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

State et rel. New Look Development) )  
LLC ) NO. 24CV03746  
Plaintiff, Relator ) )  
v ) INTERVENOR RESPONSE TO DEFENDANT'S  
City of Lake Oswego, ) MOTION TO RECONSIDER  
Defendant. ) )  
and ) )  
Michael Kohlhoff, ) )  
Intervenor ) )

SUMMARY The motion should be denied.

DISCUSSION Intervenor respectfully moves that Defendant's Motion to Reopen Consideration of Whether Chapter X is a land use regulation be denied on the grounds and for the following reasons:

I.

Defendant's Motion is not germane to the application before the court, which seeks a sewer line crossing of the Nature Preserve of Waluga Park-West. The application does not seek to cross the Nature Preserves of Kerr Natural Area or Stevens Meadows which are the Nature Preserves Defendant addresses.

II.

Defendant's Motion is not timely. Defendant admits it knew at the time of the initial argument as to Chapter X being a land use regulation the alleged facts that Kerr Natural Area and Stevens Meadows were outside the City's boundary and Urban Services Area, albeit owned by the Defendant. Defendant's Motion, page 1, lines 22-23. The City's deputy attorney's personal knowledge is not relevant. It is unclear whether the deputy city attorney is the author of this motion or the City attorney herself, Ellen Osoinach. See pleading footer.

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2 In any case, as an official of the Defendant, the City, and a long standing deputy  
3 city attorney, the knowledge of these facts is imputed to him. He works closely with the  
4 city planners on land use matters, including those before the Design Review Commission  
5 as in the case here. He wrote two formal opinion memos in this matter addressing the  
6 Initiative. As noted in the public records, Assistant planner, Paul Espe, worked with the  
7 Relator on the issue of crossing the wetland rather than using septic systems in 2021. He  
8 has declared within his scope of work that he has knowledge of the location of the Kerr  
9 Natural Area and Stevens Meadows. Both were addressed in both the Initiative and City  
10 referred Referendum that were certified by the Council on August 3, 2021 for the ballot.  
11 The contemporaneous information discussed descriptions of the natural areas. There was  
12 ample time before the November 2, 2021 vote and certainly since then to make inquiry as  
13 to whether they should or should not have been included in either or both. A part of  
14 having constructive or imputed knowledge is having information that puts one on notice of  
15 inquiry and certainly to communicate it to those involved in handling the matter. See,  
16 Marshall v. PriceWaterhouseCoopers, LLP, 316 Or App 416 (2021) (Constructive knowledge  
17 includes inquiry knowledge).

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III.  
Defendant's reliance on applying the proposition here that the City's land use regulations only applies within the Cit's boundaries except when otherwise authorized by statute as determined in Hoffman v City of Seaside, 24 OR LUBA 183 (1992) is misplaced. In Hoffman, Seaside had entered into an Urban Growth Boundary Agreement with the County. The Agreement expressly provided the County with jurisdiction over the land outside Seaside's city boundary, but within the UGB. Seaside enacted an ordinance rezoning land outside its boundary but within the UGB and did not do so as an advisory one to the County. LUBA held that Seaside did not have jurisdiction to enact the ordinance. The facts in the case before this court are different, in that:

1. Waluga Park-West is within the Defendant's boundaries. Hoffman doesn't apply.
2. Kerr Natural Area is owned by the Defendant and the City of Portland allegedly each with a 50% interest. Stevens Meadows allegedly is primarily owned by the Defendant. Preserving these natural areas by virtue of a City Charter amendment, which is also a land use regulation, has not been shown by Defendant to be inconsistent with either the City of Portland or Clackamas County's Comprehensive Plan Goal 5 policies or any boundary agreement. In Hoffman the rezoning was clearly inconsistent with the County's zoning.

IV.

The Defendant relies on the proposition that a Comprehensive Plan only applies to areas outside of Defendant's boundaries and within an Urban Services Boundary when

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2 coordinated with other jurisdictions. Waluga Park-West is within the Defendant's  
3 boundaries. The proposition doesn't apply. Since it appears the Defendant has been  
4 managing and maintaining the two natural areas for several years, it is hard to imagine  
5 there has not been knowledge of the same by the two other jurisdictions and at least tacit  
6 coordination in allowing the Defendant to protect and maintain the natural areas.  
7 Otherwise, *why would the Defendant include Kerr Natural Area and Stevens in its  
8 own Referendum to amend the Charter!*

6 V.

7 Defendant's reliance on the proposition the Defendant's Comprehensive Plan  
8 policies for parks is applied only within the urban services boundary is again misplaced.  
9 Waluga Park-West is not within the urban services boundary and it has existing sewer  
10 services. As for Kerr Natural Area and Stevens Meadows, at page 4, lines 17-21, Defendant  
11 points to the following Urban Services Boundary and Urban Growth Policy A-1: "The City  
12 will not expand the existing Urban Services Boundary \* \* \* except \* \* \* where properties  
13 are needed for the development of public parks and recreation facilities." The Defendant's  
14 acquisition of these properties certainly evidences the need for development of public  
15 parks and passive recreational facilities. They also meet the exception for expansion of the  
16 Urban Services Boundary. The effect of the enactment of the initiated Chapter should  
17 have triggered the Defendant to end its delay and institute its expansion policy for the  
18 urban services boundary for these properties. Clearly, any alleged defect could have been  
19 cured in this regard. But once again, the Defendant became willfully blind and ignored the  
20 enacted Chapter X.

