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

6 STATE ex rel. NEW LOOK
7 DEVELOPMENT LLC, an Oregon limited
liability company,

8 Plaintiff-Relator,

9 v.

10 CITY OF LAKE OSWEGO, a municipal
corporation,

11 Defendant.
12

Case No. 24CV03746

NEW LOOK DEVELOPMENT LLC'S
RESPONSE TO MOTION TO
INTERVENE

13 Plaintiff-Relator State ex rel. New Look Development, LLC (“Relator”) opposes the
14 *Motion to Intervene* (“*Motion*”) brought by Michael Kohlhoff (“Kohlhoff”). This response is
15 supported by the records and files herein, and the points and authorities which follow.

16 **I. Introduction**

17 “The mandamus remedy ‘is not designed to provide review of a local government’s land
18 use decisions,’ but, instead, provides ‘an incentive for timely governmental action, along with a
19 remedial mechanism that results in an approval,’ subject to defenses that the local government
20 must prove.” *Oregon Pipeline Co., LLC v. Clatsop County*, 253 Or App 138, 142 (2012),
21 quoting *State ex rel. Compass Corp. v. City of Lake Oswego*, 319 Or 537, 542-44 (1994).

22 To this end, ORS 227.179(5) expressly limits an objecting party’s defenses to a showing
23 of a violation of substantive provisions of a comprehensive plan or applicable land use
24 regulations. Here, Kohlhoff seeks to intervene for the purpose of arguing, almost exclusively,
25 that mandamus relief should be denied because the underlying land use application did not
26 comply with Chapter X of the City Charter. He is, in short, seeking review of the City’s land use

1 decision. As argued below, intervention should be denied because Kohlhoff’s substantive
2 objections to mandamus relief are not relevant.

3 II. Factual Background

4 Relator is the owner of tax lots 21E07CA00100, 21E07CA03000, and 21E07CA02902
5 (“Property”) located within the City of Lake Oswego (“City”).

6 On January 17, 2023, Relator filed a Land Use Application with the City (“Application”)
7 for several lot line adjustments to the Property resulting in five (5) single-family dwellings, an
8 unavoidable utility (sewer) crossing of a delineated Resource Protection District (a Class 2
9 wetland), and removal of 43 trees. The application was deemed complete on July 14, 2023.

10 Pursuant to ORS 227.178(5),¹ on September 6, 2023, Relator made written request to the
11 City to extend the 120-day deadline set forth in ORS 221.178(1) for a period of 45 days to
12 December 26, 2023.

13 Pursuant to ORS 227.178(1), the City was to have taken final action on the Application,
14 ***including all appeals*** pursuant to ORS 227.180, within 120 days (plus the additional 45 days
15 requested in Paragraph 5 above) of the date upon which the Application was deemed complete,
16 to wit: December 26, 2023. On January 23, 2024, the City issued its *Notice of Development*
17 *Review and Commission Decision* (“*Notice of Decision*”). The *Notice of Decision*, however, was
18 not, by its express terms, the final action on the Application but only a “tentative” decision (more
19 on that below).

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24 _____
25 ¹ “The 120-day period set in subsection (1) of this section or the 100-day period set in ORS
26 197A.470 may be extended for a specified period of time at the written request of the applicant.
The total of all extensions, except as provided in subsection (11) of this section for mediation,
may not exceed 245 days.”

1 **III. Analysis**

2 **A. Subject Matter Jurisdiction**

3 Kohlhoff argues in pertinent part:

4 This mandamus action, under ORS 227.178, may not be initiated
5 after the local government has taken final action **including**
resolution of appeals on a permit application(.)

6 *Memorandum Supporting Motion to Intervene, Deny Writ (“Memorandum”), P. 23, Ll. 3-11.*

7 Kohlhoff argues that the City took “final action” on the Application on January 23, 2024,
8 the day before the Petition was filed. That argument, however, belies the express terms of the
9 January 23, 2024, decision which provides in pertinent part:

10 **Description of Project and Decision:** The Development Review
11 Commission has *tentatively approved* this application subject to
12 the conditions set forth in the Findings, Conclusions and Order[.] *
* * This decision **will become final** unless appealed as described
below.

