommunications facilities, asphalt and concrete hard-surface trails, and above-ground facilities or structures that would impair or be inconsistent with natural conditions.
- Prohibits tree-cutting for purposes of commercial logging.
- Allows trails for hiking, jogging, horseback, and bicycle riding.
- Allows picnic and sanitary facilities.
- Allows benches, boardwalks, and interpretive displays.
- Allows maintenance for ecological restoration that provides safe and healthy natural areas that are accessible for public enjoyment, provides a healthy habitat for wildlife, eliminates invasive species, restores native species, and mitigates fire hazards.
- Allows maintenance of existing facilities, structures, parking lots, roads or trails for motorized vehicle if not altered in any manner that would further impair or be inconsistent with natural conditions.
- Allows implementation of pre-existing park-specific master plans that may specify development otherwise restricted by this Chapter.
- Allows for restrictions to apply to any park property acquired by bond or if designated as a "Nature Preserve" by the conveying property owners, the City, or voters.

Any master plan for parks designated as "Nature Preserves" must be consistent with the charter amendment.

After citizens filed this initiative with sufficient signatures to qualify for the ballot, the Lake Oswego City Council referred a competing measure.

To become law, this Measure must receive a majority vote and more YES votes than the competing Measure.

Submitted by:

Kari Linder
City Recorder | Elections Officer

The above information has not been verified for accuracy by the county.

ARGUMENT IN FAVOR:

Protect Our Natural Parks

We're fortunate for everything Lake Oswego offers, including: urban forests and abundant natural parks. When walking our streets 24 months ago, speaking with 900+ residents about the 3rd City attempt for a significant telecommunications facility atop Cooks Butte — a deed violation, nearly all expressed frustration with decades of City development ambitions and a tedious public process that disenfranchises citizens' voices. Many expressed worry for their neighborhood's natural park. Over 4800 petition signers helped qualify this measure.

Precise, Deliberate, Intentional

I vividly recall the conversation with an Uplands resident regarding a similar plight by citizens in the 1970s to protect Springbrook Park from high density housing and a major athletic facility. Citizens voted 3:1 on Charter protections for Springbrook — against fierce opposition from the Mayor and City-affiliated groups.

Measure 3-568 follows in Springbrooks' footsteps to enact sensible legal protections our City fails to provide. This measure is written precisely, deliberately, and intentionally. It seeks protections limiting City development incompatible with keeping 16 designated natural parks as healthy natural habitats with abundant wildlife for all to access and enjoy.

Limits Development

For 40+ years, Springbrook has proven well-crafted Charter protections limiting development work; **3-568** expands those limitations. Meanwhile:

- ADA honored for accessibility
- Stewards continue providing valuable services maintaining healthy habitats
- Infrastructure maintenance and fire mitigation efforts will provide for community needs and safety
- Natural park master planning proceeds
- Voters decide IF rare future need, otherwise prohibited, arises

Endorsements!

"Sierra Club proudly endorses Measure 3-568. The measure defines natural park boundaries enabling the protection of natural habitats, while supporting accessibility of these areas for public enjoyment."
— Oregon Chapter, Sierra Club

"Oregon Wild supports Measure 3-568 to protect and preserve the ecological values, public access, wildlife habitat, and recreational opportunities provided by Lake Oswego's parks."
— Jonathan Jelen, Oregon Wild

Get Informed

www.loveloparks.org

- Vote **YES** on **Citizen-initiated Measure 3-568**
- Vote **NO** on City Council's competing Measure 3-575

(This information furnished by Scott Handley, LoveLOParks)

ARGUMENT IN FAVOR:

Lake Oswego Loves Our Natural Spaces

Our city is known for its natural parks and tree cover. These make Lake Oswego special. Unfortunately, special areas like these are not preserved without intentional legal protections. There are just too many different interest groups looking to exploit undeveloped spaces. Because the parks protected in this measure already exist, it costs taxpayers nothing to preserve our special places.

Our Natural Parks Deserve Clear Legal Protections

We need legal protection for these areas, and not rely on the best intentions of whomever happens to occupy the City Council over the next 20 to 30 years. Even if one trusts the current City Council, another election with new council members is always coming. Once our natural areas are impacted, it takes a lifetime to recover, if ever at all.

Don't Risk our Few, Irreplaceable Natural Parks

I endorse the citizens' LoveLOParks measure 3-568 because of the straightforward and clear legal protections our Natural Parks deserve.
(Visit www.loveloparks.org).

Vote **YES** on **Citizen-Initiated Measure 3-568**, which gives certainty to protecting our natural parks.

Vote **NO** on Measure 3-575, which relies on the good graces of our City Council and all those that follow.

Andy Stanger, Lake Oswego Resident for 45 years

(This information furnished by Andy Stanger)

ARGUMENT IN FAVOR:

Don't Get Fooled Again

We can't trust the City of Lake Oswego to protect our natural parks. Three times since 1993 the City has tried to build a large communications tower in Cook's Butte Park. We were there each time with our community to protect this natural habitat as granters John and Marjorie Emery intended for it to remain.

Cook's Butte was created when the Emery's deeded the City this 42 acres. They explicitly granted this land as a natural park under the condition it remain free of future commercial development and asked that it stay "forever wild." A memorial left by John and Marjorie's sons in remembrance reads:

"Much of the land
For this park was a gift to the
Local community by two people who lived
Next to it for 48 years.
They wished this forest and meadow
To remain forever wild.
A meeting place for human
And non-human,
A place to re-enter the world
Beyond our human habits."

Measure 3-568 is about more than just Cook's Butte. It addresses concerns neighbors across LO shared for their neighborhood natural parks.

City Council's opposing measure won't protect our natural parks; furthermore, their measure is vague and filled with loopholes which may allow future development in our natural parks. Citizens must unite to protect these natural spaces before they're gone.

3-568 is more precise and focused on leaving our natural parks alone. 3-568 allows for good stewardship including tree thinning and fire mitigation. It also allows benches, trails, boardwalks, and ADA access.

We believe our natural parks should be protected and stay free from exploitation and development by Lake Oswego politicians. **3-568 was created by our citizens for our citizens.** Our parks need your help!

Vote YES on Citizen-Initiated Measure 3-568 and NO on City Council's Measure 3-575.

Brad Home – 50+ years; LHS '73
Michael Louaillier – 29+ years
Mike Wilkins – 32+ years
Jan Holibaugh – Marjorie's Friend; Emery Farm owner since 1993

*(This information furnished by Brad Home,
Michael Louaillier, and Jan Holibaugh)*

ARGUMENT IN FAVOR:

The LoveLOParks Measure 3-568 intentionally, deliberately, and precisely provides protection for 16 natural areas while allowing for public access (including ADA-compliant trails), maintenance, and stewardship.

The City's competing measure is flawed because it doesn't designate the protected areas within a natural park until after we vote, meaning part of a park may be excluded from protection. Its language about managing ecosystems is vague; it allows development of parking lots, paved trails and non-public roads within park boundaries which will destroy natural habitat and allow tree removal; it could allow for public telecommunications facilities; and it allows "other uses and facilities," opening the door for development. It gives the City, especially Parks & Recreation, too much latitude. A recent example is Woodmont Park. The owner who deeded Woodmont specifically conveyed certain trees to remain; yet those trees were nonetheless bulldozed. Other examples include repeated efforts to expand the tennis center into Springbrook Park; a mountain biking path installed within a sensitive ecosystem in Iron Mountain Park; and repeated attempts to build a telecommunications tower in Cook's Butte.

The City claims its competing measure creates a robust public process. A public process is already required under goal 1 of the Oregon comprehensive plan ("citizen involvement"). In any event, the public process has let us down. Neighborhood associations and dozens of individuals repeatedly provide comments opposing tree removal, only to be ignored. If the public process relating to these tree removal applications has been largely ignored, why would it be any different with public input relating to natural areas?

The City wants "business as usual" to pave, remove trees, add facilities, and dispense lucrative construction and landscape contracts. With the climate crises and loss of biodiversity, **we cannot afford business as usual.**

Please vote YES on 3-568!

Betsy Wasko
Ann Mikulka
Matthias Beckmann
Nancy Osborne
Pierre Zubrinsky
Kathryn Fortner
Karen Davitt
Kimberly Beeler
Alyson Miller
Carol Sarnowski
Kenneth D. Sarnowski
Cindy Knowles
Hollis McMilan

*(This information furnished by Betsy Wasko,
Ann Mikulka, and Matthias Beckmann)*

The printing of arguments does not constitute an endorsement by Clackamas County, nor does the county warrant the accuracy or truth of any statements made in the argument.

ARGUMENT IN FAVOR:

Vote **YES** on Love LO Park's **Measure 3-568**.

The City's competing Measure 3-575, puts Springbrook Park, along with our other natural parks, at risk for over development. The City of Lake Oswego has a long history of attempting to undermine natural parks to fit a vision of our city the citizens do not share.

In 1969, the Pennington family donated 28 of the 52 acres that make up Springbrook to the City for a natural park. The Friends of Springbrook Park (which Ruth Pennington helped form) rescued the adjoining 24 acres from high-density housing with a special election in 1973.

The Mayor and City Council put full page ads in the Review to defeat the acquisition. They failed to sway voters, and the property was added to the existing park parcel. The initiative to add the adjoining acreage declared it as a natural park, but the City ignored that and built an indoor tennis center on the land.

The City attempted more unnatural development of Springbrook in 1978. They failed to sway voters when 75% voted in favor of a protective charter amendment. Chapter X was passed to further cement Springbrook's status as a "Natural Park". Chapter X will be expanded to other natural parks if Measure 3-568 passes, or effectively abolished if the City's measure passes.

The Friends of Springbrook Park re-established in 2003 to form a Natural Resource Management Plan balancing the two important goals of the park; conservation and usage. The City had once again tried to add on to the tennis building. They were thwarted thanks to Chapter X.

Here we are in 2021, and the City sees an opportunity to nullify the protections offered by Chapter X. The choice we face is between preserving our natural parks or green lighting the City to over-develop them.

NO on Measure 3-375 and **YES** on **3-568**.

Jean Eves (50 year resident)
Lindy Mount (Lifelong resident)
Brian Boucher (48 year resident)

(This information furnished by Jean Eves)

ARGUMENT IN OPPOSITION:

Measure 3-568 is insufficient and ineffective in protecting and preserving our natural areas.

It assumes that natural areas are all alike and that a blanket prohibition of certain activities will protect them. It will not. **Measure 3-568 is a one-size-fits-all approach to a complex situation that does not recognize the unique qualities of each natural area.** Yet even with this blanket approach, Measure 3-568 does not protect all of our natural areas.

Further, **it restricts access for everyone** regardless of physical ability, by prohibiting asphalt or concrete trails, needed by many of us at some point in our lives.

It prohibits the vehicular access needed by Parks maintenance to repair trails and bring in supplies, remove dangerous accumulations of dead materials, build fire breaks, provide for emergency vehicles, and respond to climate change.

