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

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

Plaintiff-Relator,

v.

CITY OF LAKE OSWEGO, a municipal
corporation,

Defendant,

and

MICHAEL E. KOHLHOFF,

Intervenor.

Case No. 24CV03746

DEFENDANT CITY OF LAKE OSWEGO'S
HEARING MEMORANDUM

Defendant City of Lake Oswego ("City") files this Hearing Memorandum with the Court setting forth the position of the City with respect to expected issues at trial and the evidence and testimony that the City intends to submit. The purpose of the May 28-30, 2024 hearing is to take evidence under ORS 227.179(5) *"to determine if the land use application by New Look violates a substantive provision of Chapter X, Sections 41 and 43 of the Lake Oswego Charter"* (which the court has held to be applicable land use regulations under ORS 197.015(11)).¹ Court Opinion and Order dated March 6, 2024, pg. 2 (emphasis added in italics and underline).

1. Scope of Development under Land Use Application

The portion of the land use application at issue² by Intervenor Kohlhoff relates to

¹ Defendant has previously filed a Motion to Reopen that ruling.

² The application also involves serial lot line adjustments. Those lots are west of West Waluga Park and that area is not subject to Chapter X. Intervenor has not indicated he contests that portion of the application. The City's

1 “Unavoidable utility (sewer) crossing of a delineated Resource Protection (RP) District (a Class 2
2 wetland); and removal of 43 trees” within West Waluga Park. (Defendant’s Exhibit 112, pg. 1
3 (LU 23-0002 Staff Report, pg. 1.))

4 A narrative of the proposed development action within West Waluga Park is found in
5 Defendant’s Exhibit 111, pg. 8; (LU 23-0002, Exhibit F-001, pg. 8):

6
7 The applicant has provided the construction plans for the sewer main extension
8 (See Exhibit 8 [of Exhibit F-001]). The RP District will primarily be protected by
9 tree protection fencing, which is generally 6 feet in height. Additional fencing will
10 be provided as needed to protect the RP District outside of the construction
11 area. Erosion control will be provided along the construction area. The applicant
12 understands that construction, grading, or site clearing cannot begin until after
13 protective measures, signs, and erosion control measures are in place and have
14 been inspected and approved. **The proposed sewer main extension is proposed
15 to be constructed by trenching within the RP district. The construction limits
16 have been designed to 17 feet in width to minimize disturbance area and tree
17 removal. The trench will be backfilled with the site soil and considered a
18 temporary impact.** The 3 proposed manholes along the alignment will have
19 spoils that will be taken out of the RP district (off-site). Per DSL this is a
20 permanent impact that requires mitigation.

21 Following construction activity, the disturbance will be mitigated (Defendant’s Exhibit 111, pg.
22 9; (LU 23-0002, Exhibit F-001, pg. 9)):

23 Mitigation is proposed for the proposed disturbance for the trenching of most of the
24 sewer main in the RP District. The other area that is trenched is in Kimball Street, which is
25 in Clackamas County jurisdiction. The 17-foot wide construction corridor for the sewer
26 main, includes 14,579 square feet of temporary wetland impact. These impacts will be
mitigated through the planting of an area over twice the size of the impact. Mitigation for
the trees proposed for removal for the construction of the sewer main extension (and
south access lane) are included in the 292 trees proposed for mitigation for the RP
disturbance. The tree removal mitigation trees will be 2” caliper (instead of ½” caliper)
with a maturity height of 30’ or greater.

Development Review Commission’s (DRC) Findings, Conclusion and Order, with incorporation of the Staff Report,
sets forth findings that show the serial lot line adjustments can meet all applicable land use regulations, with the
imposition of conditions of approval. City’s understanding is that the serial lot line adjustments are not at issue in
the evidentiary hearing.

