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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
PLAINTIFF-RELATOR’S HEARING
MEMORANDUM

FACTUAL AND PROCEDURAL BACKGROUND

On January 17, 2023, Plaintiff-Relator New Look Development LLC (“New Look” or “Plaintiff”) filed a Land Use Application (“Application”) with the City of Lake Oswego (“City”) for several lot line adjustments to the real property located at tax lots 21E07CA00100, 21E07CA03000, and 21E07CA02902 (“Property”) resulting in five (5) single-family dwellings, an unavoidable utility (sewer) crossing of a delineated Resource Protection District (a Class 2 wetland), and removal of 43 trees for the purpose developing a residential site in the City.

This action pertains to the Application’s effect on Waluga Park-West, a Nature Preserve owned by the City and adjacent to the Property that is the subject of the Application. On this point, the Application provides for a trenched-in addition to a preexisting sewer line in the Park

1 to service the residential development taking place on an adjacent lot.¹ Associated with that
2 sewer line development will be an installation of two manhole covers (the only permanent
3 impact), which Plaintiff has proposed be flush with the ground.² The number of trees that will be
4 removed is twelve (all but one of which is in less than “good” shape), and the preparation of a
5 temporary access path to complete the sewer line development. Also included will be substantial
6 mitigation that will not simply “mitigate” against these impacts, but, in fact, will enhance the
7 natural beauty of the Park.

8 The Application was deemed complete on July 14, 2023.

9 Pursuant to ORS 227.178(1),³ the City was to have taken final action on the Application,
10 including all appeals pursuant to ORS 227.180, within 120 days. On September 6, 2023, and
11 pursuant to ORS 227.178(5),⁴ New Look made written request to the City to extend the 120-day

12 _____
13 ¹ This type of work is not prohibited by Chapter X, and in fact, it presumes that such work may
14 be required. Paragraph 2 of Section 43 provides for the possibility of the construction of sanitary
15 facilities. Those facilities would have to be tied into the pre-existing sewer line. *See* LOC
16 38.18.305(1) [“A structure or building normally used or inhabited by persons located within 200
17 feet shall connect to an existing City sewer line or main unless (i) exempt under subsection (2) of
18 this section; or (ii) the City sewer line is not legally and physically available (as defined in OAR
19 340-071-0160(4)(f)(A) or other DEO rules promulgated under ORS 454.655(4)), in which case
20 the structure or building may connect to an alternative system pursuant to LOC 38.20.315.”] *See also* LOC 38.20.310 (“No person shall permanently install or connect to a septic tank,
cesspool or other means of sewage disposal within the City limits unless a City sewer line is not
available under LOC § 38.18.305(1), and in such instance, the connection shall be to an
alternative on-site wastewater treatment system pursuant to LOC § 38.20.315.”) These rules
were in place at the time Measure 3-568 revised Chapter X.

21 ² There are already eight pre-existing manhole covers in the Park, which connect to and serve
over 2,000 linear feet of existing sewer line also within the Park.

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

24 ⁴ “The 120-day period set in subsection (1) of this section or the 100-day period set in ORS
25 197A.470 may be extended for a specified period of time at the written request of the applicant.
The total of all extensions, except as provided in subsection (11) of this section for mediation,
26 may not exceed 245 days.”

1 deadline for a period of 45 days to December 26, 2023, which request was granted. The City,
2 however, did not take final action by that new date. Instead, on January 23, 2024, the City issued
3 a *Notice of Development Review and Commission Decision* (“*Notice of Decision*”). While the
4 *Notice of Decision* indicated the City’s approval of the Application, the *Notice of Decision*, was
5 not, by its express terms, the final action on the Application but only a “tentative” decision.

6 In accordance with ORS 227.179, *supra*, on January 24, 2024, New Look filed a *Petition*
7 *for Peremptory Writ of Mandamus*, and on that date, this Court entered a *Writ of Mandamus*
8 requiring the City to “immediately approve [New Look’s] Application with the conditions of
9 approval required with the City of Lake Oswego’s January 23, 2024, *Notice of Decision*, or to
10 show cause before this Court and demonstrate why approval of the Application would violate a
11 substantive provision of the City of Lake Oswego’s land use regulations or comprehensive
12 plan[.]”

13 The City returned the Writ on February 7, 2024. The City did not oppose the Writ. On
14 February 1, 2024, however, Michael Kohlhoff (“Kohlhoff”) filed his motion to intervene into
15 this proceeding for the purported purpose of establishing that the Application does, in fact,
16 violate a substantive provision of the City of Lake Oswego’s comprehensive plan or applicable
17 land use regulations. (Kohlhoff’s motion to intervene was granted on February 9, 2024.)

