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

8 State et rel. New Look Development)
9 LLC) NO. 24CV03746
Plaintiff, Relator)
10) INTERVENOR MEMORANDUM
v)
11 City of Lake Oswego,)
Defendant and)
12)
Michael Kohlhoff,)
13 Intervenor.)

14 **Intervenor Memorandum**

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Statement Of The Proceedings And Pleading Allegations.

I. Jurisdiction And Intervention Motion Granted. The Court's jurisdiction has been invoked by Applicant-Relator New Look Development (hereinafter referred to as the Relator) under the statutory procedure for a Writ of Mandamus for the City of Lake Oswego's (hereinafter referred to as the City) failure to reach a final land use decision before the expiration of 120 days plus 45 days (consented to by the Relator). The Relator had applied to the Lake Oswego Development Review Commission (DRC), LU 23-0002, to develop the 5 lots with conditions, including, but not limited to, constructing a sewer main line extension together with clear cutting a 17 ft by 525 ft construction access corridor to be used as a road for heavy equipment and for parking to construct the trench and laying of the sewer pipe, for storing materials and side casts and providing an impact mitigation and restoration plan through the Nature Preserve wetlands of Waluga Park-West. The City recommended approval with these and other conditions. Intervenor Kohlhoff appeared before the DRC by written testimony and opposed the application because the sewer line extension, construction road access easement, and mitigation and restoration plan violated the land use requirements of initiated City Charter, Chapter X, Park Development Limitation, enacted November 2, 2021. The DRC declined to apply Chapter X. The Court granted Intervenor's Motion to Intervene.

1. Evidentiary Hearing Ordered. After receiving legal memorandums and arguments by the parties and being fully advised in the premises, the Court entered an order that City of Lake Oswego Charter, Chapter X, Park Development Limitations is a land use regulation that applies in this matter. The Court further ordered that an evidentiary hearing under ORS 227.179(5) be held to determine if the proposed action by Relator's development violates a substantive provision of Chapter X, sections 41 and 43.

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2 2. Intervenor's Denies The Relator's Application Should Be Granted
3 Under Chapter X And Alleges Affirmatively Herein That The Application Should Be Denied
4 under Chapter X. Intervenor denies Relator's application under Chapter X should be granted
5 and affirmatively alleges that the Relator's proposed sewer line crossing even with the
imposition of conditions is contrary to and inconsistent with Section 41 and 43, City Charter,
Chapter X , Park Development Limitation and should be denied.

6 3. Burden Of Proof. Under the Writ of Mandamus procedure, it is unclear which of
7 the parties have the burden of proof by a preponderance of the evidence. Intervenor carried
8 its burden of proof that Chapter X substantive regulations needed to be applied to the
9 Relator's application. LOC 50.07.003.1.b. directs: "The applicant for a development permit
[the Relator in this case] shall bear the burden of proof that their application complies with
all applicable review criteria or can be made to comply with applicable criteria by imposition
of conditions of approval."

10 4. Stipulation To Foundation And Identification Of Public Records, Other Objections
11 Reserved. The parties have stipulated as to the foundation and identification of public
12 records exhibits as follows: "The parties stipulate that they waive evidence rules requiring
13 authentication and information pursuant to ORS 40.505 through 40.515 and foundation
14 pursuant to ORS 40.550 through 40.585, specifically waiving any foundation requirements for
public records and documents produced by any one or more of the parties in discovery, to be
proved by copy, certified as correct in accordance with ORS 40.510 or testified to be correct
by a witness who has compared it with the original and documents produced by any one or
more of the parties in discovery.

15 The parties retain all other rights to object, including but not limited to any attempt
16 of a witness to prove the content of a writing without the writing being produced when the
actual terms or conditions of the document are at issue."

17 6. Relevance Of Public Records: Intervenor's Perspective. The relevance of the public
18 records exhibits as well as the other Intervenor's exhibits is easily discernible in Intervenor's
19 presentation of the Intervenor's case as set forth in the arguments in this Evidentiary Hearing
Memorandum.

20 7. Public Records Defined. Public records are defined in ORS 192.311 (5) (a): "A 'public
21 record' includes any writing that contains information relating to the conduct of the public
business, including but not limited to court records, mortgages, and deed records, prepared,
owned, used or retained by a public body regardless of physical form or characteristic."

22 8. Admissions By Party Opponent. Statements made in public records are attributed to the
23 Relator or to the City, respectively, if made under the provisions of ORS 40.450 Rules of
Evidence 801 4.(d) (B) and are not hearsay.

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II. Standards of Review: Interpretation Methodology.

In order to apply the facts of the proposed application to the Chapter X regulations, the Court will need to discern the legislative intent, in this case the voters' intent, in approving the initiated Chapter X's regulatory language. The Court begins the methodology with looking at the plain and ordinary meaning of the text and context of the language of the constitution, statute, or initiative at issue as the best evidence to ascertain the legislative intent of the voters and if helpful to understand what the voters intended, the legislative history, and if still necessary rules of statutory construction. See, the following:

1. Ecumenical Ministries of Oregon v Oregon State Gambling Commission, 318 Or.551, 871 P2nd 106 (1994). The Court applied this interpretation standard to the intent of voters in approving an initiative by first reviewing the initiative's text as to its plain, natural, and ordinary meaning and the context of the other provisions within the initiative and similar measures on the ballot at the same time, then if needed to help resolve any ambiguity to legislative history of voter information; finding no ambiguity, rejected the need to have evidentiary facts hearing for a facial challenge. However, the Court at 559 n 7 warned that "caution is required in ending the analysis before considering the history of an initiated constitutional provision."

2. State v Gaines, 346 Or 160, 171-172, 206 P3d 1049 (2009). The Court upheld under recently adopted standards addressing interpretive methodology that the first tier of looking at the text and context of legislation remained, but in turning to legislative history for further understanding of what was intended, the need to find an ambiguity as precondition for turning to legislative history was eliminated.

3. Knopp v Griffin-Valade, 372 Or 1 (2024). The Court stated "Therefore when interpreting a constitutional amendment adopted through an initiated ballot measure, we consider the voters' intent focusing on the text and context as well as the measure's history, should it appear useful to our analysis.

"...methodology to construe the text of the amendment, by determining how the voters who adopted the amendment most likely understood its text, including considering the information present to the voters through the ballot title and in the voters' pamphlet." Id at 3.

"On the whole, in view of the jealous regard of the people for the initiative process and of the opportunities which exist for the voters to acquaint themselves with the background and merits of a proposed initiative measure, we are of the opinion that, in the construction of such measures, the courts should indulge the same presumption as to the knowledge of historical facts on the part of the people as they indulge with reference to acts

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2 passed by the legislature.” Id at 18. The Court determined that even if the text on its own
3 would wholly support one reading, if the legislative history wholly supports the exact
opposite, then the intent of the voters will be derived by the legislative history.

4 In examining the legislative history, the Court opened up a wide swathe of places
5 where the voters would have gotten their information. At various places in the opinion, the
6 court took into account the ballot title, the voters’ pamphlet, voter arguments in the
7 pamphlet, media coverage, contemporaneous materials widely available, and explanations by
8 legislators. They assigned weight based on the substance and probative quality of the
9 materials. Id at 18. The Court found the information in the Voters’ Pamphlet, the wide
dispersal of contemporaneous information and the media coverage were consistent and
informative to determine that the voters understood the interpretation of the measure that
10 unexcused absences by state legislators would terminate their ability to have a following
term after their current term expired, irrespective of an election occurring before their
current term ended. In short, the Knopp court found that the voters’ understanding of the
Ballot Measure was so well known as to override a different textual interpretation. Id at 19.

11 4. State ex rel. Rosenblum v Living Essentials, LLC, 371 Or 23, 529 P3d 939 (2023).
The Court followed the State v Gaines methodology of interpretation in overturning the Trial
12 Court and Court of Appeals statutory interpretation. The Court found the plain language and
context of the statutory sections of Uniform Trade Practices Act (UTPA) did not expressly
13 include any material intent by consumer to purchase in order to charge a violation nor, given
the text and context, was materiality “necessarily and logically” implied. The Court found that
14 context included other relevant provisions of the UTPA including its purpose statement and
other similar statutory enactments. However, in reviewing a former previous enactment, the
15 Court found that materiality was never addressed in its legislative history; therefore, it didn’t
provide any comparable context.

16 **III. Under The Facts And Applicable Law, The Proposed Sewer Line**
17 **Development And Construction Even With Conditions Does Not Comply Nor Can**
It Be Made To Comply With Section 41 And 43 Of The Initiated Chapter X.

18 1. Analytical Overview Of Text And Context: Chapter X Plainly Means What It Says.

19 The meaning of Chapter X is actually quite clear. Section 41 states the purpose is to
20 preserve the designated natural area parks/open spaces, now defined as Nature Preserves,
as natural areas for the public’s enjoyment, (there is no mention of preservation for the use of
21 private development).

22 Section 42 defines Nature Preserve as parks/open spaces to be managed or
maintained to retain their natural condition and prevent habitat deterioration (the proposed
23 development does not preserve habitat from deterioration, it destroys it) .

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2 Later in Section 43 it repeats almost entirely the purpose stated in Section 41 albeit
3 it applies it to all development within the Nature Preserve (sewer line and its construction
4 conditions constitute development). Preservation is the key concept. (keep in original
5 condition; not destroy for private development and interrupting public enjoyment while
6 taking several years to restore under a mitigation plan).

7
8 Section 43 has various examples that have to be read paragraph by paragraph:

9
10 To facilitate public access and use, the City can build trails but should not use hard
11 surface materials (concrete and asphalt). It allows boardwalks for particularly fragile habitats
12 (sewer lines are not included in the list of limited development allowed nor naturally and
13 logically implied as included as it differs significantly from the type of limited development
14 allowed).

15
16 It forbids any roads for motorized vehicles. It forbids cutting any trees for the
17 purpose of developing any roads.(Relator's proposal employs both forbidden acts).

18
19 It forbids any facility or structure above ground that is not consistent with a Nature
20 Preserve. (sewer manholes in wetlands need to be partially above ground per City technical
21 specifications, therefore prohibited).

22
23 It allows maintenance (not mitigation) for the purposes of ecological restoration.

24
25 It allows maintenance of any existing above ground structures/roads for motorized
26 vehicles prior to the date of the enactment. (Would include existing sewer lines as their
27 manholes are above ground). This maintenance cannot alter a Nature Preserve.

28
29 2. And See, The Construction Realities Of This Sewer Line Development. The
30 Relator's Baleine Sewerline Extension Emerio Engineering plan at 2, DRC Ex G-006, Int Ex
31 200, listed the following City requirements: Lake Oswego General [Construction] Notes, item
32 30, "Contractor shall remove per plan all trees, stumps, brush, roots, topsoil, and other
33 material and dispose of them per applicable regulation."; Erosion Control Notes, item 1: "All
34 cut and fill areas (project site) shall be stripped of sod and other non-structural material
35 (depth 8" ±) exact depth to be determined by project's geotechnical engineer"; item 17, "Water
36 tight trucks must be used to transport saturated soils from the construction site."; and item 9,
37 the Contractor is directed to "Install temporary paved or gravel area for construction
38 parking."

39
40 Together with the access road, this means a clear cut, graveled swathe at the
41 minimum of 17 ft by 525 ft through the wetlands. It is an impact of full destruction to the
42 function and value of the wetlands.

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2 3. A Closer Look At The Text And Context Of Chapter X And The Relators
3 Application. In discerning the ordinary and plain meaning of text, this Memorandum uses
4 Webster's Third New International Dictionary (unabridged, 6th ed, 2002). All definitions
5 come from this source or cited case law. See, Appendix - Glossary which lists most of the
6 words defined in this Memorandum.

7
8 When legal maxims are involved, the source is Black's Law Dictionary (2nd).

9
10 Also note the paragraphs of Section 43 of the Chapter X are not numbered, but
11 Intervenor has ascribed numerical numbers 1-9 in order of first appearance and descending
12 order, et. seq., for ease of identification and discussion of text, context, and relevant
13 legislative history in this Memorandum.

14 3.1. Section 41, Purpose is substantive. To begin with, purpose statements are
15 substantive provisions. The import of Living Essentials also matters in this case. The
16 development of a sewer main line extension is not expressly included as permitted under any
17 of the sections of Chapter X. The Relator and the City are left with attempting to imply that
18 the line is permitted under the text, context, and relevant legislative history of what the
19 Relator and City asserts are the relevant sections, but they fail to address the context with
20 other relevant provisions or the relevant legislative history in any meaningful way. The City
21 initially argued in its legal memorandum of December 15, 2023, LU 23 - 0002, that paragraph 1
22 of section 43 is a purpose statement and is not a relevant, substantive, operative provision.
23 See, December 15, 2023 City's Legal Memorandum. Int Ex 201.

 This ignores that Section 41 is the overarching purpose statement that must be met
and that paragraph 1, Section 43 not only by text but in context provides a substantive
governance mandate to the City to meet the purpose of preservation over all adverse
development.

 Under Living Essentials at 39, the Court found the purpose statement of the UTPA
was a substantive, relevant provision as it provided context for the whole of the regulatory
Act and its provisions. In its order in this case, this Court likewise found the purpose
statement Sections 41 and 43 are substantive provisions for Chapter X and the Relator must
show how he meets it. The City's argument is without merit.

 The Living Essentials court also looked at the text, content, and legislative history of
the provisions of the UTPA, including its purpose statement, to interpret if the materiality
issue of a consumer's intent to purchase should be implied as a charging element needing to
be proven. In examining the question of implied materiality, the Court applied the standard of
whether the requirement was "necessarily and logically implied" from the text and context of
the applicable provision and the text and context of the other provisions of the UTPA.
Similarly, while it found some of the provisions were based on a former statute, it found no

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2 mention in the legislative history that addressed materiality in the former provisions. The
3 Court found there was no context in the former statute to support that materiality was
4 necessarily and logically implied. Likewise, as discussed below, the provisions in the former
5 Chapter X were not applied to any previous sewer line construction in Springbrook Park and
6 do not provide any context to necessarily or logically support the implied arguments of the
7 opposing parties.

8
9 3.1.1 Section 41, preserve. It states: "The purpose of this Chapter is to preserve all
10 designated Nature Preserves that are owned by the City of Lake Oswego, inclusive of the
11 fifteen natural parks specified in this Chapter, as natural areas for the enjoyment of all
12 residents and visitors to Lake Oswego. This Chapter shall be interpreted liberally to achieve
13 this purpose."

14
15 "Preserve" means "1: to keep safe from injury, harm, or destruction: guard or defend
16 from evil: PROTECT, SAVE . . ."; "2.a: to keep alive, intact, in existence, or free from decay."

17
18 The clear intent under the purpose of this Chapter is that for the natural areas to
19 be enjoyed by the public they are to be governed by the City to be kept safe, free from
20 injury, harm or destruction, to be kept alive, intact, and in existence.

21
22 Limiting development to that which is necessary for the enjoyment of the natural
23 areas and open spaces is an intended means of keeping Nature Preserves safe from
destruction and intact as natural areas preserved for the enjoyment of the public.

Relator's proposed destruction within the Nature Preserve is the opposite of and
contrary to keeping the Nature Preserve intact and preserving it for public enjoyment.

3.2. Section 42: Nature Preserve Defined: retain natural condition and prevent
habitat deterioration. The establishment of a Nature Preserve is a new concept provided in
the Initiative. It gives clarity and an enhanced preservation purpose of the Initiative for the
natural areas and open spaces. Section 42, Definitions defines Nature Preserve for use in
Chapter X to mean "natural areas 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, . . . Waluga Park-West . . ."

20
21 "Natural area" is "a geographical area (as in a city) having a physical and cultural
22 individuality developed by natural growth rather than design or planning." The term "manage
23 or maintain" in this context directs how the natural areas are to be governed: "to retain their
natural condition and prevent habitat deterioration." LOC 50.06.005 4.a.i. states: "Natural
areas shall remain in the natural condition existing at the time of their designation, except ...
(lists minor exceptions consistent with keeping a natural condition)," The code explains this
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2 definition applies to designations prior to 2012, and Waluga Park-West was so designated with
3 its RP overlay in 1997. However, the definition of the Nature Preserves enhances the
4 protection over the code for they are not only expressly preserved to retain their natural
5 conditions without any time limitation as to designation, but to expressly prevent habitat
6 deterioration.

7 “Retain” means “3.a.to hold secure or intact (as in a fixed place or condition);
8 prevent escape, loss, or detachment of.” In context, the natural areas’ natural condition refers
9 to the original state of the natural growth environment of the geographical area of a Nature
10 Preserve. In other words, the Nature Preserves are defined as natural areas and open spaces
11 to be governed to keep their natural growth characteristics intact and without any loss or
12 detachment to prevent habitat deterioration.

13 For wetlands these natural growth characteristics include the wetland soils that are
14 well known for plants, woody shrubs and tree vegetation that aid in water quality by
15 sequestering harmful carbon emissions and nitrates in the saturated soils from downstream
16 waters and by their presence and saturation aid in flood control; but also they provide the
17 characteristics of support of food, cover, and nesting for a variety of wildlife. See, definition of
18 wetland and wetland functions and values defined in LOC 50.10.003. These characteristics
19 also include those associated with the values of peaceful enjoyment of nature from bird
20 watching to mitigating mental health stress in the quiet presence of nature to education
21 about the values of wetland ecosystems. See, designs for walkway, boardwalk, and overlook,
22 1987 West Waluga Park Plan, Int Ex 202.

