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

PORTLAND METROPOLITAN)
ASSOCIATION OF REALTORS, a)
Domestic Nonprofit Corporation; HOME)
BUILDERS ASSOCIATION OF)
METROPOLITAN PORTLAND, a)
Domestic Nonprofit Corporation;)
BUILDING OWNERS AND MANAGERS)
ASSOCIATION OF OREGON, a Domestic)
Nonprofit Corporation; NAIOP OREGON)
CHAPTER, a Domestic Nonprofit)
Corporation; PORTLAND BUSINESS)
ALLIANCE, a Domestic Nonprofit)
Corporation; COMMERCIAL)
ASSOCIATION OF BROKERS)
OREGON/SOUTHWEST WASHINGTON,)
a Domestic Nonprofit Corporation; and)
OREGON ASSOCIATION OF)
REALTORS, a Domestic Nonprofit)
Corporation,)

Plaintiffs,)

v.)

CITY OF PORTLAND,)

Defendant.)

Case No. 15CV19696
OPENING BRIEF OF PLAINTIFFS

I. INTRODUCTION

On May 27, 2015, the City of Portland ("City") adopted Ordinance 187150. The ordinance imposes new system development charges ("SDCs") for parks and recreation on virtually all new construction in the City. The new fees are substantially higher than the existing fees almost across the board. They will impose significant new costs on almost every new home and apartment constructed in Portland, at a time when housing prices are

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1 already unaffordable for many in our community. They will also significantly raise costs for
2 non-residential construction.

3 The City has the right to assess fees and SDCs on its citizens. This is a
4 powerful right that is carefully guarded by checks and balances. But in Ordinance 187150,
5 the City attempts to side-step these rules and procedures to create an enormous slush fund for
6 use by the City. For years, the City has responsibly charged improvement fees on new
7 construction projects to help pay for additional burdens placed on Parks due to population
8 growth. Ordinance 187150 dramatically changes the methodology for calculating
9 improvement fees. These new fees will generate projected annual revenues exceeding \$50
10 million, approximately twice the fees generated under the current SDC.

11 The City hides this fact by manipulating data and making self-serving
12 assumptions that are wholly unsupported by evidence. The City characterizes its conduct as
13 "conservative." In fact, Ordinance 187150 is the opposite of conservative—it is a money-
14 grab. Worse, the City does not even identify how it intends to spend this windfall of funds,
15 as is required under Oregon law.

16 The City's failings in approving Ordinance 187150 are many. These failings,
17 each of which constitutes an independent basis to reverse the City's adoption of the
18 Ordinance, include:

- 19 • The City failed to prepare an adequate Capital Improvement Plan. The
20 City was required to prepare a Capital Improvement Plan providing
21 specific details about capital improvement projects that would be
22 funded by improvement fees. No legally sufficient plan was prepared.
- 23 • The City's conclusion about the "level of service" of the Parks is not
24 supported by substantial evidence. The new improvement fee
25 calculation is premised on an assumption that the City has attained the
26 exact and perfect amount of parks. This assumption contradicts a

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number of reports previously prepared and relied upon by the City, and there is no evidence in the record supporting it.

- The City's conclusion about the "replacement cost" of Portland's parks is not supported by substantial evidence. The new SDC calculation includes a determination of the "replacement cost" for the Parks. This figure is based on the misguided and unsupported assumption that all Parks are in "new condition," and improperly ignores the historical cost of many parks.
- The City's conclusion about population growth is not supported by substantial evidence. The new improvement fee calculation includes assumptions about expected population growth. There is no evidence in the record to support the City's estimated population growth rates. The City borrows a growth rate from Metro's 2014 Urban Growth Report, which is not in the record. Then, under the guise of being "conservative," the City discounts Metro's projected growth rate by more than 50 percent. The consequence of this "conservative" reduction is to decrease the expected annual fees generated by the new calculation from over \$50 million to \$27.6 million. There is no evidence in the record to support the City's "discount" in the population growth rate.
- The City's Financial Impact Statement, which is the vehicle the City uses to explain the cost of the new ordinance to its citizens, is not supported by substantial evidence. The Financial Impact Statement, using the new improvement fee calculation, announces an impact of \$27.6 million annually. This sum is based on the City's artificially deflated population growth estimate, which is not supported by

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substantial evidence. Because there is no substantial evidence to support the population estimate, there is necessarily no evidence to support the Financial Impact Statement. Indeed, if the population growth rate announced in the 2014 Urban Growth Report is reasonably accurate, the Financial Impact Statement should announce an annual cost of over \$50 million.

- The City's new calculation for improvement fees includes charges that are not associated with proposed capital improvements. Such charges are not permissible.
- The City's assumption that there is a relationship between square footage of housing and use of Parks is not supported by substantial evidence. The City's new improvement fee methodology is based on an assumption that families living in larger homes make greater use of Parks. There is no evidence in the record to support this assumption, which is intuitively misguided.

Plaintiffs support the collection of improvement fees to help fund capital improvements needed for parks as the City's population grows. Plaintiffs also firmly believe that these fees must be fairly and reasonably calculated and allocated. This occurs when the City follows the rules, which provide important checks and balances on the City's authority. The City should not be permitted to ignore procedures and manufacture calculations with self-serving assumptions that are not based on any evidence.

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1 **II. BACKGROUND**

2 In 1998, the City established a Parks SDC and adopted City Code Chapter
3 17.13, creating a methodology for calculating SDCs. (Ordinance 187150, pg. 1.)¹ The City
4 updated its methodology for calculating Parks SDCs in 2005 and 2008. (Ordinance, pg. 1.)