18 On March 6, 2024, the Court ruled that Sections 41 and 43 of Chapter X of the Lake
19 Oswego City Charter (“Chapter X”) constitutes a “land use regulation.” The hearing now
20 scheduled to commence on May 28, 2024, is to determine whether the Application does, in fact,
21 violate one or more substantive provisions of Sections 41 and 43.⁵

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25 ⁵ The text of Chapter X is attached hereto as Exhibit 1 and by this by this reference incorporated
26 herein.

1 **LEGAL ANALYSIS**

2 **1. Scope of Proceeding**

3 As indicated above, this mandamus proceeding is brought pursuant to ORS 227.179. It
4 provides in pertinent part:

5 (1) Except when an applicant requests an extension under
6 ORS 227.178 (5), if the governing body of a city or its designee
7 does not take final action on an application for a permit, limited
8 land use decision or zone change within 120 days after the
9 application is deemed complete, the applicant may file a petition
10 for a writ of mandamus under ORS 34.130 in the circuit court of
11 the county where the application was submitted to compel the
12 governing body or its designee to issue the approval.

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

20 (Emphasis added).⁶

21 Colloquially, the evidentiary hearing ordered by this Court is a Subsection (5) hearing:
22 The only substantive issue (which is the dispositive issue) is whether the Application violates a
23

24 _____
25 ⁶ A local “comprehensive plan” is defined as “a generalized, coordinated land use map and
26 policy statement of the governing body of a local government that interrelates all functional and
natural systems and activities relating to the use of lands, including but not limited to sewer and
water systems, transportation systems, educational facilities, recreational facilities, and natural
resources and air and water quality management programs. ‘Comprehensive’ means all-
inclusive, both in terms of the geographic area covered and functional and natural activities and
systems occurring in the area covered by the plan. ‘General nature’ means a summary of policies
and proposals in broad categories and does not necessarily indicate specific locations of any area,
activity or use. A plan is ‘coordinated’ when the needs of all levels of governments, semipublic
and private agencies and the citizens of Oregon have been considered and accommodated as
much as possible. “Land” includes water, both surfaces and subsurface, and the air.” ORS
197.015(5). A “land use regulation” means any local government zoning ordinance, land
division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance
establishing standards for implementing a comprehensive plan.” ORS 197.015(11).

1 substantive provision of Sections 41 or 43 of Chapter X. This requires an independent review
2 and comparison of the Application to Sections 41 and 43—the only “land use regulation” in play.
3 *See* March 6, 2024, *Opinion and Order*, P.2.⁷

4 To be clear, the Court’s review is not akin to an appellate review to determine if the
5 City’s approval of the Application was warranted by the record before it (or the record Kohlhoff
6 believes should have been before it) — that would be the function of a writ of review. Rather, in
7 this mandamus proceeding under the land use statutes, it is an independent action at law. *See*
8 *Mattila v. Mason*, 287 Or 235, 240-41 (1979) (explaining the difference between writs of review
9 and writs of mandamus). *See also State ex rel. Icon Group, LLC v. Washington County*, 272 Or
10 App 688, 698-99 (2015) [“In other words, the circuit court does not simply ‘step into the shoes
11 of the county to make a quasi-judicial decision, * * * rather, a local government “‘loses [its]
12 discretion entirely” to approve or deny a permit’ when it fails to timely act, and the local
13 government “‘*must* approve the application unless it can be demonstrated that approval would
14 violate the comprehensive plan or some other specified land use regulations.” *Id.* Quoting *State*
15 *ex rel. Compass Corp. v. City of Lake Oswego*, 135 Or App 148, 151 n. 1, 898 P.2d 198 (1995);
16 brackets in original; emphasis in *State ex rel. Compass Corp.*”]

17 2. Burden of Proof

18 ORS 227.197(5) is unambiguous: the burden of proof in this proceeding rests exclusively
19 with Kohlhoff. *See also State ex rel. Oregon Pipeline Company v. Clatsop County*, 253 Or App
20 138, 142 (2012), *quoting State ex rel. Compass Corp. v. City of Lake Oswego*, 319 Or 537, 542-
21 44 (1994). [“The mandamus remedy ‘is not designed to provide review of a local government’s
22 land use decisions,’ but, instead, provides ‘an incentive for timely governmental action, along
23 with a remedial mechanism that results in an approval,’ *subject to defenses that the local*

24
25 ⁷ “Accordingly, this Court will need to set an evidentiary hearing under ORS 227.179(5) to
26 determine if the proposed action by New Look violates a substantive provision of Chapter X,
Sections 41 and 43.”