23 All of which is contrary to the noise and pollution of construction vehicles and
equipment ripping up the soils, and destroying the habitat, vegetation and trees, and
endangering the variety of wildlife such as frogs and other amphibians, squirrels, birds-large
and small, and animals such as raccoons and coyotes testified to at the DRC hearing, LOC
23-0002 and in the admission of Pacific Habitat that many of whom are likely to be present as
set forth in its Application filed March 21, 2024 to the Division of State Lands (DSL) for a
dredge and fill permit. A copy is marked Int Ex 203.

To be clear, “prevent deterioration of habitat” means to stop the action or process
of deterioration or gradual impairment of the value of the habitat for wildlife. In the
preservation context here, any destruction of the habitat to construct the sewer line would
clearly be inconsistent with the ability to preserve the habitat by preventing its deterioration.

To state this another way: Trees, for example, are part of habitat. When you cut
them down, you displace the wildlife and the value as habitat to them is obviously lost. Thus,
cutting down trees causes habitat deterioration albeit not so gradual. A “natural area” as
defined by the Lake Oswego Code still envisions development, even if it is for what is labeled
a public benefit, e.g. utilities. Chapter X is for preservation which is focused on preventing

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2 deterioration of habitat. Likewise roads necessarily deteriorate habitat. Chapter X does not
3 allow the expansion of what is already the reality in these Nature Preserves. Everyone agrees
4 that “public” street roads have no place in the Nature Preserve, but Chapter X does not
5 agree that more “non public” roads should be allowed. We have to assume based on the
6 logic of the City and the logic in this case that the City wants to be free to put in “temporary
7 roads” and access roads that only City personnel drive such as in Cooks Butte. Chapter X
8 stands for the premise that whatever is now, can stay. But no more, for anyone, in the future
9 without voter approval.

6
7 3.3. Section 43. Development Limitations, its provisions do not permit the
8 development of the sewer line in the Nature Preserve of Waluga Park-West.

8
9 3.3.1. Paragraph 1 Analysis: It states: “The City of Lake Oswego shall insure [ensure]
10 that all development within a Nature Preserve is consistent with the preservation of a Nature
11 Preserve as a natural area for public enjoyment.” [emphasis added].

10
11 “Shall” is a clear, legal mandate to the City to ensure all development within a
12 Nature Preserve is consistent with the preservation of a Nature Preserve as a natural area for
13 public enjoyment. See, Doyle v City of Medford, 356 Or 336, 366, 337 P3d 797 (2014) (notes
14 the term “shall” ordinarily imposes mandatory duty). Its place in the Charter and its
15 governance mandate is intended to ensure “recommitment” by the City to the proposition
16 that all development in a Nature Preserve is consistent with preservation, i.e. not contrary to
17 preservation.

14
15 “All” means every member or individual component of: each one of . . .” It is clear
16 that the term “all development” does not differentiate between development types such as
17 underground and above ground, or temporary and permanent, but is plainly intended to
18 cover each member or individual component of development, its every member. Thus, the
19 development and construction of the sewer mainline extension is subject to meeting the
20 regulatory standard in Section 43, paragraph 1. Any argument that Chapter X does not apply
21 to underground sewer lines, in this case a sewer line whose manholes will be above ground,
22 or to development that causes a temporary, adverse impact is spurious. It is not in keeping
23 with the plain wording and understanding of “all.”

19
20 The term “consistent with” is clear and objective and encompasses the meaning not
21 contrary to and is well understood not only by the courts in applying it to civil home rule
22 preemption cases (Thunderbird Mobile Home Club, LLC v. City of Wilsonville, 234 Or. App.
23 457, 228 P.3d 650 (2010), but was applied by this court in its order determining the Chapter X
24 regulations were consistent with the Lake Oswego Comprehensive Plan. For the City and the
25 Relator to argue that it is not a clear and objective standard, but rather an amorphous one, is
26 without merit.

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2 As previously stated above, the definition of “preserve” means to keep intact and
3 not destroy. A natural area was also defined above and includes sensitive wetlands. Nature
4 Preserve is defined in Chapter X with preservation being essential for management and
5 maintenance governance. Clearly, under the text and context of the regulatory governance
scope of paragraph 1, Section 43, the proposed sewer line development within the Nature
Preserve of Waluga Park-West is inconsistent with and contrary to the mandated preservation
purpose.

6 3.3.2. Paragraph 2 Analysis. It states: “To facilitate public access and use, the City
7 of Lake Oswego may build trails for hiking, jogging, horseback and bicycle riding, may provide
8 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.”

9
10 The intent of paragraph 2 is to ensure the retention of the natural conditions and
11 prevention of habitat deterioration in a Nature Preserve for the public’s enjoyment by (a)
expressly limiting the purpose of the development to facilitate public use and access and (b)
expressly limiting the type and kind of the development allowed.

12 There is no ambiguity in the text of paragraph 2 as it applies to the sewer main line
13 extension.

14 First, the sewer main line extension for private development is not expressly
15 included as a limited development exception in paragraph 2 or in any other sectional
paragraph in Chapter X; therefore, it is unambiguously excluded.

16 Second, the development of the sewer line is neither (a) intended to facilitate
17 public access and use of the Nature Preserve as its purpose is to support private
development outside the park, nor (b) does it fit the type of limited passive recreation
18 development listed (benches, interpretive displays, picnic facilities, sanitary facilities,
boardwalks to preserve fragile areas, and soft surface trails); therefore, it isn’t necessarily or
19 logically implied as included by text or context and is not a permitted development. Even if a
sewer line was implied to support sanitary restroom facilities, that is far different than a
sewer line that supports private development outside the Park.

20 Obviously, if the proposed sewer line does not meet the requirements of paragraph
21 2, it is not relevant as to whether its crossing of the wetlands is unavoidable or not or whether
the damage caused can be restored or not.

22 Additionally, neither paragraph 2 nor any other sectional paragraph in Chapter X
23 includes an exception for an “unavoidable utility crossing with mitigation and restoration for
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1
2 any development.” Nor given the deterioration and damage that occurs to a natural area as
3 demonstrated herein to the wetlands by the proposed “unavoidable crossing” with its after-
4 the-fact construction impact mitigation and restoration plan, the construction of this sewer
5 line is antithetical to, inconsistent with, and contrary to preservation as well as not meeting
6 the criteria to be included under the conditions of paragraph 2. After the fact of destruction
7 by construction, then to come along after “cat’s out of the bag” to replace it with a plan for
8 mitigation and restoration is contrary to preservation of the original condition. The
9 restoration component for trees alone will take years to match the original trees removed
10 and as pointed out specifically below they will not even be planted in the impacted 17 ft by
11 525 ft barren swathe. Therefore, an exception for an unavoidable crossing because it will have
12 a mitigation and replacement plan can not be necessarily and logically implied from the text
13 or context of the Chapter X provisions. Under the facts here, application of the unavoidable
14 crossing code provisions as conditions are also preempted as being contrary and inconsistent
15 with the preservation intent of Chapter X.

16
17 3.3.3. Paragraph 3 Analysis. It states: “The City of Lake Oswego shall not construct
18 or develop (or allow any person to construct or develop) any Athletic Facility, any
19 Telecommunication Facility, or any parking lot, road, or trail for motorized vehicles within a
20 Nature Preserve. The City of Lake Oswego shall not cut (or allow any person to cut) any tree
21 in a Nature Preserve for the purpose of facilitating the construction or development of any
22 Athletic Field, any communications Facilities, or any parking lot, road or trail for motorized
23 vehicles.”

1 The term “any” as used here has the functional meaning: “One, some, or all
2 indiscriminately of whatever quantity . . . b: all-used as a function word to indicate the
3 maximum or whole of a number or quantity {give me ~ of the letters you find} . . .” In context,
4 it functions to include the whole quantity of types of parking lots and roads.

5 “Parking” simply means “2 a: the leaving of a vehicle in an accessible location b: an
6 area where a vehicle may be left.”

7 “Lot” means “6 a: an allotment or portion of land set aside for a specific purpose . . .
8 f: parking lot.

9 “Parking lot’ means an outdoor lot for the parking of vehicles.

10 To the extent, the Relator is required to have an off-site parking lot for its vehicles
11 and equipment, paragraph 3 may not be relevant. However, to the extent the Relator parks its
12 motorized vehicles overnight or otherwise sets aside and parks such vehicles when not in use
13 on the impacted site, then an outdoor portion of the impact area for parking use would occur
14 and under paragraph 3 the development of “any” parking lot is created and not permitted
15 under paragraph 3.

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1
2 “Road” means as used here “3 a: an open way for public passage for vehicles,
3 persons, or animals . . . 3 b: a public way outside an urban district; highway-contrasted with
4 street, 3 c: the part of the thoroughfare which vehicular traffic moves: space between curbs:
ROADWAY 3 d: a vehicular way for local traffic: as (1) a private way (2) one that is
unpaved . . .”

5 While the meaning of road includes roadway, roadway is not limited to that
6 between curbs, e.g. most country roads do not have curbs. Roadway means “a strip of land
7 on which a road is constructed and which is physically altered b: road; spec ; the part of a
road over which vehicular traffic travels.”

8 The City argues that the term “road” does not apply to a “temporary construction
9 road” for motorized construction vehicles and heavy equipment. Int Ex 204. The argument
10 focuses on the definition of a road: (1) a road needs to be open to pedestrian and animals, not
11 just vehicles, and it is not; (2) it needs to be open to the public and it is not; (3) it needs to be
permanent and it is only temporary; and (4) and all inclusive interpretation would not allow
“foreseeable” construction roads for building hiking trails and the voters’ would not have
intended such a consequence.

12 The obvious flaw in the first three of the City’s arguments, is that they ignore the
13 functional use of the term “any” and that it precedes the use of road in the sentence. The
14 prohibition applies to “. . . any parking lot, road or trail for motorized vehicles.” The term “any
15 road” includes all types of roads and their roadways, indiscriminately. The construction of
16 clear cutting and graveling the wetland area is to physically alter a strip of land to create a
17 roadway for motorized construction vehicles to drive over to perform the applicable
construction components for the sewer line. A road does not have to be created for
pedestrians and animals; it is enough to be created for vehicular traffic consisting of
construction vehicles. Controlling access so that during construction the roadway has a
private function for construction vehicles and not open to the public simply makes it one
type of road indiscriminately within the whole quantity of types of roads. Likewise, a
temporary road still belongs to the family of roads.

18 As to foreseeability, why would one necessarily believe that a construction road is
19 needed to build a hiking trail? Trails are not wide impact areas. Anyone who has walked a
20 natural trail, can see they are often developed by simply creating a path by use. If constructed
21 in natural areas, the City fails to state any reason why a crew of manual laborers can not walk
22 in with chainsaws, brush cutters and other tools and clear the way over natural ground. Trails
23 should go around trees, not cut them down. While not probable, if there was the one in a
million trail in which a construction road might be needed, a case of need should be made
and that could go to the voters as a one time exception. The all encompassing prohibition
against roads was a key point of debate in the choice between the Initiative and the
Referendum as presented by the legislative facts in the Voters’ Pamphlet of the respective

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1
2 Ballot Titles, the Explanatory Statements and the Arguments For and Against even to the
3 point of bringing accessibility into the argument. The voters understood that the prohibition
4 against new roads was all encompassing as part of preservation of Nature Preserves and they
5 chose preservation and prohibition of new roads.

6
7 The City also seeks misplaced comfort in the former Chapter X for construction of
8 roads with regard to sewer lines and the tennis center in Springbrook Park. Springbrook,
9 unlike Waluga Park-West, is not a wetland, but a forested park. It came into being for
10 protection in 1978 with a challenged, but winning Ballot Title, with the caption: Charter
11 Amendment to Preserve Springbrook Park as a "Natural area." The 1978 Ballot Title is marked
12 Int Ex 205 . Neither the Ballot Title's question nor its summary used the terms above or
13 below ground or even sewer line. The public record of the DRC approval findings of the
14 sewer line back in 1996 never once mentioned, let alone found, that the then and now former
15 Chapter X even applied. See, 1996 DRC Findings, Conclusion, & Order Dr 5-97, Int Ex 206.
16 And at no point has the City provided any evidence that they applied the former Charter
17 provisions in the case of the sewer line in Springbrook Park. That is because, like the
18 legislative history in Living Essentials, there was no discussion or challenges to it before the
19 DRC under the former Charter provisions. The former provisions were not applied to find
20 they implied the sewer line was to be constructed There was no nexus then, and there is no
21 precedent now. See, 1996 DRC Findings, Conclusion, & Order Dr 5-97, Int Ex 206. Nor has the
22 City presented any evidence of applying the former Chapter X regarding the abandoned 1991
23 sewer line. This lack of application of Chapter X doesn't meet the Living Essentials' standard
for comparative context.

14 The whole theory that the City now relies on to show voters' intent actually first
15 came up in 2018 when the City's park staff engaged the surrounding neighborhood with
16 architectural plans regarding the Lake Oswego Tennis Center. The City wanted to add more
17 indoor courts and that would overflow its boundaries into Springbrook Park, cut down trees
18 and add an excessive amount of parking. This attempt was stopped through Jean Eves who
caused the former Chapter X express prohibition against Athletic facilities, defined in the
Charter to include tennis courts, to be called to the City's Attorney's attention. It was shut
down. See also, Jean Eves Argument For the 2021 Initiative in the Voters' Pamphlet, Int Ex at
207. The full expansion project was abandoned.

19 Then in 2021 under LU 20-0027, the City again sought a more limited expansion of
20 the Tennis Center on site (the expansion would not extend into Springbrook Park), but
21 conditioned on needing a 10 ft construction easement on the south side of the building with
22 little vegetation and no trees, the removal of three significant on-site trees and greater on-site
23 parking. This is the matter that Intervenor previously addressed where he interceded and
obtained the Settlement Agreement in the record, that saved the three trees, reduced the
parking spaces sought, and obtained traffic safety striping for the neighborhood access
street, and based on the Settlement Agreement, withdrew his objections and reserved the

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2 ability to raise these objections in the future. Findings written by the City especially when
3 not litigated due to settlement and withdrawal are of little or no weight to the question of this
4 application for a sewer extension in Waluga Park – West’s wetlands under this replaced
5 former Chapter X.

6
7 The City’s argument simply doesn’t wash. See, Subsection III. 4. Analysis Only of
8 Ballot Title and Explanatory Statement at 20 below and Section IV. Legislative/Ballot Title
9 History beginning at 22 below.

10
11 3.3.4. Paragraph 4 Analysis. It states: “The City of Lake Oswego shall not construct
12 or develop (or allow any person to construct or develop) any facility or any structure above
13 ground that would impair or be inconsistent with the natural conditions of a Nature
14 Preserve.”

15
16 The City argues that because this provision expressly states that it limits the
17 development of above ground facilities and structures that impair or are inconsistent with the
18 natural conditions of a Nature Preserve that underground facilities are impliedly exempt as
19 not being included; therefore, the City argues that the sewer line as an underground facility
20 or structure is impliedly exempt and permitted.

21
22 The City’s interpretation is unreasonable on several grounds:

23
24 A. Construction Clear Cutting Impairs And Is Inconsistent With A Nature Preserve Because
25 It Destroys The Habitat.

26
27 “Above ground” means “located on or above the surface of the ground.” As pointed out
28 above, under Construction Reality at p 2 of this Memorandum, to construct the sewer line
29 everything above ground and even the surface – top soil, vegetation and trees – has to be
30 removed which surely deteriorates and destroys habitat. This above ground removal is
31 antithetical to the text and context of Section 41’s paramount purpose of the voters to
32 preserve the natural areas of a Nature Preserve and to give the preservation intent a liberal
33 interpretation; to the definition of Nature Preserve in Section 42 to preserve habitat from
34 deterioration; and to Section 43 paragraph 1’s governance mandate to apply the preservation
35 purpose to all development.

36
37 There is also the risk that trenching of the pipeline will cause underground draining and will
38 change the hydrology, adversely affecting wetland vegetation and even draining the wetlands
39 and/or taking a longer time to heal itself, all of which is the opposite of preserving it. See,
40 Section V. The Wetlands beginning below at 37, which outlines the City’s history in the public
41 record and admissions by the City of the negative impacts to the Waluga Park – West’s
42 wetlands brought about by the change to the hydrology by the very sewer line that now
43

44
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exists in the wetland and that the Relator wishes to tie into, which neither the City's staff nor the Relator or the Relator's agents addressed.

They also fail to address the construction issues of 1) the probability of high ground waters draining into the trenching and resulting pumping impacts on the wetlands and 2) the very real potential of the need for field changes for a greater impact area than 17 ft wide that simple math calculations illustrate, given the width of the trench, OSHA safety distance requirements for working trench equipment and spoils, and the width of the working machinery such as dump trucks and backhoe excavators and the associated width for their driving and maneuvering within the 17 ft wide construction easement. See, Section VIII. The Minimum 17 ft Wide by 525 ft Long Construction Easement is Both Unsafe and Impracticable and Will Result in Greater Damage to the Wetlands than Proposed beginning at 50 below.

B. The Purpose Of The Sewer Line Is To Serve Private Development And Not To Facilitate The Public's Access And Use Of The Park. Again, the sewer line development is contrary and inconsistent with the text and context of the type of limited development for passive enjoyment of the Park listed in Section 43, paragraph 2 and that such limited development is "to facilitate the public's access and use" of the natural area. The sewer line for private development is not intended to "facilitate public access and use" for the public's enjoyment of the park; furthermore, the City admits that the City will control the access so the public will not have access during development.

