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

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

8 Plaintiff-Relator,

9 v.

10 CITY OF LAKE OSWEGO, a municipal
corporation,

11 Defendant.

12 And

13 MICHAEL E. KOHLHOFF,

14 Intervenor.
15
16

Case No. 24CV03746

PLAINTIFF-RELATOR’S JOINDER TO
DEFENDANT CITY OF LAKE
OSWEGO’S MOTION TO REOPEN
CONSIDERATION WHETHER
CHAPTER X IS A “LAND USE
REGULATION ORDER”

17 Plaintiff-Relator New Look Development LLC (“New Look” or “plaintiff”) joins and
18 adds to *Defendant City of Lake Oswego’s Motion to Reopen Consideration Whether Chapter X*¹
19

20 ¹ Chapter X is likely unconstitutional. Not only does it bind Defendant’s authority to act on
21 property outside of its jurisdictional boundaries in a manner wholly inconsistent with the limits
22 of land use regulations, but it was never properly in front of the voters. The Oregon Constitution
23 requires that, “(n)o act shall ever be revised, or amended by mere reference to its title, but the act
24 revised, or section amended **shall be set forth, and published at full length**. However, if, at any
25 session of the Legislative Assembly, there are enacted two or more acts amending the same
26 section, each of the acts shall be given effect to the extent that the amendments do not conflict in
purpose. If the amendments conflict in purpose, the act last signed by the Governor shall
control.” Or. Const. art. IV, § 22. (Emphasis added.) This requirement applies to cities as well
as the state. *See City of Portland v. Stock*, 2 Or 69, 71-72 (1863) (applying Or. Const. art. IV, §
22 to an amendment to the City of Portland’s Charter); *see also David v. Portland Water Comm.*,
14 Or 98, 109 (1886) (If the court finds a violation of Or. Const. art. IV, § 22, then it is the

1 is a “Land Use Regulation Order” (“City’s Motion”) and moves the Court to reopen the
2 consideration of whether Chapter X, Sections 41 and 43 constitutes a land use regulation under
3 ORS 197.015(11).

4 As Chapter X restricts the City’s ability to exercise certain land development related
5 activity outside its jurisdictional boundaries and inside the jurisdictional boundaries of the City
6 of Portland and unincorporated Clackamas County, it cannot be a Land Use Regulation.

7 Subject to limited—and statutorily delineated—exceptions, state law clearly confines the
8 authority of a city to regulate land development to the areas within their jurisdictional
9 boundaries. Pursuant to ORS 227.215, which relates to cities’ authority to regulate development:

10 A City may plan and otherwise encourage and **regulate the**
11 **development of land.** A city may adopt an ordinance requiring
12 that whatever land development is undertaken **in the city** comply
13 with the requirements of the ordinance and be undertaken only in
14 compliance with the terms of a development permit. (Emphasis
15 added.) ORS 227.215(2).

16 The statute goes on to explain that a city, “ordinance may divide the city into districts and
17 **apply to all or part of the city.**” ORS 227.215(4). (Emphasis added.)

18 Chapter X explicitly applies to properties outside of the City’s boundaries. Additionally,
19 it applies to future lands — also outside of the City’s jurisdictional boundaries. Chapter X,
20 Chapter 42 states:

21 _____
22 Court’s “duty to pronounce it void, however meritorious the enterprise may be which it was
23 intended to promote.”) *See also Kerr v. Bradbury*, 193 Or App 304, 325 (2004) (“* * *
24 publication of the full text of the statute as it would appear if the initiative petition were to be
25 enacted” is required.)

26 Here, Clackamas County published a mere synopsis of Measure 3-568, which revised and
amended Chapter X of the Lake Oswego Charter, in the voter pamphlet. It did not include the
entire text, as required by Article IV, Chapter 22. This failure means that Chapter X was never
properly before the voters who, serving as the City of Lake Oswego legislators, voted on an act
that was never properly before them. Consistent with *David, supra*, the Court’s duty is to
“pronounce it void.”

A true copy of the complete text of Measure 3-568 and a true and complete copy of Chapter
X are attached hereto as Exhibits 1 and 2, and by this reference, incorporated herein.

1 Nature Preserve means natural area parks or open spaces *owned by*
2 *the City of Lake Oswego* that are managed or maintained to retain
3 their natural condition and prevent habitat deterioration. Nature
4 Preserves that are subject to the limitations of this Chapter, which
5 upon ratification will initially include, Bryant Woods Park, Canal
6 Acres, Cornell Natural Area, Cooks Butte Park, Glenmorrie
7 Greenway, Hallinan Woods, Iron Mountain Park, *Kerr Open*
8 *Space*, Lamont Springs Natural Area, River Run, Southshore
9 Natural Area, Springbrook Park, *Stevens Meadows*, Waluga Park –
10 West, and Woodmont Natural Park.

11 (Emphasis added.)

12 As the Oregon Court of Appeals has explained, the authority of a city to bind and
13 regulate land use development outside of its jurisdictional boundaries is limited. In *Standard Ins.*
14 *Co. v. City of Hillsboro*, 97 Or App 625, 628 (1989), the court held that the City of Hillsboro
15 lacked the authority to exercise its land use regulation authority on land outside of its’
16 jurisdiction. As the court explained, “the statute *does not give the city authority to make a final*
17 *land use decision* [pursuant to its land use regulations] in a county proceeding that was pending
18 when the affected area was annexed.” *Id.* (Emphasis added.)