5 On May 27, 2015, the City passed Ordinance 187150 by a narrow 3-2 vote.
6 Ordinance 187150 directs the City to adopt (1) the "updated Portland Parks & Recreation
7 *System Development Charge Methodology Update Report* dated April 15, 2015 ["2015
8 Methodology Report"]) establishing both a residential and non-residential Park SDC
9 beginning July 1, 2016," and (2) the "Park System Development Charge Capital
10 Improvements Plan (Park SDC-CIP) in APPENDIX A of EXHIBIT A." (Ordinance 187150,
11 pg. 5.)²

12 The 2015 Methodology Report creates a new methodology for calculating
13 Parks SDCs. Instead of using the methodology it had used since 1998, the City adopted a
14 methodology based on the "dollar amount per capita of the current value of park land and
15 improvements." (Ordinance 187150, pg. 2.) In its new methodology, the City decided how
16 much each current resident has "paid" for the current park system by estimating the
17 replacement value of current park assets, and now intends to make each new resident pay an
18 equivalent amount in new SDCs, regardless of the actual need for capital improvements to
19 parks. This new methodology has not been adopted by any other Oregon jurisdiction.
20 Experts who submitted reports to the City were highly critical of the City's adoption of this
21 relatively untested new method of assessing SDCs. (*See* Letter from Justin Wood to Comm'r
22 Fritz, May 26, 2015³; *see* also Letter from Kelly Ross to Mayor Hales, April 15, 2015.)⁴

23 _____
24 ¹ Documents cited in this brief were filed with the petition. Courtesy copies of each are included in the
documents hand delivered to the court.

25 ² Appendix A of Ordinance 187150's Exhibit A does not appear to be the Park SDC-CIP. The Park SDC-CIP
appears to be in Appendix B of Ordinance 187150's Exhibit A.

26 ³ *See* **Exhibit 8.**

⁴ *See* **Exhibit 10.**

1 In support of its new methodology, the City concludes that the replacement
2 value of the City's current park lands and improvements is \$3,540,158,806.00. The City sets
3 forth its \$3.5 plus billion estimate on two pages in Appendix A of the 2015 Methodology
4 Report. (Ordinance 187150, Ex. A., pg. 20-21.) The purported evidence supporting this
5 enormous number is not in the record.

6 In the 2015 Methodology Report, the City concludes that the "capacity of
7 [Portland's] existing park system has been acquired for the use and benefit of the current
8 population. There is no unused capacity, nor is there any existing deficiency." (Ordinance
9 187150, Ex. A., pg. 9 (emphasis added).) In other words, the City's 2015 Report concludes
10 that, as of the date of the passage of Ordinance 187150, the City had exactly the right amount
11 and kind of park facilities.

12 In establishing its new improvement fees, the City estimated Portland's
13 population growth over the next 20 years, the projected term of the fees. The City used an
14 "adjusted version" of Metro's "population and employment estimates" to support its new
15 methodology. (Ordinance 187150, Ex. A., pg. 4.) The City states that its "Park SDC
16 methodology reduces the 2035 projections so that the increase from 2013 to 2035 is half the
17 increase in Metro's estimates." (Ordinance 187150, Ex. A., pg. 4.)

18 Based on its new methodology and population growth estimates, the City
19 estimates generating \$552 million in fees from 2015 to 2035, which is approximately \$27.6
20 million per year. (Ordinance 187150, Ex. A, App'x B.)

21 **III. LEGAL STANDARD**

22 An interested party may challenge an ordinance that adopts or modifies an
23 SDC by petition for a Writ of Review as set forth in ORS 34.010 *et seq.* A writ of review is
24 the only means by which this ordinance may be challenged. (ORS 223.302(3)(a).) The
25 Court issued the Writ of Review on July 24, 2015, and the City filed its Return of the Writ on
26 August 7, 2015.

1 "reimbursement fee" is a "fee for costs associated with capital improvements already
2 constructed, or under construction when the fee is established." (ORS 223.299 (3).) The
3 Parks SDC at issue in this case "is an improvement fee, and does not include any
4 reimbursement fees." (Ordinance 187150, Ex. A., pg. 2) (emphasis added.)

5 Improvement fees are not intended as a means of collecting a pool of
6 unallocated general funds for operation of the Parks system. Rather, they are fees intended
7 for the purpose of funding specific capital improvement projects. Improvement fees must be
8 "calculated to obtain the cost of capital improvements for the projected need for available
9 system capacity for future users." (ORS 223.304(2)(b).) Improvement fees "may be spent
10 only on capacity increasing capital improvements." (ORS 223.307(2)) (emphasis added.)
11 Improvement fees may not be used "for the expenses of the operation or maintenance of the
12 facilities constructed with system development charge revenues." (ORS 223.307(3).)

13 To ensure that improvement fees are not used to create a slush fund of
14 available cash for the general operation of the Parks system, the Act requires that the City
15 create a comprehensive plan for capital expenditures as a precondition to imposing an SDC.
16 Before establishing an improvement fee "by ordinance or resolution, a local government shall
17 prepare a capital improvement plan * * * that includes a list of the capital improvements that
18 the local government intends to fund, in whole or in part, with revenues from an
19 improvement fee and the estimated cost, timing and percentage of costs eligible to be funded
20 with revenues from the improvement fee for each improvement." (ORS 223.309(1)
21 (emphasis added).)

22 Improvement fees are not taxes or general funding mechanisms. Nor are they
23 for use in operating or maintaining existing facilities. Improvement fees must: "(a) Be
24 established or modified by ordinance or resolution setting forth a methodology that is
25 available for public inspection and demonstrates consideration of: (A) The projected cost of
26 the capital improvements identified in the plan and list adopted pursuant to ORS 223.309 that

1 are needed to increase the capacity of the systems to which the fee is related; and (B) The
2 need for increased capacity in the system to which the fee is related that will be required to
3 serve the demands on the system by future users." (ORS 223.304(2)(a).)

4 Improvement fees are intended to fill a specific niche in Parks funding. They
5 are not intended to pay for the day-to-day operations of the department. They are not
6 reimbursement fees "associated with capital improvements already constructed." They are
7 not intended to create a slush fund of "no strings attached" money for the department or the
8 City to spend without restriction or oversight.