It discourages full citizen participation in the planning and implementation of our natural areas by prohibiting any new master and management plans from having parking lots, paved trails and non-public roads, even though these same facilities already exist in other natural areas, and even if residents want them. **It means that any changes not specifically allowed in Measure 3-568 would need voter approval in city-wide elections.** This is a waste of time and resources.

We need a thoughtful, comprehensive approach to protect, preserve and enhance all of our natural areas. Measure 3-568 is not it.

Vote NO on Measure 3-568

Friends of Lake Oswego Parks Steering Committee

Mike Buck
Thomas Bland
Stephanie Wagner
Barbara Fisher
Jim Fisher
Robert Ervin
Doug McKean
Paul Lyons
Nancy Gronowski

*(This information furnished by Nancy Gronowski,
Friends of Lake Oswego Parks)*

The printing of arguments does not constitute an endorsement by Clackamas County, nor does the county warrant the accuracy or truth of any statements made in the argument.

City of Lake Oswego Measure 3-575

Referred to the People by the City Council

AMENDS CHARTER; PROTECTS NATURAL AREAS; ALLOWS ACCESS TO NATURE

QUESTION: Shall the City of Lake Oswego amend its Charter to protect natural areas, habitat, water quality, and access to nature?

SUMMARY: This measure would revise Chapter X of the Lake Oswego Charter and rename it "Preservation of Natural Areas".

This section of the City's Charter would ensure that Springbrook Park; Cooks Butte Park; Woodmont Nature Park; Hallinan Woods; Stevens Meadow; Bryant Woods; Canal Acres; Cornell Natural Area; Glenmorrie Greenway; Kerr Open Space; Lamont Springs; River Run I and II; Southshore; Kelly Creek; Pennington Park; Sunny Slope; and the natural areas of West Waluga, East Waluga, George Rogers, Iron Mountain and Freepons Parks are managed to protect water quality, wildlife habitat, wildfire prevention and containment, aesthetic values, and ecological function and to allow trails accessible to people with different physical abilities and needs.

Athletic Facilities, new public roads, and telecommunications facilities are prohibited in Natural Areas. Restoration, stewardship, trails, and maintenance and renovation of existing facilities and structures are allowed.

Other activities are only allowed after public involvement and adoption of a Master Plan. This section would replace the existing "Chapter X - Park Development Limitations," which applies only to Springbrook Park.

EXPLANATORY STATEMENT:

The proposed "Preservation of Natural Areas" amendment of the City's Charter revises Chapter X of the existing Charter to "preserve, protect, restore, and maintain the scenic and aesthetic qualities, ecological functions, water quality and wildlife habitat of Natural Areas that are owned by the City of Lake Oswego while also allowing for their use and enjoyment."

Recognizing interest in increasing protections for parks and natural spaces in Lake Oswego, the City undertook a public engagement program to assess public attitudes and develop proposed changes to the City's Charter. The City's engagement program included an online survey promoted by the City that was completed by 355 residents; a statistically representative poll of 405 Lake Oswego voters; two public listening conversations attended by 26 local residents; and 26 individual conversations with community leaders and stakeholders from the community.

People in the community voiced a commitment to ensuring these places support a broad range of uses, while also protecting their natural integrity. The City also heard feedback on a citizen initiative to amend the Charter that will be presented to voters in the November 2021 election. While some supported the measure, others raised concerns about unintended consequences that would impair other public priorities for these spaces.

Several themes emerged including:

- The preservation and maintenance of parks and natural spaces are a key aspect of the high quality of life in Lake Oswego.
- A desire to protect water quality and wildlife habitat.
- The importance of ensuring parks and natural spaces are accessible for people of various abilities.
- A focus on the need to prepare for climate change, particularly the need to prevent and contain wildfires, and protect wildfire response capabilities.

Using this feedback, the City's elected leaders have proposed the Charter amendment that will allow:

- Maintenance, stewardship, and education activities that promote ecological restoration and enhancement, eliminate invasive species, restore native species, and mitigate fire hazards.
- Maintenance and renovation of trails for walking, hiking, wheelchairs and mobility devices, horseback riding, and non-motorized bicycle travel. Trail construction can only occur after an environmental assessment and review by the Parks, Recreation, and Natural Resources Advisory Board and must be appropriate to the conditions of a natural area.
- Construction, maintenance, renovation, and replacement of picnic and sanitary facilities, boardwalks, benches, and interpretive displays where appropriate.

The Amendment would prohibit construction of new athletic facilities, commercial logging, construction of new public streets and roads, and construction or installation of new telecommunications facilities in designated Natural Areas.

Other uses and facilities related to restoration or access to Natural Areas would only be allowed under the Amendment after City Council adoption of a property-specific master plan for the designated area. The Council must engage the public in the development of the master plan, including Neighborhood Associations and all property owners within 300 feet of the Natural Area.

If both this measure and Ballot Measure 3-568 are approved, only the measure with the greater number of affirmative votes will become effective.

Submitted by:

Kari Linder
City Recorder | Elections Officer

The above information has not been verified for accuracy by the county.

ARGUMENT IN FAVOR:

JOIN MAYORS IN VOTING YES ON MEASURE 3-575

As your Lake Oswego mayors we urge you to vote YES on measure 3-575 and to vote NO on measure 3-568. Our individual viewpoints and perspectives are varied, and we each served the community at times of different challenges. But we all share a sincere love for our city and agree that the **Lake Oswego community continually demonstrates a high priority for the care of its parks and natural spaces.**

We support Measure 3-575 because it strengthens that commitment in several key ways:

1. It ensures all of our **natural areas are protected** against uses incongruent with their preservation and care, including the natural areas of active use parks.
2. It allows for **community planning** to determine if amenities such as hard surface trails and parking are appropriate for a given area.
3. It allows for **equitable access to nature** for people of different ages and abilities. Access inspires generations of the community to continue to care for the resources they love and advances a citywide culture that keeps our parks healthy.

In addition, we support Measure 3-575 because **it both builds on and protects the way our community has managed and invested in natural areas for decades.**

Through many "Friends of" groups, community engagement, planning and wise investment, LO's dedication serves not just to maintain natural areas but further enhance and care for them.

As mayors we understand the significance of our city charter, and Measure 3-575 allows our community's commitment to care for natural areas to continue for current and future residents without removing your voice in the process.

Competing Measure 3-568 falls short of empowering our residents to join together to ensure future generations enjoy the natural areas we love today.

Join us in voting YES on Measure 3-575 and NO on Measure 3-568.

Mayor Joe Buck (current)
Mayor Kent Studebaker (2013-2020)
Mayor Jack Hoffman (2009-2012)
Mayor Judie Hammerstad (2001 - 2008)

(This information furnished by Joe Buck)

ARGUMENT IN FAVOR:

Vote Yes to preserve our natural areas in Lake Oswego's Parks. Friends of Springbrook Park supports the City's referendum to Preserve Natural Areas, Measure #3-575.

Springbrook Park has had the protection of Chapter X of the City Charter to prohibit development since 1978. Measure 3-575 continues this safeguard and extends it to ALL THE CITY PARKS with natural areas. The measure also allows for ongoing improvements for possible ADA access, fire prevention, trail surface maintenance and continued invasive removal and planting efforts in all of our City's natural areas. With the cooperation of Friends of Springbrook Park and the Parks and Recreation Department over the last twenty years, stewardship and prudent management of this great resource has flourished. **Measure 3-575 embraces citizen volunteerism and planning to guide the future directions of ecological care. Vote YES on Measure 3-575.**

Friends of Springbrook Park Board:

Thomas Bland
Melissa Cadish
H. Mike Carmichael
Virginia Haines
Anne Lider
Eric Lider
Paul Lyons
Kim Sloat
Laura Tanz

Friends of Iron Mountain Friends of Woodmont Park Friends of Hallinan Heights Woods

Amy Chase Herman, President
Friends of Rogerson Clematis Collection

Richard A. Herman, Board President
Friends of Luscher Farm

Mary Solares, Chair
Friends of Southwood Park

*(This information furnished by
Thomas C. Bland, Friends of Springbrook Park)*

ARGUMENT IN FAVOR:

Healthy, Sustainable Natural Spaces Need Our Protection

The Oswego Lake Watershed Council (OLWC) and the Lake Oswego Sustainability Network (LOSN) support Measure 3-575.

We can all agree that we value our natural areas throughout Lake Oswego. A walk in the woods supports both our bodies and our souls. But these **natural areas need our protection and care if they are going to continue to thrive.** Climate change threatens the viability of our natural areas and our urban forest. These areas require intensive management to remove dead and dying trees and replant species that are better adapted to our more intensely hot summers and windy, icy winters. **Fire also threatens our natural areas and we need to be able to plan for active fire suppression.**

This measure is written to include all the natural areas within the city, not a limited number, to guarantee the protection and improvement of natural spaces throughout the city.

Our natural areas need to be accessible to all our residents, including those with vision as well as mobility challenges. Hard surfaces, such as asphalt or concrete, allow the use of a white cane. We need to be able to plan in order to have quality trails that everyone can use.

Good natural resource management needs science-based planning and requires community input. Ballot measure 3-575 specifically outlines a process for planning and maintaining our city's natural areas. This planning, coupled with active maintenance, will allow our natural areas to flourish in the future.

Please join us in voting yes on Measure 3-575 and together we can protect and enhance our precious natural areas.

- Stephanie Wagner, Chair OLWC
- Lisa Adatto, Chair LOSN
- Michael Buck
- Barbara Fisher
- James Fisher
- Thomas Bland
- Mary Ratcliff
- Kathleen Fox Wiens
- Robert Sack
- Duke Castle
- Dorothy Atwood
- Mike Perham
- Gabe Winfrey
- Laurance Zurcher
- Thomas Berridge

*(This information furnished by
Stephanie Wagner, Friends of Lake Oswego Parks)*

ARGUMENT IN FAVOR:

Measure 3-575 is about working together to protect all of our Natural Areas.

As community leaders we want to work with the City to manage our valued assets, the City's natural areas. We look to motivate, inspire and gather people in productive ways that create and sustain meaningful transformation. We look to see how best to contribute our energies to the restoration and enhancement of natural areas so they continue to thrive in the future. These natural lands provide many environmental benefits, contributing to our sense of identity and pride as citizens of Lake Oswego.