13 * * *

14 **Right to Appeal:** This decision may be appealed *to the City*
15 **Council** by filing a written Notice of Intent to Appeal within
16 **fifteen calendar days** of the date of decision[.]

17 *See Petition for Peremptory Writ, Ex. 2.* (Bold text in the original; emphasis added in bold and
18 italicized text.)

19 ORS 227.178(1), as Kohlhoff even concedes, provides:

20 Except as provided in subsections (3), (5) and (11) of this section,
21 the governing body of a city or its designee shall take final action
22 on an application for a permit, limited land use decision or zone
change, **including resolution of all appeals under ORS 227.180**,
within 120 days after the application is deemed complete.

23
24 (Emphasis added.)

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1 In turn, and as applicable here, ORS 227.180(1)(a) provides in pertinent part:

2 A party aggrieved by the action of a hearings officer *may appeal*
3 the action *to* the planning commission or *council of the city*, or
4 both, however the council prescribes. The appellate authority on its
own motion may review the action.

5 (Emphasis added.)

6 Thus, on January 23, 2024, the Lake Oswego Development Commission took “tentative”
7 action and expressly acknowledged that its decision would only become final at a later time and
8 upon an express condition (i.e. no appeal to the City Council). Moreover, Lake Oswego City
9 Code 50.07.003(6)(a)(i) also expressly provides that “a final decision approving a development
10 permit becomes effective upon expiration of the local appeal period(.)”² Accordingly, the City
11 did not, in fact, take final action as provided by ORS 227.178(1) and (5). Indeed, the City agrees
12 that the January 23, 2024, decision is not a “final action” until “the time for local appeal from the
13 decision of the Commission expires without an appeal having been filed[.]” *Defendant City of*
14 *Lake Oswego’s Answer to Writ of Mandamus*, ¶11. *See also Amended Return of Writ of*
15 *Mandamus and Certificate*, P. 1, Ll. 17-18 (“The Defendant has not immediately approved
16 Plaintiff-Relator’s Application with the conditions of approval approved by its Development
17 Review Commission * * * Order dated January 23, 2024 because Defendant **had not taken ‘final**
18 **action** ..., including resolution of all appeals...’ pursuant to ORS 227.178(1)[.]” [Emphasis
19 added.]

20 Kohlhoff cites to *State ex rel. Fraley v. Deschutes County Board of Commissioners*, 151
21 Or App 201 (1997) in support of his position. *Fraley* is inapposite. While the *Fraley* Court did
22 rule that a mandamus proceeding initiated after the governing body has made a final decision,
23 even if after 120 days, was improper, it was limited to the specific facts of the case, holding that
24 the mandamus proceeding at issue “was unavailable to plaintiff **under these circumstances.**”

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26 ² Lake Oswego City Code 50.07.003(7)(b) provides for a 15-day appeal deadline.

1 (Emphasis added.) *Id.* The circumstances here are markedly different.

2 In *Fraley*, the plaintiff filed an application with Deschutes County for a “verification of a
3 nonconforming use.” *Id.* at 203. The county governing board issued a final decision generally
4 favorable to the plaintiff. *Id.* A party opposing plaintiff’s application appealed to LUBA which
5 remanded the proceedings back to the county. *Id.* (Plaintiff sought review of *that* decision with
6 the Court of Appeals, which upheld LUBA’s decision.) More than 120 days after LUBA
7 remanded the proceedings back to the county, the county governing board entered a new final
8 decision that was adverse to plaintiff. *Id.* at 203-04. Plaintiff, in turn, appealed this second
9 county governing board final decision to LUBA, but while that appeal to LUBA was pending,
10 plaintiff initiated a mandamus proceeding with the Circuit Court. *Id.* at 204.

11 Here, the Lake Oswego Development Commission’s January 23, 2024, tentative decision,
12 by its express terms, is not a final decision, unlike the county governing board’s decision in
13 *Fraley*. Accordingly, and unlike in *Fraley*, the Lake Oswego Development Commission’s
14 January 23, 2024, tentative decision is not subject to LUBA’s exclusive jurisdiction.

