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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**

PETITION FOR WRIT OF REVIEW

Oral Argument Requested

ORS 21.135(1),(2)(h)

Petition for Writ of Review

1.

Pursuant to ORS 34.030, Plaintiffs petition this Court to review the City of
Portland's approval of Ordinance No. 187150 as Amended ("Ordinance 187150").¹
Ordinance 187150 relates to the City of Portland's modification of how it calculates Portland

¹ A true copy of Ordinance 187150 is attached as **Exhibit 1** to this Petition.

1 Parks and Recreation ("Parks") system development charges ("SDCs" or "improvement
2 fees"). When it adopted Ordinance 187150, the City of Portland (the "City") failed to follow
3 the applicable procedure, made multiple findings that are not supported by substantial
4 evidence, and misconstrued applicable law. (ORS 34.040.) Plaintiffs request that this Court
5 annul or reverse the City's adoption of Ordinance 187150. (ORS 34.100.)

6 Introduction

7 2.

8 On May 27, 2015, the City adopted Ordinance 187150. The ordinance
9 imposes new improvement fees on virtually all new construction in the City. The new fees
10 are substantially higher than the existing fees almost across the board. They will impose
11 significant new costs on almost every new home and apartment constructed in Portland, at a
12 time when housing prices are already unaffordable for many in our community. They will
13 also significantly raise costs for non-residential construction.

14 3.

15 The City has the right to assess fees and SDCs on its citizens. This is a
16 powerful right that is carefully guarded by checks and balances. This petition is about the
17 City's attempt to side-step these rules and procedures to create an enormous "slush fund" for
18 use by the City for its Parks system. For years, the City has responsibly charged
19 improvement fees on new construction projects to help pay for additional burdens placed on
20 Parks due to population growth. Ordinance 187150 dramatically changes the methodology
21 for calculating improvement fees. These new fees will generate projected annual revenues
22 exceeding \$50 million, approximately twice the fees generated under the current
23 methodology.

24 4.

25 The City hides this fact by manipulating data and making self-serving
26 assumptions that are wholly unsupported by evidence. The City characterizes its conduct as

1 "conservative." In fact, Ordinance 187150 is the opposite of conservative—it is a money-
2 grab. Worse, the City does not even identify how it intends to spend this windfall of funds,
3 as is required under Oregon law.

4 **5.**

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

- 8 • The City failed to prepare a Capital Improvement Plan. The City was
9 required to prepare a Capital Improvement Plan providing specific
10 details about capital improvement projects that would be funded by
11 improvement fees. No legally sufficient plan was prepared.
- 12 • The City's conclusion about the "level of service" of the Parks is not
13 supported by substantial evidence. The new improvement fee
14 calculation is premised on an assumption that the City has attained the
15 exact and perfect amount of parks. This assumption contradicts
16 numerous reports previously prepared and relied upon by the City, and
17 there is no evidence in the record supporting it.
- 18 • The City's conclusion about the "replacement cost" of Portland's parks
19 is not supported by substantial evidence. The new improvement fee
20 calculation includes a determination of the "replacement cost" for the
21 Parks. This figure is based on the misguided and unsupported
22 assumption that all Parks are in "new condition," and improperly
23 ignores the historical cost of many parks.
- 24 • The City's conclusion about population growth is not supported by
25 substantial evidence. The new improvement fee calculation includes
26 assumptions about expected population growth. There is no evidence

1 in the record to support the City's estimated population growth rates.
2 The City borrows a growth rate from Metro's 2014 Urban Growth
3 Report, which is not in the record. Then, under the guise of being
4 "conservative," the City discounts Metro's projected growth rate by
5 more than 50 percent. The consequence of this "conservative"
6 reduction is to decrease the expected annual fees generated by the new
7 calculation from over \$50 million to \$27.6 million. There is no
8 evidence in the record to support the City's "discount" in the
9 population growth rate.

- 10 • The City's Financial Impact Statement, which is the vehicle the City
11 uses to explain the cost of the new ordinance to its citizens, is not
12 supported by substantial evidence. The Financial Impact Statement,
13 using the new improvement fee calculation, announces an impact of
14 \$27.6 million annually. This sum is based on the City's decreased
15 population growth rate assumption, which is not supported by
16 substantial evidence. Because there is no substantial evidence to
17 support the population estimate, there is necessarily no evidence to
18 support the Financial Impact Statement. Indeed, if the population
19 growth rate announced in the 2014 Urban Growth Report is reasonably
20 accurate, the Financial Impact Statement should announce an annual
21 cost of over \$50 million.
- 22 • The City's new calculation for improvement fees includes charges that
23 are not associated with proposed capital improvements. Such charges
24 are not permissible.
- 25 • The City's assumption that there is a relationship between square
26 footage of housing and use of Parks is not supported by substantial

1 evidence. The City's new improvement fee methodology is based on
2 an assumption that families living in larger homes make greater use of
3 Parks. There is no evidence in the record to support this assumption,
4 which is intuitively misguided.

5 **6.**

6 Plaintiffs respect the City and firmly support the collection of improvement
7 fees to help fund capital improvements needed for parks as the City's population grows.
8 Plaintiffs also firmly believe that these fees must be fairly and reasonably calculated and
9 allocated. This occurs when the City follows the rules, which provide important checks and
10 balances on the City's authority. Here, if the City's intention is to tax its citizens to raise over
11 \$50 million annually, then the City should announce this intention and follow the proper
12 procedures. The City should not be permitted to ignore procedures and manufacture
13 calculations with self-serving assumptions that are not based on any evidence.