9 Rather, improvement fees are intended solely to fund new capital
10 improvements. To ensure that this requirement is met, the Act requires the City to create a
11 capital improvement plan with a list of specific capital improvement projects that the fee will
12 fund. This plan must include details about how the funds will be spent on each project on the
13 list, including "timing and percentage of costs eligible to be funded with revenues from the
14 improvement fee." ORS 223.309(1)

15 Because improvement fees are not taxes, they are not subject to the same
16 intense public and legislative scrutiny. They are comparatively obscure fees that once
17 enacted (to use this case as an example), may be collected for 20 years without need for
18 revision or reenactment. To avoid the possibility of abuse, the legislature built strict
19 requirements into the Act, limiting the purposes for which improvement fees can be collected
20 and spent and defining the procedure by which they must be enacted. Here, however, the
21 City is attempting to avoid these requirements altogether, in an attempt to create a pool of
22 cash for use without restriction.

23 **B. The City's Capital Improvement Plan Does Not Comply With Applicable**
24 **Procedure and Is Not Supported by Substantial Evidence**

25 As noted above, before imposing a new improvement fee, the City must
26 prepare a detailed capital improvement plan, including a list of capital projects to be funded

1 by the fee. Here, the City made only a token effort to satisfy its obligations to prepare and
 2 submit such a plan. When it approved Ordinance 187150, the City adopted a one-page
 3 document called "the Park System Development Charge Capital Improvements Plan."
 4 (Ordinance 187150, pg. 5 and 22 (App'x B).) This "plan" is referred to below as "the
 5 Adopted Plan."

6 A complete copy of the Adopted Plan is set forth here:

TABLE B.1

SDC CAPITAL IMPROVEMENTS PLAN
2015 - 2035

Service Area	Annual	Total 2015-2035
Citywide		
Costs	\$ 17,075,569	\$ 341,511,388
Funding: Park SDCs	15,130,380	302,607,596
Funding: Other Revenue Sources	1,945,190	38,903,792
Central City Local Access		
Costs	6,697,964	133,959,288
Funding: Park SDCs	5,934,956	118,699,111
Funding: Other Revenue Sources	763,009	15,260,177
Non-Central City Local Access		
Costs	7,374,009	147,480,189
Funding: Park SDCs	6,533,988	130,679,758
Funding: Other Revenue Sources	840,022	16,800,431
Total		
Costs	31,147,543	622,950,865
Funding: Park SDCs	27,599,323	551,986,465
Funding: Other Revenue Sources	3,548,220	70,964,400

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1 This Adopted Plan does not come close to satisfying the requirements of the
2 SDC Act. Prior to establishment of a new improvement fee by ordinance, the City is
3 required to prepare a "capital improvement plan * * * or comparable plan." (ORS
4 223.309(1).) The plan must include "a list of the capital improvements that the [City] intends
5 to fund, in whole or in part, with revenues from an improvement fee." (ORS 223.309(1).) In
6 addition, the City must identify (1) the estimated cost, (2) timing, and (3) percentage of costs
7 eligible to be funded with revenues from the improvement fee for each capital improvement
8 it includes in the list. (ORS 223.309(1).)

9 The Adopted Plan does not satisfy any of these statutory requirements. To
10 begin with, and notably, the Adopted Plan does not include a list of capital improvements
11 that the City intends to fund with revenues from the improvement fee. And since there is no
12 list, the plan necessarily did not satisfy any of the other requirements of (ORS 223.309.)

13 At the April 15, 2015, public hearing, interested parties criticized the City for
14 failing to comply with the requirements of ORS 223.309. After the meeting, the City
15 inserted into the record the 2015 Park System Development Charge Plan 20-Year Capital
16 Plan (the "20 Year Wish List").⁵ As described below, the 20 Year Wish List does not satisfy
17 the requirements of ORS 223.309 either.

18 The 20 Year Wish List includes the following statement:

19 As required by ORS 223.309 Portland Parks and Recreation
20 maintains a list of capacity increasing projects intended to address the
21 need created by growth. These projects are eligible to be fund[ed] with
22 Park SDC revenue. The total value of the projects summarized below
23 exceeds the potential value of \$552 million estimated by the 2015 Park
SDC Methodology and the funding from non-SDC revenue targeted for
growth projects.

24 The project list and capital plan is a "living" document that, per
25 ORS 223.309(2), maybe [sic] modified at anytime [sic]. It should be
noted that potential modifications to the project list will not impact the fee

26 ⁵ See Exhibit 2.

1 since the fee is not based on the project list, but rather the level of service
2 established by the adopted Park SDC Methodology.

3 This statement underscores the City's obvious departure from the requirements
4 of the SDC Act in Ordinance 187150. The SDC Act requires much more than just
5 "maintain[ing] a list of capital increasing projects." (Cf. 20 Year Wish List, pg. 1.) The Act
6 requires the City to "prepare a capital improvement plan * * * or comparable plan that
7 includes a list of the capital improvements that the local government intends to fund, in
8 whole or in part, with revenues from an improvement fee" before it imposes any new SDC.
9 (ORS 223.309(1).) In addition, for each listed capital improvement the City is required to
10 identify the (1) estimated cost, (2) timing, and (3) percentage of costs eligible to be funded
11 with revenues from the improvement fee. (*Id.*)

12 The 20 Year Wish List, which lists approximately 270 "capital
13 improvements," does not satisfy the Act's requirements. Many of the listed "capital
14 improvements" are just names of neighborhoods in the City, including "Linnton,"
15 "Humboldt," "Hillsdale," "South Tabor," "Goose Hollow," and "Downtown." (20 Year Wish
16 List.) Some of the "capital improvements" don't even provide that much of a description.
17 For these, the City just states something like: "Unidentified Central City Projects" and
18 "Unidentified Non-Central City Acquisitions." (*Id.*) None of the listed "capital
19 improvements" include (1) estimated cost, (2) timing, and (3) percentage of costs eligible to
20 be funded with revenues from the improvement fee.