1 **government must prove.”** (Emphasis added.)

2 With one exception, New Look is automatically entitled to the peremptory writ — the
3 City did not take final action on the Application within the time allowed by statute — a punitive
4 statue. On this point, there is no factual or legal dispute — everyone agrees that the City did not
5 take final action within the time allowed. The **only** exception to this result is if Kohlhoff can
6 establish that the Application violates a substantive provision of Sections 41 or 43 of Chapter X.
7 Accordingly, Intervenor should be required to present his case in chief first — he is the only
8 party required to prove anything at this hearing.

9 **3. Chapter X is not Incorporated into the City’s Development Ordinance**

10 Although this Court has issued a ruling that Chapter X is a “land use regulation,” not all
11 land use regulations are subject to enforcement for all permits. By way of example, land use
12 regulations that are not “clear and objective,” (discussed below), are not enforceable as to the
13 development of housing projects (even though they may be enforceable as to commercial
14 projects). Here, Chapter X is not incorporated into Lake Oswego’s development code, and as
15 argued below, may therefore not serve as a basis for denial of the Application.

16 “Implementation and enforcement of acknowledged comprehensive plans and land use
17 regulations are matters of statewide concern.” ORS 197.013. Consistent with this legislative
18 determination, Oregon enacted ORS 227.173(1), which provides:

19 **Basis for decision on permit application or expedited land**
20 **division; statement of reasons for approval or denial. (1)**
21 ***Approval or denial of a discretionary permit application shall be***
22 ***based on standards and criteria, which shall be set forth in the***
23 ***development ordinance*** and which shall relate approval or denial
24 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.

25 (Emphasis added.) ORS 197.013 and ORS 227.173(1) supersede the City’s home rule authority.
26 *See City of La Grande v. Public Employee Retirement Bd.*, 281 Or 137, 149 (1978) (“However,

1 when a local enactment is found incompatible with a state law in an area of substantive policy,
2 the state law will displace the local rule.”)

3 “Reduced to its essentials, ORS 227.173(1) requires that development ordinances set
4 forth reasonably clear standards for discretionary permit applications. The intent of the statute is
5 to insure that those standards be the *sole basis* for determining whether a discretionary permit
6 application is approved.” *Lee v. City of Portland*, 57 Or App 798, 801 (1982). In Lake Oswego,
7 the “development ordinance” is set forth in Chapter 50 (“Community Development Code”) of
8 the Lake Oswego Code. The City Charter is not part of that “development ordinance.”

9 The current text of ORS 227.173(1) was enacted in 1999.⁸ The author(s) of Measure 3-
10 568 (which would become Chapter X) failed to designate Measure 3-568 as part of the
11 development ordinance within Chapter 50, and thus it did not become a part of the City’s
12 development ordinance. Accordingly, although it has been ruled to be a land use regulation,
13 Chapter X cannot be a basis to accept or reject an application subject to Chapter 50.

14 4. Clear and Objective Standard

15 Even if Chapter X were part of the City’s development ordinances, local jurisdictions
16 must nonetheless apply only clear and objective standards and conditions for, as is the case here,
17 residential development projects. ORS 197A.400⁹ provides in pertinent part:

18 **197A.400 Clear and objective approval criteria required;
19 alternative approval process.** (1) Except as provided in
20 subsection (3) of this section, a local government may adopt and
21 apply *only clear and objective standards, conditions and
procedures regulating the development of housing, including
needed housing, on land within an urban growth boundary.* The
standards, conditions and procedures:

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

25 ⁸ See 1999 c. 357 §3.

26 ⁹ Formerly ORS 197.304.

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

3 * * *

4 (3) In addition to an approval process for needed housing based on
5 clear and objective standards, conditions and procedures as
6 provided in subsection (1) of this section, a local government may
7 adopt and apply an alternative approval process for applications
and permits for residential development based on approval criteria
that are not clear and objective if:

8 (a) The applicant retains the option of proceeding
9 under the approval process that meets the
requirements of subsection (1) of this section;

10 (b) The approval criteria for the alternative approval
11 process comply with applicable statewide land use
planning goals and rules; and

12 (c) The approval criteria for the alternative approval
13 process authorize a density at or above the density
level authorized in the zone under the approval
process provided in subsection (1) of this section.