C. Any Parking Lot, Road Or Trail For Motorized Vehicles Prohibited. As set forth above, providing the use of a construction easement for construction parking and road access for motorized vehicles is contrary and inconsistent with the text and context of Section 43 paragraph 3 that prohibits development and construction of any parking lot, road or trail development for motorized vehicles by the City or any other person.

D. Tree Cutting For The Provision Of Construction Parking And Road Access Is Prohibited. It is contrary and inconsistent with paragraph 3's further prohibiting development that cuts any tree for the purpose of constructing any parking lot, road, or trail for motorized vehicles.

E. Manholes are facilities or structures required to be above ground in natural areas. Once again, the Relator and the City conveniently avoid the use of "any". The explicit prohibition is for "any facility" or "any structure" above ground. As noted above-ground" means located on or above the surface of the ground." While the sewer line itself may eventually be underground, two of the three new manholes are part of the sewer line in the Park and will be structures that must be at least 6 inches to 12 inches above ground under City specifications noted below and therefore are expressly limited and not permitted. There has been an attempt to fudge on how high the manholes would be. A staff report brushes it aside by saying "only a minor area of the district will be disturbed with permanent manhole

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2 installation at ground level (37.5 sq ft total area) and cites to Ex F-005, pg 4; October 25, City
3 Staff Report, p 21, Int Ex 204. 6" to 12" above the ground is not ground level. Intervenor will
4 provide evidence that shows when initially constructed the manholes are more than 6" to 12"
5 above the ground to account for an increasing ground level from soil and other material
6 deposits from surface water run off in future years. Otherwise, they would be several feet
7 under the ground, not accessible, and useless to serve their maintenance functions.

8
9 Note: Existence of these manholes are recognized by the Relator (if not the City)
10 to be permanent impacts as they advised DSL in their Application of March 21, 2024. Int Ex
11 203. Even if everything that looks so rosy on their paper application works entirely as
12 planned, no one denies to the extent that the ground manholes are above ground they are
13 explicitly prohibited by Chapter X. It's like well, if we don't mention it, maybe you won't
14 notice. Permanent manholes which must be above the ground are unambiguously forbidden
15 and this extension cannot be built without the manholes. Full stop.

16
17 F. The City And Relator's Deduction Is A Non Sequitur. Setting aside for the
18 moment that manholes are above ground facilities or structures, the City and Relator deduce
19 that the authors would have included underground sewer lines as prohibited development if
20 they intended them to be prohibited and since they only mentioned above ground facilities
21 and structures, the voters would have understood that such underground sewer lines would
22 be allowed. They ignore the prohibition rationale is to preserve the Nature Preserve from
23 improvements that would impair or be inconsistent with the natural conditions of the Nature
24 Preserve. Clearly to get underground, the above ground condition of the wetlands will
25 necessarily be impaired and habitat destroyed, which is inconsistent with the natural
26 condition of the Nature Preserve. They ignore that sewer lines were not included in the list of
27 allowable developments associated with passive recreation. The City's assertions of how "the
28 voter would have understood the text" simply threw punches in its own private bubble. It also
29 never actually dealt with the evidence the author provided or contemporaneous materials
30 that accompanied the Ballot Measures. Nor did it deal with the evidence of how strongly the
31 voters felt about the City's spotty record at preserving natural resources and chose the more
32 absolute Initiative over the more spongy Referendum.

33
34 As such, it also is not an interpretation that is reasonable under the express
35 direction of Section 41 that the Charter is to be interpreted liberally. But even if it were, the
36 legislative history is so consistent and the voter's intent was so well informed as to preserving
37 Nature Preserves, that under Knopp, supra, the voters' preservation intent would prevail over
38 a contrary intention to allow destructive sewer lines. See, further discussion below under
39 Section IV. Legislative History/Ballot History beginning at 22.

40
41 3.4.5 Paragraph 5 Analysis. It states: "The City of Lake Oswego shall not cut (or
42 allow any person to cut) any tree for the purpose of commercial logging." This paragraph
43 carries forth the preservation purpose of Nature Preserves. It is further evidence in context

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2 with the other Sections and paragraphs of the voters intent to ensure preservation and to
3 keep the natural areas intact and free from loss. Given the vast number of trees that need to
4 be cut down to develop the property and the sewer line, it is probable that logging will be
5 commercially monetized with development. Clearly commercial development in the wetlands
6 as the sole purpose would be prohibited. At this time, Intervenor has no specific evidence
7 that logging in the wetlands would occur without being a part of the development approval.
8 In context with the strong purpose preservation provisions and the direction of liberal
9 interpretation, a prohibition against such commercial logging could be interpreted to be
10 implied for this development given the number of trees to be cut here.

11
12 3.4.6. Paragraph 6 Analysis. It states: "The City of Lake Oswego shall be allowed to
13 maintain (or allow any person to maintain) a Nature Preserve for the purpose of ecological
14 restoration that provides a safe and healthy natural area that is accessible for public
15 enjoyment, provides a healthy habitat, eliminates invasive species, restores native species,
16 and mitigates fire hazards."

17
18 When read in the context of Section 41's preservation of Natural Preserves purpose
19 and Section 42 definition of a Nature Preserve as natural area parks "that are managed or
20 maintained to retain their natural condition and prevent habitat deterioration," paragraph 6
21 describes the type of restoration maintenance that is allowed for preservation, including
22 "provides a healthy habitat" which is clearly in line with preventing "habitat deterioration,"
23 and contrary to the sewer line's construction.

It makes no common sense, let alone be "necessarily and logically" implied from
paragraph 6 and in context with the other Sections to implicitly imply an intent to otherwise
permit development that first would deteriorate and destroy habitat and then would come
along and attempt to restore it. It is a restoration described for maintenance only and is
distinguishable from restoration of a planned destruction and as part of an impact and
mitigation plan.

3.3.7. Paragraph 7 Analysis. It states: "The City of Lake Oswego shall be allowed to
maintain (or allow any person to maintain) any existing facility or structure, or any 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 a manner that would further impair or be inconsistent
with the natural conditions of a Nature Preserve."

The obvious intent is to provide for maintenance of what exists but don't use
alteration under the guise of maintenance as an excuse to further develop in the natural
areas of a Nature Preserve. Paragraph 7 includes above ground facilities and structures that
existed before the November 2, 2021 enactment of Chapter X by the voters and is consistent
with paragraph 4's prohibiting such above ground facilities that would impair or be

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2 inconsistent with the natural conditions of a Nature Preserve going forward from November
3 2, 2021.

4 Paragraph 7 does address the maintenance of existing underground sewer lines
5 before November 2, 2021, as they are developed with manhole structures with entry covers at
6 or above the ground surface as part of the line. The very purpose of such manholes is for
7 maintenance of the line. By maintaining the above ground manholes pre November 2, 2021,
you are able to maintain the then existing sewer lines. Therefore, any argument about
developing the existing sewer line in Springbrook is also irrelevant as it is included for the
limited purpose of maintenance by the current Chapter X which repealed and replaced the
former Chapter X as discussed above.

8 Further, maybe due to these experiences, when the City wanted to cut itself slack
9 in the future against the rigidity of Springbrook's Charter constraints, it sought to terminate
Springbrook's protections and put it into the group of parks that would be covered by its
much more fluid Referendum. 2021 City Referendum Int Ex 208. This Referendum was
10 soundly defeated by the Initiative. So the only candid extrapolation about Springbrook and
its history that can be made is that it is yet another example of how stridently the voters had
11 come to value their wild areas and sought to preserve them.

12 3.3.8. Paragraph 8 Analysis: It states: "The City of Lake Oswego shall be allowed to
13 implement (or allow any person to implement) a park master plan for a Nature Preserve that
was adopted before November 2, 2021." This paragraph is in accord with case law that allows
14 implementation of items in the process of going forward under former repealed and replaced
laws to proceed. The paragraph does not prohibit future master plans for Nature Preserves,
15 but any such master plan would have to be in compliance with Chapter X.

16 3.4. Section 44. Effective date: "This Chapter carries an effective date of
November 2, 2021." This is the date of the general election where the voters affirmatively
17 approved the Charter, Chapter X, Park Development Limitation Initiative Measure 3-568. As
cited in the Intervenor's initial legal memorandum, the Lake Oswego code provides that a
18 stated effective date in an Initiative, as in the case here, becomes the enactment date upon
voter approval.

19 3.5. Section 45. Severability, states: "If a court should hold invalid or
20 unconstitutional any clause or part of this Chapter, that holding shall not affect the remaining
parts of this Chapter which are not held invalid." The court has made no such holding and
21 therefore, application of this Section is irrelevant at this time.

22 3.6. Section 46. Application to Other Park, states: "This Chapter shall apply to any
other park (i) conveyed by property owners to the City of Lake Oswego with a "Nature
23 Preserve" designation that shall carry with the property in perpetuity, (ii) nominated by the

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2 Parks, Recreation, and Natural Resources Board and/or the Director of Parks and Recreation
3 designating such other park as a Nature Preserve and ratified by the City Council, (iii) ratified
4 by voters specifically designating such other park as a "Nature Preserve," or (iv) acquired by a
5 bond issued after the effective date of this Chapter if (and only if) the futures 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."

6 The Nature Preserve in Waluga Park-West is currently included in the enacted
7 Chapter X; therefore, it is not an "other Park" for the purposes of this case and Section 46
8 while consistent with preserving Nature Preserves in after acquired property, is not
applicable in this case.

9 3.7. Section 46A. Maximum height of Structures in Residential Areas. The parties
previously pointed out has no applicability to this case.

10 It should also be pointed out that Chapter X is not one of balancing - development,
11 or "public interest", or economical infrastructure for future housing. Note: ORS 197.758 (4) (d)
12 exempts wetlands from middle housing development and ORS 197.307 (d) D exempts
affordable housing development from public park natural areas zoned under land use
regulations.

13 In these 15 parks, preservation, not even conservation, is the ultimate standard.

14 4. Analysis Only On The Basis Of The Ballot Measure And The Explanatory Statement
15 Further Underscores The Fallacy Of The Opponents' Argument.

16 4.1. The Court May Turn to Legislative History. To review, while the interpreter looks first
17 at the plain, natural and ordinary meaning of the text and context of the language, to aid in
18 resolving any disagreement in that regard, the Court may turn to legislative history beginning
19 with the ballot measure and the explanatory statement. The goal is to discern the intent of
the voters by what informed their understanding. Ecumenical Ministries v Oregon State
Lottery Commission, 318 Ore 551,560, 817 P2d 106 (1994) Knopp v Griffin-Valade, 372 Ore 1, 19
(2024)

20 4.2. Several Points Become Obvious. Just analyzing this point, using the glossary
21 Webster's Third New International Dictionary (unabridged, 6th ed, 2002), Appendix , as to
the plain meaning of language, several points become obvious.

22 4.2.1. The Voter Was Informed. The voter was informed and most likely understood the
23 text to mean the following: There were to be restrictions on improvements in Nature

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2 Preserves. There would be prohibitions, including above-ground structures that would impair
3 or be inconsistent with natural conditions. There would be other activities allowed as
4 exceptions to or clarifications to the extent of the prohibitions. The City and the Relator try
5 to flip the structure of both the ballot measure and the explanatory statement to give an
allowance that was not there. As set forth above, they argue that since "under ground" was
not prohibited per se then it must be allowed. And if it is "under ground" then it cannot
impair or be inconsistent with natural conditions.

6 They are wrong. Facilities and structures are man-made and would by definition
7 impair or be inconsistent with the natural conditions of a Nature Preserve, "an area (as a tract
8 of land or body of water) restricted for the protection and preservation of animals, trees, or
9 other natural resources." Further, in order to construct anything underground, let alone a
10 dredge and fill sewer, would necessitate impairment, i.e. doing harm to and damage to the
11 Nature Preserve. It cannot be implied either as the only construction allowed is whatever
already existed, that which is named to facilitate the public's use of the parks, and the type of
construction which is actually 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." These
are basic understandings.

12 Beyond the text, the next question is whether it is necessarily or logically implied.
13 State ex rel Rosenblum v Living Essentials, LLC, 371 Ore 23, 38, 529 P3d 939 (2023) The
14 prohibitions are examples of permanent and man-made infrastructure: hard surfaces,
15 diminishment, roads, and vehicles conveying goods to treat a road to prevent muddiness. The
allowances are examples of soft to no man-made intrusions: where plant or animal species
naturally live or grow, natural growth rather than design or planning, It is the essence of
inconsistency: A facility or a structure is not in harmony with what is described as natural
conditions.

16 The statutory context includes other provisions of the same statute and the
17 statutory framework within which the law was enacted. Id at 38. The Explanatory Statement
18 does list some highlights of Chapter X as it is only related to Springbrook including the
19 prohibition on infrastructure such as athletic facilities, parking lots and roads or trails for
20 motorized vehicles. It later informs the voter that a yes vote would maintain and enhance
21 Chapter X's development limitations, this measure intended to repeal and replace the
22 present Chapter X. A dredge and fill sewer is not implied given that the additional
23 enhancement of development limitations is a specific prohibition of infrastructure:
telecommunications facilities, asphalt and concrete hard-surface trails, and above-ground
facilities or structures that would impair or be inconsistent with natural conditions. If
anything, what is logically implied is that these kinds of infrastructure projects impair or are
inconsistent with natural conditions. And the latter is the key concern as stated even in the
caption: Restricts improvements on certain Lake Oswego park properties.

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2 Maxims of construction: When the text, context and legislative history provide a
3 single unambiguous interpretation of the statute we do not reach such maxims. Living
4 Essentials at 42 "Canons of construction must yield to the voter understanding
demonstrated by the ballot measure history, including material in the voters' pamphlet."
Knopp at 11.

5 In short, even if the court did not find any other legislative history to be of any
6 assistance in interpreting Chapter X, the text and context of the two primary sources of
information are abundantly clear in order to apply the Chapter X against the proposed
dredge and fill sewer.

7 **IV. Legislative History/Ballot History: The Full Story.**

8 1.Introduction. As set out in the above, Relator and the City posit a theory that
9 the sewer line is impliedly allowed under Section 43 paragraph 3 prohibition against any
above ground facility or structure because it will be underground and its construction will
10 only create temporary impacts because its mitigation and restoration plan is consistent with
preservation development and the voters' would not have intended the prohibition of roads
11 to include roads for temporary construction. The arguments were debunked under the above
review of the text and context of Chapter X and the overview comparison of the Ballot Titles
12 and Explanatory statements. Nevertheless, to resolve any remaining doubt there may be as
to whether or not the voters fully understood the meaning of the Initiative's provisions and
13 intended them to go into effect, for the Court's discernment the full history of this Initiative
process evidences that at each juncture of the process that an overwhelming amount of
14 informational was provided for the voters understanding.

15 2.The Petitioner/Author/Sponsor i.e. non legislator. Scott Handley will be called
upon by the Intervenor to give testimony as the petitioner, author and sponsor i.e. non
16 legislator of the Charter amendment as to why he chose certain language for the petition, his
due diligence in following the initiative petition process, the widespread outreach he
17 undertook to obtain signatures and information provided to the signatories and the number
of households information was sent to and what was sent to them to inform voters about the
18 Petition Initiative, and the wide- spread circulation of information comparing and contrasting
the two competing measures in the two and a half months before the election, and to identify
19 his involvement or non involvement in the various sources of information such as the media
and the Voters' Pamphlets with the respective Ballot Measures, Explanatory Statements, the
20 Arguments For and Against the Measures, and in the Clackamas County Circuit Court
challenge to the City Attorney's draft of the Referendum's Ballot title (which Title was
21 upheld).

22 As the petitioner/author/sponsor i.e. non legislator, Mr Handley is uniquely qualified
23 to testify as to the chain of events, about his intent to ensure enhanced preservation of
natural areas through the Initiative, and to identify the information that was widely

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2 disseminated for the Court's discernment relevant to the voters understanding and the
3 voters' intent in enacting the Initiative. The case law discussed in this Memorandum strongly
4 informs the court's discretion to receive this type of evidence for interpreting what the voters
5 understood what the meaning of the language of an initiative intended even to the point that
6 the Oregon Supreme Court in Knopp v Griffin-Valade, 372 Or 1 (2024) held that the the voters
understanding of a Ballot Measure was so well known as to override a different textual
interpretation. The evidence to be provided will show the understanding of the voters of
Lake Oswego was known on a par of being well known to that of Knopp.

7
8 3. Explanations By Sponsors Allowed. Sponsors of legislation are in a good
9 position to describe its purpose and effect. As pointed out in a recent case, Childress v Bd.
10 of Psych., 327 Or App 48, 533 P3d 1099 (2023), the Court stated: "The court recognizes that
11 the testimony of a single, non legislator witness is not conclusive evidence of legislative
intent. However, where the statement is from a proponent of the bill, and the statement is
not inconsistent with statements from the legislators, the statement can be indicative of
legislative intent. In the case of non legislator statements, courts tend to be more wary, but
do accord them some weight when the nonlegislators sponsored the legislation and who, as a
result, are in a good position to describe its purpose and effect." This clearly applies to Mr.
Handley.