1 **2. Development Complies with Sensitive Lands Code Requirements; Alternatives Analysis**
2 **Not Relevant to Chapter X**

3 The Development Review Commission (“DRC”) found, directly and by incorporation of
4 the Staff Report’s findings, that the development activity and the mitigation / restoration
5 plantings met the requirements of the Sensitive Lands section of the Community Development
6 Code, LOC 50.05.010. (Defendant’s Exhibit 113, pg. 5 (LU 23-0002, DRC Findings, Conclusion
7 and Order, pg. 5)). Intervenor does not challenge compliance with the Code requirements, as
8 his challenge is limited to Chapter X requirements.

9 Accordingly, the scope of the hearing is limited to whether or not the expected effects
10 of the development within West Waluga Park trigger Chapter X review, and if so, whether those
11 effects comply with Chapter X. In the proceeding before the DRC, persons argued about
12 whether or not the unavoidable crossing could be avoided by providing for sewer / septic
13 services to the five lots by some other means than connection by the extension of a sewer main
14 through a portion of West Waluga Park. (Defendant’s Exhibit 113, pg. 5 (DRC Findings,
15 Conclusion and Order, pg. 5)). That testimony was relevant to whether the “unavoidable
16 crossing / avoidance” criteria of LOC 50.05.010.4.e-g are met, but that testimony and the
17 question of whether or not there are alternatives to providing sewer service to the lots is not
18 relevant to whether Chapter X is met. Chapter X does not require (nor permit) a showing of “no
19 alternative” as a means of determining compliance with Chapter X; rather, if the work would
20 not comply with Chapter X, the work is not permitted even if there is no alternative means and
21 the underground sewer main is conceded to be by all parties as a utility “unavoidable crossing”
22 (LOC 50.05.010.6.ii(1)(c)), with sufficient mitigation / restoration in compliance with LOC
23 50.05.010.4.

24 **3. Chapter X Requirements**

25 The scope of work includes temporary construction access to the work area, trenching
26 //

1 in a sewer main, covering and replanting over the work area, and removal and replanting over
2 the temporary construction access.

3
4 **a. Section 41**

5 The purpose of this Chapter is to preserve all designated Nature Preserves that
6 are owned by the City of Lake Oswego, inclusive of the fifteen natural parks
7 specified in this Chapter, as natural areas for the enjoyment of all residents of
and visitors to Lake Oswego. This Chapter shall be interpreted liberally to achieve
this purpose.

8 Section 41 is a purpose clause. It does not have any standards or criteria itself, which are
9 required for approval standards for land use applications. ORS 227.173(1, 3)³. (Similar LOC
10 50.07.003.4.g.ii; 50.07.003.14.d.iii(1); *LO 138, LLC v. City of Lake Oswego*, ____ 2015 Or. LUBA
11 ____ (2015)(LUBA No. 2014-092, First Assignment of Error, Section B), affirmed without opinion
12 272 Or. App. 78 (2015), pet. denied, 358 Or. 248(2015); *Reeves v. Yamhill County*, 28 Or. LUBA
13 123 (1994)). Section 43 would be the implementing provisions that are the actual “Limitations
14 on Development” that carry out the purpose of Section 41; Section 41 does not have any
15 operative regulatory effect itself. Section 41 aids in stating a general purpose to be
16 accomplished, for purposes of interpreting Section 43, and directs that Section 43 be
17 interpreted liberally.

18 ////
19

20 _____
21 ³ **ORS 227.173(3) 227.173 Basis for decision on permit application or expedited land division; statement of**
22 **reasons for approval or denial.** (1) Approval or denial of a discretionary permit application shall be **based on**
23 **standards and criteria**, which shall be set forth in the development ordinance and which shall relate approval or
denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the
area in which the development would occur and to the development ordinance and comprehensive plan for the
city as a whole.

24 (2) When an ordinance establishing approval standards is required under ORS 197A.200 and 197A.400 to
provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance.

25 (3) Approval or denial of a permit application or expedited land division shall be based upon and accompanied
26 by a brief statement **that explains the criteria and standards considered relevant to the decision**, states the facts
relied upon in rendering the decision **and explains the justification for the decision based on the criteria,**
standards and facts set forth.