14 (4) Subject to subsection (1) of this section, this section does not
15 infringe on a local government's prerogative to:

16 (a) Set approval standards under which a particular
housing type is permitted outright;

17 (b) Impose special conditions upon approval of a
18 specific development proposal; or

19 (c) Establish approval procedures.

20 (Emphasis added.)

21 A standard is “clear” where it is “‘easily understood’ and ‘without obscurity or
22 ambiguity.’” *Roberts v. City of Cannon Beach*, 316 Or App 305, 312 (2021), quoting *Roberts*, –
23 — Or LUBA at — (slip op at 19) [quoting *Nieto*, — Or LUBA —, — (slip op at 9 n.
24 6)]. The *Roberts* Court added: “Ultimately, in the context of ORS 197.307(4) [now ORS
25 197A.400], the degree of clarity required for standards, conditions, and procedures for housing
26 development represents a balance between the need of applicants for an understandable route to

1 approval of the applied-for development and the need of local governments for code-drafting
2 requirements that are realistically achievable.” *Roberts*, 316 Or App at 312.

3 A standard is “objective,” when it exists “independent of mind.” *Roberts*, 316 Or App at
4 311, quoting *Nieto*, — Or LUBA —, — (slip op at 9 n. 6). The *Roberts* court again added:

5 Standards are not objective “if they impose ‘subjective, value-
6 laden analyses that are designed to balance or mitigate impacts of
7 the development on (1) the property to be developed **or (2) the**
8 ***adjoining properties or community.***’ ” *Legacy Dev. Grp., Inc. v.*
9 *City of The Dalles*, — Or LUBA —, — (LUBA No. 2020-
10 099, Feb. 24, 2020) (slip op at 7) (quoting *Rogue Valley Assoc. of*
11 *Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff’d*,
158 Or. App. 1, 970 P.2d 685, *rev. den.*, 328 Or. 594, 987 P.2d 514
(1999)); *id.* at — (slip op at 14) (“***Terms such as ‘necessary’***
and ‘consistent’ are designed to balance or mitigate impacts from
development and, therefore, are not objective.” (Some internal
quotation marks and brackets omitted.))].]

12 *Roberts* 316 Or App at 311-312. (Emphasis added.)¹⁰

13 5. Section 41

14 a. Section 41 is not a Substantive Provision of Chapter X.

15 Section 41 of Chapter X provides in pertinent part:

16 Section 41. Purpose.

17 The purpose of this Chapter is to preserve all designated Nature
18 Preserves that are owned by the City of Lake Oswego * * *. This
Chapter shall be interpreted liberally to achieve this purpose.

19 Purpose statements are not substantive provisions of a law. Instead, they provide context
20 for interpreting the operative provisions of the law. In *Department of Land Conservation and*

22 ¹⁰ ORS 197.831 provides an additional burden on Kohlhoff in this regard, to wit: “In a
23 proceeding before the Land Use Board of Appeals or an appellate court that involves an
24 ordinance required to contain clear and objective approval standards, conditions and procedures
25 for housing, including under ORS 197.307, ***the local government imposing the provisions of the***
ordinance shall demonstrate that the approval standards, conditions and procedures are
capable of being imposed only in a clear and objective manner.” (Emphasis added.) Thus,
26 here, Kohlhoff, standing in the shoes of the City, must also be required to demonstrate that
Sections 41 and or 43 Chapter X can be imposed “only in a clear and objective manner.” *Id.*

1 *Development v. Jackson County*, 151 Or App 210, 218 (1997) the court held:

2 Statutes and rules often contain statements of general policy * * *.
3 Such expressions *can* serve as contextual guides to the meaning of
4 particular provisions of the statutes or rules, as much as any other
5 parts of the enactment can. At the same time, the use of
6 expressions of policy as context is subject to the same limitations
7 as any other proffered type of context: *they are instructive only*
8 *insofar as they have a genuine bearing on the meaning of the*
provision that is being construed. Moreover, when legislative or
administrative expressions of policy are offered as context, courts
must be cautious not to *make* policy in the guise of interpretation,
or to allow agencies or other parties to achieve through a court’s
interpretation policy objectives that the enactment as promulgated
was not meant to or failed to embody.