15 ORS 197.825(1) provides in pertinent part:

16 (1) Except as provided in ORS 197.320 and subsections (2) and (3)
17 of this section, ***the Land Use Board of Appeals shall have***
18 ***exclusive jurisdiction*** to review any land use decision or limited
19 land use decision of a local government, special district or a state
20 agency in the manner provided in ORS 197.830 to 197.845.

19 (2) The ***jurisdiction of the board:***

20 (a) Is limited to those cases in which the petitioner
21 ***has exhausted all remedies*** available by right
22 before petitioning the board for review[.]

23 (Emphasis added.) Here, “all remedies” have not been exhausted because there remained the
24 right to appeal the Lake Oswego Development Commission’s January 23, 2024, tentative
25 decision to the Lake Oswego City Council.

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1 In 2012, the Court of Appeals revisited this issue, and confirmed that LUBA’s exclusive
2 jurisdiction was the key component to whether the Circuit Court had jurisdiction. Referring to
3 *Fraley* and cases cited therein, the Court of Appeals held in *State ex rel. Oregon Pipeline Co.,*
4 *LLC v. Clatsop County*, 253 Or App 138, 147 (2012):

5 It is apparent from the foregoing decisions that the mandamus
6 remedy was meant to require local governments to take “final
7 action” within a specified amount of time; ***when such action has***
8 ***been taken***, the purpose of the mandamus statutes has been
satisfied, ***and an aggrieved party must look to LUBA for further***
review.

9 (Emphasis added.) *Oregon Pipeline*, if it were not already clear, then confirmed: “Because the
10 county’s withdrawal of that decision for reconsideration ***did not divest LUBA of its exclusive***
11 ***jurisdiction*** over the appeal under ORS 197.825, the circuit court lacked jurisdiction to
12 adjudicate Pipeline’s petition for a writ of mandamus and properly granted the county’s motion
13 to dismiss.” *Id.* at 150. (Emphasis added.) Here, because LUBA had not yet acquired
14 jurisdiction (exclusive or otherwise) and final action had not been taken upon the filing of the
15 mandamus Petition filed herein, the Circuit Court has jurisdiction for the mandamus action now
16 before it.

17 **B. Intervention Generally**

18 Kohlhoff seeks an order to intervene pursuant to ORCP 33 C, which provides:

19 At any time before trial, any person who has an interest in the
20 matter in litigation may, by leave of court, intervene. In exercising
21 its discretion, the court shall consider whether the intervention will
unduly delay or prejudice the adjudication of the rights of the
original parties.

22 Relator agrees that Kohlhoff likely has standing to intervene. There is no dispute that
23 Kohlhoff participated in writing in an evidentiary hearing on the Application prior to the filing
24 the Petition on file herein. ORS 227.179(3) provides:

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1 A person who files a petition for a writ of mandamus under this
2 section shall provide written notice of the filing to all persons who
3 would be entitled to notice under ORS 197.797 and to any person
4 who participated orally or in writing in any evidentiary hearing on
the application held prior to the filing of the petition. The notice
shall be mailed or hand delivered on the same day the petition is
filed.

5 Kohlhoff was provided notice in compliance with this rule via first-class mail. *See*
6 *Declaration of Mailing of Notice Under ORS 227.179* on file herein.

7 For the reasons set forth below, however, the statutory basis to intervene in a proceeding
8 brought under ORS 227.179(5) is limited, and here, Kohlhoff has not stated a proper basis to
9 contest mandamus relief. Instead, he relies almost exclusively on the scope and terms of the
10 City’s Charter as a basis to deny the underlying Writ. Accordingly, intervention will unduly
11 delay and prejudice the adjudication of the rights of Relator and the City of Lake Oswego, the
12 original parties.

13 **C. Application of ORS 227.179(5)**

14 This proceeding is governed by ORS 227.179(5), which provides:

15 The court shall issue a peremptory writ unless the governing body
16 *or any intervenor shows that the approval would violate a*
17 *substantive provision of the local comprehensive plan or land use*
18 *regulations as those terms are defined in ORS 197.015. The writ*
may specify conditions of approval that would otherwise be
allowed by the local comprehensive plan or land use regulations.

19 (Emphasis added.)