Measure 3-575 respects what active people are doing collaboratively to preserve and protect our beloved natural areas. It invites fuller participation in the effort to make our natural open spaces places of healthy habitat for both humans and wildlife. To "preserve and protect" means that we residents are caretakers, responsible for positive change in these cherished spaces. **This Measure was written after listening to the voices of people who have experience working in our natural areas. By casting your vote in favor of 3-575, you are joining and supporting this ongoing dialogue of trusting care.**

- Lake Oswego City Councilors
 - John Wendland
 - Aaron Rapf
 - Rachael Verdick
- Massene Mboup
- Jackie Manz
- Former Lake Oswego City Councilors
 - Bill Tierney
 - Skip O'Neill
- Jeff Gudman
- Charles Collins
- Lake Grove Neighborhood Association
 - Dan Anderson
 - Trudy Corrigan
 - Jerome Nierengarten
- Charles Fisher
- Robert Dove
- Upland Neighborhood Association
 - Larry Wobbrock
- Robert Ervin
- Hallinan Heights Neighborhood Association
 - Chris Huettemeyer
 - Sarah Ellison
- Christy Clark
- Friends of Hallinan Heights Woods
 - Gary Thompson
 - Bill Abadie
- Friends of Iron Mountain Park
 - Susanna Campbell Kuo
 - Cliff Breedlove
- Doug McKean
- Chris Thompson
- Cheryl Uchida
- Allan Solares
- Karen Jacobson
- Kit Corrigan
- Jan Castle
- Thomas Atwood
- Bruce Brown
- Alex Adhdaei
- Rachel Garrett
- Janet Buck
- Susan Greer
- Mike Darcy
- Mignon Ervin

*(This information furnished by
Stephanie Wagner, Friends of Lake Oswego Parks)*

The printing of arguments does not constitute an endorsement by Clackamas County, nor does the county warrant the accuracy or truth of any statements made in the argument.

Ex 3 P 10 of 11

ARGUMENT IN OPPOSITION:

Vote NO on Measure 3-575

Measure 3-575 is a rebuttal to citizen-initiated Measure 3-568 by City Council and some community members. Multiple attempts to reach common ground with Measure 3-575's authors were made; they refused and insisted we abandon our efforts. Don't be misled by nice sounding words and slogans that provide fewer legal protections under the guise of preservation; Springbrook Park would lose protections enjoyed since 1978 and 15 other natural parks would continue to be at risk.

Waste of taxpayer resources

It should raise concern the City engaged a political firm, Praxis Political, at taxpayer expense for a rushed, biased, and political "public process" that resulted in no material changes to the draft text first presented to City Council on June 15, 2021 and ratified on Aug 3rd. A "public process" for such an important effort would assuredly shape the outcome more substantially.

The numbers don't add up

One should also question the City's claims on engaging 812 residents. Individuals could participate in 1 or all 4 activities and many did. Additionally, Lake Oswego residency was never verified. Contrast that with over 4,800 petition signatures, 4,433 from certified Lake Oswego voters, that qualified citizen-initiated Measure 3-568 for the ballot.

3-575's Charter text:

- Inaccurately renames Chapter X falsely describing its intent and effect
- Fails to specify natural park acreage and boundaries until a later date
- Risks the potential to divide parks into natural and developable areas
- Eliminates several protections sought after in citizens' Measure 3-568
- Redefines telecommunications facility that may allow for public towers
- Removes certain existing protections from Springbrook Park
- Enacts the same tedious public process for "other uses and structures" that minimizes citizen involvement and voice

This is "business as usual" and **NOT** the development limitations citizens seek.

Get Informed

www.loveloparks.org

Please join our grassroots effort:

- Vote **NO** on City Council's Measure 3-575
- Vote **YES** on **Citizen-initiated Measure 3-568**

(This information furnished by Scott Handley, LoveLOParks)

ARGUMENT IN OPPOSITION:

This Measure is a Wolf in Sheep's Clothing

Although it pretends to support "preservation" of Lake Oswego natural areas, it in fact erodes protections for Springbrook Park. It also uses vague and innocuous sounding phrases like "ecological restoration": **Do not be fooled**, in one LO City sponsored "listening" session, the destruction at Woodmont Park was described as "restoration". This measure allows the City to partition our natural parks into developable areas without additional voter review and approval. This measure provides virtually no protection for our natural parks.

Vote NO on Measure 3-575

This LO City measure (3-575) was written to allow the City to develop our natural parks in any way they see fit. They were concerned that the competing LoveLOParks citizens' measure (3-568) would do what it was intended to do, preserve our natural parks. Development of our natural parks should require LO voter approval, which measure 3-575 does not require.

The LoveLOParks measure (3-568) ensures 15 additional natural parks have the same legal protections that Springbrook Park currently has, and it includes clear legal protections against development in these natural parks (visit www.loveloparks.org to see the comparison chart of these two competing measures).

Vote **NO** on **Measure 3-575**, which allows City development of our natural parks

Vote **YES** on Citizen-Initiated **Measure 3-568**, which provides clear legal protections for our natural parks

Kirsten Sommer, Lake Oswego Resident for 20 years

(This information furnished by Kirsten Sommer)



**CITY COUNCIL REGULAR MEETING
MINUTES**

November 2, 2021

1. CALL TO ORDER, CITY COUNCIL

Mayor Buck called the regular City Council meeting to order at 5:31 p.m. on November 2, 2021. The meeting was held both virtually via video conferencing and in-person.

2. ROLL CALL

Present: Mayor Buck, Councilors Mboup, Manz, Nguyen, Wendland, Verdick, and Mboup

Staff Present: Martha Bennett, City Manager; Jason Loos, City Attorney; Evan Boone, Deputy City Attorney; Paul Espe, Associate Planner; Erica Rooney, City Engineer | Public Works Director; Shawn Cross, Finance Director; Nadia Ahmed, Human Resources Specialist; Scot Siegel, Economic Development Director; Gert Zoutendijk, Fire Marshal; Kari Linder, City Recorder

3. PLEDGE OF ALLEGIANCE

Mayor Buck led the Pledge of Allegiance.

4. PUBLIC COMMENT

No Public Comment was provided.

4.1 PRIOR PUBLIC COMMENT FOLLOW-UP

No prior follow-up was provided.

5. PUBLIC HEARINGS

5.1 Ordinance 2874, Annexing Property at SW Kimball and SW Baleine Streets (AN 21-0003).

Jason Loos, City Attorney, read the parameters of the public hearing, and asked if any members of the Council had any ex parte contacts, including a site visit, any bias, or any financial conflicts of interest. None were heard.

Paul Espe, Associate Planner, presented the Council Report for three properties being considered for annexation at the southeast corner of Kimball St and Baleine St. One item of public testimony was received from David Brown, included in the packet as Exhibit F-200, against the annexation. ~~The concerns raised in his email would be addressed with the future partitioning of the property in terms of wetland delineation, tree removal, storm water provision, etc.~~ The proposed annexation was owner-initiated and would result in the addition of approximately 2.07 acres of residential land to the City. The property was currently under Clackamas County's jurisdiction and was zoned R-7.5 low-density residential in the Comprehensive Plan and would also be zoned R-7.5 on annexation. The City's Sensitive Land Map designated a resource protection (RP) district over the northeast side of the properties. Pursuant to Code, the RP overlay district would be applied to the properties upon annexation, and the property owners had been informed of such. He addressed other related items including installation and mitigation of a sewer line by the applicant, future improvements to Baleine St., and stormwater facilities. Staff recommended tentative approval of the annexation with the final enactment being deferred until the owner had executed and recorded the covenant to construct and connect to the City sewer line.

In response to an inquiry by **Councilor Manz**, **Mr. Espe** confirmed other annexations had taken place in the area, and the location of the sewer system 500 feet away from the property added complexity to the application.

In response to a question from **Mayor Buck**, **Mr. Espe** confirmed the applicant would need to execute the covenant to install the sewer line before the ordinance came back to Council for signature. Council was being asked to tentatively approve the annexation tonight. ~~He further clarified that it would be necessary for the applicant to delineate the wetland, the RP, and file a land use application for the sewer construction. The delineation would be through a standard land use application, including a public process.~~ Lastly, he confirmed the lots were currently vacant.

Councilor Wendland asked for a review on what could be developed on land with an RP designation. **Mr. Espe** replied that if a property was totally encumbered by an RP resource, the Code allowed for the development of a reasonably-sized house-like development on the property.

Mayor Buck noted the report stated the single-family dwelling access was taken from Kimball St. **Mr. Espe** responded that an access from Kimball St already existed, but no dwelling was located on the property.

Applicant's Testimony

Ed Brockman, Applicant, stated quite a bit of planning for the project had been done already and he would be turning in a pre-application request on Thursday. Meetings had been held in Waluga Park with the Parks Director, City Engineer, and the person in charge of sewer maintenance. Pacific Habitat had examined, surveyed, and conducted a full delineation of the wetlands on Tax Lot 2902. The location of the resource on Tax Lots 3000 and 100 had been tentatively identified and flagged by Pacific Habitat and was yet to be surveyed. Tax Lots 3000 and 100 were originally each platted as two lots and could be reclaimed simply through a request by the property owner through the Clackamas County Assessor according to State Law. In other

words, five lots of record existed and could be assigned new tax lot numbers and addresses. If the property was annexed, the applicant planned to do some lot line adjustments but had no plans to develop a home, even though he legally could. The lot line adjustments would move the proposed five residences out of the RP zone entirely.

- The sewer would be 1,100 ft long in total and would be expensive. The owner had recently purchased the properties and because of the RP zone and no plan for how to develop properties, the cost had not been great. The owner could pay for the sewer and still have a project that made financial sense.
- The home builder had built other homes in Lake Oswego. The planned lot sizes would not be less than 8,000 sq ft.

Councilor Mboup asked how many trees were located on the property and how the applicant planned to deal with them upon annexation. **Mr. Brockman** replied the property would be surveyed, and the location of every tree on the property 5 inches in diameter and greater would be mapped and its species identified. He declined to provide an estimate of the number of trees on the property without more data. Tax Lot 2902 was the yard for Tax Lot 15868 and had been cleared, but had some good-sized trees. He had photos of the property before it was cleared, but they were not readily available. A lot of undergrowth and blackberries had moved into the lot. Tax Lots 3000 and 100 in the RP zone would be protected and nothing would be removed other than invasive species, such as blackberries. The impact on the lots to be built on as well as the size of house would be limited according to Code. Tax Lots 3000 and 100 were not full of big Fir trees, but some big Firs existed on Tax Lot 2902 that could be seen in an aerial photo on the City's website.

- **Neal Bauer**

Mr. Bauer spoke on behalf of the Carman Garden Homeowners Association (HOA) and was a resident of Tara Place. For as long as he had lived in the neighborhood, the wetlands had turned into a lake for a good part of the winter. The area of the cul-de-sac had been flooded in the past, and the builder had brought in many truckloads of rock and sand to build it up for the four homes developed there. Subsequent runoff from the rain had taken away the land, and the residents had to fill up their backyards with dirt on two occasions. Once someone had dug into the field across from the cul-de-sac to determine if it was buildable and could not find any dry areas. They had taken down trees and carved into the land and could provide no documentation in response to the neighbors' request. The wetland had several hundred trees, including big Birch trees, which provided beautiful scenery, a root structure for the land, and also deadened the sound of traffic from I-5. His neighbors had just sold their home and had brought someone out who reported the existing sewer already had a belly because of subsidence from the rain it had not been equipped for. Building five homes on Tara Pl was outrageous and he found the proposal to be scary because of the fill that would be required and would direct the water through the other houses in the area. He confirmed he was opposed to the annexation.