1 **b. Section 43**

2 The Development Review Commission adopted alternative findings regarding the
3 applicability of Section 43 to the proposed development work.

4 **i. Paragraph One**

5 The City of Lake Oswego shall insure that all development within a Nature
6 Preserve is consistent with the preservation of a Nature Preserve as a natural
7 area available for public enjoyment.

8 The DRC alternatively found by incorporation of the Staff Report that if Section 43 were an
9 applicable criterion:

10 ... the first paragraph, quoted above, is a purpose clause for the paragraphs that
11 follow within Section 43 because, if the first paragraph were an operational
12 standard, there would be no need for the seven development limitation
13 paragraphs that follow.

14 Even if the first paragraph was a standalone standard, no evidence has been
15 presented that shows installation of an underground sewer pipe would not be
16 “consistent with the preservation of a Nature Preserve as a natural area available
17 for public enjoyment” of West Waluga Park because the pipe will be buried
18 underground and will not be visible above ground nor will it prevent any park
19 uses. Staff notes that the area of sewer installation is not currently used as an
20 active recreation area, nor can it be converted to an active recreation area
21 pursuant to Chapter X of the City Charter, so installation and use of the
22 underground sewer main in West Waluga Park is “consistent with the
23 preservation of a Nature Preserve as a natural area available for public
24 enjoyment.”

25 Defendant’s Exhibit 112, pg. 11 (LU 23-0002 Staff Report, pg. 11).

26 And that:

 Paragraph One uses broad language and thus is ambiguous as to whether it is a
prohibiting paragraph itself or is more of a specific purpose paragraph to provide
context for the express prohibition paragraphs. The other seven paragraphs
either expressly authorize or prohibit specific development.

 Defendant’s Exhibit 114, pg. 17 (LU 23-0002 Exhibit F-017, pg. 17).

1 Alternatively, if Paragraph One is given its own prohibitory effect, as urged by
2 comments (see Exhibits G-572, pg. 5, and G-587, pg. 2), its terms must be
3 interpreted by using text and context, legislative history, and maxims of
4 construction. The commenters argue that all development must be consistent
5 with preserving a Nature Preserve as a natural area. First, by its terms, some
6 development is permissible: that which “preserves” the natural area. Second, if
7 there were no other Limitations of Development that permit certain types of
8 development, one might conclude without context that “retain their natural
9 condition” means that no change could be made to a Nature Preserve in any
10 degree, for that change would alter the “natural condition.” Yet, the context
11 provided by the below paragraphs shows that “retain the natural condition” is
12 not to be interpreted absolutely as a “no change” prohibition because these
13 paragraphs are not stated to be exceptions to the “retain the natural condition”
14 requirement of Paragraph One.

15 If Paragraph One is an independent restriction that must also be met, in addition
16 to any related express provision in Paragraphs Two through Eight (Paragraphs
17 Two through Eight are not exceptions to Paragraph One of development that
18 would be contrary to Paragraph One, which is conceded by the commenter of
19 Exhibit G-572, pg. 5 but is nevertheless permitted development), we look to
20 Paragraphs Two through Eight to provide context of what development would
21 meet Paragraph One’s “consistent with the preservation of a Nature Preserve as
22 a natural area.”

- 23 • may build *trails* for hiking, jogging, horse-back and bicycle riding, may
24 provide *benches* and *interpretive displays*, and may provide *picnic and sanitary
25 facilities*. [B]oardwalks may be built; however, trails shall *refrain from using hard
26 surface materials*, such as asphalt and concrete, in order to *remain consistent
with the natural conditions* of a Nature Preserve. [Paragraph Two.]

27 ...
28 Comment: Permanent above-ground development, e.g., trails, benches, displays,
29 picnic shelters, restrooms (sanitary facilities), and boardwalks are permitted as
30 not being inconsistent with the “natural condition” of a Nature Preserve. What
31 would be inconsistent with the natural condition is permanent hard surface
32 trails, e.g., asphalt and concrete, above ground. Installed underground sewer
33 mains, with the construction area replanted, would not seem to be inconsistent
34 with the natural conditions, when contrasted to such permitted permanent
35 above ground facilities.