20 In turn, ORS 197.015 defines “comprehensive plan” and “land use regulations” as
21 follows:

22 (5) “Comprehensive plan” means a generalized, coordinated land
23 use map and policy statement of the governing body of a local
24 government that interrelates all functional and natural systems and
25 activities relating to the use of lands, including but not limited to
26 sewer and water systems, transportation systems, educational
facilities, recreational facilities, and natural resources and air and
water quality management programs. “Comprehensive” means all-
inclusive, both in terms of the geographic area covered and
functional and natural activities and systems occurring in the area

1 covered by the plan. “General nature” means a summary of
2 policies and proposals in broad categories and does not necessarily
3 indicate specific locations of any area, activity or use. A plan is
4 “coordinated” when the needs of all levels of governments,
5 semipublic and private agencies and the citizens of Oregon have
6 been considered and accommodated as much as possible. “Land”
7 includes water, both surface and subsurface, and the air.

8 * * *

9 (11) “Land use regulation” means any local government zoning
10 ordinance, land division ordinance adopted under ORS 92.044 or
11 92.046 or similar general ordinance establishing standards for
12 implementing a comprehensive plan.

13 The City Charter is not a “Comprehensive plan” or a “Land use regulation” as defined by
14 this statute. This is the City’s position as well. The Lake Oswego Development Review
15 Commission specifically found that Chapter X cannot be a land use regulation because it only
16 constrains the City’s actions, and it does not bind non-City actors, such as the Plaintiff-Relator.
17 Arguments that Chapter X applies here is outside the scope of ORS 227.179(5), and the Circuit
18 Court must issue the writ as the statute directs.

19 **D. Response to Intervenor’s “Legal Questions Presented”**

20 Kohlhoff raises eight (8) separate legal questions³—none of which relate to or “shows
21 that the approval would violate a substantive provision of the local comprehensive plan or land
22 use regulations as those terms are defined in ORS 197.015(,)” which are the *only* bases to deny
23 mandamus relief under ORS 227.179(5). Instead, Intervenor employs classic *non sequitur*
24 diversionary arguments—that is, arguing against something by arguing for something else. In
25 this case, and notwithstanding the express limitations in ORS 227.179(5), intervenor repeatedly
26 raises Chapter X of the City Charter (“Chapter X”) as the basis for denial of the Writ.

“A city’s charter is, in effect, the city constitution.” *Portland Police Ass’n. v. Civil
Service Board of Portland*, 292 OR 433, 440 (1982). That said, “(t)he home rule provisions of

³ *Memorandum*, P. 6-7.

1 the Oregon Constitution grant cities broad authority to regulate to the full extent allowed by their
2 charters.” *McPherson v. Coos Bay-North Bend Water Board*, 318 Or app 592, 584 n. 3 (2022).
3 A city retains authority to adopt rules and ordinances that may also regulated by the Charter
4 itself. *Childers Meat Co., Inc. v. City of Eugene*, 296 Or App 668, 677 (2019).

5 Here the City’s Charter reserves unto the City (acting by and through its Council) “all
6 powers which the constitution, statues, and common law of the United States or of this state
7 expressly or impliedly grant or all allow municipalities as fully as though This Charter
8 specifically enumerated each of those Powers.” *Charter*, Ch. 2, Sec. 4. To that end, conflicts
9 between the Charter and the legislative authority of the City “should be resolved so as to enable,
10 and not restrict, the legislative authority of the city council.” *Ramirez v. Hawaii T & S*
11 *Enterprises, Inc.*, 179 Or App 416, 425 (2002). Indeed, the Charter expressly provides that it
12 shall be “liberally construed to the end that the City has all powers necessary or convenient for
13 the conduct of its municipal affairs(.)” *Charter*, Ch. 2, Sec. 5.