- **Stephanie Glazer**

Ms. Glazer stated she was neutral on the annexation, but she was concerned about the sensitive area that she lived adjacent to. She agreed with Mr. Bauer's testimony that the land was under water for many months out of the year. She wanted to make sure that the RP remained in place after annexation and would not be diminished when development was considered. Tax Lots 3000 and 100 had even more standing water than the wetlands already delineated. She wanted the management of that water to be part of the annexation to make sure the water stayed where it was. Allowing the trees to remain would help. The neighbors who had lived there longer than her had spoken about the earlier development on Tara PI that made their properties flood. The sensitive lands overlay was intended to protect the water resource and to maintain the water in its current location. With a few exceptions, most everyone in the area was on a septic system and many residents had invested significant financial resources to install, upgrade, and maintain them. She did not know what the implications were to the neighbors of a new sewer on Kimball St and whether they would need to pay for it. The sewer line would cut directly through the sensitive lands and it seemed like proper care was not being taken to protect the resource. Baleine St was currently a walking and biking path and a very narrow area and she would not want to see it become a major cut-through street. The intersection of Baleine St and Carman Dr was not safe enough to handle additional traffic.

Mayor Buck clarified that the installation of the sewer line was part of the Sewer Master Plan and ~~would not have any bearing on others in the area,~~ other than that its extension would make it easier for someone to connect to it if they wanted to, so, in a sense, they would be bearing that expense for the other neighbors. Properties within a close distance to a main were required to connect upon annexation due to the plan that everyone would be on the sewer and not on septic tanks. **Martha Bennett, City Manager**, added that if someone's septic tank was leaking and creating a health hazard, and they were located within a certain number of feet of a sewer line, they would be required to connect.

- **Kathy Lundeen**

Ms. Lundeen said she was neutral to the application and she agreed with the others who testified that standing water remained on the site even during the drought. Tara PI had been a marsh with nesting water birds, turtles, and cattails and it was filled in for a development. The backyard of the neighbor to the left of Tract A had flooded and she needed to dig a pond because the water was displaced from the marsh into her backyard and then into the RP areas. She believed that if the area was annexed, it was Council's responsibility to make sure the remediation was done. She was neutral to the application because she did not know Council's position on the matter. She also believed the wetlands needed to be preserved as habitat. She inquired who would replace the Surface Water Management of Clackamas County as they would no longer be responsible after the annexation. Baleine St was paved only to Carman Dr and the rest was gravel. The City frequently had to add more gravel due to the roadway washing out. It had been a walking path for many years. The condition of the trees on Tax Lots 3000 and 100 was not as good as it used to be which she suspected was because of the extra water and subsequent rot. She had lost several trees to wind and rot. Some beautiful Willamette Valley Oaks were on Tax Lots 3000 and 100 and she strongly believed they should be preserved as habitat for Douglas squirrels and Western gray squirrels. When she needed a new septic system, the City told her that a pumping station or a lifting station was needed, but she had not heard either system mentioned in regard to this annexation.

- **Willy Paul**

Mr. Paul stated he had been neutral to the application but was now against it due to what he had heard from Mr. Brockman. His home was located on the southwesterly corner of the proposed annexation. He was in complete agreement with the previous testimony about the water issues. The wetlands were necessary for the standing water on the property throughout the winter. ~~The sewer on his property had an easement to allow a tie-in from Tax Lot 2902 to Kimball St~~ but he understood it would be for a single-family residence behind his property. He heard Mr. Brockman state the intention to make lot line adjustments to Tax Lots 100 and 3000 through the county to mitigate some of the RP boundary issues. He understood the intention was to develop five homes on the subdivided tax lots which meant to him five homes located on a remainder of Tax Lots 3000 and 2902. It seemed to be an extremely dense amount of development that would take advantage of the RP area in order to gain that density. He proposed R-15 zoning instead of the R-7.5 designation to help mitigate some of the density issues and some of the water issues relative to the RP area. He was concerned about the mention in the application that no additional impervious surfaces would be introduced to the properties which to him meant no paved streets and no driveways and he asked for clarification. He also asked what provision was made for the neighbors to be involved in the development process after the annexation. He asked if a storm drain system was also considered part of the mitigation to address some of the water accumulation issues. Lastly, he asked about how Goal 10 would apply to the properties in the RP area as it was not mentioned in the Council Report.

Councilor Manz ~~clarified with staff that only the annexation was being considered tonight and not the development of the property,~~ nor was consideration being given to the ruling on proportionality of what can or cannot be done with development on the property. **Mr. Paul** understood that the recommendation in the Council Report for annexation maintained the R-7.5 zoning and asked if a process existed post-annexation for reconsideration of that zoning. **Ms. Bennett** clarified the annexation would come in under the pre-determined zoning in the Comprehensive Plan. HB 2001 was not material in this case regarding zoning. **Mayor Buck** added that rezoning would be a separate consideration in another public process.

- **Natalie Diloreto**

Ms. Diloreto stated she lived in the field Mr. Bauer referred to in his testimony earlier. Her home backed up to Baleine St which was now just a beautiful walking trail for families and their dogs. The wetlands started about halfway through her property and the water reached knee-depth in winter. She was concerned that if it already became that deep, where it would go if more development took place and what studies would be done to make that determination. The residents took great pride in the existing trees and her property backed up to some beautiful trees. Though it was private property, kids were allowed to play there and in her field when it was dry enough. It offered a great sense of community and she asked if the trees were removed, would it mean that Baleine St would become an actual street instead of a trail. Her backyard was a whole ecosystem with several types of wildlife and it would be sad if it was taken away.

Councilor Manz clarified that the part of Baleine St indicated in blue was a trail and became gravel at the location of Tax Lot 3000. She confirmed with staff that it was a right-of-way in the

City of Lake Oswego. **Ms. Bennett** cautioned against assuming Baleine St would become an improved street. She advised questions to staff be held until Council's deliberation.

Mayor Buck called for the applicant's rebuttal.

Mr. Brockman noted he had spoken to the tentative plans to develop the area, though his application was for annexation because he believed it would be helpful to Council and the public to be upfront. Engineering advised against having Baleine St cut through to Inverurie Rd to avoid cut through traffic. He had no plans to improve Baleine St now, but that did not mean it would never be improved. His responses to questions raised during public testimony were as follows:

- Access was planned on the southern border of Tax Lot 3000 and not on the 15-ft easement at 15868 Kimball St, and plans were to bring the sewer through Tax Lot 3000 and not through 15868 Kimball St.

Anything north of Tax Lots 3000 and 100 was strictly a path, though sewer would be brought through there. He anticipated it would remain a path in the future and he had no plans to disrupt the neighborhood use of foot traffic there.

- The Code required management of storm water, and that was probably one of the most limiting factors to the development potential of the site. Initially, he had informally inquired of the Planning Director about annexing and developing the area with septic systems for a couple of the homes. The Planning Director seemed to believe that was reasonable, but Mr. Brockman understood he was not the decision-maker and when he applied for annexation, he was told staff would not recommend the annexation to Council unless sewer was brought to the property. In order for that to pencil out, more than two houses would need to be developed there.
- He had paid \$7,000 to an engineering firm to guarantee that the sewer system could gravity flow without a pump station, so no pump station would be involved.
- On Tax Lot 100 toward Inverurie Rd an area existed that was a lake virtually all winter long, but it was not the entire area indicated for annexation.

Mayor Buck noted for the public that the Council Report contained an attachment that explained annexation. **Mr. Espe** explained staff had not been given details on what could happen with the property in terms of partitioning or recognizing legal lots of record. Mr. Brockman indicated he wanted to reestablish the legal lots of record through Clackamas County which would not require public noticing. Once the property was annexed, a lot line adjustment could be done through the City which would have limited noticing and was also an administrative process. If re-platting was required, it would be necessary for him to go through the noticed land use process. The land use process that would be noticed first would be the delineation of the wetlands, followed by a noticed land use process for the construction of the sewer and the re-delineation of the existing RP lines. He confirmed the relationship between the lot lines and the RP designation was irrelevant; the lot lines would not dictate the location of the RP area. The public would have the opportunity to participate in the wetland delineation process and comment on the criteria as well as on a Type 2 tree removal.

Councilor Mboup said he was very concerned about the issues raised in testimony. He asked if developing the property would have consequences in terms of engineering. The neighbors were worried about damage to their property resulting from development. He asked if from a scientific standpoint they could be told that the damage from flooding would not happen. **Mr. Espe** replied

that the applicant would determine through the future land use process whether a storm system would work so the adjacent properties would not be inundated. Additional related requirements would also have to be followed. **Councilor Mboup** referred to the testimony about the previous development flooding a home and asked if any guarantee could be offered to reassure the residents that would not happen again. **Mr. Espe** replied he did not believe that staff was equipped to make any such scientific guarantee for the adjacent properties until a land use application was before them for review. The burden of proof would be on the applicant to bear that out and determine whether or not their development would meet the City Code requirements regarding sensitive lands, storm water, providing the sewer, etc.

Councilor Manz confirmed that this part of the process was only for annexation and any future development would go through a very rigorous process defined by Code. **Ms. Espe** further confirmed additional procedures would include land use review for the wetland delineation, partition requirements, and building permits for individual houses. Storm water would need to be managed on site and the storm water Codes followed.

Councilor Wendland confirmed the three tax lots had already been determined and asked how often changes to an RP area were allowed once the RP designation was placed. It was difficult to imagine how five houses would be built in the area indicated in red on the diagram provided by Mr. Brockman. He asked why Tax Lot 100 would be connected to the sewer when it was not intended to be developed. **Mr. Espe** replied that the sensitive land designation shown on the map was a generalized location because the wetland scientists were not able to ground truth every lot when the overlays were established for the wetlands. The idea was that final delineation of the RP resource would take place in the future based on field surveys. Secondly, the sensitive lands designation allowed for modifications to dimensional standards, setbacks, and floor area of the underlying zone, and for variation in the lot dimension, lot size, and depth without a variance if the transfer of allowable density in the R-7.5 zone was not increased and did not have a greater negative impact on the natural resource. Other limitations in the Sensitive Lands Code also existed. If one lot was completely designated as an RP resource and occupied most or all of the lot in any residential district, the property owner was permitted development on the parcel of a single-family dwelling or the equivalent based on the minimum lot area of the underlying zone. If they owned only Tax Lot 100 and it was completely encumbered by the RP resource, the owner would be legally entitled to build one reasonably-sized house on the property based on the setbacks and requirements of the R-7.5 zone. **Councilor Wendland** inquired if a similar situation had occurred on Tara PI, and if the same could happen on Tax Lots 100 and 3000. The property owner could go through the same process to erase some of the blue area if they met the criteria. **Mr. Espe** agreed it was possible if the criteria were met and the property owner could establish that the location did not contain a wetland, but they could not fill or place fill in an RP resource.