12
13 4. The Petition Process Is Highly Regulated. First, the proposed petition itself
14 provides relevant evidence of intent by information provided on the legally required SEL
15 form, including the responsive attachments when the line space on the form is insufficient.
16 The full petition is legally required to be provided to the prospective signator at the time a
17 signature is solicited. Second, under the statutory process, the City Attorney must determine
18 the petition meets the applicable legal requirements and then provides the ballot title
(caption, question, and summary) which also becomes part of the petition form and the
attachments for circulation with the voter signature form. Third, the City then officially
notifies the petitioner that the petitioner can begin circulating the petition for signature. The
entire required process for Initiatives and Referendums is provided in the County, City, and
District Initiative and Referendum Manual, published by the Secretary of State's Elections
Division, and adopted by Oregon Administrative Rule. 165 - 014 -0005. A copy of the Manual
can be produced if desired.

19 5. The Context Of Relevant History Of The Process In This Case.

20 5.1. The Petition To Repeal And Replace Lake Oswego Charter, Chapter X On
21 November 14, 2019 and approval for circulation. On November 14, 2019, the evidence will
22 show chief petitioner/author/sponsor i.e. non legislator, Mr. Scott Handley, submitted a
23 prospective Petition for an Initiative (2020IN-1) to the City of Lake Oswego to repeal and
replace the Lake Oswego City Charter, Chapter X. Initiative Petition 2020IN-1, Int Ex 210.
This Oregon Constitutional home rule right begins the journey of the Initiated Chapter X.
The evidence will also show that on its face the required SEL form in order to be fully filled

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2 out provided for attachments to be included, which occurred. The attachment contents
3 included that the Initiative amendment would repeal and replace the former Chapter X and
4 the Initiative's title and the Initiative's and the former Chapter X's language it was replacing
and enhancing. All of which is relevant to discerning the meaning of the Initiative's language
and the voters' understanding and intent in enacting the Initiative's language.

5 5.2. Confirming Approved For Circulation. The evidence will show Mr. Handley was
6 advised by letter from the City's election's officer that the Prospective Petition for Initiative
7 measure (2020IN-1) to amend the Lake Oswego Charter was approved for circulation. City
8 Election Officer's Letter dated December 12, 2019. Int Ex 211. It legally unlocks the passage to
allow information about the Initiative petition to begin to be distributed, albeit delayed, as
the evidence will establish, by various lockdowns we all were subject to in 2020 due to the
world wide COVID 19 epidemic.

9 5.3. The Initiative, Competing Measures And Ballot Titles. Subsequently, sufficient
10 signatures were gathered and the Initiative was placed on the ballot as Measure 3-568. The
11 City Council also placed on the ballot a competing Measure 3-575. City of Lake Oswego
12 Resolution 21-29 adopted August 3, 2021. Int Ex 212. The respective Ballot Titles of the
13 Measures are set forth in the Clackamas County Voters' Pamphlet, Int Ex 207 and in the
14 Multnomah County's Voters' Pamphlet, Int Ex 213. The two differ in style but are identical in
15 content. (The Washington County Voters' Pamphlet is not included as it does not contain
anything new and only one registered voter.) Hereinafter, reference to Voters' Pamphlet is
that of Clackamas County. The adopted Initiative is marked Int Ex 214 and the Referendum is
marked Int Ex 208. Again, the various information sources of both Measures are relevant to
establishing context of the voter's intent under the case law discussed below. See,
Ecumenical Ministries v Oregon State Lottery Commission, 318 Or 551, 871 P2d 106 (1994);
Knopp, supra.

16 Again, albeit perhaps redundant, a quick rereview might be helpful at this point.
17 The Ballot Title for the Initiative plainly states "Restricts Improvements on certain Lake
18 Oswego Park Properties." The question clearly asks "Should the Lake Oswego City Charter
19 be amended to restrict improvements on certain City park properties." The Summary also
plainly states that "The Charter amendment was placed on the ballot through initiative
petition, lists the park properties it initially applies to, "designates these properties as 'Nature
Preserves", and mirrors in short the provisions of the Initiative.

20 Read in this straightforward way, it is plain that the proposed dredge and fill
21 through the wetlands of a Nature Preserve is explicitly prohibited. It would necessitate a
22 heavily graveled road (hard surfaced enough) for construction equipment, would require
23 cutting trees both in the footprint and out in order to construct this sewer line extension and
would leave two new manholes as permanent structures above the ground. The need for
conditions to allow future maintenance would forever change natural conditions. Words can

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2 be spun on paper but no scientist or engineer could testify that this project could stop these
3 impacts from occurring.

4 5.4. The Voters' choice. On November 2, 2021, the voters by an overwhelming,
5 affirmative majority of 62% enacted the new Chapter X, Park Development Limitation with
6 the clear intent to protect the park natural areas with development limited to only that which
7 was necessary for the enjoyment of these open spaces as provided in the Initiative Petition.
8 At the City Council meeting of December 7, 2021, the Council voted to approve the City
9 Election officer's 2021 Declaration of Vote that Measure 3-568 is paramount, receiving the
highest number of "yes" votes over measure 3-575. December 21, 2021 City Council Minutes at
11. A copy of the Minutes at page 11 together with the approved declaration are marked Int Ex
215. This is evidence relevant to the facts that the new Chapter X was duly enacted and the
intent of the voters preference for Charter mandated requirements for City Council
governance of the Nature Preserves rather than leaving it up to the City Council and staff
discretion as set forth in the Referendum.

10 5.5. The Explanatory Statement. The Explanatory Statement provided by the City
11 in the Voters' Pamphlet for the November 2, 2021 election for the Initiative Measure 3-568,
12 clearly stated: the citizen-initiated measure repeals and replaces Chapter X to protect 15
13 additional parks with additional development limitations to preserve them as natural habitats
14 accessible for public enjoyment." Voters' Pamphlet at 4. Int Ex 207. The Explanatory
15 Statement in the Voters' Pamphlet provided information that the former Chapter X "only
16 applies to Springbrook Park" and listed what it basically prohibited and what it allowed. It
stated: "A 'yes' vote on Measure 3-568 would maintain and enhance Chapter X's development
limitations: Designates these natural parks as Nature Preserves: . . ." It then went on to list the
15 natural parks and a series of what basically the Initiative prohibited and what it allowed.
Thus it informed the voters about a Nature Preserves designation and what development
limitations were being maintained and what were being enhanced.

16 5.6. Arguments For And Against. As the court can discern, the Arguments For and
17 Against both the Initiative Measure and Referred Measures focused on the impacts of certain
18 provisions of each in certain broad categories: 1) the greater authority of the initiated Charter
19 Amendment mandating preservation governance of the specific natural areas named versus
20 the referred Charter Amendment giving discretionary authority to later determine the extent
21 of the natural areas to be protected, 2) the City's poor track record in protecting natural
22 resources, 3) the Initiative's strict limitation of prohibiting any roads being developed in the
23 natural areas after the enactment of the Initiative versus the Referral's more flexible approach
to allow some types of roads, 4) whether the Initiative's strict prohibition of new parking lots,
roads, and concrete and asphalt hard trails denied accessibility whereas the Referral would
allow the flexibility to develop these items and aid accessibility, and 5) whether the Initiative's
strict limitation on developing any new roads denied fire protection in the natural areas,
albeit the Initiative's Explanatory Statement stated: Allows maintenance for * * * and mitigates
fire hazards" and "Allows maintenance of existing facilities, parking lots, roads or trails for
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2 motorized vehicle [s, sic] if not altered in a manner that would impair or be inconsistent with
3 natural conditions.” This again is evidence that all goes to the voters' understanding of the
provisions of the Initiative and the intent of their approval.

4 In short one of the ongoing accusations against the Initiative - which prove that the
5 opponents understood the prohibitions against roads to be clear and rigid, are that they were
6 clear and rigid. So voters understood from advocates in the Voters' Pamphlet- that the
7 Initiative “prohibits the vehicular access needed by Parks maintenance to repair trails and
8 bring in supplies.” The voters were informed from media reports of the complaints that roads
9 were needed for maintenance, wildfire management and accessibility. There were worries
10 whether crushed gravel would provide sufficient accessibility, (but nothing about its use for
11 access roads for heavy construction equipment in the wetlands). And when their
12 Referendum lost, media reports quote them talking about unintended consequences with
13 their first impulse to try to amend the new Chapter X.

14 And the response is, no, they were intended and as of now, there have been no
15 signs of any such attempts.

16 5.7. Contemporaneous Materials Widely Available. Mr. Handley can testify to the
17 documentation of the public outreach by LoveLOParks that was widely disseminated
18 supporting the Initiative, including information that compared and contrasted the Initiative
19 and the Referendum, which documentation he also presented at the hearing before the DRC,
20 LU 23-0002, EX G - 572. A copy is marked Int Ex 216.

21 5.8. Media Coverage. See Aug 5, 2021 “Lake Oswego council refers preservation
22 measure to November ballot,” and Oct 27, 2021 editorial, my view, and letters to the editor,
23 Lake Oswego Review, PamplinMedia. Int Ex 217.

24 5.9. Repeal and replace. Repeal and replace of former legislation also has legal
25 consequences as a matter of law. It renders the former Chapter X's provisions for
26 Springbrook Park null and void, unenforceable. ORS 174.080 clarifies that even if the
27 repealing law is repealed the former repealed law remains repealed. Any argument the City
28 makes for interpreting provisions of the current Chapter X based on the former Chapter X
29 provisions are taken out of a context that is null and void, unenforceable.

30 5.10. Admissions of the City, a party opponent, made before the election of
31 November 2, 2021. Whatever the City wants to say now, this is what they said before the
32 election: “Measure 3-568 broadly precludes any improvements to natural areas in the City,
33 which limits accessibility to the public and hinders the ability of the City to maintain utilities.”
34 Respondent City's Response at 2 in Handley v Lake Oswego City Council, Clackamas County
35 Case No 21CV32768. Int Ex 218.

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2 6. Context: Comparing And Contrasting Similar Laws To Interpret Intent. One of
3 the instructive ways to analyze context is by contrast and comparison to the same or similar
4 laws on the same subject. Ecumenical Ministries at 559-560. See above under Section II,
3.3.4, at 13-14 as to former Chapter X not providing comparable context under Living
Essentials.

5 6.1. The City's Referendum. The City, in lieu of the Initiative, Measure 3-568, hurriedly
6 drafted its own Referendum, Measure 3-575, which staff presented at the June 15, 2021,
7 Council Meeting with a public outreach request along with a comparison with the Initiative. A
8 copy of the 6/15/2021 Council Meeting Minutes with Resolution and comparison attachment
9 is marked Int Ex 219. After what can only be described as a dog and pony show called "Public
10 Engagement or Community Planning", Council ratified the Referendum on August 3, 2021.
The City Manager hired a political consultant, Praxis Political, to manage the public
engagement. See, Voters' Pamphlet, Argument in Opposition to Referendum at 11, Int Ex 207.
The City Council then lauded the consultant's results compiled from a few hundred
participants at its August 3, 2021, having previously downplayed the over 4,000 petition
signers as "only 10%" of the population. Int Ex 219.

11 6.2. Referendum's Purported Purpose. According to the City, Measure 3-575 was to
12 revise and replace the then Chapter X and stop the "unintended consequences that would
13 impair other public priorities for these spaces" that the Initiative posed. Its purpose
14 statement was to preserve "while also allowing for their use and enjoyment." Compare the
Initiative's purpose to preserve, which means an area (as a tract of land or body of water)
restricted for the protection and preservation of animals, trees, or other natural resources -
at least to the extent possible in the future.

15 6.3. Referendum's use of the terms public street and road. Public street and road was
16 defined as a "public road, street, highway or other public way constructed or used for
17 vehicular travel." The net effect of this definition was to prohibit construction of new public
streets and roads but allowed access for city employees or agents. Their use would be
considered non-public.

18 This underscores that the Initiative would prohibit the City from activities at issue
19 here. They wanted to keep their options open to install new sewer lines in natural areas and
20 not have other priorities for these public spaces impaired as they understood would be the
21 case if the Initiative passed. This is what the city attorney meant when he wrote that the
Initiative would hinder "the ability of the City to maintain utilities." He was referring to future
infrastructure for future development, not working to keep up present lines. This is what the
voters would understand as well. They defeated the Referendum by passing the Initiative.
The City is now hoist with their own petard.

22 It is also unclear if the "temporary construction access road" would be allowed to
23 remain in order to do maintenance, or if the area would be torn up time and again in order to
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2 do this. In any event, road appropriateness would be reviewed by the Parks, Recreation and
3 Natural Resources Advisory Board, who, by the way, are hand appointed by the City Council.
4 Interestingly, nothing is said about maintenance in the present application, whereas one of
the reasons the City said it really wanted their Referendum was to have access for
maintenance which they recognized was not a problem for them.

5 A slight aside on the issue of maintenance: The Referendum did emphasize
6 maintenance and access roads. The Initiative allowed maintenance for the purpose of
7 ecological restoration and to maintain what is already in existence. It is a bit startling to
8 realize that the present application before the court does not discuss access for maintenance
9 at all. From an engineering perspective this is a significant issue and it is entirely ignored.
One has to at least ask whether it is because the prospect of maintenance highlights the fact
that the sewer line once in, is likely to need both maintenance and repair and that necessarily
means disturbance to the wetlands, again. Harken to the existing sewer line and the removal
of the maintenance road because of the additional disturbance and the need to be permitted
admitted to by the City as set forth in Section V. The Wetlands below at 37.

10 Maintenance means the labor of keeping something (such as buildings or equipment)
11 in "a state of repair or efficiency." Management means the more or less skilled handling of
12 something (as a weapon, a tool, a machine). Applicable here, management means: "to adjust
13 the ecological factors to best meet the needs and ensure the survival of (a wild animal) usu.
14 by controlling predators and hunting and by providing shelter or supplement food supplies."
However, the need is to manage the wetland habitat for wildlife preservation in accord with
Charter's home rule sovereignty governance "to control and direct the administration of
policy." In this case, to manage in accord with the governing policy to preserve habitat from
deterioration, habitat that provides shelter and food for wildlife. There is a difference
between the two, maintenance is just what is necessary but management implies more
interaction, more direction, more human intervention especially here to be in accord with the
governing policy.

17 There was no distinction between public and non-public roads in the Initiative.

18 A reasonable conclusion is that the issue of any road was problematic for the City
19 even in their own Referendum and no sleight of hand could make the problem go away. They
20 perceived correctly that the citizens did not want them in the areas to be kept preserved and
protected: Thus the fiction of simply calling the road merely a temporary construction access
road.

21 That said, the legislative/ballot history of the Referendum evidences a very strong
22 desire to have roads. It is not necessary to further analyze or speculate on this
contradiction.

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2 6.4. Referendum's Other Uses And Structures In Natural Areas And the "Trust Us"
3 Premise When Contrasted With The Initiative Was Rejected By The Voters. The Referendum
4 envisioned a natural area but left open the potential for "other uses and structures" being
5 allowed. It specified that this would not take place until after there was enacted a specific
6 master plan requiring "extensive public involvement." This encapsulated a "trust us" doctrine.
7 Given the recitals of past experience of the City's lack of natural resource protection in the
8 Arguments in Favor of the Initiative and in Opposition to the Referendum, the intent was
9 clearly to eliminate any "trust us" doctrine. 62% voted for the alternate premise of the
10 Initiative which was for a Nature Preserve, retaining natural conditions, preventing
11 degradation and restricting improvements.

12
13 6.5. Initiative and Referendum Contrasted Regarding Accessibility And Fire
14 Protection. The Referendum touted the desirability of accessibility and preparation for
15 wildfires, intimating inaccurately that these were not possible under the Initiative. Fire
16 protection is provided specifically in the Initiative. See, Section 43 paragraph 6, that provides
17 maintenance of a Nature Preserve that "mitigates fire hazards." Arguments Opposing the
18 Initiative raised the issues that prohibiting roads, parking lots, and concrete and asphalt trails
19 would deny accessibility. The Initiative was silent on the Americans with Disability Act (ADA);
20 but Arguments for the Initiative and Opposed to the Referendum provided the obvious: any
21 requirement of the ADA as a federal law that a road or parking was required for accessibility
22 would preempt any contrary code or charter amendment of the City rendering it
23 unnecessary to address.

14 Additionally, pursuant to ORS 40.090, judicial notice of the law is taken of the
15 United States, its agencies, regulations and official acts of any of its agencies. The United
16 States Access Board is provided under the federal law, the Architectural Barriers Act of 1968,
17 and the Board is responsible for developing accessibility guidelines for the construction and
18 alteration of facilities covered by the Americans with Disabilities Act (ADA) of 1990 and the
19 Architectural Barriers Act (ABA of 1968). The Board produces its guidelines for both under a
20 document titled Guide to ABA Accessibility Standards. A copy of the relevant portions for
21 building nature trails in the Guide, is marked Int Ex 220.

18 These guidelines clearly recognize the need for hard surface trails for accessibility,
19 but that they can be designed, prepared and constructed with compacted natural ground,
20 ground stabilizers and other natural hard surface materials other than concrete or asphalt.
21 For example, it defines "a trail as a pedestrian route developed primarily for outdoor
22 recreational purposes," it provides a series of technical requirements for accessibility of
23 trails, and design and construction tips to provide stable surface trails without concrete and
asphalt in natural areas. It includes boardwalks for sensitive areas. While these guidelines
have no legal effect on local governments even though they are subject to the Department of
Justices (DOJ) ADA regulations; nevertheless, they are commonly followed by local
governments. The City had knowledge of the preemptive DOJ requirements for accessibility

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2 as well as Access Board guidelines as the City references the Access Board's guidelines in its
3 Parks Plan 2025, adopted 7/31/2012 at 5-4. A copy is marked Int Ex 221.