14 VI.

15 Defendant in support of its above urban services boundary argument in paragraph  
16 V above also recites the Comprehensive Plan's subsection D. Planning and Coordination  
17 Policies that provide entering into and maintaining certain intergovernmental agreements.  
18 While it included D-3. to "enter and maintain an Urban Growth Management Agreement  
19 with Clackamas County for Lands within the Urban Services Boundary," it also included  
20 D-1. which states: "Enter into and maintain intergovernmental agreements with any sanitary  
21 sewer . . . provider within the Urban Services Boundary, and include a requirement for an  
22 annexation agreements for unincorporated lands to receive either service." It is  
23 undisputed that the Defendant has an agreement with Washington County's Clean Water  
Services to provide sewer services to the unincorporated area in the Urban Services  
Boundary that involved properties close to Waluga Park-West, including the applicant's  
property before its annexation. If Defendant had chosen to negotiate with Clean Water  
Services regarding servicing Defendants 5 lots and pump to the manhole in Baleine  
approximately 350 feet to the west, the Defendant could have tied the applicants  
annexation agreement to Clean Water Services and avoided crossing the wetlands of

PAGE 3 INTERVENOR RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER

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1  
2 Waluga Park- West, and would have been within coordination policy D-1. Obviously, the  
3 Defendant could have also amended the UGB Agreement with Clackamas County to  
4 include the two properties and cured any alleged defect. Again, willfully blind.

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13 VII.

14 Defendant makes a gigantic leap because Chapter X includes Kerr Natural Area  
15 and Stevens Meadows, and they are outside the Defendant's boundaries and the  
16 Defendant has not sought to follow its own Comprehensive Plan policies and reach a  
17 formal agreement over servicing and maintaining its own properties, that the voters would  
18 not intend the other 13 Nature Preserves to be regulated in keeping with the Chapter X  
19 regulations they enacted.

20 This is absurd on the face of it. The Defendant would have the court opine that  
21 because the Initiative didn't explicitly state that it would only apply to the two properties  
22 outside the city boundaries upon annexation, somehow they would have understood it to  
23 not apply to the 13 parks within the city? The voters' understanding of the Initiative and  
their intent to regulate Kerr Natural Area and Stevens Meadows was so strong that the  
Defendant should do what is necessary to effectuate that intent and to cure any alleged  
defect.

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23 VIII.

14 Not only has Defendant failed in carrying out the voters intent in this regard,  
15 Defendant utterly ignores Chapter X, Section 45, Severability, which states: If a court  
16 should hold invalid or unconstitutional any clause or part of this Chapter, that holding shall  
17 not affect the remaining parts of the Chapter, which are not held invalid or  
18 unconstitutional." Once again, willfully blind. In Childs Meat Company v. City of Eugene,  
19 296 Or App 668 (2019), the Court of Appeals reviewed the case history. It found that the  
20 voters had amended their Charter with a Toxic Substance Right To Know set of regulatory  
21 provisions. One provision was in conflict with a state statute on charging a hazardous user  
22 fee based on quantity. It found that there was a severability clause and that it had  
23 previously sent the matter back to the trial court to apply it. The trial court severed the  
user fee provision, upholding the rest of the Charter amendment. The city then adopted a  
code provision adopting a hazardous user fee that cured the defect. On appeal, the Court  
of Appeals held that the voters would have intended the Charter to remain after the  
severance because the severance was in a manner that least damaged the overriding  
concern of reporting of hazardous substances. The court also upheld the City code  
hazardous fee having cured the defect and in being consistent with the Charter  
Amendment. It is interesting to see how Eugene worked to uphold the voters intent in  
stark contrast to the Defendant.

PAGE 4 INTERVENOR RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER

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IX.

Intervenor respectfully suggests that based on the arguments above, this Court can deny Defendant's motion without having to reach the issue of severability. Intervenor's Trial Brief recently efiled points out the County seeks to take a portion of Stevens Meadows for a road project now at final design which the City Council vehemently stated they were neither individually nor collectively made aware of. When confronted for the first time by the county presentation, they made public statements that any action to sell the property would violate Chapter X. (To add to the chaos the prior owner has entered into a conservation easement in perpetuity with Metro that is contrary to Clackamas County proposed use.) See the cite to the City Council meeting of April 16, 2024 and a follow up article in the Lake Oswego Review, both of which are trial exhibits being tendered in this case.

What came out of the meeting was that the county had been in contact with the Defendant's staff for several years but staff had never informed the City Council. What is really painful to read though is paragraph 6 on Page 12 which basically says that this motion is the Defendant's get out of jail card regarding Stephens Meadow. "There is currently pending a request (or threat of condemnation) by Clackamas County for a portion of Stevens Meadow for a road roundabout purpose. Opponents to the request argue that Chapter X prohibits the City from conveying the land to the County for road purposes. But if Chapter X is only a land use regulation, without effect on lands outside of the City's boundaries, then Chapter X would not limit the County's ability to develop the land for road purposes, seemingly contrary to the express terms of Section 42."

This is a fight for another day. The Defendant is not trying to exercise jurisdiction beyond its authority, it is being preempted by the Charter from developing what the voters intended to be preserved. The city of Portland is not a party to this proceeding. Severability may otherwise affect the dispute over the proposed taking without all the parties being involved.

This motion should be denied.

*Theresa M. Kohlhoff*

Theresa M. Kohlhoff, May 22, 2024. This Response was written largely by the Intervenor but was co-written, and adopted by the attorney.

Prepared and Submitted by:  
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Co-Author and Trial Attorney  
OSB #803981

PAGE 5 INTERVENOR RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER

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