9 (Emphasis in the original.) *See also* *Burke v. State ex rel. Department of Conservation and*
10 *Development*, 352 Or 428, 443 (2012) [“(A) statement of legislative findings, without more, is a
11 slim reed on which to rest an argument that *the operative provisions of a statute* should be taken
12 to mean something other than what they appear to suggest.” (Emphasis added.)] *See also*
13 *Northwest Natural Gas Co. v. Oregon Public Utilities Commission*, 195 Or App 547, 556 (2004)
14 [“(C)ourts are without authority to put policy considerations into the meaning of statutes in place
15 of the words the legislature has chosen to use.”]

16 **b. Section 41 is not Clear and Objective.**

17 Even if Section 41 were a substantive provision, it provides scant direction upon which
18 any developer or any approving governmental entity may determine whether its “standards,
19 conditions and procedures,” can be imposed “only in a clear and objective manner.” ORS
20 197.831. The stated purpose of preserving nature preserves as “natural areas for the enjoyment
21 of residents of and visitors to Lake Oswego” is inherently unclear and subjective. Section 41
22 fails to provide a developer with “an understandable route to approval of the applied-for
23 development[.]” *Roberts* at 312.

24 The definition of a “Nature Preserve” *might* provide *some* clarification, to wit: “Nature
25 Preserve means natural area parks or open spaces * * * that are managed to retain their natural
26 condition and prevent habitat deterioration.” Chapter X, Section 42. Even here, however, the

1 duty to retain a park’s “natural condition” or “prevent habitat deterioration,” (which are not
2 defined in Chapter X) are hardly “clear and objective” standards, particularly where Chapter X
3 expressly does not bar all development within the park.

4 **c. The Application does not Violate Section 41.**

5 Assuming Section 41 is a “substantive provision” of Chapter X, and further assuming that
6 its terms are “clear and objective,” the Application does not, in any event, violate its terms. The
7 evidence will establish that any impact on Waluga Park — West is temporary because acceptable
8 mitigation efforts will be substantial.

9 Mitigation is embedded in the City’s Development Code, and it is a well understood and
10 acceptable remedy to any adverse impacts. LOC §50.05.010.4.e provides in pertinent part:

11 Mitigation is a way of repairing or compensating for adverse
12 impacts to the functions and values of a natural resource caused by
13 a development. Mitigation may consist of resource area creation,
14 restoration, or enhancement. Some examples of mitigation are
15 construction of new wetlands to replace existing wetland that has
16 been filed, replanting trees, and restoring stream side vegetation
17 where it is disturbed.

16 **6. Section 43**

17 Section 43, which provides for limitations on development, is also decidedly not “clear
18 and objective.”

19 **a. Paragraph 1.**

20 Paragraph 1 of Section 43 provides:

21 The City of Lake Oswego shall insure that all development within
22 a Nature Preserve is *consistent* with the preservation of a Nature
23 Preserve as a *natural area* available for *public enjoyment*.

23 (Emphasis added.) As noted by the *Roberts* Court, *supra*, a term such as “consistent,” is not
24 “objective.” *Roberts* at 312. Moreover, terms such as “natural area” and “public enjoyment” are
25 inherently subjective. Like Section 41, Paragraph 1 of Section 43 provides nothing more than a
26 vague standard, with no conditions or procedures to rely upon. It is, in short, simply a

1 restatement of Section 41.

2 **b. Paragraph 2.**

3 Paragraph 2 of Section 43 provides in pertinent part:

4 To facilitate public access and use, the City of lake Oswego may
5 build trails for hiking, jogging, horseback riding, may provide
6 benches for interpretive displays, and may provide picnic and
7 sanitary facilities within a Nature Preserve.

8 Kohlhoff suggests that this represents an exclusive list of projects that may be developed
9 within a Nature Preserve. *See Memorandum Supporting Motion to Intervene, Deny Writ*, P. 11,
10 Ll. 6-10. The “list,” however, to the extent that it was intended to be exclusive, is directed only
11 at projects initiated “[t]o facilitate public access and use.” Nothing in Paragraph 2 limits other
12 projects for other purposes. Indeed, the fact that Paragraph 3 (addressed specifically below)
13 identifies types of projects that are not allowed within a Nature Preserve inevitably confirms that
14 Paragraph 1 does not limit other types of projects. If that were not so, Paragraph 3 would be
15 superfluous. *See* ORS 174.010 (“In the construction of a statute,* * * where there are several
16 provisions or particulars, such construction is, if possible, to be adopted to give effect to all.”)