21 The City "note[s] that potential modifications to the project list will not
22 impact the fee since the fee is not based on the project list." But this is directly contrary to
23 the requirements for improvement fees under the SDC Act. The SDC Act states that
24 improvement fees "must" be "calculated to obtain the cost of capital improvements for the
25 projected need for available system capacity for future users." (ORS 223.304(2)(b).) Yet the
26 City admits that its new method for calculating improvement fees "is not based" on "the

1 project list" of capital increasing projects needed for growth. The SDC Act envisions that the
2 City will prepare a detailed list of capital projects and then impose improvement fees to fund
3 those specific projects. Here, the City has, by its own admission, taken the exact opposite
4 approach. The City has designed its fee to raise a large pool of money that "is not based" on
5 capital projects. This approach violates the plain terms of the SDC Act.

6 Close analysis of the numbers included in the 20 Year Wish List demonstrates
7 how aggressively the City tries to create an unallocated pool of improvement fees. The City
8 states in the 20 Year Wish List that capital projects "to be undertaken in the 1-5 year
9 timeframe are identified in the Parks Adopted Budget." It also includes summaries of
10 "capital improvements" for the "FY2020-25" and "FY2026-35" periods, which have not been
11 a part of a budgeting process.

12 The "capital improvements" the City intends to pay for with improvement fees
13 explode starting in 2020. As an example, the "Total Park SDC Eligible City-Wide Capital
14 Increasing Projects" from 2015 to 2019 is \$18,932,574 or approximately \$4.75 million per
15 year. In stark contrast, the City estimates \$268,145,709 of "Total Park SDC Eligible City-
16 Wide Capital Increasing Projects" projects for 2020 through 2025, or approximately \$53
17 million per year. The City provides no explanation for this approximately eleven-fold
18 increase starting in 2020. It appears the City prepared a set of bloated numbers, which have
19 no connection to any actual capital improvement plan, to pay for "unidentified" capital
20 improvements in order to fill its coffers with improvement fee revenues. This is contrary to
21 the requirements of the SDC Act, which allows improvement fees to be charged only as
22 needed to fund specific, identified projects.

23 The City also suggests that line items in the Parks Budget and the 20 Year
24 Wish List can be compared. The City's apparent purpose in making this argument is to
25 suggest that the necessary detail for its deficient capital improvement plan can be found
26 somewhere else. Even if this approach satisfied the terms of the SDC Act, which it does not,

1 the City's argument has no factual basis. Given the complete lack of specificity in the 20
2 Year Wish List, it is impossible to responsibly compare it to the parks budget. Where
3 comparison is possible, however, there is more evidence of the City padding the 20 Year
4 Wish List to support charging excessive Parks SDCs. For example, the budgeted amount for
5 non-central city land acquisitions is \$500,000 for the 2018-2019 fiscal year, but the
6 comparable figure in the 20 Year Wish List is \$3,203,809. The statute requires specificity to
7 avoid this very issue: making up numbers to support overcharging for projects that don't
8 even exist.

9 There is a remarkable footnote to the City's failure to create an adequate
10 capital improvement plan. When it passed Ordinance 187150, the City amended Chapter 17
11 of the City Code, which governs Parks SDCs. Previously, Chapter 17 tracked the language
12 of the SDC Act, requiring a "specific list of projects, identified in the Parks and Recreation
13 SDC [Capital Improvement Plan] to be funded with money collected under this Chapter * * *
14 ." (Ordinance 187150, Ex. B, pgs. 1-2.) But in connection with the passage of Ordinance
15 187150, the City amended Chapter 17 to remove any reference to a specific "list of projects *
16 * * to be funded" with Parks SDCs. (*Id.*) Instead of creating a plan that complied with its
17 rules, the City changed its rules. But of course the City cannot change the SDC Act, which is
18 a state statute. The City's failure to create an adequate plan violates state law, regardless of
19 the its to its rules.

20 **C. The City's Level of Service Standard Is Not Supported by Substantial**
21 **Evidence**

22 The City also makes unsupported and unsupportable conclusions regarding
23 the current level of park service. As noted above, the City's new SDC methodology attempts
24 to (1) place a dollar value on existing park assets and then (2) charge an equivalent value to
25 new construction. As part of this analysis, the City reaches the remarkable conclusion that

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1 there "is no existing unused capacity [in the existing park system], nor is there any existing
2 deficiency." (Ordinance 187150, Ex. A., pg. 9.)

3 The apparent purpose of the City's conclusion is to push the majority of the
4 costs of park development on to new construction, based on the assertion that as of the
5 passage of the Ordinance, everything was perfect.⁶ After all, if the Parks system is truly in
6 perfect balance at this moment – with no deficiencies and no capacity – then it follows that
7 each new resident and each new building will necessarily upset this equilibrium and create
8 some new deficiency. This is the City's justification for its decision to fund the majority of
9 new Parks projects through SDCs imposed on new construction.

10 The City's assertion that the Parks system is in perfect balance represents an
11 abrupt change of direction. Until the moment it passed Ordinance 187150, the City has
12 consistently reported that there were significant deficiencies in existing Park capacity. The
13 City's new conclusion—that Portland has exactly the right amount and kind of Parks—is
14 contradicted by numerous of the City's own statements.

15 Chapter 17 of the City Code, as amended by Ordinance 187150, includes a
16 reference to the Parks 2020 Vision. (Ordinance 187150, Ex. B, pgs. 1-2.) In the Parks 2020
17 Vision, which was adopted pursuant to Ordinance 175774, the City recognizes time and
18 again the park system's deficiencies. The City states that the "challenge for our time is that
19 most residents think that our park system is in good shape, when in fact every area is
20 underserved in basic ways." (Parks 2020 Vision, pg. 3.)⁷ The City also says that "every
21 sector of the city has at least one parkland deficiency," "all areas of the city lack some park

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24 ⁶ The City may claim that the funds from the 2014 bond measure will make the current park system perfect. If
25 it makes this argument, the City will have to contradict itself again. The City recognizes in Ordinance 187150
26 and in its adopted budget that the bond funds will be used for deferred maintenance, not to eliminate the
system's many other deficiencies. Moreover, the funding from the bond measure is only sufficient to pay for a
small portion of the maintenance needed over the next ten years.