14 **1. Intervenor’s Legal Question No. 1**

15 **Are the voters a governing body under the home rule**
16 **provisions of the Oregon Constitution?**

17 Kohlhoff argues that “(t)he voters are a City’s government.” *Memorandum*, P. 8, Ll. 2.
18 From that rather dubious position, Kohlhoff suggest that Chapter X, an amendment to the
19 Charter adopted by the Lake Oswego voters in 2021, is a land use decision because it is a “final
20 decision * * * made by a local government” under ORS 197.015(10). Kohlhoff cites no relevant
21 authority to support that position,⁴ and he does not explain how this purported, Charter-based
22 “final decision” requires denial of Relator’s Application in light of the limitations of ORS
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24 ⁴ Kohlhoff’s cite to *Heritage Enterprises v. City of Corvallis*, 300 Or 168 (1985) does not
25 support his position here. *Heritage* held, in addressing ORS 197.015(10), that, for the purpose of
26 LUBA jurisdiction, “the legislature intended that the city council’s decision would be the final
‘land use decision.’” *Heritage* at 172.

1 227.179(5) which expressly limits his “defenses” to establishing a violation of a substantive
2 provision of the local comprehensive plan or land use regulations. Kohlhoff fails to assert, much
3 less establish, any such violation, because there is none.

4 **2. Intervenor’s Legal Question No. 2**

5 **Does the home rule Charter Amendment enact regulations**
6 **affecting the use of park and open space lands by providing**
7 **additional protections for the natural areas of the City’s parks**
8 **and open space lands now and providing these protections for**
9 **certain after acquired park and open space lands in the future?**

10 Kohlhoff argues that Chapter X “provides a set of standards for development,” that are
11 “an implementation of the natural resource protections of the Comp Plan Chapter Healthy
12 Ecosystems[,] [and it] is in accordance with the general ordinance provision implementing a
13 Comp Plan under the definition of ‘land use regulations.’” *Memorandum*, Pp. 9-10. This
14 statement is fundamentally flawed: Chapter X does not set standards for development. Instead, it
15 informs the Council as to the parameters of City’s comprehensive plan from which further land
16 use regulations may follow to set the standards for development.

17 In any event, Chapter X does not serve as one of the statutorily recognized bases to deny
18 mandamus relief. *See* ORS 227.179(5), *supra*. In posing the question as he does, Kohlhoff
19 suggests, without citing to any authority, that Chapter X is a “regulation.” A “land use
20 regulation” is a clearly defined (and limited) term, *see* ORS 197.015(11), *supra*, that does not
21 include Chapter X. Chapter X is not an ordinance of the City of Lake Oswego: “An ordinance
22 is enacted upon approval of the question by vote of the City Council.” *Charter*, Ch. 8, Sec. 35.
(Chapter X was not approved by a vote of the City Council, but rather the by the voters of Lake
23 Oswego.)

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1 **3. Intervenor’s Legal Question No. 3**

2 **Do the charter amendment development limitations provide**
3 **clear and objective standards as to what is allowed to be**
4 **developed and constructed and what is not?**

5 Regardless of whether Chapter X includes clear and objective standards, it is neither a
6 land use regulation nor a component of the City’s comprehensive plan, and as such, its nature is
7 not the basis for denying the statutorily prescribed mandamus relief sought. This is simply more
8 of Kohlhoff’s diversionary strategy—arguing against the Application (and thus the Writ) by
9 arguing for Chapter X.

10 **4. Intervenor’s Legal Question No. 4**

11 **If the voters enacted land use regulations by virtue of the**
12 **Charter Amendment, do they meet the significant impact and**
13 **constitute a final land use decision?**

14 The significant impact test that the intervenor alludes to is immaterial to the discussion of
15 the relief sought. Succinctly, Chapter X is not a final land use regulation. As indicated above,
16 the Court in *Heritage, supra*, made it clear that a final land use decision is issued by the City
17 Council, not the voters.

18 **5. Intervenor’s Legal Question No. 5**

19 **Are these Charter Amendment additional protections**
20 **consistent with (a) statewide goal 5, (b) statewide goal 11, (c)**
21 **the modification and change of location of the sewer line**
22 **locations of a sewer facility plan under OAR 660-022-0030(2)**
23 **and (4) and the Comp Plan Chapters, Healthy Ecosystems and**
24 **Utilities in accordance with ORS 197.015(1) and (2)?**

25 Just as succinctly, Chapter X is not the comprehensive plan, nor is it a land use
26 regulation. These are the *only* bases upon which Kohlhoff may argue that the Writ should be
27 vacated.