4 After the passage of the Initiative, at a January 4, 2022 Council study session, the
5 Park's director admitted the "Americans with Disability Act (ADA) had provisions for using
6 materials for soft surfaces such as decomposed granite as used in Woodmont Natural Park
7 and Headlee Pathway. It was not ideal but did meet the requirements." 1/4/2022 City Council
8 Minutes at 7, Int Ex 245.

9 The City and its Referendum supporters cynically reframed development as a form
10 of equity, e.g. the roads and parking were designed for disability accessibility, to discredit the
11 Initiative when clearly they knew the Initiative would have to comply with DOJ requirements
12 for accessibility and that its prohibition of concrete or asphalt trails in natural area did not
13 prevent providing stable trails for wheelchair access or for those with impaired eyesight
14 under the Access Boards construction and material guidelines. To the extent, the Council was
15 concerned with existing steep trails, those trails should otherwise meet the guidelines for the
16 degree of allowable slope for accessibility, and if not, they should be made to conform
17 (usually by zig-zagging or switch-backing across a horizontal plane), which is distinguishable
18 from slapping on concrete to manage slopes that do not conform to the accessibility
19 guidelines in the first place.

20 6.6. Referendum's Description Of Natural Areas Is Vague. The Referendum itself
21 gave no specified boundaries to the properties that would form the "natural areas" nor were
22 the legal protections for any piece to remain protected under new council administrations.
23 The Initiative was definite as to boundaries to be preserved regardless of future council
administrations and ordinances.

24 In sum, the voters did not want to pay their money and then see what they would
25 get. They voted for square corners, not rounded.

26 6.7. Contrasting endorsements. Measure 3-575 was endorsed by the City's core
27 influencers: mayors, friends groups, affinity groups, councilors, neighborhood associations,
28 and community leaders. There were no individuals outside these groups speaking out on their
29 own in favor, however. Measure 3-568 was endorsed only by two groups outside the City's
30 core influencers: Sierra Club Oregon and Oregon Wild, and the five people who constituted a
steering committee for the Initiative and the individuals who had their say.

31 6.8. Stark Contrast: The Voters' Did Not Want Business As Usual. The Gaines/
32 Knopp's fundamental acknowledgment that legislative history can be instructive is certainly
33 relevant here. The City's legal position speculates the voters did not understand or intended
34 Chapter X to be understood to limit all new roads such as a "temporary" access road even if
35 trees were cut down and removed in order to develop a sewer line improvement in a Nature
36 Preserve and because it was referred to as a temporary construction access road it wasn't
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2 actually a new road. The legislative history of the Voters' Pamphlet and the statements made
3 in the Pamphlet by the proponents, including Mr. Scott Handley, and opponents who favored
4 the City's competing measure as well as the materials in support of the petition by
5 LoveLOParks are relevant and instructive of the voters' understanding and intent to adopt a
series of very strong protective sections in Chapter X to preserve Nature Preserves as they
didn't trust the City to protect the natural resources of the parks from adverse development
impacts. The voters' did not want "business as usual." Int Ex 207.

6 6.9 Shoe On The Other Foot: What The Voters Likely Understood Regarding The
7 Initiative Is To Look At The Text And Context Of The Competing Referendum And Also Its
8 Ballot Title, Explanatory Statement And Whatever Is Useful In It's Legislative/Ballot History.
9 First the ballot title says "Amends Charter; protects natural areas, allows access to nature"
10 and the question says "Shall the City of Lake Oswego amend its Charter to protect natural
11 areas, habitat, water quality, and access to nature?" What it doesn't say is preserve. But then
in the summary it says "This measure would revise Chapter X of the Lake Oswego Charter
and rename it "Preservation of Natural Areas." The word preservation here, however, is not
what the Initiative's use of preservation means. The Referendum clarifies in the explanatory
statement: Yes, it will preserve, protect, restore and maintain but "while also allowing for
their use and enjoyment."

12 Further it uses the term "managed" to protect water quality, wildlife habitat, wildfire
13 prevention and containment, aesthetic values and ecological function and to allow trails
14 accessible to people with different physical abilities and needs." To manage is to direct or
15 carry on business or affairs, to supervise, administer. This carries the implication of human
design and planning, not the planning of nature left alone. Nor does it carry out the governing
policy implementation set forth in the Initiative to preserve the natural habitat from
deterioration.

16 Waluga Park-West (and East) would have only been protected to the extent that it was
17 deemed a "natural area." Note: the ballot measure and the explanatory statement do not
18 define what is meant by a "natural area." If the City meant to include its code definition then
19 this lack of transparency is even greater because the code definition leaves open exceptions
20 for "unavailability" which is not preservation to say the least. This is significant in that George
21 Rogers, also in this category, is basically a built out park. It's hard to see these parks as
22 anything but apples and oranges except for the back door to utilizing Waluga Park-West for
23 development improvement projects at issue here. This is not paranoia - annexation was first
applied for in July of 2021, the Referendum was certified by August 3, 2021 and defeated in
November of 2021, the City insisted that the Relator sign and record a covenant to put in
"public sanitary sewer lines" in Waluga Park-West in February of 2022 and the property was
annexed in in March of 2022. By November 2, 2021 the City knew that the Initiative was in
the Charter and the boundaries of the park were entirely known. If the Referendum had
passed, Waluga Park-West would not have been protected.

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2 6.10. City Website Disinformation. There is a relatively disturbing bit of
3 "disinformation" on the City's website, Parks & Recreation, under full press release, Int Ex 222,
4 regarding what would be included in the Initiative. It specifically lists the "natural areas of
5 West Waluga Park" as the language of the Initiative. This is incorrect. The Prospective
6 Petition does not delimit Waluga Park-West in this manner. Rather it states "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)." The voters would likely have
understood that the fuzzy boundaries under the Referendum were in sharp contrast to the
distinct boundaries under the Initiative.

7
8 The Referendum touted itself as protecting all the natural areas in the City, but
9 unfortunately it didn't say what would actually be named a natural area. That would come 60
days later. The voters at the very least then were informed that Springbrook's designation as
a natural area was now up for grabs. Here again the City and a PAC "Friends of Lake Oswego
Parks" engaged in "disinformation."

10 6.11. Mayor Forms Pac To Inform About The Ballot Measures. First, it is relevant that
11 the PAC, ID 21611 was formed on August 24, 2021 by the Mayor in his personal capacity. It
remains active. It raised \$21,100 and has a \$11,518.10 balance. Second, the Pac had a website:
12 Friends of LO Parks, A WordPress.com Website which contained their version of information
to be disseminated. For example, it claimed that concerned citizens came together in
13 January of 2021 presumably to meet the specter of the Initiative. In its Q and A it disputes
that developers did not participate in formulating the Referendum. This is one of those things
14 that can't be known. What is known is that the PAC was funded in large part by a developer,
with a \$10,000 donation and two high end realtors, \$3,000. See, ORESTAR Statement of
15 PAC Friends of Lake Oswego Parks, Int Ex 226.

16 They claimed that Springbrook would NOT lose its protections if the Referendum
17 were to pass. If the Referendum passed Springbrook would lose whatever protections it had
had under the former Chapter X and would then be with all the other city's natural areas
which were to be determined.

18
19 In lieu of actually dealing with the boundary issue, the PAC on its website, quoted the
mayor's father, saying that the real threats to our natural areas came from a number of other
20 sources and not from "vaguely defined development." "None of us will allow our natural
areas to be developed beyond that which allows citizens to access and enjoy our natural
21 areas," he says. PAC website, "What is the Real Threat to Our Natural Areas", October 6th,
2021, Mike Buck, Chair of Friends of Iron Mountain. Int Ex 223.

22 The PAC website had two contemporaneous media reports from it. There was hardly
23 an inch between the City and this PAC. They, in fact, lifted whole cloth the material from the
City's website (Parks and Recreation) onto their PAC website starting with "Frequently Asked
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1
2 Questions" through the side by side comparison. Friends of LO Parks FAQ, Int Ex 224. It
3 saved and promoted citizen's Comment that was in the Lake Oswego Review. See, Friends of
4 LO Park, Protecting Parks and Enhancing Nature, Int Ex 225.

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2 preserve and enhance the biological, hydrological, ecological and environmental functions
3 and promote a healthy ecosystem." Would the voters most likely have understood that what
4 was given in one hand was being taken away by the other? Waluga Park-West is a well known
5 wetlands but by leaving open by 60 days after the vote a discretionary decision on whether it
6 would be included as a protected natural area, the preservation and enhancement of its
7 hydrological functions completely disappears. This was clearly pointed out in the compare
8 and contrast contemporaneous information.

9
10 6.15. More City Discretion. The City's website expanded on what would be allowed
11 under the Referendum: "Thinning and removal of hazardous trees and removal of non-native
12 nuisance and invasive plants." There was no qualifying as to the extent of these activities. It
13 was entirely discretionary. The Initiative they admit qualifies this by "maintenance." In other
14 words, you simply can't clear-cut an area which was supposed to be left in a natural state and
15 call it restoration." Under the Initiative, maintenance implies discernment.

16
17 The PAC interpreted the Referendum to allow tree removal for future parking if
18 needed, or for a road or trail for motorized travel. It correctly interpreted the Initiative as
19 prohibiting tree removal for these purposes.

20
21 In summary, comparing and contrasting the elements of the Referendum text, the
22 ballot title, explanatory statement, and the Referendum's ballot/legislative history -
23 particularly why the City in its formal role and its informal role through the mayor's PAC -
24 contended against the Initiative - because it would "put extreme limitations on citizens' ability
25 to manage our natural areas."

26
27 It does.

28
29 7. Discerning The Arguments For And Against That The Voters Understood The
30 City's Dismal Record Of Allowing Development To Remove Trees, A Natural Resource, Under
31 Its Tree Code Would Be "Business As Usual" Under The Referendum In Contrast To The
32 Stronger Natural Resource Protection Under The Initiative.

33
34 7.1. What The Tree Code Does And Doesn't Do. First, the City had disenfranchised the
35 Tree Code from implementing the Comprehensive Plan Chapter on Healthy Ecosystems by
36 not placing it into the development code requirements, but making it a separate code.
37 Second, staff interprets the Tree Code in favor of development's removal of trees over citizen
38 objections under the Tree Code because they have designed it so even if there is a basis for
39 an alternative site design to preserve significant trees, it is voluntary on the part of the
40 developer. As Intervenor pointed out in the Legal Memorandum in Support of the Motion to
41 Intervene, he has been one of the only lucky ones in the last several years to save a tree
42 before the DRC and that was based on a Settlement involving an alternative design to the
43 proposed location of the drainage system that would otherwise cause their removal, LU 20 -
44 0027.

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2
3 7. 2. The brick wall effect. What must be understood is that many of the people who
4 testified at the DRC believed they had an opportunity for meaningful input as to the Tree
5 removal permit being sought. But unexpectedly they ran into a brick wall called the Lake
6 Oswego Tree Code as designed and interpreted by staff and followed by the DRC, and
7 particularly the chapter on tree removal, Chapter 55.02. This accounts for the Argument in
8 the Voters' Pamphlet of both Multnomah and Clackamas County: "Many testify opposing tree
9 removal, only to be ignored. If the public process relating to these tree removal applications
10 has been largely ignored, why would it be any different with public input relating to natural
11 areas. The City wants "business as usual" to pave, remove trees, add facilities and dispense
12 lucrative construction and landscape contracts. With the climate crisis and loss of
13 biodiversity, we cannot afford business as usual." Int Ex 207 and 213.

14 7.3. A Truncated Analysis Of This Code Makes It Obvious Why Only In The Rarest
15 Of Circumstances Are Trees Not Permitted To Be Removed. After a number of provisions
16 which purport to deter removal, especially of significant trees which are healthy, noninvasive
17 trees over 15 inches in diameter, 55.02.080, the criteria for issuance of type II tree cutting
18 permits, 55.02.080 subsection (3) proves that protection is illusory. The applicant can almost
19 always remove the tree(s) because of (3). It says: "Alternatives to the tree removal have been
20 considered and no reasonable alternative exists to allow the property to be used as
21 permitted in the zone. In making this determination, the City may consider alternative site
22 plans or placement of structures (development purpose) or alternate landscaping designs
23 (outgrown landscape area; landscape plan) that would lessen the impact on trees, so long as
24 the alternatives continue to comply with other provisions of the Lake Oswego Code."
25 However, because the developer can get a development site permit first, the footprint can be
26 locked in. The practical effect of (3) is that if it is in the footprint of what the developer plans
27 to build, which is locked in, the developer does not have to present alternatives and the
28 tree(s) can be removed.

29 Although on first glance it would appear there were factors that could fit within the
30 code, they have been found not to apply. The City actually laid out a handy outline of all the
31 environmental reasons that have been rejected by the DRC and Council. "Heating and
32 cooling, greenhouse gasses, air quality, water quality, habitat loss, pollution, privacy and
33 buffering, physical and mental health, property values, sequestration of carbon dioxide,
34 production of oxygen, reduction of energy costs, effect on animal habitat, and buffering of
35 road noise." October 25, 2023 City Staff Report, LU 23-0002. Int Ex 204 .

36 To boot: staff in its November 20, 2023 report at 34, specifically rejects, after using
37 a tree code analysis, LOC 55.02.080, consideration of arguments regarding impact of tree
38 removal that do not address the applicable code," i.e. the very purposes recited for the
39 Healthy Ecosystems Chapter of the Comprehensive Plan are thereby rejected. November
40 20, 2023 City Staff Legal Memorandum is marked Int Ex 227. City' Ordinance No. 2687,
41 effective 1/14/2016, amended the Comprehensive Plan "to include a new Healthy Ecosystems
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Chapter with goals, policies, and recommended action measures for Natural Resources, Urban Forest and Vegetation, Open Spaces . . ." A copy of Ordinance 2687 together with Attachments A - D p 1 is marked Int Ex 228. Since the City's Development Code does not address any private site development permit requirement for removal of natural resources such as trees, but instead leaves the permit approval to the separate tree code process after site development approval, the only requirements in this regard as implementation of the Healthy Ecosystems Chapter is the Tree Code. But if the site's building footprint has been approved in the development process, even under the purported standards in the Tree Code that redesign could occur to protect tree(s) from removal, the Tree Code can't require it. Thus, the City only pays lip service to the very purposes that formed the basis for the Comprehensive Plan's Chapter Healthy Ecosystems Goal 5 requirements for protection of trees through the private property site development process. The City has designed a device to look like it is implementing protection only to circumvent its duty in this regard to carte blanche favor development? It has and it is business as usual.

Even as it relates to this dredge and fill project staff extends the zone of tree removal because "the proposed trenching will cut roots and disturb trees' root protection zones along the new alignment even where trees are not immediately centered over the future pipe." October 25th Staff Report at 35.

This several decades long fight, with the net result of few if any big trees being saved, the interpretation by council and the insistence by the legal department that these interpretations are near binding precedents and the lack of any political electives' momentum to change the code, including push back by developers that it is invalid as not being clear and objective and a hindrance to the goal of more housing, etc.. have lead to intense hostility toward the tree code and a lack of trust in the City's handling of natural resources in general. This is a piece of legislative history referenced in the Voters' Pamphlet arguments as to what the voters had observed, experienced, and understood and is informative as to why they voted for the more rigid Initiative over the more discretion filled Referendum.

8. Comparison Of Treatment Of Other Nature Parks In The Voters' Pamphlet Is Informative Of The Voters' Further Distrust And The Need For Stronger Protection for Natural Resources.

8.1. Admission: Rooted In Distrust, Cooks Butte Park. At the June 15, 2021 City Council meeting, the Mayor admitted that Initiative by LoveLO Parks "was rooted in distrust." In addition to the Tree Code, the Council had added to that distrust as set forth in the Voters' Pamphlet Arguments based on objective facts. The City sought to install a cell tower in the natural area called Cooks Butte Park despite the grant of the deed preserving the natural area which the citizens publicly exposed and prevented.

8.2. Woodmont Natural Park. Additionally, the grantor of Woodmont Natural Park had conditioned the grant of the park on it remaining a natural area, no hard surfaces for

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2 pathways, and no structures except those specifically allowed, but the citizens woke up one
3 morning to its natural area being clear cut. See, 3 Lake Oswego Review articles 3/30/2017,
4 2/5/20, 4/9/2020 about keeping the property natural in the master plan, Int Ex 229; City's
5 acquisition documents and certified copy of recorded Special Warranty Deed, Int Ex 230; and
6 pictures after the clear cut, Int Ex 231. The Parks Department had allowed it or didn't monitor
7 it or something else. But a large portion of the natural area was entirely gone to meet the
8 City's preference for active recreational facilities and structures.

9 At a Praxis listening session the complete destruction of Woodmont Park natural
10 area for active recreation was described as "restoration." See, Voters' Pamphlet, Argument
11 For, p 4, Int Ex 207. Insult to injury, it is of no matter stated the PAC for the Referendum.
12 Everything there apparently was a noxious weed. "They were removed and replaced with
13 appropriate trees for this area, including an oak savannah." Int Ex 225.

