

Verified Correct Copy of Original 3/7/2024.

ENTERED
MAR 06 2024
By: WJW

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

STATE ex rel NEW LOOK)	
DEVELOPMENT LLC, an Oregon limited)	Case No.-24CV03746
liability company,)	
)	
Plaintiff-Realtor)	OPINION and ORDER
v.)	
)	
CITY OF LAKE OSWEGO, a municipal)	
Corporation,)	
)	
Defendant,)	
)	
and)	
)	
MICHAEL E. KOHLHOFF,)	
)	
Intervenor.)	
_____)	

This matter is before the court on Petitioner/Relator New Look Development, LLC's (New Look) petition for a writ of mandamus under ORS 227.179(5), Defendant the City of Lake Oswego's (City) answer, and Intervenor Michael Kohlhoff's (Kohlhoff) Memorandum.

The court previously held it had jurisdiction under ORS 227.179(5) and granted Kohlhoff's motion for intervention under ORCP 33. The limited issue now before this court is whether Chapter X of the Lake Oswego Charter (as amended by the voters pursuant to Oregon's home rule constitutional provisions in November 2021) constitute a land use regulation under ORS 227.179(5) and ORS 197.015.

Under ORS 197.015(11), a land use regulation is defined as "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or **similar general ordinance establishing standards for implementing a comprehensive plan.**" (emphasis added).

24CV03746
OPOR
Opinion - Order
17805701



The purpose of Chapter X as recited in section 41 is to “preserve designated Nature Preserves [including Waluga Park – West] . . . as natural areas for the enjoyment of all residents of and visitors to Lake Oswego.”

Section 43, Limitations on Development, begins with the direction that all development in a Nature Preserve be consistent with the “preservation . . .as a natural area available for public enjoyment.” The next paragraph includes some permissible trails and facilities but prohibits hard surface trails, to remain consistent with natural conditions.

The fourth paragraph of Section 43 contains specific prohibitions on building certain facilities, lots, roads or trails. It also prohibits cutting trees to facilitate such construction.

The fifth paragraph of Section 43 prohibits construction of above ground structures that would be “inconsistent with the natural conditions of a Nature Preserve.”

The sixth paragraph of section 43 prohibits commercial logging of trees in Nature Preserves. Finally, the seventh paragraph allows maintenance of Nature Preserves 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.”

Lake Oswego’s 2013 Comprehensive Plan includes the following chapters/sections, carried forward from the 1994 Comprehensive Plan:

- Section 1, Fish and Wildlife Habitat, with a stated goal to “preserve and restore environments which provide fish and wildlife habitat.”
- Section 2, Vegetation, with a stated goal to “protect and restore the community’s wooded character and vegetation resources.”
- Section 5, Sensitive Lands, with a stated goal to “protect, enhance and maintain the wooded character and natural features of Lake Oswego that are prized by residents.”
- Section 6, Open Space, with a stated goal to “protect, enhance, maintain and expand a network of open space areas and scenic resources within and adjacent to the Urban Services Boundary.” Waluga Park is specifically mentioned within section 6.

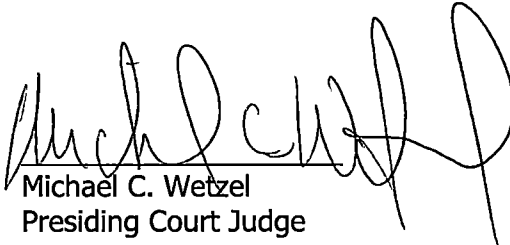
The purposes and limitations set forth in Chapter X, sections 41 and 43 are entirely consistent with and further the objectives set forth in the Lake Oswego Comprehensive Plan carry forward sections 1, 2, 5, and 6 described above. To use a different term, the provisions of Chapter X nest with the goals of the Comprehensive Plan. Accordingly, I conclude that Chapter X, Sections 41 and 43 of the Lake Oswego City Charter are the type of municipal laws falling within the definition of a land use regulation under ORS 197.015(11).

New Look and the City argue Chapter X does not fall within ORS 197.015(11) because it is part of the city charter not the laws set out as ordinances. I do not read ORS 197.015(11) that restrictively. First, ORS 197.015(11) defines a land use regulation, and the plain meaning of a regulation includes both charter provisions and ordinances. Second, the context of ORS 197.015(11) is directed towards municipal laws regulating land use, and it would elevate form over substance to ignore charter provisions but include ordinances. Finally, such interpretation would be inconsistent with Oregon’s Home Rule and Initiative provisions, Oregon Constitution, Article XI section 2 and Article IV section 1(5), by elevating laws enacted by city councils above the laws enacted by the voters and enshrined in the city charter.

CONCLUSION

I hold that Chapter X, Sections 41 and 43 are land use regulations under ORS 197.015(11). Accordingly, this court will need to set an evidentiary hearing under ORS 227.179(5) to determine if the proposed action by New Look violates a substantive provision of Chapter X, sections 41 and 43.

Dated this March 6, 2024.



Michael C. Wetzel
Presiding Court Judge