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1 **6. Intervenor’s Legal Question No. 6**

2 **Do the Charter Amendment development limitations supersede**
3 **contrary City regulations regarding (a) the location of the**
4 **sewer line extension in the park under map Fig 6-14, Sewer**
5 **Utility Facility Plan, (b) sewer connections and the**
6 **disallowance of alternative sewer waste systems that could**
7 **avoid the sensitive lands involved here (c) sensitive lands**
8 **mitigation that doesn’t prevent loss of natural resources?**

9 Kohlhoff’s argument that the Charter supersedes the City’s regulations is irrelevant
10 because the Charter does not serve as a basis upon which mandamus may be denied. ORS
11 227.197(5) is clear that the Kohlhoff must show that the Application violated substantive
12 provisions of the City’s comprehensive plan or land use regulations. No such violations are
13 alleged, and therefore, this question is simply another diversion. In this mandamus proceeding,
14 the circuit court is bound by ORS 227.197(5), and lacks authority to consider, or grant any relief
15 on, the questions presented regarding the City Charter.

16 **7. Intervenor’s Legal Question No. 7**

17 **Did the City fail to enforce the Charter Amendment and cause**
18 **land use regulations to be applied that should not have been if**
19 **the Amendment was properly enforced?**

20 Continuing with his “Charter Amendment” arguments, Kohlhoff next argues that the City
21 “failed to enforce the Charter Amendment, thereby allowing DRC to misapprehend the Charter
22 Amendment’s application” to the *Application. Memorandum*, P. 21, Ll. 20-21. This is simply
23 not relevant. Indeed, the bulk of Kohlhoff’s argument is nothing more than a critique of the
24 City’s handling of the Application. He makes no reference to any violation of the comprehensive
25 plan or any applicable land use regulation.

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1 **8. Intervenor’s Legal Question No. 8**

2 **Did DRC misapply issue preclusion to not consider the Charter**
3 **Amendment?**

4 Kohlhoff’s argument remains far outside the limitations of ORS 227.197(5). The fact
5 that Kohlhoff and the City entered into a settlement agreement pertaining to a different project at
6 a different time is not evidence of a violation of a substantive provision of the comprehensive
7 plan or an applicable land use regulation here.

8 **IV. Attorney Fees**

9 Relator has properly alleged a right to recover its attorney fees. *Petition for Peremptory*
10 *Writ of Mandamus*, ¶9. Relator waives its claim to fees (and costs and disbursements) as against
11 the City, and to the extent necessary, will stipulate to this on the record. Relator, however, does
12 not waive its claim to fees, costs, and disbursements against Intervenor, which is an “adverse
13 party.” [Intervenor was duly served with the *Petition* and the *Writ*. See ORS 34.210(2)
14 (“Attorney fees, costs and disbursements may only be awarded against adverse parties who have
15 been served with the petition and writ.”)]

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1 **V. Conclusion**

2 Kohlhoff’s motion to intervene should be denied. While he arguably has standing, he has
3 presented no lawful basis (that is, a showing of a violation of a substantive provision of the
4 comprehensive plan or applicable land use regulations) upon which his intervention will be
5 necessary for adjudicating the issues in this case. Intervener will seek fees in a supplemental
6 proceeding pursuant to ORCP 68.

7
8 DATED this 8th day of February, 2024.

9 JORDAN RAMIS PC
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11 Development LLC

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date shown below, I served a true and correct copy of the
3 foregoing New Look Development LLC’s Response to Motion to Intervene on:

4 Evan P. Boone, OSB #781518
5 Lake Oswego City Attorneys
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Attorneys for Intervenor Michael Kohlhoff

9 *Of Attorneys for Defendant the City of Lake
10 Oswego*

11 ****E-MAIL SERVICE AGREEMENT***

- 12 by first class mail, postage prepaid.
- 13 by overnight mail.
- 14 by hand delivery.
- 15 by facsimile transmission.
- 16 by facsimile transmission and first class mail, postage prepaid.
- 17 by electronic transmission.
- 18 by electronic transmission and first class mail, postage prepaid.

19 DATED: February 8, 2024.

20 *s/ Christopher K. Dolan*
21 _____
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