⁷ See **Exhibit 3**.

1 services now," and "more areas of the city will be underserved in the future." (Parks 2020
2 Vision, pgs. 13, 27.)

3 The City made similar statements when it passed its current budget. In the
4 2015 budget, the City stated that "there are parts of Portland where families and residents do
5 not have ready access to parks, recreation facilities, or open space." (Portland Parks,
6 Recreation, and Cultural Service Area 2015-2016 Budget, pg. 22.)⁸ Again, in its current
7 budget, the City recognized that it has existing park deficiencies.

8 The City relies on the fiction that the current park system is perfect for
9 multiple reasons. First, if there is no unused capacity, then the City can avoid the
10 complications of trying to charge both a reimbursement fee and improvement fee.

11 Second, if the park system does not have any deficiencies, the City will have
12 more latitude in spending the new pool of funds it is trying to create. The City understands
13 that "SDC funds cannot be used to correct existing parkland deficiencies." (Parks 2020
14 Vision, pg. 19.) But if there are no deficiencies, then apparently the City believes it can
15 spend SDC funds without restriction.

16 Third, the City's fiction supports its changed methodology for calculating the
17 new improvement fee. Since 1998, the City has assessed its improvement fees by calculating
18 the number of acres of parks needed per person. As the population increased, the City
19 collected fee revenues to purchase more parks. As new parks were acquired, the number of
20 acres of park per person moved back to the desired level.

21 But under its new methodology, the City purports to charge each new resident
22 the "current investment per person in park land and improvements." (Ordinance 187150, Ex.
23 A., App'x A.) The City's new methodology only works if the current residents, "investment"
24 in the parks system is perfect, with no excess and no deficiencies. It is not. The City's
25 fiction that there "is no existing unused capacity, nor is there any existing deficiency" is not

26 ⁸ See Exhibit 4.

1 supported by any evidence. (Ordinance 187150, Ex. A., pg. 9.) Indeed, all of the evidence in
2 the record, including evidence created by and relied upon by the City, contradicts this self-
3 serving fiction.

4 **D. The City's Investment Per Person Calculation Is Not Supported by**
5 **Substantial Evidence**

6 To support its new methodology, the City purports to calculate "current
7 investment per person in park land and improvements." (Ordinance 187150, Ex. A., App.
8 A.) The City's investment "calculation" is based on three numbers—none of which the City
9 included in the record.

10 First, the "values of park land in this study are based on the average per acre
11 Real Market Value of all tax parcels in Portland from Multnomah County's tax assessment
12 data base." (Ordinance 187150, Ex. A., pg. 20.) Second, the "value of habitat and natural
13 areas and trailways are the average of Portland's purchases of such land in the years 2007-
14 2013." (*Id.*) Finally, the "values of improvements are based on the replacement value of
15 each type of recreational facility." Examples of different types of recreational facilities
16 included are "Ball Fields," "Dock Ramps," "Furnishings," and "Horse Shoe Pits." The City
17 calculates a total investment of \$3,540,158,806.00 based on undisclosed math in reliance on
18 undisclosed numbers. (*See id.*)

19 The City purposefully inflates the actual investment by current residents in its
20 calculation. Here are just three examples of the flaws in the City's investment calculations.
21 First, the City's calculation suggests that current residents invested several hundred million
22 dollars to purchase Forest Park. (*See id.*) This is not true. Forest Park was largely obtained
23 at a nominal cost based on gifts and on the City's foreclosure of tax liens. Second, the City's
24 investment calculation ignores the fact that public and private contributions underwrote the
25 acquisition and development of other significant park assets, including Waterfront Park, the
26 Eastside Esplanade, the Springwater Trail, and Washington Park. Third, the City values

1 parks as if they are routinely sold. They are not. There is no evidence in the record to
2 support a conclusion that parks have the same value as the "average per acre Real Market
3 Value of all tax parcels." The City claims to be requiring future residents to make the same
4 investment in parks as current residents, but the City's investment calculation drastically
5 inflates current residents' actual investment.

6 Beyond the significant problems noted above, the City's inclusion of "open
7 spaces" (*i.e.*, habitat and natural area lands) in the Parks asset base is inappropriate. Under
8 ORS 223.304(2) and 223.299(1)(a)(E), improvement fees may be used only for capital
9 improvements for facilities or assets for "Parks and recreation." State land use, tax, and other
10 laws and regulations treat "open space" and "wildlife habitat" differently from "Parks and
11 recreation" facilities. *See Home Builders Ass'n. of Metro. Portland v. City of West Linn*, 204
12 Or App 655, 670-71, 131 P3d 805 (2006). "Open space" is a broader term than "Parks and
13 recreation facilities," yet the City attempts to conflate them for purposes of increasing the
14 estimated replacement value of the existing park inventory. Properly excluding the amounts
15 attributable to open space reduces the City's valuation by \$477,939,830. There is no
16 evidence in the record to justify the City's approach to include these amounts in its
17 calculation.

18 **E. The City's Population Projections Are Not Supported By Any Evidence**

19 As part of the 2015 Methodology Report, the City projected population
20 increases for Portland for 2013-2035. (Ordinance 187150, Ex. A., pg. 4.) The City's
21 population projections are crucial to its projections of the effect of the new Parks SDC. This
22 is because the rate of population growth is a factor in the City's proposed new methodology
23 for calculating Level of Service. As with the calculations of Park value, the City's
24 conclusions about future population growth are not supported by evidence. If anything, the
25 error is more telling with respect to population, because the City actually refers to evidence
26 regarding population growth, and then distorts it.