17 **c. Paragraph 3.**

18 Paragraph 3 of Section 43 provides:

19 The City of Lake Oswego shall not construct or develop (or allow
20 any person to construct or develop) any Athletic Facility, any
21 Telecommunications Facility, or any parking lot, road or trail for
22 motorized vehicles within a Nature Preserve. The City of Lake
23 Oswego shall not cut (or allow any person to cut) any tree in a
24 Nature Preserve for the purpose of facilitating the construction or
25 development of any Athletic Facility, any Telecommunication
26 Facility, or any parking lot, road, or trail for motorized vehicles.

27 The Application provides for a housing development. The Application does not provide
28 for the development of an Athletic Facility, Telecommunications Facility, or any parking lot, or
29 permanent road or trail for motorized vehicles, nor are any trees to be cut for any such stated
30 purpose. In other words, the Application does not violate this provision.

1 **d. Paragraph 4.**

2 Paragraph 4 of Section 43 provides:

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

6 (Emphasis added.)

7 The Application does not provide for the construction or development of any “facility” or
8 “structure” above ground in the park, but rather a below-ground sewer line.¹¹ Notably, the terms
9 “facility,” and “structure” are not defined. Equally ambiguous (and thus not “clear and
10 objective) are Paragraph 4’s demand that, to be a violation, the facility or structure must “*impair*
11 or be *inconsistent* with the *natural conditions* of a Nature Preserve.” (Emphasis added.)

12 **e. Paragraph 5.**¹²

13 Paragraph 5 of Section 43 provides:

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

16 The Application does not provide for the cutting of trees for commercial logging
17 purposes, thus there will be no substantive violation of Paragraph 5. What Paragraph 5 (and the
18 second clause of Paragraph 3) confirm, however, is that trees may be cut for reasons other than
19 “the development of an Athletic Facility, Telecommunications Facility, or any parking lot, road
20 or trail for motorized vehicles” or “logging.” If that were not so, Section 43 could have simply
21 barred the cutting of any tree without further clarification or limitation.

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¹¹ This development in the park will include two manhole covers that will sit flush to the ground.
25 At the risk of stating the obvious, “flush to the ground,” is not “above-ground.” See ORS
26 174.010 [“In the construction of a statute,” the court is “not to insert what has been omitted(.)”]

¹² Paragraphs 6 through 8 of Section 43 do not apply.

1 **7. General Violation of Chapter X**

2 Instead of identifying a violation specific violation of Sections 41 or 43, Kohlhoff may be
3 tempted to argue that the Application simply violates the entirety of Chapter X when viewed
4 “liberally.” That argument is unavailing for four reasons.

5 First, that argument lies outside of the Court’s March 6, 2024, *Opinion and Order*, which
6 limited this hearing to whether “the proposed action by New Look violates a substantive
7 provision of Chapter X, sections 41 and 43.”

8 Second, ORS 227.179 does not require a showing of a “substantive violation” of a land
9 use regulation. Rather, it requires a showing of a violation of a “substantive provision” of a land
10 use regulation. This necessarily requires Kohlhoff to identify one or more specific provisions
11 within Chapter X he believes will be violated by approval of the Application (and here, that
12 review is limited to Sections 41 and 43).

13 Third, the fact that Chapter X requires a liberal interpretation does not trump the required
14 showing of “clear and objective” standards. *See City of La Grande, supra*.

15 Fourth, and as LUBA recently explained, requiring general consistency with an
16 expansive array of code sections is inherently unclear. In *Icon Construction and Development,*
17 *LLC v. City of Oregon City*, ___ Or LUBA ___ (LUBA No. 2022-100, May 19, 2023), 2023 WL
18 3968361 (Or LUBA), Oregon City required a project applicant to demonstrate consistency with
19 the city’s comprehensive plan and any applicable overlay zone or concept plans. Because the
20 call for general compliance failed to explain which sections and requirements with which the
21 applicant was supposed to comply, the city effectively obscured and obfuscated requirements in
22 a manner that was completely unclear, so LUBA rejected the requirement. *Id*, slip op at 33-35.
23 Here, Kohlhoff may seek to have the Project “comply” with Chapter X. Doing so, however,
24 would relieve Kohlhoff of the obligation to prove (and the Court’s obligation to find) that the
25 Application violated a substantive *provision* of Chapter X.

26 ///

1 **CONCLUSION**

2 ORS 227.179 is designed to protect developers, including New Look from extended,
3 unnecessary delays in the approval of their development projects. Once a governing body fails
4 to act within the time allowed by law, a developer is entitled to a peremptory writ requiring the
5 governing body to issue final approval except *only* upon a showing that the application would
6 violate a substantive provision of a comprehensive plan or applicable land use regulation.