36
37 By expressly allowing “sanitary facilities,” which one presumes to be restrooms
38 rather than sewer lines because of the public use of the other structure in the list
39 – picnic facilities – the associated infrastructure for a restroom would be

1 included, e.g., an underground sewer line to the sewer main. The difference
2 between a sewer line and sewer main, once installed underground, is the size of
3 the pipe. If a restroom facility itself, and the associated underground sewer line,
4 is not inconsistent with the natural conditions under Paragraph One, an
5 underground sewer main would also not be inconsistent with the natural
6 conditions under Paragraph One [“consistent with the preservation of a Nature
7 Preserve as a natural area”].

8 Defendant’s Exhibit 114, pg. 19-20 (LU 23-0002 Exhibit F-017, pg. 19-20).

9 Paragraph Two allows above ground construction of structures of a permanent nature, e.g.,
10 trails, boardwalks, benches, displays, picnic shelters (picnic facilities), restrooms (sanitary
11 facilities), and boardwalks, and Paragraph Four itself only prohibits above ground structures
12 that would “impair or be inconsistent with the natural conditions of a Nature Preserve,” so
13 above ground structures of a permanent nature would be permitted if they do not “impair or
14 be inconsistent with the natural conditions of a Nature Preserve.” Paragraphs Two and Four
15 allow development, even permanent above ground structures, such that they are not
16 separately prohibited by Paragraph One. Paragraph Three prohibits cutting trees when done
17 for certain listed purposes, meaning that when cut for other purposes, tree cutting would not
18 violate Paragraph Three. Accordingly, the scope of development that may be prohibited by
19 Paragraph One independently must be to a level that rises above and beyond the development
20 permitted by Paragraphs Two, Three and Four. Since some above ground development and
21 tree removal is permitted under the three Paragraphs, the DRC found that the proposed
22 development (trenching and covering and undergrounding of a sewer line, installing and
23 removing temporary construction access, and associated tree cutting), with subsequent
24 mitigation / restoration plantings would not independently violate Paragraph One.
25 (Defendant’s Exhibit 113, pg. 4-5 (LU 23-0002, DRC Findings, Conclusion and Order, pg. 4-5)).

26 The City will present the testimony of Todd Knepper (City Engineering Program
Supervisor) and Noah Herlocker (City’s Natural Resources Consultant) as to the site conditions
expected post-development, following cover of the sewer main, removal of the temporary

1 construction access, and mitigation / restoration plantings. Kyra Haggart (City's Park Analyst /
2 Project Manager) will testify regarding the existing West Waluga Park plans for areas of public
3 usages, and possible future plans for public use.

4 **ii. Paragraph Two**

5
6 To facilitate public access and use, the City of Lake Oswego may build trails for hiking,
7 jogging, horse-back and bicycle riding, may provide benches and interpretive displays,
8 and may provide picnic and sanitary facilities within a Nature Preserve. To access and
9 use particularly fragile habitats, boardwalks may be built; however, trails shall refrain
10 from using hard surface materials, such as asphalt and concrete, in order to remain
11 consistent with the natural conditions of a Nature Preserve.

12 Although the scope of the proposed development is outside the scope of Paragraph
13 Two's permitted development, Paragraph Two does provide context for both Paragraph One
14 and Four as to what extent of development is expressly permitted and the effects of which
15 would be "consistent with the preservation of a Nature Preserve as a natural area" (Paragraph
16 One) and would not "impair or be inconsistent with the natural conditions of a Nature
17 Preserve" (Paragraph Four). Paragraph Two permits the construction of trails, boardwalks,
18 picnic facilities, and sanitary facilities, all of which would be above ground, would likely involve
19 the creation of temporary construction access for construction vehicles, and, in regards to
20 sanitary facilities (which the City understands to be restrooms, rather than sewer mains and
21 laterals), would require trenching and subsequent cover of underground sewer laterals to
22 connect the restroom to a sewer main. Restroom facilities of nature preserves within the City
23 boundaries would be required by Code to connect to sewer mains:

24 **LOC 38.18.305 Connection Required if Sewer Available; Exception.**

25 1. A structure or building normally used or inhabited by persons located within
26 200 feet shall connect to an existing City sewer line or main unless (i) exempt
under subsection (2) of this section; or (ii) the City sewer line is not legally and
physically available (as defined in OAR 340-071-0160(4)(f)(A) or other DEO rules
promulgated under ORS 454.655(4)), in which case the structure or building may
connect to an alternative system pursuant to LOC 38.20.315. (For land divisions,
see LOC 50.06.008.3).

1 The City of Lake Oswego shall be allowed to maintain (or allow any person to
2 maintain) ...any existing ... *road*, or trail for motorized vehicles in a Nature
3 Preserve constructed before November 2, 2021 ... *as long as that ... road*, or trail
4 for motorized vehicles is not altered in any manner that would further impair or
5 be inconsistent with the natural conditions of a Nature Preserve.

6 *If “road” includes temporary construction access, that would allow temporary*
7 *construction accesses existing as of November 2, 2021 to continue. Continuation*
8 *of a temporary construction access is inconsistent with the purpose of a Nature*
9 *Preserve, to require restoration of the construction access to a natural open*
10 *space condition.*

11 ...
12 *Paragraph Two provides context for whether a temporary construction access for*
13 *installation of development would be the construction of a “road.” Paragraph*
14 *Two expressly states that the City “may build trails for hiking, jogging, horse-back*
15 *and bicycle riding, may provide benches and interpretive displays, and may*
16 *provide picnic and sanitary facilities within a Nature Preserve.” Construction of*
17 *these developments would inevitably require temporary construction access for*
18 *construction equipment. The measure’s text should be interpreted so that it does*
19 *not prohibit indirectly that which it permits. Stated differently, the voters would*
20 *not have thought that by prohibiting by the use of “road” they were also*
21 *prohibiting the necessary temporary construction access needed for equipment*
22 *for the development they expressly permitted.*

23 Defendant’s Exhibit 114, pg. 18-19 (LU 23-0002, Exhibit F-017, pg. 18-19
24 (emphasis added by italics).

25 To the extent “roads” are discussed in the legislative history most readily
26 available to the voters, i.e., the County’s official voter’s pamphlet (Attachment
1) the contrast of Measure 3-568 to Measure 3-575 was about the nature of the
users of “new public streets and roads” and “non-public roads”, rather than any
prohibition of temporary construction vehicle access. The contrast of “roads”
with “new public streets and roads” is one of public use v. City (owner) use, such
that, for example, a City-use-only roadway for permanent access in a park to a
water reservoir within the park would be subject to the same limitation on
development under Measure 3-565. Neither measure individually, or by contrast
with the other, addresses temporary construction vehicle access by “road” or
“new public streets and roads.”

Defendant’s Exhibit 114, pg. 23 (LU 23-0002, Exhibit F-017, pg. 23-)
(emphasis added by italics).

1 **(2). Tree Cutting for Temporary Construction Access**

2 As the DRC found that the tree cutting was not for Paragraph Three’s prohibited
3 purpose of cutting a tree to construct a “road,” the cutting of trees for the temporary
4 construction access and undergrounding a sewer main was not prohibited by Paragraph Three.

5
6 Whether Paragraph Three prohibits tree removal for construction access turns
7 on the question of whether a temporary construction access is the “construction
8 or development of a road ... for motorized vehicles.” A temporary construction
9 access has different characteristics than a road, given that it is temporary and
10 that following the work, the area will be replanted with vegetation that is
11 appropriate for wetland restoration. (Exhibit F-005). Thus, the legislative history
12 must also be considered.