Councilor Nguyen thanked Mr. Brockman for providing additional insight on his future plans for the annexed property. He believed the question should be asked if the applicant would continue with the annexation if it was determined later that five houses could not be built on the three lots. He understood it was a chicken-and-egg scenario, but it would be good to know to save staff and the applicant time, and whether the project made financial sense. **Ms. Bennett** responded that it was not possible because the City did not review the idea of a development proposal, just the proposals themselves. The property owner had to do their own due diligence to determine the viability of the project. **Councilor Nguyen** noted the four manholes for the sewer and asked if

another way existed to connect the sewer without impacting the natural areas. **Erica Rooney, Public Works Director/City Engineer**, replied that a master plan based off of high-level geography showed a slight rise to the west necessitating that the sewer flowed to the east. As part of the annexation package, the applicant looked into the feasibility of having the sewer flow by gravity because the area was so flat. Having the sewer flow to the west would require a pump. The City had placed sewers in parks before, most recently in Rivergrove Park, in the interest of keeping sewers in a gravity formation. In this application, they wanted to attempt to bore instead of using an open cut to lessen the impact to the natural area.

Councilor Verdick asked for more detail on how the zoning was determined for the site in the past. The residents had mentioned during testimony the possibility of different zoning to preserve the neighborhood character. **Ms. Bennett** replied it was the result of the State Goal 10 Housing Rules where every community of a certain size had to achieve a certain housing density community-wide. Down-zoning in the subject neighborhood would require up-zoning someplace else. **Councilor Verdick** asked for further information about requiring sewer versus septic. **Ms. Bennett** replied that was also a statewide requirement prohibiting septic systems in a development in an urban area with urban services. A failed septic system within a certain number of feet of a sewer line would require a connection to a sewer and, under City policy, an annexation was required before a sewer connection could be made.

Mayor Buck moved to tentatively approve Ordinance 2874 and direct staff to return with findings and an Ordinance for enactment upon the owner recording the Covenant to Construct and Connect to City Sewer Line in the official records of Clackamas County, Oregon. **Councilor Rapf** seconded the motion.

Councilor Nguyen received confirmation that the approval would be tentative and the applicant could withdraw the application if he decided to do so.


Councilor Wendland noted the city welcomed those who wished to annex in and did not force the issue. He would support the application under those circumstances with the understanding that a lot of work had to be done on Mr. Brockman's part.

Councilor Rapf was in support of the application because he believed government should not get in the way of wealth-building or in making life better and that it was not Council's job to state whether or not the applicant could build on the site. If the property ultimately could not be built upon, the city would have a nice wetland that would not be developed. He believed many people tonight might have expected something more from the process than just a decision on annexation. He fully supported annexation and believed that City staff and others would make the right decision on developing the property when the time came.

Councilor Mboup stated he would have voted against annexation of the property, but he had faith in staff and accepted their statements tonight. The property had a visible problem and he had reservations about it, but would vote in favor of the annexation.

A roll call vote was held, and the motion was passed, with Mayor Buck and Councilors Mboup, Manz, Nguyen, Wendland, Verdick, and Rapf voting 'aye', (7-0).

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<p>Name of Document For Recording: Covenant to Construct and Connect to City Sewer Line Grantor: Hail Capital LLC., i/o David Nelsen, 3115 Wembley Park Road Lake Oswego OR 97034 Grantee: City of Lake Oswego, P.O. Box 369, Lake Oswego, OR 97034 Consideration: \$0.00. Tax Statement to be mailed to: No Change Recordation Authority: ORS 205.130(2)(a). <u>After Recording, Return To:</u> City of Lake Oswego, Attn: City Recorder, P.O. Box 369, Lake Oswego, OR 97034</p>	<p>(For County Recording Use Only) Clackamas County Official Records 2022-011231 Sherry Hall, County Clerk  02543743202200112310080089 \$128.00 02/23/2022 02:20:40 PM D-OD Cnt=1 Stn=9 COUNTER1 \$40.00 \$16.00 \$62.00 \$10.00</p>
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Covenant to Construct and Connect to City Sewer Line

WHEREAS, the undersigned Hail Capital LLC ("Owner") warrant(s) to the City of Lake Oswego (City) that Owner is the fee title or contract purchaser of real property in Clackamas County, Oregon, outside the corporate limits of the City of Lake Oswego, but inside the City's Urban Service Boundary, described as follows ("Subject Property" or "Subject Properties"):

Legal Description:

A tract of land located within the southwest quarter of Section 7, Township 2 South, Range 1 East of the Willamette Meridian, City of Lake Oswego, County of Clackamas, Oregon, said tract of land being all of that property conveyed to Hail Capital LLC, an Oregon limited liability company, by Statutory Warranty Deed recorded July 7, 2021 in the Official Records of Clackamas County as Recording No. 2021-065158; said tract of land more particularly described as follows:

Lots 1, 2, 69, and 70 of Block 1, Plat of Lake Forest (Plat No. 509), plat records of Clackamas County.

Together with a tract of land located within the southwest quarter of Section 7, Township 2 South, Range 1 East of the Willamette Meridian, City of Lake Oswego, County of Clackamas, Oregon, said tract of land being all of that property conveyed to Hail Capital LLC, an Oregon limited liability company, by Statutory Warranty Deed recorded June 30, 2021 in the Official Records of Clackamas County as Recording No. 2021-063293; said tract of land more particularly described as follows:

Parcel 2, Partition Plat No. 2007-142, plat records of Clackamas County.

Street Address: No Situs address, Lake Oswego

Assessor Map/Lot References: Tax Lots 0100, 3000 and 02902, Map 21E07CA

WHEREAS, the undersigned Owner applied for annexation of the subject property to the City of Lake Oswego (Planning Dept. Case No. AN 21-0003).

WHEREAS, the City's Public Facilities Plan, which is consistent with Statewide Planning Goal 11 (Public Facilities) and the Community Health and Public Safety Chapter of the Comprehensive Plan, requires the

development of master plans for the orderly development of streets, sanitary sewer, water, and stormwater facilities, and the basis for long-range planning for both the incorporated and unincorporated lands within Lake Oswego's Urban Services Boundary.

WHEREAS, the Lake Oswego Comprehensive Plan Urbanization Policy C-4: "requires that urban services commensurate with the scale of the proposed development are available and are adequate to serve the property or can be made available in a timely manner prior to the annexation of non-island properties."

WHEREAS, to comply with the above Policy and with other related policies that are criteria for annexation of the Subject Properties, the Owner represented to the City that it would proceed with construction of public sanitary sewer lines to serve future development on the Subject Properties consistent with the City's Sewer Master Plan and guarantee sewer availability.

WHEREAS, following a public hearing, the City Council tentatively approved Ordinance 2874 ("Annexation Ordinance") and directed City staff to return with findings and ordinance for enactment upon recordation of this *Covenant to Construct and Connect to City Sewer Line* (Exhibit E-3) in the official records of Clackamas County, Oregon.

NOW THEREFORE, Owner does hereby covenant to City as follows:

1. Owner shall construct a sewer main, in conformance with the City Engineering Dept.'s standards and specifications from the Point of Connection of the existing City Sewer Main to the upstream boundary of each property for one connection or one home, or in the case of a partition of the Subject Property, then to the upstream boundary of that Subject Property (parent parcel of the partition), to serve each of the respective Subject Properties, as shown on the attached map, Attachment 1. The sewer main shall be installed to the respective Subject Property and accepted by the City prior to issuance of a development permit (including a building permit) for the respective Subject Property. (This obligation to construct does not preclude Owner from seeking a Zone of Benefit under LOC Art. 40.04.)
2. Owner acknowledges that neither the City's condition upon the annexation nor the City's acceptance of this covenant constitutes consent for Owner to install the sewer main in any property owned by or under the jurisdiction of the City. The Owner will need to obtain such City consent in the manner required for such, and the annexation does not obligate the City to so consent. The Owner's obligations under this Covenant shall arise only after the Subject Property has been fully annexed into the City. The completion of the annexation process shall be an express condition precedent to Owner's obligations under this Covenant.
3. Owner acknowledges the risk that events, circumstances, or unknown conditions could arise that would make it more difficult or preclude the extension of the sewer main as intended. Nevertheless, the Owner waives any and all claims or causes of action, legal or equitable, for the issuance of a development permit (including a building permit) absent compliance with the requirement that any development on the respective Subject Property be served by connection to a City sewer main. Specifically, the Owner waives any right to seek approval of an alternative sewage disposal system, including the right to seek exemption from the requirement to connect to the City sewer system.

4. This Covenant may be enforced by the City of Lake Oswego by a proceeding in the Clackamas County Circuit Court under any applicable legal or equity basis, including specific performance and injunction. The City shall be entitled to its reasonable attorney fees if it is the prevailing party, at trial or on appeal. If the City is represented by "in-house" counsel, the City shall nevertheless be entitled to recover reasonable attorney fees based upon the reasonable time incurred and the attorney fee rates and charges reasonably and generally accepted in the metropolitan Portland, Oregon area for the type of legal services performed.

5. Following construction of the sewer main to the upstream boundary of the property a respective Subject Property (as provided in Paragraph 1, above), at the Owner's request and expense, the City shall execute a Notice of Termination of Covenant suitable for recording with the County Clerk, so that upon recordation, the obligation to construct the sewer main to the respective Subject Property, and the agreement that no development permit (including building permit) be issued for the respective Subject Property will be shown as an obligation against the respective Subject Property.

6. This Covenant shall run with the land and shall be recorded in the deed records of the County of Clackamas, to give notice to all successors-in-interest in the Subject Properties and shall be binding on all successors in interest.

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[Signature on Next Page]

IN WITNESS WHEREOF, the undersigned Owner has hereunto executed this Covenant on the date stated below.