7 Here, Chapter X was never made a part of the City’s developmental code. As such, it
8 may not serve as a basis to deny the Writ. In any event, Section 41 is not a substantive provision
9 of Chapter X, and even if it were, it is not clear and objective. Section 43, to the extent it is a
10 substantive provision (although Paragraph 1 is not), is also not clear and objective. New Look is
11 entitled to the peremptory writ.

12 DATED this 24th day of May, 2024.

13 JORDAN RAMIS PC
14 Attorneys for Plaintiff-Relator New Look
15 Development LLC

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CHAPTER X. PARK DEVELOPMENT LIMITATION

Section 41. Purpose.

The purpose of this Chapter is to preserve all designated Nature Preserves that are owned by the City of Lake Oswego, inclusive of the fifteen natural parks 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.

(Amended November 7, 1978; November 2, 2021.)

Section 42. Definitions.

As used in this Chapter:

Athletic Facility means any area, field, or building which is graded, leveled, constructed, or equipped for use in sports or athletics. Fields for baseball, soccer, or football and courts of tennis are examples of Athletic Facilities.

Bryant Woods Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Bryant Woods Park" (19.7 acres, more or less, to the North of Childs Road located at the corner of Childs Road and Canal Road at 4301 Childs Road).

Canal Acres means the park land owned by the City of Lake Oswego which is commonly referred to as "Canal Acres" (27.3 acres, more or less, to the South of Childs Road, to the West of Canal Road, and to the East of Sycamore Avenue, located at 19300 Canal Road).

Cooks Butte Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Cooks Butte Park" (43 acres, more or less, located at 2100 Palisades Crest Drive).

Cornell Natural Area means the park land owned by the City of Lake Oswego which is commonly referred to as "Cornell Natural Area" (3.2 acres, more or less, to the East of Cornell Street, to the South of Larch Street, located at 16920 Cornell Street).

Glenmorrie Greenway means the park land owned by the City of Lake Oswego which is commonly referred to as "Glenmorrie Greenway" (1.3 acres, more or less, to the East of Pacific Hwy, to the North of Glenmorrie Terrace, located at 16540 Pacific Hwy).

Hallinan Woods means the park land owned by the City of Lake Oswego which is commonly referred to as "Hallinan Woods" (3.8 acres, more or less, located at 1103 Obrien Street).

Iron Mountain Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Iron Mountain Park" (51 acres, more or less, to the North of Iron Mountain Blvd, located at 2401 Iron Mountain Blvd).

Kerr Open Space means the park land owned by the City of Lake Oswego which is commonly referred to as "Kerr Open Space" (10 acres, more or less, to the South of SW Stevenson Street, to the East of Grouse Terrace, to the North of Walking Woods Drive, to the West of Icarus Loop).

Lamont Springs Natural Area means the park land owned by the City of Lake Oswego which is commonly referred to as "Lamont Springs Natural Area" (0.5 acres, more or less, to the South of Lakeview Blvd, and to the East of Bryant Road, at the corner of Lakeview Blvd and Bryant Road, located at 4600 Lakeview Drive).

Nature Preserve means natural area parks 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, Bryant Woods Park, Canal Acres,

Cornell Natural Area, Cooks Butte Park, Glenmorrie Greenway, Hallinan Woods, Iron Mountain Park, Kerr Open Space, Lamont Springs Natural Area, River Run, Southshore Natural Area, Springbrook Park, Stevens Meadows, Waluga Park – West, and Woodmont Natural Park.

River Run means the park land comprised of two parcels (River Run East and River Run West), owned by the City of Lake Oswego, which is commonly referred to as "River Run" (10.8 acres, more or less, to the East of Canal Road, to the North of the Tualatin River, located at 19690 River Run Drive and 3770 Rivers Edge Drive).

Southshore Natural Area means the park land owned by the City of Lake Oswego which is commonly referred to as "Southshore Natural Area" (9.2 acres, more or less, located at 1201 South Shore Blvd).

Springbrook Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Springbrook Park" (52 acres, more or less, to the South of Country Club Road, to the West and North of Wembley Park Road, and to the East of Boones Ferry Road). The term "Springbrook Park" does not include the City of Lake Oswego existing indoor tennis facility and adjoining parking lot.

Stevens Meadows means the two park lands owned by the City of Lake Oswego, which is commonly referred to as "Stevens Meadows" and the "Stevens Homestead" (27.8 acres, more or less, located at 18600 Shipley Drive and 1551 Childs Road, respectively).