13 Defendant’s Exhibit 114, pg. 24-25 (LU 23-0002, Exhibit F-017, pg. 24-25).

14 In looking to the legislative history, the DRC stated, by incorporation:

15 The voters would have understood that tree removal was permitted unless it
16 was for a prohibited purpose, which is raised here as to whether the prohibited
17 purposes is for a “road.” Thus, the same discussion of the legislative history for
18 “road” above would apply here in determining whether Paragraphs One and
19 Three prohibit tree removal for the temporary construction access.

20 Defendant’s Exhibit 114, pg. 26 (LU 23-0002, Exhibit F-017, pg. 26).

21 The City will present the testimony of Todd Knepper and Noah Herlocker on the
22 difference between a “road” and the proposed temporary construction access, as to its
23 permanent effects.

24 **iv. Paragraph Four**

25 The City of Lake Oswego shall not construct or develop (or allow any person to
26 construct or develop) any facility or any structure above ground that would
impair or be inconsistent with the natural conditions of a Nature Preserve.

The DRC found that installation of an underground sewer main, followed by cover and wetland
vegetation mitigation plantings within a wetland in Waluga Park - West, is not contrary to
Paragraphs One and Four. (Defendant’s Exhibit 113, pg. 5 (LU 23-0002, DRC Findings,

1 Conclusion and Order, pg. 5)). By incorporation, the DRC found that:

2
3 Installation of Underground Sewer Main: Installation of an underground sewer
4 main, with cover and planting of appropriate wetland mitigation plantings **is not**
5 **contrary to Paragraph Four’s prohibition against *above ground structures* that**
6 **“would impair or be inconsistent with the natural conditions of a Nature**
7 **Preserve.”** Paragraphs Four and Two provide context that such installation,
8 undergrounding of a sewer main, and plantings is not contrary to Paragraph
9 One’s “consistent with the preservation of a Nature Preserve as a natural area,”
10 and voters would not have known that a new interpretation of the same “impair
11 or be inconsistent with the natural conditions” text in Paragraph One would now
12 prohibit installation (cover and mitigation planting) of underground sewer lines.

9 Defendant’s Exhibit 114, pg. 29 (LU 23-0002, Exhibit F-017, pg. 29). (Italics
10 in original; emphasis in bold).

11 The City will present the testimony of Todd Knepper regarding above ground structures
12 associated with the underground sewer main, e.g., manholes. Todd Knepper and Noah
13 Herlocker will testify whether the manholes “would impair or be inconsistent with the natural
14 conditions of a Nature Preserve.”

15 **v. Paragraph Five**

16 The City of Lake Oswego shall not cut (or allow any person to cut) any tree in a
17 Nature Preserve for the purpose of commercial logging.

18 This paragraph is not relevant to the scope of the proposed work, in that commercial
19 logging is not the purpose of the tree removal. However, the text does thereby imply that tree
20 cutting for purposes other than commercial logging would not violate Paragraph Five, and also
21 would not violate Paragraph One.

22 **vi. Paragraph Six**

23 The City of Lake Oswego shall be allowed to maintain (or allow any person to
24 maintain) a Nature Preserve for the purposes of ecological restoration that
25 provides a safe and healthy natural area that is accessible for public enjoyment,
26 provides a healthy habitat for wildlife, eliminates invasive species, restores native
species, and mitigates fire hazards.

1 This Paragraph Six is not relevant to the scope of work proposed, as the proposed scope
2 of work is not for the purposes of ecological restoration. However, it does provide context as to
3 the elements that would also comply with Paragraph One’s “consistent with the preservation of
4 a Nature Preserve as a natural area available for public enjoyment”: a nature preserve should
5 be “a safe and healthy natural area that is accessible for public enjoyment, provides a healthy
6 habitat for wildlife, eliminates invasive species, restores native species, and mitigates fire
7 hazards.”

8 The testimony of Noah Herlocker and Kyra Haggart will address the impacts of the
9 proposed development, and how, following completion of the work, cover of the underground
10 sewer main and mitigation / restoration plantings, West Waluga Park will continue to meet
11 these Paragraph Six elements of a nature preserve.