14 9. Moreover, this strong intent to limit development to protect the natural areas
15 was also recognized and admitted to by the City Manager. Again, after the voter approval of
16 the Initiative, that night the Manager's official statement on November 2, 2021 previously
17 quoted in this matter, stated, in part: "Through voter approval, the City will amend Chapter X
18 of the Lake Oswego Charter to include additional protections to our natural areas. Any
19 further specific property changes will include voter approval * * *." .

20 Also, an argument in opposition to the Initiative recognized the need for voter approval:
21 "It means that any changes not specifically allowed in Measure 3-568 would need voter
22 approval in City-wide elections." [bold omitted] Int Ex 207 at 7.

23 Knowing this going into the election and confirming on the night of the election, yet here
24 we are with the City wanting to change the wetlands without an election, business as usual.

25 **V. The Wetlands.**

26 1. The Overarching Point. The overarching point to always keep in mind is that the
27 525 ft of this area sought to be trenched is in Waluga Park-West's natural area that was
28 determined to be a wetland. Waluga Park- West is what the City calls a "side by side" park. Its
29 easternmost 4 acres is active recreational and sits on unpermitted fill over the years. The
30 wetlands compose the rest of the Park. It is well known that Wetlands act as a sink for CO₂, a
31 source, a transformer.

32 2. Its Habitats. It consists of three major habitats: above the ground (CO₂,
33 temperature, rainfall); the surface and lower portions of living plants and the aquatic habitat,
34 and below ground. The technical criteria used in a delineation is hydric soils, hydrophytic
35 vegetation, and hydrology.

1
2 The study area Wetland B for the sewer line is .74 acres in size. It was delineated by
3 Pacific Habitat on behalf of the Relator who sought delineation approval from the DRC. LU
4 22-0019, F-001. A copy is marked Int Ex 232. It is part of a larger wetland complex that
extends offsite in all directions, into Waluga Park-West and beyond the Park. This is relevant
to describing the area that is the subject of this case.

5 It is considered a Palustrine wetland, which is further classified as emergent, scrub-
6 shrub, or forested wetland and which comes from the US Fish and Wildlife system of
7 classification. The City retained AECOM to review the Pacific Habitat delineation and found
8 that wetland area B for the sewer line, in Waluga Park-West should be classified as palustrine
9 forested because it had 30% tree coverage instead of palustrine scrub-shrub and palustrine
10 emergent. They also refer to it as a Riparian swamp: it contains extensive shallow surface
11 water. The City entered AECOM memo, LU 22-0019, F-002 into the record of the 2022
hearing, Int Ex 233. City staff in its report to the DRC noted that ACEM's review memo found
that Pacific Habitat had followed the correct procedures for delineating the wetlands. The
report failed to call out the discrepancy in classifying the Waluga Park -West wetlands as
palustrine forested. 2019 Staff Report, Int Ex 234. The history of trees is important to
understanding the effects on the Nature Preserve from the proposed sewer line.

12 By definition this all means the Nature Preserve of Waluga Park -West involves
13 sensitive lands and a significant and sensitive ecosystem. It's not any piece of land.
14 Historically, its use can inform us about the impacts of the current proposal. It was used as a
15 dumping ground, even by the City. Both the history of its various fills and the allowance of the
existing sewer line had adverse effects on the wetland hydrology. Even with a restoration
plan, after the negative, "temporary" impacts of the existing sewer, it has taken almost 34
years of self healing to now be at the point of being pristine. It is wetlands sought to be
preserved by the designation of it as a Nature Preserve under Chapter X.

16 3. The Historical Context Of Damage To These Wetlands By The City, The
17 Allowance Of Adjacent Development And The Existing Sewer Line And The Long Time To
Recover.

18 3.1. The Park: Its Own Best Evidence. The history of Waluga Park-West is its own example
19 of how long it would take for the area to come back, given how long it took to bring it back to
20 its present condition from the evidence in the public records of the historical events
21 described below. This is relevant and perhaps the best evidence involving the actual wetland
in dispute to counter the Relator's and the City's arguments that the adverse effects of
construction of the proposed sewer line are only temporary and mitigation restores the
original function and values.

22 In 1989 a subdivision, Windfield Estates, was proposed and permitted for
23 development in two blocks (1 and 2) on property with wetlands that was adjacent and
connected both to the north and to the south of the wetlands located in Waluga Park-West.

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2 See, the 1990 resource report by Scientific Resources, Inc, (SRI) entitled The Waluga Wetland
3 and Windfield Estates Impact and Mitigation and Long-Term Management. A copy is marked
4 Int Ex 235. Like the Pacific Habitat development report, the SRI report was prepared for a
5 developer, the Holman Company, and was filed with the City to obtain development permits
6 and subsequently filed with an application with DSL for a dredge and fill permit. It was used
7 as one of the stated reference documents for the 1992 delineation report of the Waluga Park
8 - West by Fishman Environmental hired by the City to produce a delineation report for
9 Waluga Park-West. A copy of the Fishman Environmental Wetland Determination and
10 Delineation Waluga Park and West Waluga Park is marked Int EX 236. The City and DSL
11 relied on the information provided by the SRI report. The City granted the requested
12 development permit with a mitigation and restoration plan for the sewer impacts and DSL's
13 granted the dredge and fill permit specifically requiring an impermeable barrier to be
14 installed at 100 ft intervals to mitigate the french drain effect of the sewer line to serve the
15 Winfield development. A copy of the 1990 DSL permit is marked Int Ex 237.

16
17 The SRI resource report addressed and included map figures for developing a
18 sewer line south across the wetlands of Waluga Park- West in order to serve and connect the
19 proposed Block 1 subdivision adjacent and north of Waluga Park -West with and to serve and
20 connect the proposed Block 2 subdivision adjacent to and south of Waluga Park-West.
21 Additionally, a manhole (which is the manhole currently proposed to be tied into) was
22 constructed in the northern portion of the Park to serve the proposed connecting and
23 crossing south sewer line, but also a proposed north sewer line from this manhole east
through the Park's wetlands to the main line in Waluga Drive. The resource report addressed
the need to use a backhoe for trenching and that they needed to avoid compaction, asked for
a 30 ft. wide easement to accommodate the swing of the backhoe, proposed a 3 ft. wide by 7
ft deep trench and admitted to direct impacts where the sewer line would be and where the
10 feet needed for the side cast would be. It proposed a mitigation and restoration plan
based on a 70% survival rate of the plantings after a year. Int Ex 235.

16
17 The City's public records also included 1990 photos after the sewer line was
18 installed that illustrate the reality of what a barren swathe looks like and that the manholes
19 were constructed so as to be above the ground by several feet. Obviously, this is to account
20 for anticipated sedimentation over several years as has occurred as the manhole is no longer
several feet above the ground. A copy of the 1990 group of photos is marked Int Ex 238. The
report also attached an offer letter that 7 acres of the northern Block 1 property in wetlands
be acquired by the Nature Conservancy, but the 7 acres was eventually acquired by the City
as part of Waluga Park-West and its wetlands.

21
22 The SRI Report established by aerial photography that between 1963 and 1975 due
23 to clearing and fill, the Park's wetland experienced considerable changes in its hydrology. Int
Ex 235. It also identified the soil as silty clay loam, aloha silt loam and Xerochrepts-rock
outcrop complex which was buried under fill citing the 1985 Clackamas County Soil Survey.

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1
2 And the sewer lines were built.

3 3.2. Admissions by the City. The history of filling in the wetlands prior to the City's
4 acquisition of the property in 1986 was further confirmed by the City's aerial photographs as
5 stated in an August 3, 1990 internal City memo to the City Manager in response to a 1990
6 objection filed by a neighbor to the City's unpermitted fill and the access road location for
7 the sewer's maintenance. August 3, 1990 City Internal Memo is marked Int Ex 239. A copy of
8 the objection is marked Int Ex 240.

9 The memo admitted to the City's fills, including sewer sludge, being placed on the
10 eastern portion of Waluga Park-West but over the existing fill and several feet away from the
11 edge of the wetlands. As to the particular fill objected to, the Memo rationalized: "the City
12 only had about 50 cubic ft. left which was to be used in a park path; grading and filling
13 permits were not needed because the fill was where there had originally been fill and
14 furthermore it was only temporary and confined and isolated and not a danger." The memo
15 admits that even after the 1978 Clean Water Act, the City was doing its share of filling, albeit
16 stating it may not be in violation as by 1986 when the City acquired the the property the City
17 did not stockpile any "permanent fill" but did stockpile temporary fill, but it was on the
18 original fill. Int Ex 239. It was noted that in 1988, 560 cubic yards of asphalt grinding were
19 stockpiled there. Int Ex 239.

20 The memo also admits the access road to the manhole for sewer line maintenance
21 across the northern portion of the wetlands was developed without the proper permit [from
22 DSL]. Unbelievably when responding to the question of what the staff member
23 recommended for the future he had the good grace to forthrightly say: "remove the
24 maintenance road to the sewer manhole. Due to the original fill and development [of the
25 sewer line] trees were dying. Future development will make it worse." Int Ex 239. The cover
26 to the memo noted the recommended removal had occurred or was about to occur. There is
27 no access road currently. The memo also recommended a consultant be hired to determine
28 what was causing trees to die in the wetlands.

29 3.3. Confirmation That The Sewer Lines Damaged The Wetlands. Shortly
30 afterwards came the 1992 Fishman Environment Delineation report for the City. It stated:
31 "West Waluga site is very disturbed by filling which began in 1971, and the site has continued
32 to be used by the City of Lake Oswego for stockpiling fill and debris." Some of the other
33 observations were: "The placement of fill, the construction of a sewer pipeline, and
34 residential development upslope have altered the natural hydrology of the wetland of West
35 Waluga Park. Fill may be displacing water and causing it to pond along its margins. The sewer
36 pipeline appears to be acting as a conduit for surface water runoff increasing the amount of
37 water present on the north end of West Waluga ." Int Ex 236 at 4.

38 "Residential development north of West Waluga is also contributing additional
39 water to the west end of the site. Emergent wetland occurs on the north edge of the fill in
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2 West Waluga Park along a sewer pipeline corridor. The canopy in this area is dominated by
3 mature white oak trees that are dead or dying. The understory is dominated by cattails. This
4 contrast of dying upland trees and obligate wetland plants indicates a severe change in the
5 hydrologic regime of this area. Conditions have become wet enough in the last three years to
6 kill the trees and create a narrow strip of cattail marsh approximately 50 ft by 400 ft.
Emergent wetlands also occur at East nt Waluga Park near Waluga Drive. Vegetation in this
community is a monoculture of reed canarygrass." Int Ex 236 at 6. It noted that the source of
water appears to be surface water runoff and groundwater collecting in the gravels of the
three year old sewer line corridor.

7 The saddest observation made several times was that the hydrology was so
8 changed that maybe the northern portion of the wetlands was not even a jurisdictional
wetland any more. Int Ex 236 at 6.

9 But I guess it wasn't sad enough because in February of 1995, the City's Parks
10 and Recreation Department developed a Waluga Park Wetland Maintenance and
11 Management Guidelines for a Waluga Park Master Plan. A copy of the Guidelines is marked
12 Int Ex 242. The Guidelines stated it was in response to the Comprehensive Plan and the
13 Master Plan for Waluga Park, which called for preserving and enhancing significant wildlife
14 habitat areas throughout the park site and balancing development with preservation to the
15 greatest extent possible." See 1994 Comprehensive Plan, Goal 5, Section 3, Wetlands, Int Ex
16 243. The Maintenance Plan recognized that the area was only fit for low intensity use but
17 would need periodic maintenance vehicle access, albeit it listed as a source Paul Haines, who
18 had such access removed.

19 The Fishman Environmental report also found under the required Goal 5 analysis
20 the habitat resource of the wetlands to be in the composite highest score range, making it a
21 Class 1 resource. Int Ex 236.

22 The reason for the present sewer proposal remains the same: more infrastructure has
23 to be built for present development with an eye to future development. The proposed sewer
extension is actually 1,440 ft long, with 525 ft in Waluga Park- West and "when fully extended
would serve over 60 properties as currently developed with the potential to serve even more
in the future, e.g. land divisions for additional single family homes and for ADUs and middle
housing." December 15, 2023 City Attorney memo p 2. Int Ex 221.

As noted before, ORS 197.758 (4) (d) exempts wetlands from middle housing
development and ORS 197.307 (d) D exempts affordable housing development from public
park natural areas zoned under land use regulations.

The point to be made is that both the Relator and the City seem to be shrugging
their shoulders saying: There is no practical alternative. Per LOC 50.10.003 Definitions,
practicable is defined as capable of being done after considering and balancing cost, existing
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2 technology and logistics in light of overall project purposes. That is not the test for a Nature
3 Preserve covered by Chapter X.

4 Further, the City itself forced this matter to be considered unavoidable by virtue of
5 conditioning annexation on a covenant! But justified it as stating it would be consistent with
6 the Wastewater Master Plan. Exhibits to the covenant expressly state that they are for
7 reference purposes and created for feasibility. The Sensitive Lands Report by Pacific Habitat
began by stating this condition was pre decided March 30, 2021 by the acting City attorney,
LU 23-0002, Ex F-005. Int Ex 244. The purpose was for future development, clearly, not to
facilitate park access and use for the public's enjoyment and to prevent the deterioration of
habitat. Int Ex 244 at 2.

8 In summary, there is an abundance of evidence that all of this comes down to the
9 City putting the needs of development first. A cursory look at the Lake Oswego map makes it
10 blatantly clear that the areas that are ripe for development and are in fact experiencing
11 development at the moment are to the west, in unincorporated Clackamas County - right
next to Waluga Park-West. Whether that is viewed as good or bad or unstoppable - is
irrelevant. Chapter X stood for leaving alone a small piece of the whole area, preserving it -
not deteriorating it - again - for the benefit of development.

12 3.4. And What About The Wildlife And Its Habitat. The 1996 Park Department Report was
13 adopted as part of the August 5, 1997 City adoption of its sensitive lands regulations and
14 resource protected (RP) overlay districts. August 5, 1997 City Council Minutes. Int Ex 224. It
15 was only then in this report that "The City applied the Economic, Social, Environmental, and
16 Energy Analysis (ESEE) required under Statewide Land Use Goal 5. The purpose of the ESEE
17 analysis is to balance the relative value of an inventoried natural resource against conflicting
use and thereby determine an appropriate level of protection through land use regulations.
The ESEE analysis that formed the factual basis for the Sensitive Lands Overlay Districts
(LOC 50.05.010) and was used initially to designate properties for protection under the
program is the Lake Oswego Resource Area report and ESEE analysis dated April 1, 1997, as
revised on July 15, 1997." LOC 50.10.003 definitions: ESEE PROCESS ANALYSIS.

18 At the same time a habitat assessment score (HAS) was conducted.
19 LOC 50.10.003 definitions state: "HAS (HABITAT ASSESSMENT SCORE) The numerical
20 ranking applied in an ESEE inventory which represents the relative wildlife habitat values of a
21 given natural resource site in comparison with other sites in the City. Six features are
22 evaluated to determine the total Wildlife Habitat Assessment Score; a. Water; b. Food; c.
Cover; d. Disturbance; e. Linkage; f. Unique features. Each feature receives a 'High, Medium,
or Low' description and a numeric ranking as shown in the HAS ranking sheet in the Lake
Oswego Resource Area Report and ESEE analysis dated April 1, 1997, as revised on July 15,
1997 (on file in the Planning Department) to the Sensitive Lands District. * * *."

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2 In point of fact, a review of these reports, which were made a part of the planning
3 staff report, which was made part of the City Council August 3, 1997 adoption of the resource
4 protected (RP) districts, Waluga Park-West received a composite High ranking over 50 which
5 qualified it as a Class 1 resource. However, staff has chosen to focus on a moderate
6 classification for the sub area known as b in the wetland area for the sewer crossing as a class
7 2 as subsequently stated by staff. Int Ex 204. This means a 2 to 1 mitigation area rather than a
8 5 to 1 mitigation area. Int Ex 204. The earlier Fishman Environmental report had also provided
9 an ESEE analysis and HAS score placing Waluga Park as a Class 1 resource. Int Ex 236.

10 Apparently, wildlife knows its place and doesn't migrate from one section to the next in
11 Waluga Park or Waluga Park-West, thus the subsection becomes a Class 2.

12 And by 2022 when Waluga Park-West was really recovering its wildlife habitat, the
13 City demanded that it be "balanced" out to enable yet another destructive sewer line.

14 3.5. Failure to account for sensitive species: the western gray squirrel. While setting forth
15 a number of different wildlife and birds observed to make the wetland their home, a neighbor
16 testifying in opposition before the DRC to the sewer line also pointed out the white oak trees
17 being cut down were also the favored habitat for the western gray squirrel, which is listed as
18 endangered in Washington and sensitive in Oregon [Oregon Dept of Fish and Wildlife
19 Sensitive Species List, Willamette Valley, western gray squirrel (*Sciurus griseus*)]. LU 23-0002,
20 DRC EX G-513. Neighbor's testimony and Oregon Dept of Fish and Wildlife Sensitive Species
21 List is marked Int Ex 247.