1 As noted above, the City proposes to change its current method of calculating
2 Level of Service by assigning a dollar value to existing park assets and dividing that value by
3 existing population. (Ordinance 187150, Ex. A., pg. 10.) The result is a "dollar per person"
4 investment in the existing park system. The City then proposes to collect the equivalent
5 dollar value from new residents, through improvement fees, regardless of Parks capital
6 improvements actually needed for growth. (*Id.*)

7 There are a number of significant problems with this proposed new
8 methodology, as discussed above. As an initial point, however, this new methodology places
9 great importance on the City's projections of population growth. The City's projection of the
10 financial impact of the new improvement fees is based on the projected population increase.
11 This is because the City has calculated the total amount projected to be raised by the new
12 improvement fees through calculations that include multiplying the projected population
13 growth by the dollar value it has assigned to the current Parks assets.

14 The projected dollar figure that results from this calculation in turn affects the
15 Parks capital improvement plan. As noted above, the City was required to create a plan that
16 lists the capital improvement projects on which it will spend the "improvement fees" raised
17 by the new improvement fees. Based on its estimates of increased population, the City
18 claims that the new improvement fees will raise approximately \$552 million over 20 years.
19 This \$552 million figure is then used as the basis for the City's deficient capital improvement
20 plan.

21 Under the City's new methodology, a higher population growth projection
22 results in a higher projection of dollars raised by improvement fees. In turn, this leads to a
23 higher estimated financial impact of the Parks SDCs, and to a larger estimated pool of funds
24 available to the City. By lowering the projected population growth, on the other hand, the
25 City can create the appearance that the Parks SDCs will have less of a financial impact and
26 generate less cash for the City.

1 That is exactly what the City has done here. The only evidence of projected
2 population growth in the record is a reference in the City's Methodology Report to population
3 growth estimates set by Metro in its 2014 Urban Growth Report. (Ordinance 187150, Ex. A.,
4 pg. 4.) The City does not include Metro's Urban Growth Report itself in the record.

5 Remarkably, however, the City does not follow Metro's population
6 projections. Instead, the City states that its "SDC methodology reduces the 2035 projections
7 so that the increase from 2013 to 2035 is half the increase in Metro's estimates." (Ordinance
8 187150, Ex. A, pg. 4) (emphasis added.) The City does not justify this departure from
9 Metro's projections with any evidence or analysis. Nowhere in the record does the City
10 suggest that Metro's population growth estimates are inaccurate, let alone provide evidence to
11 support such a suggestion.

12 In fact, the City has not cut Metro's population estimates "in half." Although
13 the City did not make the Metro Report part of the record, Metro's population projections are
14 available online at Metro's website. (*See* Population for Housing Forecasts for 2035 by City
15 and County, pg. 2.)⁹ Metro's actual projected 2010-2035 population growth for Portland is
16 205,594. The City does not use this estimate. Instead, the City substitutes its own population
17 growth estimate of 99,452. (Ordinance 187150, Ex. A, pg. 5.) This is a reduction of Metro's
18 estimate by 51.63%, not by half. The importance of this highly specific alteration is
19 discussed below. But to summarize, the City says that it based its population growth
20 estimate on the Metro study, but reduced Metro's estimate by 51.63% without evidence or
21 explanation. There is no evidence in the record to support an estimate that Portland's
22 population will grow by 99,452 by 2035.

23 The City bases its conclusions regarding the projected financial impact of the
24 new improvement fees on its unsupported population estimate. To be clear, there is
25 absolutely no evidence in the record to support the finding that the City's population will

26 ⁹ *See* Exhibit 5.

1 | grow by 99,452 by 2035, and not by 205,594 as Metro predicts. The only evidence that the
2 | City even refers to regarding projected population growth is the Metro Urban Growth Report,
3 | which projects more than twice the City's projected level of population growth.

4 | This is not a trivial issue. As noted above, the City's financial projections in
5 | connection with the new SDCs are derived from the City's population growth estimates. Had
6 | the City used Metro's actual population projections, the projected financial impact of the
7 | Parks SDCs would be approximately twice as high. Simply put, the only evidence in the
8 | record is that the new SDCs will raise twice the money, and cost twice as much, as the City
9 | claims.

10 | Notably, the City only reveals that it is reducing Metro's population estimates
11 | in a single sentence buried in the text of the 2015 Methodology Report. But in the text of
12 | Ordinance 187150 itself, the City hides the ball, claiming: "The Metro population and
13 | employment data for the City of Portland projects population growth of about 99,000 by the
14 | year 2035 * * *." (Ordinance 187150, pg. 3.) This plainly misstates the conclusion in the
15 | Urban Growth Study, in which Metro projected population growth of 205,594 – not 99,000 –
16 | by 2035.

17 | The City's only attempt to justify its departure from the Metro population
18 | study is its statement that it wished to be "conservative." (Ordinance 187150, Ex. A., pg. 4.)
19 | This statement does not accurately reflect the City's choice to reduce Metro's projections. It
20 | is not "conservative" to substitute invented population estimates for the Metro study. It is not
21 | "conservative" to understate the projected financial impact of the new improvement fees by
22 | half. It is not conservative to mislead the public about the actual impact of new improvement
23 | fees.

24 | There is a remarkable footnote to this issue, too. Just last week, the City's
25 | Bureau of Planning and Sustainability released its draft Comprehensive Plan Update –
26 | Citywide Systems Plan. This is a coordinated, 20-year attempt to project and address the

1 increasing demands on Portland's infrastructure created by the City's projected growth. As
2 part of the draft Plan, the City's own Bureau of Planning and Sustainability estimates that
3 Portland's population will grow by 260,000 by 2035¹⁰. This estimate is even higher than
4 Metro's growth estimate, and more than 250% higher than the City's unsupported estimate
5 used for these Parks SDCs. If the City had used its own, actual number, it would have
6 projected Park SDCs revenues of approximately \$62.5 million per year. Instead, it made up a
7 different population number to form a conclusion that Park SDC revenues will be
8 approximately \$27.6 million per year under the new methodology. This underscores the
9 plain truth that the City simply made up a population estimate that fit its narrative for
10 Ordinance 187150. There is no support for the population estimate set forth in Ordinance
11 187150 and the Methodology Report, which deviates wildly from responsible estimates
12 prepared by Metro and the City's planning Bureau.