19 This geographical limitation is needed to ensure that a city does not enact land use
20 regulations that burden and confine the actions of those who are outside of its political
21 boundaries. This action is weighty and reserved. As the Supreme Court explained, “the power
22 to regulate, restrict and segregate different classes of businesses *in a city* by [a land use
23 regulation] ordinance is reserved to the city council.” (Emphasis added.) *Link v. City of Coos*
24 *Bay*, 23 Or App 648, 650 (1975).

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City of Lake Oswego Measure 3-568

Referred to the People by Initiative Petition

RESTRICTS IMPROVEMENTS ON CERTAIN LAKE OSWEGO PARK PROPERTIES

QUESTION: Should the Lake Oswego City Charter be amended to restrict improvements on certain city park properties?

SUMMARY: This Charter amendment was placed on the ballot through an initiative petition. Applies initially to Bryant Woods Park, Canal Acres, Cooks Butte Park, Cornell Natural Area, Glenmorrie Greenway, Hallinan Woods, Iron Mountain Park, Kerr Open Space, Lamont Springs Natural Area, River Run, Southshore Natural Area, Springbrook Park, Stevens Homestead, Stevens Meadows, West Waluga Park, and Woodmont Natural Park. Designates these properties as "Nature Preserves." Prohibits above-ground facilities or structures that would impair or be inconsistent with natural conditions. Also prohibits hard-surface trails, parking lots, athletic fields or facilities, roads, trails for motorized vehicles, tree-cutting for certain purposes, and telecommunications facilities. Previously-constructed facilities or structures may be maintained if not altered in any manner that further impairs or is inconsistent with natural conditions. Allows soft-surface trails, benches, interpretive displays, and picnic and sanitary facilities. Allows the city to implement previously-adopted park master plans. Applies the same restrictions to any park property acquired in the future, if designated as a "Nature Preserve" by the conveying property owners, the city, or voters.

EXPLANATORY STATEMENT:

Lake Oswego's City Charter currently does not contain development limitations for City-owned natural parks except for Springbrook Park, which has been protected under Chapter X - Park Development Limitation since 1978. This citizen-initiated measure repeals and replaces Chapter X to protect 15 additional natural parks with additional development limitations to preserve them as natural habitats accessible for public enjoyment.

Chapter X, which currently only applies to Springbrook Park:

- Prohibits athletic facilities, parking lots, and roads or trails for motorized vehicles.
- Allows trails for hiking, jogging, horseback, and bicycle riding.
- Allows picnic and sanitary facilities.

- Allows for restrictions to apply to any park property acquired by bond and designated by voters as subject to these restrictions.

A "yes" vote on Measure 3-568 would maintain and enhance Chapter X's development limitations:

- Designates these natural parks as "Nature Preserves:" Springbrook Park, Bryant Woods Park, Canal Acres, Cooks Butte Park, Cornell Nature Area, Glenmorrie Greenway, Hallinan Woods, Iron Mountain Park, Kerr Open Space, Lamont Springs Natural Area, River Run I & II, South Shore Natural Area, Stevens Homestead, Stevens Meadows, West Waluga Park, and Woodmont Natural Park.
- Prohibits athletic facilities, parking lots, and roads or trails for motorized vehicles.
- Prohibits telecommunications facilities, asphalt and concrete hard-surface trails, and above-ground facilities or structures that would impair or be inconsistent with natural conditions.
- Prohibits tree-cutting for purposes of commercial logging.
- Allows trails for hiking, jogging, horseback, and bicycle riding.
- Allows picnic and sanitary facilities.
- Allows benches, boardwalks, and interpretive displays.
- Allows maintenance for ecological restoration that provides safe and healthy natural areas that are accessible for public enjoyment, provides a healthy habitat for wildlife, eliminates invasive species, restores native species, and mitigates fire hazards.
- Allows maintenance of existing facilities, structures, parking lots, roads or trails for motorized vehicle if not altered in any manner that would further impair or be inconsistent with natural conditions.
- Allows implementation of pre-existing park-specific master plans that may specify development otherwise restricted by this Chapter.
- Allows for restrictions to apply to any park property acquired by bond or if designated as a "Nature Preserve" by the conveying property owners, the City, or voters.

Any master plan for parks designated as "Nature Preserves" must be consistent with the charter amendment.

After citizens filed this initiative with sufficient signatures to qualify for the ballot, the Lake Oswego City Council referred a competing measure.

To become law, this Measure must receive a majority vote and more YES votes than the competing Measure.

Submitted by:
Kari Linder
City Recorder | Elections Officer

The above information has not been verified for accuracy by the county.

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 JOINDER TO DEFENDANT CITY OF LAKE
4 OSWEGO’S MOTION TO REOPEN CONSIDERATION WHETHER CHAPTER X IS A
5 “LAND USE REGULATION ORDER” on:

6 Evan P. Boone, OSB #781518
7 Lake Oswego City Attorneys
8 PO Box 369
9 Lake Oswego OR 97034
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Of Attorneys for Defendant the City of Lake Oswego

12 ***E-MAIL SERVICE AGREEMENT**

- 14 by first class mail, postage prepaid.
- 15 by overnight mail.
- 16 by hand delivery.
- 17 by facsimile transmission.
- 18 by facsimile transmission and first class mail, postage prepaid.
- 19 by electronic transmission.
- 20 by electronic transmission and first class mail, postage prepaid.

21 DATED: May 24, 2024.

22 *s/ Christopher K. Dolan*
 23 _____
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