GRANTOR

Hail Capital LLC, an Oregon limited liability company

By: David A. Nelson
David Nelson, Manager

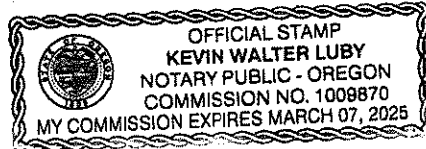
2 / 21 / 2022
Date Signed

STATE OF OREGON)
) ss.
County of Clackamas)

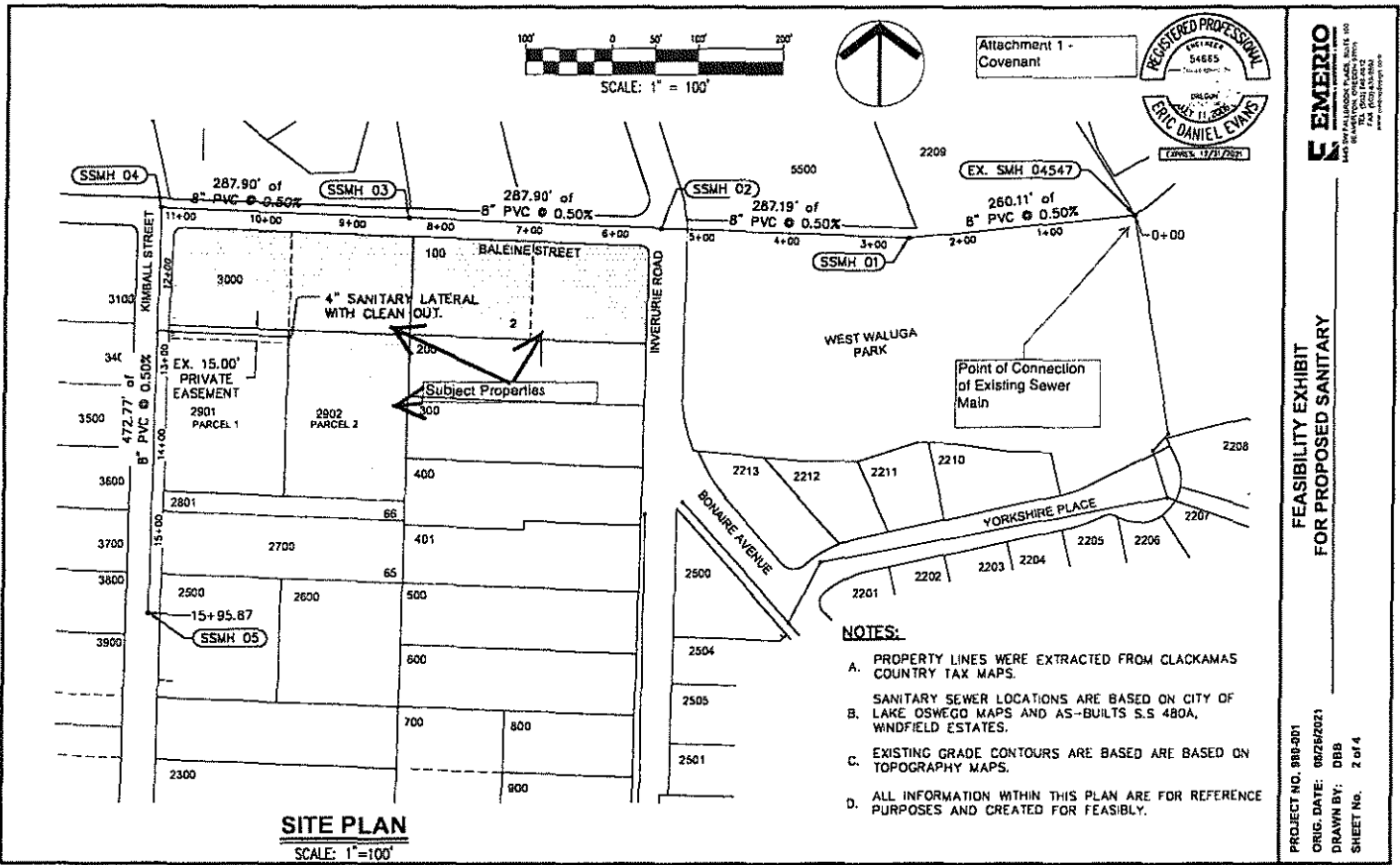
On this 21st day of February, 2022, before me the undersigned Notary Public, personally appeared DAVID NELSEN

- personally known to me
- proved to me on the basis of satisfactory evidence

To be the person who executed the within instrument as manager of and on behalf of Hail Capital, LLC, pursuant to authority, and acknowledged to me the execution hereof.

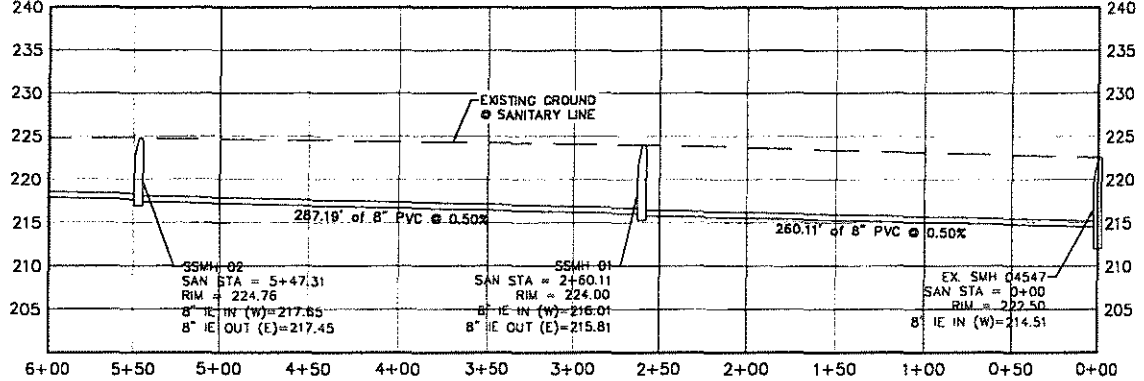
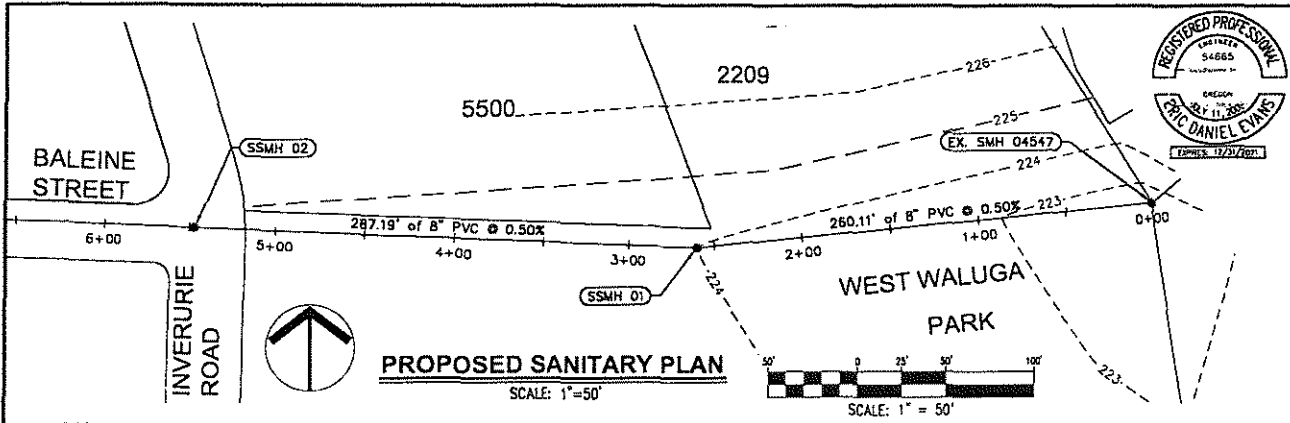


[Signature]
Notary Public for Oregon
My Commission Expires: 3-7-25





EMERIO
 ENGINEERING & ARCHITECTURE
 645 SW WALNUTWOOD PLACE, SUITE 100
 WEST PALM BEACH, FL 33411
 PHONE: 561-833-1111
 WWW.EMERIOFL.COM



PROPOSED SANITARY PROFILE
 SCALE: H:1"=50' V:1"=10'

FEASIBILITY EXHIBIT
 FOR PROPOSED SANITARY

PROJECT NO. 399-001
 ORIG. DATE: 06/26/2021
 DRAWN BY: DBB
 SHEET No. 2 of 4

6

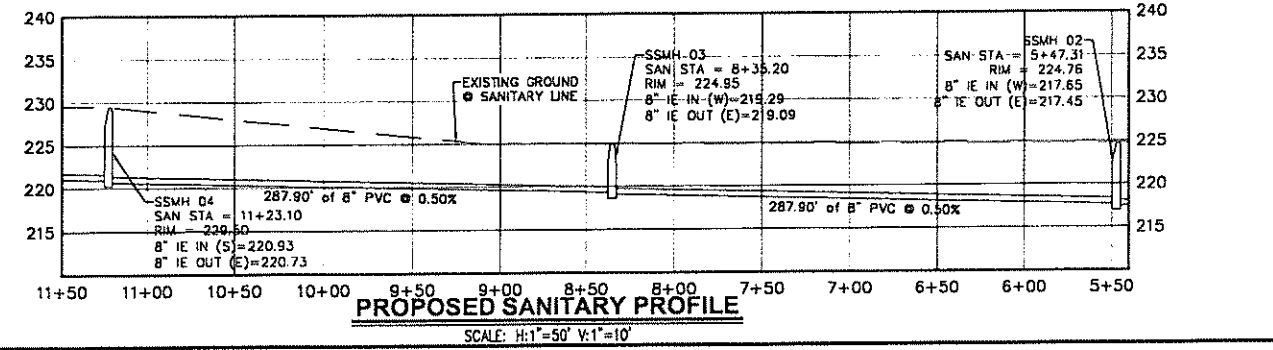
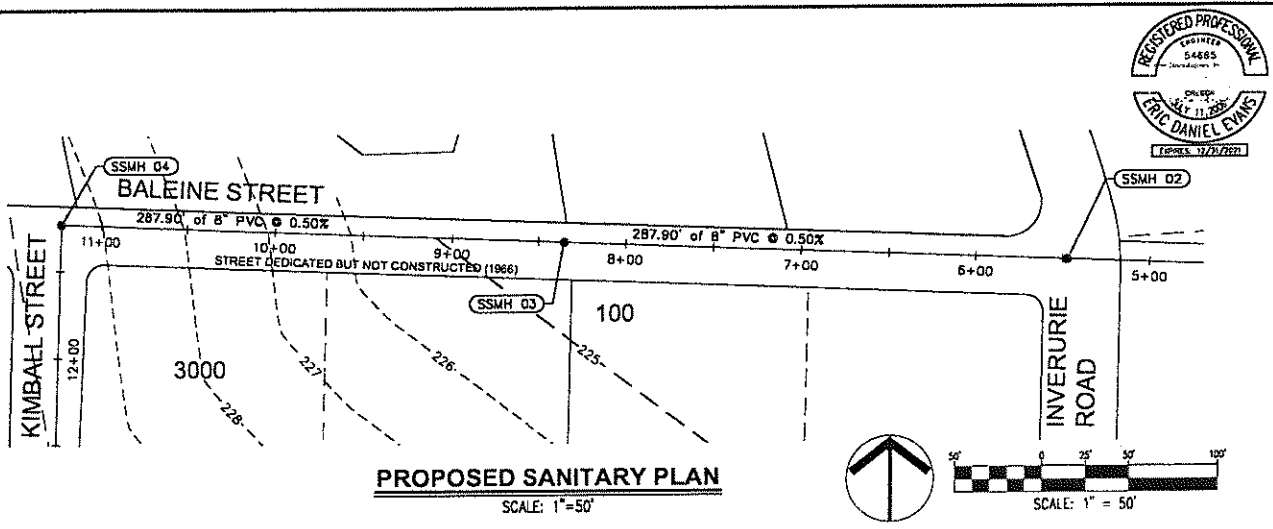
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EMERIO
 REGISTERED PROFESSIONAL ENGINEER
 STATE OF MICHIGAN
 NO. 54885
 EXPIRES 12/31/2021