12 **vii. Paragraph Seven**

13
14 The City of Lake Oswego shall be allowed to maintain (or allow any person to
15 maintain) any existing facility or existing structure, or any existing parking lot,
16 road, or trail for motorized vehicles in a Nature Preserve constructed before
17 November 2, 2021 that is above ground as long as that facility or structure, or
18 parking lot, road, or trail for motorized vehicles is not altered in any manner that
19 would further impair or be inconsistent with the natural conditions of a Nature
20 Preserve.

21 As the proposed work does not involve the continuation of any existing facility or
22 structure, parking lot, road or trail, this Paragraph Seven is not directly relevant. However, as
23 noted in discussion above regarding Paragraph Three / Temporary Construction Access, it
24 provides context for “road” not being interpreted to equate a temporary construction access as
25 a “road” because otherwise this would authorize a then existing temporary construction access
26 to remain in perpetuity, which is contrary to Paragraph One’s overall principal that
“development within a Nature Preserve [be] consistent with the preservation of a Nature
Preserve as a natural area available for public enjoyment.”

1 **viii. Paragraph Eight**

2 The City of Lake Oswego shall be allowed to implement (or allow any person to
3 implement) a park master plan for a Nature Preserve that was adopted before
4 November 2, 2021.

5 The proposed work is not within the scope of a park master plan. [However, the sewer
6 main extension is within the Wastewater Master Plan 2013 (amended 2019 and 2020), which
7 was adopted before November 2, 2021. (Defendant’s Exhibit 107)].

8 **4. ORS 197A.400 (Clear and Objective Requirement for Land Use Regulations Relating to**
9 **Housing)**

10 The proposed development involves the construction and extension of a sewer main in
11 order to provide sewer service to five residential lots. (Defendant’s Exhibit 111, pg. 2 (Exhibit F-
12 001, pg. 2)). The requirement was imposed as a condition of annexation regarding future
13 residential development on the lots. (Defendant’s Exhibit 115, pgs. 19 and 43 (Exhibit F-020,
14 pgs. 19 (council minutes) and 43 (covenant)).

15 ORS 197A.400(1) [formerly ORS 197.307(4)] requires standards, conditions and
16 procedures regulating the development of housing be "clear and objective."

17 **ORS 197A.400 Clear and objective approval criteria required; alternative**
18 **approval process.**

19 (1) Except as provided in subsection (3) of this section, a local
20 government may adopt and apply only clear and objective standards,
21 conditions and procedures regulating the development of housing,
22 including needed housing, on land within an urban growth boundary. The
23 standards, conditions and procedures:

24 (a) May include, but are not limited to, one or more provisions regulating
25 the density or height of a development.

26 (b) May not have the effect, either in themselves or cumulatively, of
discouraging needed housing through unreasonable cost or delay.

The DRC found, by incorporation of Defendant’s Exhibit 115, pg. 3 (LU 23-0002, Exhibit F-020,
pg. 3), that if Chapter X were applicable to this land use application, that Section 43, Paragraph

1 One, as an independent prohibition, was not “clear and objective” and could not be applied.

2
3 Merely because some commenters and staff have a different reading of the
4 applicability and requirements of Chapter X does not automatically mean that
5 Chapter X is not “clear and objective” under ORS 197.307(4). A standard can still
6 be “clear and objective” if some interpretation is required, but following
7 application of the methodology for interpretation, a “clear and objective”
8 standard is ascertained.

9
10 As we have explained, the fact that a standard requires some interpretation in its
11 application does not make that term unclear or subjective. *Roberts v. City of*
12 *Cannon Beach*, Or LUBA (LUBA No 2020-116, July 23, 2021), *aff'd*, 316 Or App
13 305, 504 P3d 1249 (2021), *rev den*, 370 Or 56 (2022); *Rudell v. City of Bandon*, 64
14 Or LUBA 201 (2011), *aff'd*, 249 Or App 309, 275 P3d 1010 (2012). *Coopman v.*
15 *City of Eugene*, ___ Or. LUBA ___ (2022)(LUBA No. 2022-056; 2023 Or. Land
16 Use Bd. App. Lexis 13, *23).