13 **F. The City's Financial Impact Statement is not Supported by Substantial**
14 **Evidence**

15 Because the City's population estimates are not supported by evidence, it
16 follows that the financial projections based on the City's estimates are also unsupported by
17 evidence.

18 In connection with the passage of Ordinance 187150, the City prepared a
19 Financial Impact Statement. (Impact Statement for Requested Council Action (Dec. 2014
20 Version).)¹¹ Using its artificially reduced population estimate, the City concludes that the
21 new improvement fees will have essentially no additional financial impact as compared to
22 the existing fees. In its Financial Impact Statement, the City states that its existing fees are
23 projected to generate \$27.7 million per year, and projects that the new fees will raise just
24 slightly less, approximately \$27.6 million per year. (*Id.*) This conclusion is puzzling on its

25 _____
26 ¹⁰ See Draft Citywide Systems Plan at 4, available at www.portlandoregon.gov/bps/pdxcompplan

¹¹ See **Exhibit 6**.

1 face, since even the City concedes that the new fees are higher than the current fees virtually
2 across the board. Nevertheless, the City projects that these higher fees will generate slightly
3 lower annual revenue.

4 This projection, however, is directly derived from the City's population
5 growth estimate which, as noted, is less than half the Metro estimate. If the Court were to
6 substitute the actual Metro estimate for the City's unsupported reduction, the financial impact
7 of the new SDCs would be more than \$50 million annually, not \$27.6 million. This would
8 result in a 20-year estimate of fees raised by the new improvement fees of appropriately \$1
9 billion, not \$552 million as the City claims. Simply put, because the City's estimate of
10 financial impact is based on its estimates of population growth, the lack of evidence for the
11 population estimate carries over to the estimate of financial impact. There is no evidence to
12 support the population estimate, and therefore there is no evidence to support the financial
13 impact estimate either. The effect of reducing Metro's population growth estimate is to
14 misstate the true estimated financial impact of the new improvement fees.

15 In this respect, the City's methodology appears particularly cynical. Recall
16 that the City did not in fact reduce the Metro population estimate "by half," as it claims, but
17 by 51.63%. This is exactly the reduction necessary to make the new financial impact
18 estimate (\$27.6 million annually) just slightly lower than the current projected financial
19 impact (\$27.7 million). If in fact the City had reduced Metro's estimate "by half," the new
20 SDCs would appear to generate slightly higher fees (though not the massively higher fees
21 shown if the actual Metro estimates are used). So instead, the City tweaked Metro's numbers
22 until it hit the desired 51.63% reduction, and then announced that the new improvement fees
23 would somehow raise less money than the current fees, despite being higher almost across
24 the board. It is hard to imagine that the City accidentally chose to reduce the Metro population
25 estimate to exactly the decimal necessary to support a finding that the new improvement fees
26 will have no financial impact. This suggests that the City was willing to ignore or rewrite

1 evidence to disguise the plain fact that the new fees project to raise twice as much money as
2 the current fees. But the City does not have carte blanche to invent financial projections that
3 dovetail with its policy goals. Its factual findings must be supported by substantial evidence.
4 There is no evidence in the record to justify the City's projections of financial impact.

5 One additional point: When the real financial impact of the new improvement
6 fees is calculated, the inadequacy of the City's capital improvement plan is further exposed.
7 If the population estimates are not manipulated, the estimated improvement fee revenue for
8 the 20-year period skyrockets to approximately \$1 billion. But the City's capital
9 improvement plan is based on projected revenue of \$552 million. Even with that artificially
10 reduced revenue estimate, the Plan is woefully lacking in detail. But the Plan does not even
11 hint how the City would spend \$1 billion. Even the City's "20 Year Wish List" only includes
12 \$893,675,267 of "eligible capacity increasing projects." In other words, the City has not
13 even dreamed up enough new projects to pay for with the estimated improvement fees that
14 Ordinance 187150 should generate. (Even when the city defines "projects" to include entries
15 like "Linnton" and "Unidentified Central City Project") This plainly shows that the real
16 effect of the new improvement fees would be to create a slush fund, a pool of unallocated
17 cash unrelated to real capital improvement projects.

18 **G. The City's Capital Improvement Plan Includes Unauthorized Charges for**
19 **Costs of Passive Open Space and Habitat Restoration**

20 Improvement fees may only be used for costs associated with facilities "to be
21 constructed" in association with Parks. ORS 223.299(2). This statute defines "improvement
22 fee" as "a fee for costs associated with capital improvements to be constructed." (ORS
23 223.299(2).) This may include site costs, but only if those costs are "associated" the
24 proposed construction of capital improvements.

25 Acquisitions of land for watersheds, riparian zones, wildlife corridors, or
26 passive open space unconnected with "capital improvements to be constructed" are not

1 permissible SDC costs. Such costs may only be included in SDCs if there is substantial
2 evidence in the record that links such open spaces with specific Parks and recreation facilities
3 that will be constructed pursuant to the new SDCs.

4 Here, the Adopted Plan does not specify how any of the new improvement fee
5 funds will be spent, as noted above. However, the City does state that it intends to spend
6 significant funds on open spaces. The 20 year Wish List includes – without specificity –
7 \$34,966,257 for "natural area acquisition and restoration." Unless there is substantial
8 evidence linking those proposed expenditures with "capital improvements to be constructed,"
9 the expenditures are not permitted under ORS 223.299(2).

10 There is no detail as to how the city proposes to spend this \$34,966,257.
11 Accordingly, there is no detail establishing one way or the other whether the proposed
12 expenditures for "natural area acquisition and restoration" would have a sufficient nexus with
13 "capital improvements to be constructed." The record is silent on the question. There is no
14 way to determine on this record whether costs associated with these unspecified projects are
15 permitted under ORS 223.299(2).