FEASIBILITY EXHIBIT
 FOR PROPOSED SANITARY

PROJECT NO: 980-001
 ORIG. DATE: 08/28/2021
 DRAWN BY: DBB
 SHEET No. 3 of 4



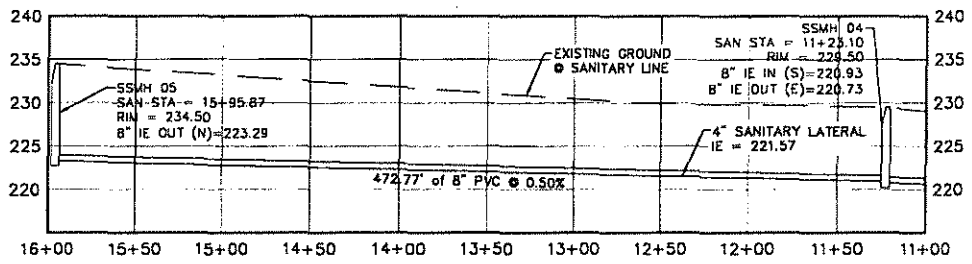
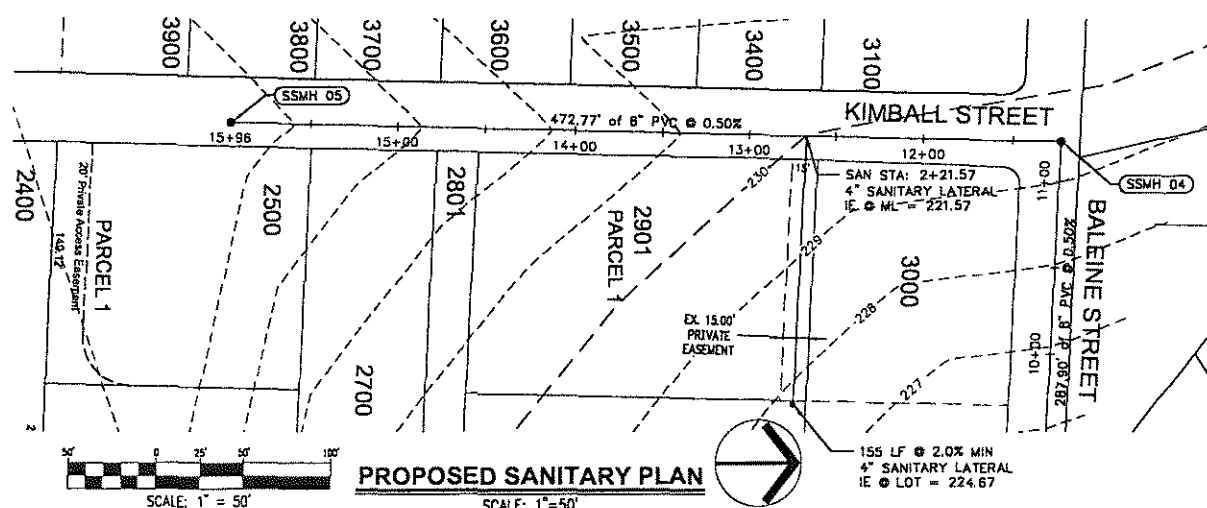
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Ex 517 of 8



FEASIBILITY EXHIBIT
FOR PROPOSED SANITARY

PROJECT NO. 990-081
ORIG. DATE: 08/26/2021
DRAWN BY: DBB
SHEET No. 4 of 4



8

Ex 5 P 8 of 8

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.

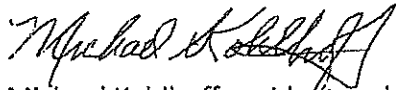
The provision could also be viewed as a restrictive covenant by the voters as how ownership of the Natural Preserves of the designated parks must be maintained and managed to retain and preserve the natural areas. The sewer line conditions do the opposite of that by creating a loss of the natural area 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

3122 Diane Drive

Lake Oswego OR 9703

503-709-1858

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.

City Website: <https://www.ci.oswego.or.us/>

(<https://www.ci.oswego.or.us/>)

City Telephone: (503) 635-0290

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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

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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,



Michael Kohlhoff, resident and park user

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Lake Oswego, OR 97035 phone: 503-709-1858

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EXHIBIT 1



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

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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."

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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:

EXHIBIT 2

HEALTHY ECOSYSTEMS COMPREHENSIVE PLAN CHAPTER

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

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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.

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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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- 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.

Third Supplemental Testimonial Submission Opposing LU 23-0002

As previously pointed out, under home rule, constitutionally the voters have the authority to govern the use and development of city's parks and the city's sewage system, provided in exercising that authority they do so consistent with state statutory authority that address the same areas. If the voters have properly exercised their authority, then contrary action by governmental officials is invalid.

The Charter Amendment is voter governance that limits development in the natural areas of the city parks, including that of sewer facilities, to protect their natural areas. It is democracy in action. The very fact that the citizens felt the need to do so clearly underscores their observation of a failed governance whose actions seldom, if ever, truly champion natural areas over development. It is drafted reasonably to allow sewer utilities to support the beneficial users of the parks and no more. It is consistent with statewide Goal 11 and the provision of sewer system utilities to meet the land use it directly serves. It limits sewer facilities for park users and visitors (the public) as a reasonable nexus to benefit the park users, and by so limiting, preserves from additional loss to the natural areas from sewer facilities serving extra territorial (outside the park boundaries) private development. As previously noted, it can be read consistently with Goal 5 and the City's Comp Plan and eco healthy provisions.

But it is also consistent as well with Goal 11 for the provision of infrastructure and after the Amendment fact of the city's narrowly drawn connection ordinance for land division. The Charter Amendment doesn't bar the five-lot subdivision's development from connecting to a city sewer system. An alternative is available to provide sewer line extension and connection to city lines outside the park, which is pumping. Grinder pump systems are often used with single family homes that need to push sewage up-hill for long distances to connect to a manhole of a gravity line or to a pressure main. And a second alternative in the form of septic systems if they did not negatively affect the wetlands more than the proposed sewer line and the potential of the sewer line for both infiltration and leakage in a wetland.

Nor does the Development Review Board need to find the Charter Amendment needs to be a land use decision to exclude the private sewer line that is sought as a condition of approval. It can be viewed as an ownership decision that otherwise is consistent with the affected land use law, is not precluded, and invalidates the proposed sewer line conditions. The Design Review Commission simply does not have the authority to approve the condition of allowing the sewer line extension from the private development to cause a loss to the natural area. City staff's argument that reclamation will save the day underscores what is there now and what the voters intended to be preserved will, in fact, be lost. Wounds may heal, but they leave scars; especially clear cutting a swath through a natural area to dig a 25-foot trench for over 500 feet.

Alternatively, there are two tests that support the Charter Amendment is the controlling final decision. In *Heritage Enterprises v City of Corvallis*, 300 Or 168, 708 P2d 601 (1985), the court found the voters' decision overturning the City Council's decision approving an annexation, based on the Council's making the required findings that the statewide land use Goals were met, was not a final land use decision under ORS 197.015(10) defining land use decisions. It found the city council's decision to refer was consistent with the Charter provision calling for a vote on annexation by the electorate; however, the referral simply called upon the voters to approve the Council's decision and did not address the goal findings that are required. Because the electorate did not address the goal findings under the particular

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circumstances of an annexation, it was not a final land use decision (to disapprove a finding must be made that one or more of the goals were not met), leaving LUBA without jurisdiction to hear the appeal. The facts in Heritage are distinguishable. The Heritage election took place after the City's decision, not before as is the case here. There wasn't the home rule governance issue as presented here, although even in Heritage, in passing, recognized there could be cases where the electorate was the governing body: "We do not exclude the possibility that the electorate might be a "local government" within the meaning of ORS 197.015 (10)". Also, the Amendment is consistent with the applicable land use laws as stated above, which laws were based on goal findings. A determination limiting development of sewer facilities for the particular purpose of providing protection for natural areas of 15 parks and any future park natural areas differs from an annexation decision. The Charter Amendment provision does not address annexation. It meets the ORS 197.015 (10) (A) (iv) definition of a new land use decision which implements the Comp Plan goal 5 protection for natural areas and open spaces.

In addition to the statutory test, there is a second test developed by case law when a governmental decision has a significant land use impact now and in the future. *Kerr v City of Pendleton*, 294 Or 126, 653 P2d (1982). See also, *Billington v Polk County*, 299 Or 471, 703 P2d (1985). In *Kerr*, the decision locating a road was found to have significant impact for two undeveloped subdivisions and was held to be a land use decision. In *Bollington*, the court found a vacation of a road opposed by only one adjacent property owner did not have significant impact and was not a final land use decision. The Amendment Limiting Park Development to certain types and kind provides standards to protect natural areas for not only the 15 existing parks with natural areas, but extends those protections to the natural areas of future parks. This meets the second test for a land use decision. The charter amendment is intended to and does have a significant impact on how current and future park natural areas may be developed. As a final land use decision, it must be followed by the Development Review Commission.

Respectfully submitted,

Michael Kohlhoff, resident and park user
3122 Diane Dr.
Lake Oswego, Or 97035
503-709-1858



Current Planning Public Comments and Testimony

Please fill out the form, below, to submit written comments on a pending land use application or an appeal of a tree removal request. All written comments and materials are due by the deadline listed on the Notice. Written submittals received by the deadline will be entered into the public record of file and will be considered by the decision body. Contact the staff coordinator listed on the Notice if you have questions.

Case Number * Please see Notice for correct LU or tree appeal number.
LU 23-0002/AP 23-04: A request for an RP District (wetland) Unavoidable Crossing to Install a Sewer Line and Serial Lot Line Adjustments.
If you do not see your case here the comment period is not open. Please check back later.

Case Number - Verification * LU 23-0002/AP 23-04: A request for an RP District (wetland) Unavoidable Crossing to Install a Sewer Line and Serial Lot Line Adjustments.
Please re-select your case number to ensure it routes to the appropriate case.

First Name * Michael

Last Name * Kohlhoff

Address
Street Address
3122 Diane Dr
Address Line 2
City State / Province / Region
Lake Oswego OR
Postal / Zip Code
97035

Email * mkohlhoff@msn.com

Stance: *
 Support
 Opposition
 Neither for nor against

Please type your comments below, or you may upload a PDF of your comments. If you have other media types, please contact planning@lakeoswego.city to coordinate its addition to the public record.