17
18 In other words, a standard that, on its face, may not be “clear and objective”
19 may be rendered “clear and objective” after applying the interpretation
20 methodology of text, context, legislative history, and rules of construction. As an
21 example, in this case one question is whether “road” in Chapter X, Section 43,
22 Paragraph Three includes temporary construction access. If Paragraph Three
23 were an applicable criterion or standard under LOC 50.07.003.14.d.ii -- which
24 staff finds it is not for the reasons stated in Exhibit F-017 -- and after applying
25 text, context, legislative history and rules of construction, it was determined that
26 a temporary construction access was a “road,” then upon finding that “road”
was inclusive of temporary construction access, Section 43’s “road” text would
be applied as a “clear and objective” standard per ORS 197.307(4).

Where the standard cannot be rendered “clear and objective” following the interpretation of the standard by examining the text, context, legislative history and rules of construction, then ORS 197.307(4) would not permit the standard to be applied. An example of this may be Paragraph One’s “all development is *consistent with* the *preservation* of a Nature Preserve as a *natural area* available for public enjoyment.” **Assuming Paragraph One was first found to be an applicable land use criterion** (again, which staff finds it is not as stated in Exhibit F-017), and if Paragraph One was the standard against which an element of development was to be judged, e.g., installing underground sewer main, covering and revegetating with required sensitive lands wetland plants, the “consistent with” element in the criterion would **raise substantial doubt**,

1 **even after applying text, context, legislative history and rules of construction,**
2 **that it would be found to be “clear and objective.”**

3 **Where criteria and standards are determined not to be “clear and objective”**
4 **and they relate to housing, then under ORS 197.307(4), the criteria or standard**
5 **cannot be applied.** *Warren v. Washington County*, 296 Or. App. 595, 439 P.3d
6 581 (2019).

7
8 Defendant’s Exhibit 115, pg. 3 (LU 23-0002, Exhibit F-020, pg. 3) (Italics in
9 Original; emphasis added in bold).

10 The DRC did not determine whether Paragraphs Two through Eight were “clear and
11 objective.”

12 **CONCLUSION**

13 Based on the text, context and measure’s history as used to interpret Sections 41
14 and 43, Chapter X, Lake Oswego City Chapter, if said Sections are a “land use
15 regulation,” Defendant City expects the evidence and testimony to show that the
16 proposed development consisting of construction and undergrounding a sewer main,
17 including temporary construction access and related tree removal, with the required
18 cover and mitigation / restoration plantings either does not violate either Section 41 or
19 Section 43, or that conditions of approval can be added that would “otherwise be
20 allowed by the local comprehensive plan or land use regulations” per ORS 227. 179(5) to

21 *////*

22 *////*

1 approve the development so that the proposed development can be approved (see also
2 (see ORS 227.175(4) and LOC 50.07.003.4.g.ii / LOC 50.07.003.5.a.i⁴) or that the
3 provision cannot be applied as applicable criteria under ORS 197A.400.

4 Dated this 23rd day of May, 2024.

5 LAKE OSWEGO CITY ATTORNEY'S OFFICE

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24 ⁴ LOC 50.07.003.14.g.ii: ... At the conclusion of deliberations, the hearing body shall make a preliminary oral
25 decision to approve, approve with conditions pursuant to LOC § 50.07.003.5, or deny an application based upon
the applicable standards and criteria and the evidence and testimony in the record.
26 LOC 50.07.003.5.a.i: The reviewing authority may impose conditions of approval on a major or minor development
permit in one or more of the following circumstances: i. The condition is necessary to bring the application into
compliance with applicable approval criteria.

CERTIFICATE OF SERVICE

As stipulated to by the parties herein and pursuant to ORCP 9 G, I hereby certify that I accomplished service of a true and correct copy of **DEFENDANT CITY OF LAKE OSWEGO'S HEARING MEMORANDUM** on the parties below on the date and in the manner indicated:

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DATED: May 23, 2024.

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