16 This issue was litigated in a 2002 legal challenge brought by the Home
17 Builders Association of Metropolitan Portland against the City of West Linn. In his ruling,
18 Clackamas County Circuit Judge John Lowe agreed that "open space" is broader than the
19 term "Parks and recreation facilities," and that some types of open spaces do not qualify as
20 Parks and recreations facilities eligible for inclusion in SDCs. On remand, the City of West
21 Linn agreed that it had erroneously included in its inventory of "park facilities" open spaces
22 that did not qualify for SDC funding. Based on this conclusion, the City reduced its SDC.
23 *See Home Builders Ass'n. of Metro. Portland v. City of West Linn*, 204 Or App 655, 670-71,
24 131 P3d 805 (2006). In the same vein, there is no evidence in this record supporting the
25 City's apparent conclusion that the "natural area acquisition and restoration" projects
26 identified in the 20 Year Wish List are appropriate for inclusion in these SDCs. Accordingly,

1 the Court should remand to address this lack of evidence or remove these items from the
2 SDCs.

3 **H. The City's SDCs Inappropriately Link Square Footage to Park Use**

4 The City's new improvement fees propose to charge higher fees based on the
5 square footage of new construction. (Ordinance 187150, Ex. A., pg. 15.) This is a departure
6 from the existing practice, which charges uniform fees for single family and multifamily
7 construction. The record contains no evidence even attempting to link square footage of new
8 construction to use of park facilities. To date, no other jurisdiction in Oregon has attempted
9 to impose higher improvement fees on larger homes.

10 In the absence of any evidence demonstrating that people who live in larger
11 homes make greater use of park facilities, there is nothing in the record to support this
12 finding. It is at least equally logical to propose that new residents who live in smaller homes
13 on smaller lots will make greater use of park facilities than their neighbors who have larger
14 lots and yards. Because there is no evidence in the record regarding any relationship between
15 use of park facilities and size of residential construction, the City's finding on this point, and
16 the differential charges that the City has adopted, are not supported by substantial evidence.

17 The real purpose of this differential treatment is to penalize construction of
18 homes over 2,250 square feet. Comments in the record praise the City for using the SDC
19 process to create a disincentive for construction of larger homes. (*See, e.g.*, Testimony of
20 Terry Parker Apr. 15, 2015.)¹² Reasonable parties may debate whether this is good public
21 policy. But it has nothing to do with the permissible purposes for SDC improvement fees.
22 They are intended as means to finance capital projects, not as tools to prioritize one type of
23 home construction over another.

24 Simply put, there is no evidence in the record to support these differential
25 improvement fees. If the City believes it is too difficult to gather such evidence, then the

26 ¹² See Exhibit 7.

1 answer is to continue with the existing system of uniform fees. It is not appropriate to make
2 such significant decisions without evidence, as the City has done here.

3 **I. The New Improvement Fees Will Make Homes Less Affordable**

4 At virtually every level of development, the Parks SDCs will impose large
5 additional costs on new construction. (*See* Letter from Justin Wood to Comm'r Fritz, March
6 26, 2015, pg. 2 *and cf.* Ordinance 187150, Ex. A., pg. 15-16.) These significant increases
7 come at a time when housing is scarce and many vulnerable residents lack sufficient housing
8 options. Indeed, on October 5 the City just declared a "State of Emergency" in housing
9 citywide.

10 Experts retained by the Home Builders Association of Metropolitan Portland
11 reviewed the effect of the new improvement fees on new construction, based on the City's
12 permit data for 2014. (*See* Letter of David Nielsen on behalf of Home Builders Assoc., May
13 5, 2015.)¹³ Their analysis showed:

- 14 • Citywide, Multi-Family residential would have paid over 31% higher
15 improvement fees based on the proposed rates. That includes a 17%
16 increase for the Central City and a 47% increase in the non-central
17 City. All Multi-Family units in the non-central City would have an
18 increase, including the smallest units. The average increase would
19 have been over \$1,700.
- 20 • Citywide, Single-Family residential would have paid over 42% higher
21 improvement fees based on the proposed rates. 99% of all Single-
22 Family was built in the non-central City. The average increase would
23 have been over \$3,500.
- 24 • Overall, Single-Family and Multi-Family combined, over 83% of all
25 new residential units would have seen an increased improvement fees.

26 ¹³ *See* Exhibit 9.

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Every new Single-Family residential units would have seen an increase.

- The National Association of Home Builders calculates how many median family income homebuyers in each major metropolitan market are priced out of being able to afford a median-priced home with every \$1,000 increase in home price. Based on their analysis of the Portland Metro market, and the average fee increases shown above, these increases will prevent more than 4,100 homebuyers/families from being able to afford a home.
- The new improvement fees are said to encourage smaller units, including ADUs, by creating a new sub 700 sq. ft. category. However, this new category has fees that are actually higher than the previous fees for ADUs. In addition, almost 50% of fees permitted in 2014 were in the 700-1200 sq. ft. category. These would see an 85% increase in fees. Overall, ADUs permitted in the City would see a 54% increase in fees on average, so this methodology does nothing to increase affordability of smaller units. In fact, given that the City has waived improvement fees the last few years for ADUs, the bottom line is that ADUs will now have a huge increase in fees. This will not encourage smaller development.

The new SDCs will also impose even greater increases on non-residential construction. The evidence in the record shows that the improvement fees for non-residential construction will increase by more than 300% from their present level. (*See Letter from Kelly Ross, NAIOP, to Mayor Hales, April 15, 2015, and compare Ordinance 187150, Ex. A, pg. 17-19.*)

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enormous sum of money will be spent. This is unacceptable and unlawful. For the reasons discussed above, this Court should annul or reverse the City's adoption of Ordinance 187150.

Dated this 9th day of October, 2015.

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