22 It is interesting that the record is clearly absent of any recent, city recorded wildlife
23 presence in the wetlands in this case, let alone for the years 2020 through the 2023 hearings
24 in this matter. Again it was up to the citizens to detail the wildlife they observed which they
25 did. Citizen observation and concern for the habitat and wildlife and their loss gave way to
26 the staff and the Relator's notion that it's only "temporary" and they will come back with
27 "restoration." Even when there was still time from the testimony about loss of habitat of
28 trees favored by the western gray squirrel, when the City could and should have followed up
29 with site visits to determine if the sensitive species was present, it went deaf to citizen input
30 and did nothing. Not to be overly unkind, the City allows citizen involvement, but isn't open
31 to anything that doesn't fit within the staff driven plans. Again, this supports the very reason
32 the voters didn't trust the City's management of natural resources and intended the stronger
33 protections of limited development in Nature Preserves for their preservation to occur.

34 **VI. Mitigation and Replacement Does Not Fully Restore the Wetlands Functions** 35 **and Values.**

36 1. Admission. The Relator and the City admit a proposed 17 ft by 525 ft constructed
37 impact swathe for the trenching of the sewer pipeline area will adversely affect the wetlands,
38 as such they are not being kept intact; but, they claim, that by mitigation and restoration they

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2 will "restore" the wetland without net loss of functions or values. Pacific Habitat's Sensitive
3 Lands Report at 3, Int Ex 244. Planning Staff Report, Int Ex 204. This is nonsense.

4 2. Loss of functions and values. Mitigation is after-the-fact of clear cutting and destroying
5 the wetland vegetation, trees, and habitat. The Relator and the City admit this constitutes
6 loss of functions and values that they represent. This violates the preservation purpose in the
7 first place. Sensitive Lands Report at 1-3, Int Ex 244; Planning Staff Report, Int Ex 204.

8 3. Nor is the loss temporary. Mitigation and restoration in the City's sensitive land
9 provisions admits to their preservation shortcomings especially in the area of temporary loss.

10 "Mitigation is a way of repairing or compensating for adverse impacts to the
11 functioning and values of a natural resource caused by a development." LOC 50.05.010.4.e.
12 The City also determined: "This subsection LOC 50.05.010. 4.e through LOC 50.05.010.4.g
13 **recognizes that true replacement of mature or complex natural resource**
14 **systems is difficult and can take many years.**" (Emphasis added)

15 It must be reiterated. The theme of the code on Sensitive lands is avoid, minimize,
16 mitigate. This theme is aligned with a 404 permit for dredge and fill activity federally and
17 state wide. "The requirement that utilities approved within a delineated RP district shall be
18 constructed in such a way that a minimum of excavation is required and so that no permanent
19 draining or filling of a stream corridor or wetland will occur and the requirement that surface
20 runoff and other water sources supplying hydrology to an RP district shall be designed and
21 maintained so as not to adversely impact the functions and values of the resource." LOC
22 50.05.010.4.d. Further, remember all that the Relator had to do when he went before DRC
23 was to show that the plan was feasible, not that it could actually be done without deleterious
impacts to the wetlands.

Even the idea that wetlands can be restored or how it could be done is part of what
constitutes a Nature Preserve. It is pretty clear reading the resource report, Sensitive Lands
Report, Int Ex 244, that what the Relator and the City are proposing is a "designer wetland."
They want to introduce some plants, the survival of which becomes the measure of
restoration. It is understandable because it is somewhat controllable, but runs the risk of
being less sustainable than letting nature do its thing.

"The continual introduction of species, whether introduced through flooding and
other abiotic and biotic pathways, appeared to have a much longer-lasting effect in the
development of these ecosystems than the few species of plants that were introduced to one
of the wetlands in the beginning. This 17 year study of wetland development showed that the
planting had some long-term effect on functions, but none on denitrification. But planting did
appear to have had a significant effect on decreasing carbon accumulation in the soil. After 17
years the two created wetlands may have converged on plant cover structure but the residual

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2 effect of the years when they were different in productivity may still be influencing some
3 ecosystem functions." Taken from Wetlands 6th Edition by William J. Mitsch (Author), James
4 G. Gosselink (Author), Christopher J. Anderson (Author), M. Siobhan Fennessy (Author) (July
5 12, 2023)

6 In other words, preservation means letting nature be involved in the design, letting
7 wildlife be the engineers of this park's ecosystem, and letting biodiversity simply exist.

8 4. After Construction No Invasive Species To Treat. It's a small detail but the
9 proposal is to hand weed or spot treat with herbicide invasive species. Sensitive Lands
10 Report at 6, Int Ex 244. But this mitigation would not be where there had been a dredge and
11 fill but on other land owned by the Relator to the west and south. Int Ex 244 at 7.

12 5. Significant Trees. 14 of the 39+ trees to be removed are within Waluga Park. 9 are
13 significant healthy trees, i.e. trees of 15" d.b.h or greater. Applicant (Relator) Narrative
14 Statement at 34, F- 001, Int Ex 248. 5 are Oregon Ash, between 15" and 20 d.b.h." Two
15 Oregon White Oak are 27" and 33 d.b.h." Narrative Statement at 32-34. "Mitigation" trees
16 will be at least 1 in. in caliper. 47 of the mitigation trees will be at least 2" caliper and only 30
17 ft. at mature height. 40 will be western red cedar and 7 Oregon white oak. Sensitive Lands
18 Report at 8.

19 Five significant trees - 15" in caliper or greater - will be replaced with 1.5 caliper
20 trees. There is no getting around that big trees are to be removed, replaced somewhere else
21 with little trees that will take years and years to regain, if at all, what was already here today,
22 let alone where the trees would have been if left in place. This then is a permanent impact
23 and deterioration of habitat and loss.

There is some confusion between the Relator's filed Narrative Statement and
Pacific Habitat's Sensitive Lands Report as to the exact number of trees and types to be
removed from Waluga Park-West. In the latter the number is placed at 12 Ash trees, ranging
from 6" caliper to 15" caliper that are destined to be destroyed for the sewer line in the Park.
Interestingly, they are not being replaced. After construction, destroyed trees in the impact
area are to be replaced with one-half inch caliper trees that at maturity will be 30 feet high,
except that Western Red Cedar and Oregon White Oak are to be replaced by 2" caliper
trees. Sensitive Lands Report at 8, Int Ex 245. Even if the Ash trees were being replaced
(which can grow to 80 or 100 feet), it will take at least a few years of growth for a 2" caliper
Ash (or any of the other tree) to become a 6" caliper tree and even more to become a 15"
caliper tree. Even given Oregon Ash' moderately rapid growth, it will take an average of 100
to 150 years on good sites to attain a d.b.h. of 16 to 30 inches. See, Oregon Ash, a treatise by
Peyton W. Owston. A copy is marked Int Ex 249.

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2 Yet, these 12 Ash trees, or any of the other trees, will never get their chance to live,
3 let alone to the ripe old age of 100.

4 6. No trees restored to wetlands in the construction corridor. Nor will any of the
5 "minimum" 17 ft by 525 ft habitat-deteriorated-wetlands corridor even see any trees restored
6 within it. "The City has directed the applicant [Relator] to avoid planting trees within 5 ft of
7 the new sanitary easement [17 ft wide corridor]. As such, though some trees will be planted
8 along the project corridor, most trees required for sensitive lands mitigation and for tree
9 removal will be planted elsewhere." Sensitive Lands Report at 8. Imagine the anguish for a
10 mother bird to return to find her babies and their nest completely obliterated and then
11 having to be satisfied that in a few years off site saplings will be mature enough to establish a
12 new home. The loss within the clear cut swathe is not temporary, nor is it sensitive.

13 7. Only Maintained For 3 years. The Sensitive Lands Report at p 6 notes it will only
14 maintain the trees and other restoration plantings for three years. These trees provide
15 habitat cover, nesting, and food resources for birds and small animals such as squirrels, with
16 the white oaks providing habitat for the western gray squirrel which is listed as a sensitive
17 species for Oregon's Willamette Valley.

18 8. The Sensitive Lands Report Is Of Limited Focus And Doesn't Address The Risks
19 Of The Trenched Pipe To The Hydrology And The Hydric Soils. Moreover, the Sensitive
20 Lands Plan is almost entirely based on plants - nothing is said about the risks to the hydrology
21 and maintaining the hydric soil that the sewer line presents. This is, of course, a major flaw in
22 the report and in the analysis. All three are of the utmost importance to a wetlands. Tellingly,
23 while plant types were inventoried, aquatic and other wildlife were not, including any that
might be listed as sensitive or endangered. As documented above, the existing sewer line
damaged the wetland hydrology and killed trees, which, in turn, affected habitat. During the
construction period, with the soil and vegetation being stripped off and with the rumblings of
the heavy equipment, members of this wildlife may die off and/or move away and not return,
especially if there are no mature trees or plant life, which again simply underscores the
permanent consequences of the destruction.

18 Saturated (hydric) soils and underground water hydrology are key elements that
19 establish what water quality and flood control is occurring. How to best manage the risks of
20 the construction of the sewer line and its permanency from changing hydrology to providing a
21 potential French drain to adversely affect the wetland characteristics should have been
22 reported as did the 1990 SRI Resource Report to the City and which the subsequent 1992
23 Fishman Environmental report documented had occurred over 30 years ago.

21 Finding out about the hydrology in the record is a challenge and this is curious
22 because the impact on hydrology is the one most likely to be affected in a damaging way by
23 this proposed dredge and fill project. From Emerico Engineering Drainage

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2 Report, Int Ex 250, for the five lot property, we are told that there is stiff fine grained soils
3 from Missoula Flood Deposits, that the rate of infiltration is 3 inches in an hour, that the
4 groundwater may be 40 ft. below the site and that this latter data came from Portland maps.
5 Even if true, it appears likely that this signifies an underground river or aquifer - and with the
topography sloping downward west to east, it is not likely at this depth and slope that this
groundwater is the groundwater that is providing the hydric soils and the soil conditions that
will make it necessary to worry about whether the trench will drain the wetlands.

6 At 3.5 to 8 inches they found barely damp clay. They did one infiltration test on
7 July 8, 2021. They did another on May 13, 2022, excavated to 4 ft and performed a 4 hour
8 presoak and it did not drain at all. Emerio Drainage Report, Int Ex 250. The coup de gras is
9 that the field report in the Delineation Report of 10/12/21 for the wetland study area shows
that the water table present and saturation present is 15 inches. Int Ex 232. You don't have to
be an expert to understand the problem: the trench is largely 5 ft deep, it's going to run into
water at 15 inches and it is a ghost issue in all the reports.

10 Hydrology, the discharge-recharge interchanges between wetland and groundwater
11 systems, is important in this particular case because it appears that what we have is a
12 perched water wetland or surface water depression. It only loses water through infiltration
13 into the ground and through evaporation. Below the perched surface water is impermeable
soil. In other words, if the groundwater is high, and the trench is not sealed, there is a risk of a
French drain. And what Intervenor hopes he is making plain is that in this case there is no
mitigation plan for deterioration of hydrological conditions.

14 Further, even if viewed only during the period of construction, deterioration and
15 destruction of habitat is expressly not allowed under Chapter X, nor should the soils and
16 hydrology be changed by construction so that over the following time the wetlands are not
preserved, dry out or lose their ability to function in supporting the hydric plants and habitat,
providing carbon sequestration, flood control and water quality .

17 **VII. The Minimum 17 ft Wide by 525 ft Long Construction Easement is Both**
18 **Unsafe and Impracticable and Will Result in Greater Damage to the Wetlands**
than Proposed.

19 1. Simple Math, Technical Specifications, And Safety Regulations Result In Too
20 Narrow An Area In Which To Construct. Assuming a neat trench, the minimum width for
21 backfill is 10 inches on either side of an 8 inch pipe. City of Lake Oswego Technical
22 specifications, Water and Sewer Trench Backfill, S6-01, is marked Int Ex 251. This places the
23 trench at a minimum width of 2' 4" (28") and 1' 2" from the trench center to each of the edges
(Note: The staff report of October 25, 2023 at p 35 incorrectly stated the proposed width of
the trench is approximately 7 ft in each direction of the centerline of the proposed pipe, Int
Ex 204) The Relator's reports indicated the 17 ft width would be 7 ft from the center of the
trench to the south and 10 ft from the center to the north. Thus, on the south side, there

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2 appears to be 5' 10" to work with from the southern edge of the trench and 9' 10" from the
3 north side of the trench, setting aside the widening of the trench in the Park for two new
4 sewer manholes, with an inside diameter of 48" and required to be at least 6"-12" above the
5 surface. LO Technical Spec, Standard Manhole, WW1-02. A copy is marked Int Ex 252.

6
7 However, the Occupation Health and Safety Act (OHSA), 29 CFR 1926.651(j) (2)
8 requires: "Employees shall be protected from excavated or other materials or equipment that
9 could pose a hazard by falling or rolling into excavations. Protection shall be provided by
10 placing and keeping such material or equipment at least 2 feet (.61m) from the edge of the
11 excavation, or by the use of retaining devices that are sufficient to prevent materials or
12 equipment from falling or rolling into excavations, or by a combination of both if necessary."
13 Subtracting the 2 ft of safety set back from each side, leaves 3'10" on the south and 7'10" on
14 the north.

15
16 According to anticipated testimony and reviewing the various manufacturer's
17 specifications widely available on the internet, the average width of most dump trucks (which
18 commonly are known to be used for hauling of saturated topsoil, trees, stumps, and
19 vegetation and the hauling and dumping of gravel) is 8 ft to 8.5 ft and backhoe excavators
20 (which commonly are known to be used for trenching and placing sidecast) is 6 to 8 ft. Both
21 are listed in the Relator's application with DSL for its dredge and fill permit. Int Ex 203.

22
23 This leaves no room on either side for this type of motorized equipment to drive,
24 back up, or turn around without falling or rolling into the trench. It also stands to reason and
25 common sense that operating heavy equipment close to the trench due to its weight could
26 compact the saturated soil causing it to mush out the trench walls and endangering workers
27 in the trench. Likewise, storing sidecast to the south means piling it up, which will spread out
28 at the bottom and the toe of such sloughed piling can reasonably be expected to be greater
29 than 3 ft as anyone who has dealt with 1 cubic yard (3 ft by 3 ft by 3 ft) mulch pile can attest to.
30 It is not a neat cube.

31
32 From the topography and schematic drawings of the trench in the above cited
33 engineering plan, it appears the trench will average a little over 5 ft deep, is a little over 2 ft in
34 width without accounting for the manholes, and 525 ft in length. By simple arithmetic
35 calculation, this will result in approximately 195 cubic yards of sidecast to be removed from
36 the trench, which according to Relator's Sensitive Lands Report at 3 is intended to be used to
37 refill along the sides and top of the trench with 6 inches of gravel at the base. Thus, the issue
38 of how much space the toe of any piled sidecast will need is very real.

39
40 Relator's DSL permit application filed on March 21, 2024, clearly shows a trench for
41 the pipeline was to be excavated, not bored, and the trench at the location of each of the two
42 manholes is to be 8 ft wide. With the OHSA 2 ft set back, only 1 ft to the south is left for side
43 cast and 4 ft to the north for vehicle travel in the area of the manholes. What are the
44 consequences when the contractor begins the job and can't safely or adequately construct in
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2 the minimum 17 ft? One result is the contractor continues with a field contractual add on to
3 have an increased width and less preservation with the City in control. What logically appears
4 to be the case is the 17 ft width might have been designed with boring in mind, and retained
5 with trench with field changes in mind for widening the width. In any event, where is the City
6 in protecting the wetlands in all this?

7
8 Also, compare and contrast the 30 ft sewer line easement required for Windfield
9 sewer crossing of the wetland and the 30 ft easement forced on the contractor over the
10 contractor's objection that it was too narrow for the sewer construction at Springbrook Park
11 forest, a copy of objection is marked Int Ex 241 and the "minimum" of 17 ft in the present
12 proposed sewer line.

13
14 Intervenor's evidence will establish the construction impact area for safety and
15 workability should be at least 50 ft wide; thereby increasing by 3 times the proposed 14,579
16 sq ft area of impact area to the wetlands to over an acre of impacts. In short, yes, these
17 estimates were only for "feasibility" before the Relator can obtain the permit and staff did
18 refer to the actions to be taken as merely minimizing impacts. However, common sense and
19 simple math demonstrates the figure of a 17 ft wide corridor is fanciful: not feasible, safe or at
20 all workable. More impact will occur than the Relator and the City presented.

21
22 2. Risk Dewatering And Impacts Outside 17 ft. Given that it is more likely than not
23 that there is groundwater the top of which is perched at 15 inches over a layer of
impermeable soil (perched water), trenching through to 5 ft plus may well cause water to fill
into the trench as it drains. At this time, the Relator has not proposed how the Relator will
dewater the trench if water is encountered and what effects dewatering might have on drying
up the wetland or being displaced on and over the 17 ft width of the impacted area. Given the
probability of perched water, the trench as proposed is likely to act as a French drain and
adversely affect the ecosystem by drying out the wetland. See, "Environmental
Consequences of Water Withdrawals and Drainage of Wetlands," University of Florida IFAS
publication, Alain L. Wright, professor, Dept of Soil, Water, and EcoSystem Science, 2023. A
copy is marked Int Ex 253. The bottom line is the depth according to the Relator's own
Delineation Report of 10/11/21, the water table and saturation present was at 15 inches. A 5 ft.
trench is going to begin to drain the wetlands.

24
25 Once again, the citizens correctly understood the need to protect the Park natural
26 area, including the wetlands, truly rests with the citizens through the intended Charter
27 Initiative preservation regulations, which are respectively sought to be applied and upheld
28 against this type of blaise governance and destructive development.