Telecommunications Facility means any area, field, or building which is graded, leveled, constructed, or equipped for use in telecommunications or broadband communication, Antennas, Cellular Towers, Radio Masts and Towers, Satellite Dishes, and Emergency Communications Systems are examples of Telecommunications Facilities. This includes Telecommunications Facilities for both public or private use.

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).

Woodmont Natural Park means the park land owned by the City of Lake Oswego which is commonly referred to as "Woodmont Natural Park" (6.8 acres, more or less, at the corner of Atwater Rd and Atwater Lane, located at 13600 Atwater Lane).

(Amended November 2, 2021.)

Section 43. Limitations on Development.

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

To facilitate public access and use, the City of Lake Oswego may build trails for hiking, jogging, horseback and bicycle riding, may provide 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.

The City of Lake Oswego shall not construct or develop (or allow any person to construct or develop) any Athletic Facility, any Telecommunications Facility, or any parking lot, road, or trail for motorized vehicles within a Nature Preserve. The City of Lake Oswego shall not cut (or allow any person to cut) any tree in a Nature Preserve for the purpose of facilitating the construction or development of any Athletic Facility, any Telecommunications Facility, or any parking lot, road, or trail for motorized vehicles.

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

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

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

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

(Amended November 7, 1978; November 2, 2021.)

Section 44. Effective Date.

This Chapter carries an effective date of November 2, 2021.

(Amended November 2, 2021.)

Section 45. Severability.

If a court should hold invalid or unconstitutional any clause or part of this Chapter, that holding shall not affect the remaining parts of this Chapter which are not held invalid or unconstitutional.

(Amended November 2, 2021.)

Section 46. Application to Other Park.

This Chapter shall apply to any other park (i) conveyed by property owners to the City of Lake Oswego with a "Nature Preserve" designation that shall carry with the property in perpetuity, (ii) nominated by the Parks, Recreation, and Natural Resources Board and/or the Director of Parks and Recreation designating such other park as a "Nature Preserve" and ratified by the City Council, (iii) ratified by voters specifically designating such other park as a "Nature Preserve," or (iv) acquired by a bond issued after the effective date of this Chapter if (and only if) the voters specifically 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.

(Amended November 7, 1978 [Note: from November 7, 1978 until June 30, 1980, this Chapter was numbered XXV and included Sections 102 through 107]; Renumbered Chapter on July 1, 1980; Amended November 2, 2021.)

Section 46A. Maximum Height of Structures in Residential Areas.

The City of Lake Oswego shall neither construct nor allow the construction of any structure which is more than 50 feet in height within a residential zone, except for the construction of a single symbolic appurtenance of a structure to 75 foot height. The City may, however, construct or allow the construction of a lighting structure which is more than 50 feet in height in a public park or school sports fields located in a residential zone. For purposes of this section the height of a structure or of a part or appurtenance of a structure shall be measured from the ground or sidewalk surface within a 5-foot horizontal distance of the exterior of the structure, provided such sidewalk or ground surface is not more than 10 feet above the lowest grade as defined by city ordinance; or, if such sidewalk

or ground surface is more than 10 feet above lowest grade, height shall be measured from a point 10 feet higher than the lowest grade, to the top of the highest element of the building or structure.

(Amended May 19, 1987; March 24, 1992.)

The Lake Oswego Municipal Code is current through Ordinance 2922, and legislation passed through June 6, 2023.

Disclaimer: The City Recorder's Office has the official version of the Lake Oswego Municipal Code. Users should contact the City Recorder's Office for ordinances passed subsequent to the ordinance cited above.

City Website: <https://www.ci.oswego.or.us/>
(<https://www.ci.oswego.or.us/>)
City Telephone: (503) 635-0290
Code Publishing Company
(<https://www.codepublishing.com/>)

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date shown below, I served a true and correct copy of the
3 foregoing PLAINTIFF-RELATOR’S HEARING MEMORANDUM on:

4 Evan P. Boone, OSB #781518
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9 *Of Attorneys for Defendant the City of Lake
10 Oswego*

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

- 12 by first class mail, postage prepaid.
- 13 by overnight mail.
- 14 by hand delivery.
- 15 by facsimile transmission.
- 16 by facsimile transmission and first class mail, postage prepaid.
- 17 by electronic transmission to counsel that has agreed to email service.
- 18 by electronic transmission and first class mail, postage prepaid to counsel that has not
19 agreed to email service.

20 DATED: May 24, 2024.

21 *s/ Christopher K. Dolan*

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