Comments The Charter Amendment vote mandates limited development to preserve the natural areas of fifteen current public parks and any future parks. This is within the voters authority, preempts contrary ordinances or code provisions and is recognized under case law as a significant land use decision. It is consistent with Goal 5 and the Comp Plan to protect open space and natural areas.

The application for this land use decision preceded the applicable application for annexation. On June 23, 2021 the City's Election Officer confirmed 2021 IN-1 met signature threshold (nearly 25% of the registered voters).

On July 6, 2021, the City Council passed Resolution 21-23, Receiving and Filing Initiative Measure 2020 IN-1 to Amend Chapter X of the Lake Oswego Charter To Enhance Protections of the City's Natural Areas.

Framing the matter as a minor development does not avoid applying the land use Amendment decision to prevent the sewer connection and construction within the natural area. Alternative sewer systems are available even if not preferred by city.

Exhibit 626, LU 23-0002, Provides New Evidence

Applicant seeks to exclude Exhibit 626 for failing to provide new evidence. This is not correct. 626 is a new evidentiary response directed to part of the City's after hearing response of December 22, 2023 to the December 18, 2023 hearing testimony. The City's response that relies on ORS 227.178 (3)(a) argues that, even if the Charter Amendment is a land use regulation, it fails to apply as being enacted after the Annexation application.

626 bundles the unique circumstance here that the Charter Amendment is a significant land use regulation *under case law* and that with the recited date of the election officers certification of signatures of June 23, 2021, the recitation that the signatures totaled almost 25% of the registered voters, and the recited date of City's Resolution certifying the Charter Amendment of July 6, 2021, constituted an application for a land use decision that was well know to the applicant and city officials to probably succeed. As such an application, it preceded the July 8, 2021 application for Annexation.

The fact the measure won by approximately 62% underscores the probability of winning by the evidence of the massive signature gathering. Also, the DRC should and can take judicial notice of these official acts of certifications and the known circumstances of the signature count. Under these unique circumstances, the applicable date by which Charter Amendment should apply is the earlier dates of its certifications; therefore, meeting ORS 277.178(3)(a).

Obviously, ORS 277.178(3)(a) is intended to provide a fair playing field so the goal posts are not moved once an application is filed. This rule of fairness equally applies to an application by the voters for a significant land use decision in the form of a Charter Amendment. The applicant and city officials knowing the Amendment was duly filed and probable to win should not be allowed to subvert the will of the people by relying on an after filed Annexation application conditioned to destroy a portion of the natural area the voters wanted protected.

Additionally, the City's December 22, 2023 response argues the hearing is limited in nature to only certain applicable criteria. Nevertheless, under the new evidentiary response recited above as to the timing of the Charter regulation, 626 provides additional evidence that Charter Amendment supersedes the sewer connection code on its face and how it is being applied.

Applicant's motion to exclude Exhibit 626 should be denied.

Cordially submitted:


Michael Kohlhoff, resident and park user

3122 Diane Dr, Lake Oswego, Or 97035; phone: (503) 709-1858



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1 Staff notified the applicant and the respective submitters of the objection prior to the
2 January 3, 2024 public hearing, advising that they would have an opportunity to present
3 argument in regards to the objection.

4 **Commission Findings and Decision Upon Objections**

5 Based upon written and oral testimony, and lack thereof, the Commission deliberated,
6 found, and voted upon objections, which this Order memorializes, as follows:

7 **1. Exhibit G-626 Kohlhoff 12-23-2023**

8 Exhibit G-626 was received within the deadline of December 26, 2023. Following the
9 applicant's objection, the submitter presented written argument in response to the applicant's
10 objection on January 2, 2024 (Exhibit G-631), stating that the new evidence contained within
11 Exhibit G-626 was in response to the City's submission of Exhibit F-017 on December 15, 2023,
12 which was further addressed by Exhibit F-020 on December 22, 2023. The applicant did not
13 submit further argument than as stated in its Exhibit F-021.
14

15 The Commission finds that Exhibit G-626 is sufficiently in response to Exhibit F-017 (as
16 further addressed by Exhibit F-020) that Exhibit G-626 should be considered as submitted.
17

18 Commission Vote: Pursuant to motion, the Commission rejected the applicant's
19 objection and shall consider Exhibit G-626 as part of the Record to be considered by the
20 Commission in its deliberation upon the application. (Vote: 6-0, 1 absent; January 3, 2024
21 Commission Video).

22 **2. Exhibit G-628 Schwartz 12-26-2023**

23 Exhibit G-628 was received within the deadline of December 26, 2023. The applicant did
24 not submit further argument than as stated in its Exhibit F-021. No argument was submitted by
25 the submitter of Exhibit G-628.
26

1 The Commission finds that Exhibit G-628 is a statement of position of the submitter of
2 Exhibit G-628, as Exhibit G-628 does not identify any part of a written exhibit filed prior to
3 December 18, 2023 to which it is presenting new *evidence* in response. The applicant, staff, and
4 Commission are not obliged to search Exhibit G-628 for what responding evidence it may
5 contain, nor what written evidence was submitted into the Record prior to December 18, 2023
6 to which it may be responding.
7

8 Commission Vote: Pursuant to motion, the Commission granted the applicant's
9 objection and shall not consider Exhibit G-628 as part of the Record to be considered by the
10 Commission in its deliberation upon the application. (Vote: 6-0, 1 absent; January 3, 2024
11 Commission Video).
12

13 **B. Exhibits Received After December 26, 2023**

14 Based upon written and oral testimony, and lack thereof, the Commission deliberated,
15 found, and voted upon objections, which this Order memorializes, as follows:

16 **1. Exhibit F-022 Applicant Rebuttal to New Evidence 1-2-2024**

17 Exhibit F-022 was submitted on January 2, 2024. This exhibit is the applicant's rebuttal
18 to Exhibit G-629, which was submitted on December 26, 2023. Staff objected to the
19 Commission's consideration of Exhibit F-022, on the basis that LOC 50.07.003.4.a.xi(1) and ORS
20 197.763(6)(b) does not allow an additional time period for sur-rebuttal of exhibits submitted
21 after December 26, 2023. The applicant made no argument.
22

23 The Commission finds that, pursuant to LOC 50.07.003.4.a.ix(1) and its statutory basis,
24 ORS 1997.763(6)(b), rebuttal evidence may not be submitted after the close of the seven-day
25 period. Thus, Exhibit F-022 was not submitted within the December 26, 2023 deadline.
26

1 Commission Vote: Pursuant to motion, the Commission rejected the applicant's
2 objection and shall not consider Exhibit F-022 as part of the Record to be considered by the
3 Commission in its deliberation upon the application. (Vote: 6-0, 1 absent; January 3, 2024
4 Commission Video).

5
6 **2. Exhibit G-631 Kohlhoff 12-30-2023**

7 This exhibit was submitted on December 30, 2023. As noted in Section A.1 of this Order,
8 the submitter asks the Commission to take official notice of certain facts which the submitter
9 asserts would meet the requirements of LOC 50.07.003.4.c.iii:

10 The hearing body may take official notice of all **adjudicative facts and law which may be**
11 **judicially noticed pursuant to ORS 40.060 to 40.090¹**, including an ordinance,
12 comprehensive plan, resolution, order, written policy or other enactment of the City of
13 Lake Oswego. Matters officially noticed need not be established by evidence and may
14 be considered by the hearing body in determination of the matter.

15 Initially, the Commission notes that LOC 50.07.003.4.c.iii is addressed to the
16 Commission's discretion, in that it authorizes, but does not require, the Commission to act.

17 The Commission finds that it need not consider whether to take official notice of certain
18 facts because the time for the request for submission of evidentiary *facts* to be considered by
19 the Commission would have been prior to either December 18, 2023, or December 26, 2023 if
20 in response to written evidence submitted prior to December 18, 2023. The request was not
21

22
23
24 ¹ The relevant statutory section for judicial notice of facts is ORS 40.065:

25 **ORS 40.065 Rule 201(b). Kinds of facts. A judicially noticed fact must be one not subject to**
26 **reasonable dispute in that it is either:**

- (1) **Generally known** within the territorial jurisdiction of the trial court; or
 (2) **Capable of accurate and ready determination** by resort to sources whose accuracy cannot
 reasonably be questioned.

1 timely filed and it would not be fair under the principles of due process for the Commission to
2 take official notice of *facts* after the close of the Record to all parties.

3 Further, the Commission finds that the facts requested to be taken notice of – signature
4 counts of an initiative measure for a charter amendment submitted to the city recorder in 2021
5 and their percentage of the then-registered voters – are not facts that are either “readily
6 known” within Lake Oswego or capable of accurate and ready determination without resort to
7 the official records pursuant to ORS 40.065, and the time for submission of those records has
8 passed.
9

10 Accordingly, the Commission finds that the request to take official notice was not timely
11 filed, and even if it had been, the Commission declines to take official notice of the requested
12 facts stated in Exhibit G-631, and those stated facts in Exhibit G-631 shall not be considered by
13 the Commission in its deliberation.
14

15 Commission Vote: Pursuant to motion, the Commission rejects the submitter’s request
16 to take official notice of certain asserted facts stated in Exhibit G-631 and the Commission shall
17 not consider the certain asserted facts in Exhibit G-631 as part of the Record to be considered
18 by the Commission in its deliberation upon the application. (Vote: 6-0, 1 absent; January 3,
19 2024 Commission Video).
20

21 **3. Exhibit G-632 Bregar 1-2-2024**

22 Exhibit G-632 was submitted on January 2, 2024. Staff objected to the Commission’s
23 consideration of Exhibit G-632, on the basis that it was not timely filed prior to December 18,
24 2023. Furthermore, even if Exhibit G-632 was filed prior to December 26, 2023, as being in
25 response to new written evidence filed prior to December 18, 2023, and even if it was
26

1 presenting new *evidence* in response to written evidence submitted prior to December 18
2 (which it is not), it was not submitted prior to December 26, 2023. The submitter made no
3 argument in response.

4 The Commission concurs with the basis stated by staff's objection.

5
6 Commission Vote: Pursuant to motion, the Commission granted the objection and shall
7 not consider Exhibit G-632 as part of the Record to be considered by the Commission in its
8 deliberation upon the application. (Vote: 6-0, 1 absent; January 3, 2024 Commission Video).

9 **ORDER**

10 This Order is adopted to memorialize the above Commission findings and vote.

11 //

12
13 AYES: Arthur, Dewes, Leek, O'Connor, Poinsette, and Sangrey

14 NOES: None

15 ABSTAIN: None

16 EXCUSED: Bates

17 DATED this 16th day of January, 2023.

18
19
20 _____/s/ Randy
Arthur _____
21 _____ Randy Arthur, Chair

22
23 ATTEST: _____NONE

24 _____/s/ Kat Kluge
25 Kat Kluge, Administrative Support