29
30 Finally, the City required this minimizing approach to construction with mitigation
31 and restoration only after a determination that there are no other alternatives to handle the
32 waste water from the 5 lot development, but to cross the wetlands with a gravity line, and by
33 forcing the gravity line on the Relator through a Covenant agreement executed February 21,
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2022. A copy is marked Int Ex 254, and enacting a subsequent change to the sewer code connection requirements, Ord 2890, enacted April 16 2022. A copy is marked Int Ex 255. Both occurred after the fact of the November 2, 2021 enactment of Chapter X.

Not to be redundant, but all this kind of analysis comes out of federal law and sadly, even when incorporated into the City's sensitive lands code, is manipulated to still allow development in wetlands, which is utterly frowned on by all existing law on all levels. It comes out of the idea of "no net loss" which balances wetland loss when economic or political reasons dictate otherwise. It has been around for 20 years and under it we continue to lose wetlands.

VIII. Citizens Again Hit Brick Wall Of Bias In Attempting To Preserve Natural Resources Under Chapter X, Section 41-43 And Under The Doctrine Of Equitable Estoppel, The City Should Not Be Allowed To Permit The Sewer.

1. The Citizens Addressed The Applicable Criteria. Under land use requirements the applicable criteria must be addressed by the applicant and opponents. In the record of the DRC hearing, LU 23-0002, which the City has introduced in its link provided in its previously responsive pleadings, many of the opposing citizens gave evidence that Chapter X applied as criteria, and that the construction of the sewer line violated Chapter X, degrading the wetlands and destroying habitat. They then again hit a brick wall with staff holding it did not apply.

2. But Even If Criteria, Still Same Business As Usual, Door Is Shut. However, in its October 25, 2023, Planning Staff Report at 11, staff provided a double whammy, after stating Chapter X didn't apply, the staff report opened the door with its section "If City Charter Chapter X (Section 43) Were Applicable Land Use Regulation Criteria and Standards" and then shut the door through the fanciful interpretations discounted above. Staff denied the purpose of the first section [of Section 43] was an operational standard and even if it were, "no evidence has been presented that shows installation of an underground sewer pipe would not be "consistent with the preservation of a Nature Preserve as a natural area available for public enjoyment." Staff completely ignored the impacts to the wetland during the construction phase and the deterioration to habitat presented in the Relator's engineering and resource reports. They ignored that the time to fully restore wasn't really temporary by their own code and that trees removed would not be replaced in the wetland areas for the pipeline at all. They wrongly equated the potential for an underground sewer line to facilitate sanitary restroom facilities for the use of the park with an underground sewer line for private development that had nothing to do with restroom facilities or facilitating the use and enjoyment of the Park's Nature Preserve. In fact, there already are restroom facilities at the Park. Unbelievably, they ignored the documented past damage the existing sewer line had caused to the wetland. They ignored the fact that simple math and common sense made construction of the trench in only a minimally 17 ft wide impact area highly unlikely. They

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2 ignored the oral and written testimony stating the obvious fact that construction of the sewer
3 line by degrading the wetlands and destroying habitat violated Chapter X and the very
4 definition of a Nature Preserve.

5 3. Voters Responded With Evidence, But Their Evidence Was Ignored. Among the
6 over 100 citizens in opposition, 15 opponents, from 9 different neighborhoods, expressly
7 stated that they voted for the Initiative and specifically addressed the Ballot Title, Sections
8 41, 42, and 43, in keeping with addressing the applicable criteria and that it was "abundantly
9 clear that constructing a 17' wide by 525' long road, the removal of 14 established trees, and
10 the severe disturbance to the designated wetlands in Waluga Park-West to facilitate trenching
11 and installation of a sewer line for a private developer, let alone the City, IS NOT
12 PERMITTED in the City Charter: Chapter X. The City must pursue other alternatives." This is
13 evidence directly in response to the City's call to why the installation would be inconsistent
14 with the preservation of the wetland and its peaceful enjoyment under Chapter X. A copy of
15 the 15 voters' public record submittals is marked Int Ex 246. (Note: the initial Relator's
16 Application Statement of June 22, 2023, at 32 stated 14 trees were to be removed from
17 Waluga Park-West, but in subsequent reports reduced that number to 12 as 2 of the trees
18 were in the right of way of Inverurie).

19 Against the pretzel like logic of the City that the voters didn't understand the
20 meaning of the Chapter X's regulations, this representative sampling of the voters will be
21 offered not for their intent in voting for the Initiative, but as further weight that the
22 information in the Voters' Pamphlet was not a fluke as to "business as usual" and that the bias
23 against the Initiative was so strong that any favorable testimony addressing Sections 41, 42,
24 and 43 was discounted and ignored. This supports Intervenor's previously advanced
25 equitable estoppel argument. In Intervenor's earlier Memorandums, the Intervenor
26 documented through public documents the fact that the City Council continued to take
27 action contrary to the Initiative from the date of its enactment. This testimonial evidence
28 coupled as to how it was treated goes to that same pattern of conduct.

29 At their January 4, 2022 study session after the election results were clearly known,
30 the City Council set this tone with such statements by one councilor that "he was not
31 politicking but believed most of the voters did not know the impacts of the passage of the
32 amendment. Another lamented the prohibition against telecommunications towers affecting
33 emergency communications and safety, "because of the lies certain people in the community
34 were spreading about what the City did, kids were not safe" and stated "that people who
35 voted for the amendment should be ashamed. They needed to do their homework and to not
36 listen to people on the internet or on Nextdoor. They were hurting the community and the
37 City's ability to protect people and kids." And of course, they would never rent the land for
38 the development of private Cell towers.

1
2 In light of the comments, the voters did not know the impacts of the passage of the
3 Initiative or that they were liars, did not do their homework and should be ashamed,
4 the testimony in opposition directed at this application and the criteria of Chapter X
5 establishes just the opposite, they had done their homework, understood language in the
6 Initiative and that this type of development was in plain violation of the preservation
7 provisions of Chapter X. The Citizens' substantial rights to the peaceful enjoyment of
8 preserved wetlands were clearly evidenced. Yet, the Citizens' government remained
9 deliberately indifferent to the majority's duly enacted home rule Charter, Chapter X and its
10 preservation of the Nature Preserve wetlands in this case. The City should be equitably
11 estopped from granting a sewer development permit through the Waluga Park-West
12 wetlands. See argument in prior memos.

13 **IX. Finally, the Intervenor disputes that there were no alternatives such as septic**
14 **systems or other routes through pumping that were available in the first place**
15 **and could still be.**

16 Note: City itself forced this matter to be considered unavoidable by virtue of the
17 Covenant! It had the leverage since it did not want to maintain STEP or other septic systems
18 or pump stations and the Relator wanted to develop given wetlands that were also on private
19 property. But justified it as stating it would be consistent with the Wastewater Master Plan,
20 albeit locations can be changed. Exhibits to the covenant expressly state that they are for
21 reference purposes and created for feasibility and that a separate, future hearing for a
22 development permit would be needed and the City would be held harmless if it didn't get
23 permitted. The Sensitive Lands Report at 2 began by stating this was pre decided March 30,
2021 by the then city attorney. The purpose was for future development. However, this
analysis does not necessarily have to be reached or decided. As pointed out above, Chapter
X does not expressly provide for unavoidable utility development crossings in a Nature
Preserve or a progressive step approach with mitigation and restoration for utility
development in any of its Sections, nor can it be necessarily and logically implied from the
text, context, or relevant legislative history of Chapter X. Simply put, sewer line development
for private use purposes is neither expressly or impliedly allowed.

It is obvious that under this Code, the City would have done nothing to avoid the
wetlands, would have inflicted adverse impacts, and planted some native trees and grasses
and called it good. This is exactly why it lost the trust of the public to manage its natural
resources.

It is presently unclear how the City will respond to a new situation regarding
Stevens Meadows, another Nature Preserve, a portion of which is wanted by Clackamas
County for a round-about which would take out trees and turn a portion of the land into
road. Clackamas County is at 100% design completion. They stated that although they had
not publicized this project broadly in Lake Oswego, it had notified Lake Oswego Staff. If their

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2 public statements at the latest City council meeting of April 16, 2024 are to be a judge of their
3 present thinking, they now recognize that the Charter provisions on preservation are
4 paramount. It is too early to tell. See media coverage from Lake Oswego review. Int Ex 256.
5 See, April 16, 2024 Council meeting. Int Ex 257. <https://www.youtube.com/watch?v=OssckkCnJyl&t=1815s>

6 What did come out of this meeting were a number of admissions of a party
7 opponent as to what the City knew was the impact of Chapter X. "No one can make
8 development in the park." Massene Mboup, City Councilor. "We will defend the charter. We
9 will defend what our voters stood behind. You need to convince them of the benefits of this
10 project and how we can move forward. Otherwise we are at loggerheads. If you think
11 condemnation is the way forward, be prepared." Lake Oswego Mayor.

12 For a project about three years in the making to come as a complete surprise to the
13 council but having been known to staff, especially in light of Chapter X having been voted on
14 and in existence for those three years, there has to be a massive break in communication
15 between staff and the council/the citizens. It also lends credence to the idea that staff was
16 dismissive of Chapter X or as they say in the South, "Well, bless your heart." And worse than
17 patronizing, was it just plain "willful disobedience?"

18 **X. Summary:**

19 The Relator's application for a proposed sewer main line extension crossing the
20 Nature Preserve of Waluga Park-West should be denied as failing to meet by a
21 preponderance of the evidence the substantive requirements for preserving the Nature
22 Preserve pursuant to Section 41 and 43 of the Lake Oswego Charter, Chapter X, Park
23 Development Limitation on one or more of the following grounds and reasons:

24 (1) Fact: The development and construction of the sewer main line extension line
25 does not keep the wetland, its soils, its trees, vegetation, and habitat intact and free of
26 damage and deterioration in keeping with what the voters understood and intended in
27 enacting Chapter X. Thus, the development and construction of the sewer line is not
28 consistent with and is in violation of what voters intended in Chapter X, Section 41's express
29 purpose of establishing a Nature Preserve to ensure the preservation of natural park and
30 open space areas of a Nature Preserve and that it should be liberally interpreted. Therefore,
31 the development and construction of the sewer main line extension is not permitted and the
32 application should be denied.

33 (2) Fact: The development and construction of the proposed sewer main line
34 extension is not expressly or impliedly authorized as a limited development within a Nature
35 Preserve under Chapter X, Section 43's text, context, and relevant legislative history of what
36 the voters understood and intended, nor is the concept of unavoidable utility crossing of a

37 PAGE 53 INTERVENOR MEMORANDUM

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2 wetland as a limited development exception expressly or impliedly authorized in a Nature
3 Preserve under Chapter X, Section 43. Therefore, the development and construction of the
4 sewer main line extension is not permitted and the application should be denied.

5 (3) Fact: The development and construction of the proposed sewer main line
6 extension will necessarily need to employ a construction access road, a construction parking
7 lot, and the cutting of trees to construct the road and lot, and also causes habitat
8 deterioration in the process, which are all expressly prohibited under Chapter X, Section 43's
9 text, context and relevant legislative history as understood and intended by the voters.
10 Therefore, the development and construction of the sewer main line extension is not
11 permitted and the application should be denied.

12 (4) Fact: The development and construction of the proposed sewer main line
13 extension will more probably than not adversely impact the wetlands by 2-3 times surface
14 area than that which the Relator has proposed as well as adversely impacting the hydric soils,
15 the vegetation and the hydrology; providing an even greater failure to preserve the Nature
16 Preserve of Waluga-Park-West under Chapter X, Sections 41 and 43. Therefore, the
17 development and construction of the sewer main line extension is not permitted and the
18 application should be denied.

19 (5) Fact: Whenever faced with applying Chapter X over the last two and half years,
20 the City with the Relator's knowledge and approval has deliberately and intentionally ignored
21 and stonewalled the citizens intent at every turn and should be equitably estopped from a
22 development permit for their willful disobedience in this matter. Therefore, the development
23 and construction of the sewer main line extension is not permitted and the application should
be denied.

Respectfully submitted,

Theresa M. Kohlhoff

Theresa M. Kohlhoff, May 22, 2024

This Memorandum was written and edited by both the
Intervenor, Michael Kohlhoff and the attorney, Theresa M.
Kohlhoff

Appendix Glossary

Webster's Third New International Dictionary Unabridged, 6th edition, 2002

Above-ground - located on or above the surface of the ground

All - every member or individual component of : each one of —used distributively with a plural
noun or pronoun to mean that a statement is true of every individual considered

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Any - one, no matter what one : every —used as a function word especially in assertions and denials to indicate one that is selected without restriction or limitation of choice

Amend - 3.b. To change or alter (as a motion, bill, or law) formally by modification, deletion, or addition (- the constitution)

Amorphous - without clearly drawn limits: not precisely indicated or established

Beneficial improvement is an improvement on land that enhances the value of a property but is not necessary to prevent deterioration.

Conditions - 3.b attendant circumstances: existing state of affairs

Consistent - coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities or trends : compatible —usually used with with

Designate - To serve as a name of: stand for: denote

Development - A developed tract of land esp: a subdivision, having necessary utilities (as water, gas, electricity, roads

Enhance - to increase the worth or value of

Facilities - something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve or facilitate some particular end.

Govern - to exercise arbitrarily or by established rules continuous sovereign authority over especially : to control and direct the making and administration of policy in

Guard - a state of watchfulness and readiness against danger : state of standing in defense of a person or thing against possible injury, attack, or theft

Habitat - the place where a plant or animal species naturally lives and grows.

Hard surface - to treat (as by paving or macadamizing) the surface of (as a road) to prevent muddiness.

Impair - to make worse: diminish in quantity, value, excellence, or strength: do harm to: damage, lessen

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2 Imply - to involve as a necessary concomitant (as by general or logical implication, by
signification, or by very nature or essence)

3 Improve 2.e - to grade and drain (a road) and apply surfacing material (as gravel, crushed
4 rock, or oil) other than pavement.

5 Improvements - A permanent addition to or betterment of real property that enhances its
6 capital value and that involves the expenditure of labor or money and is designed to make
the property more useful or valuable as distinguished from ordinary repairs. See beneficial
improvement

7 Inconsistent - lacking consistency, incompatible, incongruous, in harmonious 1.b so related to
8 something premised or understood that it cannot be true if what is thus assumed is true

9 Injure - to inflict material damage or loss on

10 Limit - Restrict may imply a narrow limitation, a more sharp and severe constriction or
checking than limit.

11 Limitation - a restriction or restraint imposed from without (as by law, custom, or
12 circumstances)

13 Macadamize - to construct or finish (a road) by compacting into a solid mass a layer of small
14 broken stone on a convex well-drained roadbed using fine stone dust and water as a cement
or now usually cement grout or bituminous material as a binder.

15 Maintenance - the labor of keeping something (such as buildings or equipment) in a state of
repair or efficiency

16 Maintain - to keep in a state of repair, efficiency, or validity : preserve from failure or decline

17 Manage - to direct or carry on business or affairs : supervise, administer

18 Motor vehicle an automotive vehicle not operated on rails; esp one with rubber tires for use
19 on highways

20 Motorized - to equip with motor-driven vehicles in substitution for those otherwise propelled

21 Natural area - geographical area (as in a city) having a physical and cultural individuality
22 developed through natural growth rather than design or planning.

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2 Nature - the created world in its entirety; the totality of physical reality exclusive of things
3 mental; the total system of spatiotemporal phenomena and events that can be explained by
4 other occurrences in the same system

5
6 Parking lot - an outdoor lot for the parking of motor vehicles

7
8 Preserve - an area (as a tract of land or body of water) restricted for the protection and
9 preservation of animals, trees, or other natural resources.

10
11 Prevent - to keep from happening or existing especially by precautionary measures : hinder
12 the progress, appearance, or fulfillment of : make impossible through advance provisions

13
14 Prohibits - to forbid by authority or command: enjoin, interdict

15
16 Protect - to cover or shield from that which would injure, destroy, or detrimentally affect :
17 secure or preserve usually against attack, disintegration, encroachment, or harm : guard

18
19 Public - accessible to or shared by all members of the community

20
21 Repeals - the act or an instance of repealing: abrogation, revocation

22
23 Replaces - to take the place of: serve as a substitute for or successor of: succeed, supplant

Restore - to bring back to or put back into a former or original state : renew: such as
a: rebuild, reconstruct

Restriction 1.b - a limitation placed on the use or enjoyment of real or other property,
especially an encumbrance on land restricting the uses to which it may be put

Restricts - To place (land) under restrictions as to use (as by zoning ordinances)

Retain - to hold secure or intact (as in a fixed place or condition) : prevent escape, loss,
leakage, or detachment of

Road - 3a an open way or public passage for vehicles, persons and animals: a track for travel
or transportation to and fro serving as a means of communication between two places,
usually having distinguishing names. 3c the part of a thoroughfare over which vehicular traffic
moves

Roadway - road specifically : the part of a road over which the vehicular traffic travels

Shall - used in laws, regulations, or directives to express what is mandatory

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2 Stewardship - the careful, responsible management of something entrusted to one's care

3 Structures - Something constructed or built

4 Trails - 3.c(1) a track made by passage (as through a wilderness or wild region: a beaten path
5 (2) a blazed or otherwise marked path through a forest or mountainous region (woodland -)
(3).a road or highway approximately following an historic trail

6 Vehicles - a means of carrying or transporting something: conveyance as a) a carrier of goods
or passengers; motor vehicles.

7 Vehicular - of, relating to, or designed for vehicles and especially for motor vehicles
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