14 **Background**

15 **7.**

16 Plaintiffs are the Portland Metropolitan Association of Realtors, Home
17 Builders Association of Metropolitan Portland, Building Owners and Managers Association
18 of Oregon, NAIOP Oregon Chapter, Portland Business Alliance, Commercial Association of
19 Brokers of Oregon/Southwest Washington, and Oregon Association of Realtors. Plaintiffs'
20 and their members' substantial interests have and will be injured by the City's adoption of
21 Ordinance 187150. Before filing this Petition, Plaintiffs contested the City's adoption of
22 Ordinance 187150 in writing and at public hearings held on April 15 and May 27, 2015.

23 **8.**

24 In 1998, the City established a Parks SDC and adopted City Code Chapter
25 17.13, creating a methodology for calculating SDCs. (Ordinance 187150, pg. 1.) The City
26 updated its methodology for calculating Parks SDCs in 2005 and 2008. (Ordinance, pg. 1.)

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9.

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

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10.

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

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11.

In support of its new methodology, the City concludes that the replacement value of the City's current park lands and improvements is \$3,540,158,806.00. The City sets

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.

³ A true copy is attached as **Exhibit 8**.

⁴ A true copy is attached as **Exhibit 10**.

1 | forth its \$3.5 plus billion estimate on two pages in Appendix A of the 2015 Methodology
2 | Report. (Ordinance 187150, Ex. A., pg. 20-21.) The purported evidence supporting this
3 | enormous number is not in the record.

4 | **12.**

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

11 | **13.**

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 | **14.**

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

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1 **Legal Arguments**

2 **Writ of Review Procedure**

3 **15.**

4 An interested party may challenge an ordinance that adopts or modifies an
5 SDC by petition for a Writ of Review as set forth in ORS 34.010 *et seq.* A writ of review is
6 the only means by which this ordinance may be challenged. (ORS 223.302(3)(a).)

7 **16.**

8 The "writ shall be allowed" if—when it adopted Ordinance 187150—the City
9 (1) failed to follow the applicable procedure, (2) made a finding or order not supported by
10 substantial evidence in the whole record, or (3) improperly construed the applicable law.
11 (ORS 34.040(1).) The City's findings in connection with the new improvement fees must be
12 supported by substantial evidence in the record. (ORS 34.040(c).) "Substantial evidence in
13 record' exists * * * when 'the record, viewed as a whole, would permit a reasonable person to
14 make that finding.'" (*Johnson v. Civil Serv. Bd.*, 161 Or App 489, 500, 986 P2d 854 (1999)
15 (quoting ORS 183.482(8)(c)).) Here, the City failed on all accounts.

16 **SDCs Are One-Time Fees for Capital Improvements, Not Taxes**

17 **17.**

18 In 1989, the Oregon legislature passed the Oregon Systems Development Act
19 (the "Act"). (Ordinance 187150, Ex. A, pg. 2.) The Act's "purpose * * * is to provide a
20 uniform framework for the imposition of system development charges [SDCs] by local
21 governments, to provide equitable funding for orderly growth and development in Oregon's
22 communities and to establish that the charges may be used only for capital improvements."
23 (ORS 223.297.)

1 **18.**

2 SDCs "are one-time fees charged to new development to help pay a portion of
3 the costs associated with building capital facilities to meet needs created by new growth."
4 (Ordinance 187150, Ex. A., pg. 1.)

5 **19.**

6 SDCs come in three varieties. An SDC can be a "reimbursement fee, an
7 improvement fee or a combination thereof assessed or collected at the time of * * * issuance
8 of a development permit, building permit or connection to the capital improvement." (ORS
9 223.299 (4)(a).) "Capital improvements" include facilities or assets used for Parks and
10 recreation. (ORS 223.299(1)(a)(E).)

11 **20.**

12 An "improvement fee," which is one type of SDC, is a "fee for costs
13 associated with capital improvements to be constructed." (ORS 223.299 (2).) A
14 "reimbursement fee" is a "fee for costs associated with capital improvements already
15 constructed, or under construction when the fee is established." (ORS 223.299 (3).) The
16 Parks SDC "is an improvement fee, and does not include any reimbursement fees."
17 (Ordinance 187150, Ex. A., pg. 2) (emphasis added.)

18 **21.**

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

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22.

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

23.

Improvement fees are not taxes or general funding mechanisms. Nor are they for use in operating or maintaining existing facilities. Improvement fees must: "(a) Be established or modified by ordinance or resolution setting forth a methodology that is available for public inspection and demonstrates consideration of: (A) The projected cost of the capital improvements identified in the plan and list adopted pursuant to ORS 223.309 that are needed to increase the capacity of the systems to which the fee is related; and (B) The need for increased capacity in the system to which the fee is related that will be required to serve the demands on the system by future users." (ORS 223.304(2)(a).)

24.

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

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25.

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

26.

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

The City's Capital Improvement Plan Does Not Comply With Applicable Procedure and Is Not Supported by Substantial Evidence

27.

As noted above, before imposing a new improvement fee, the City must prepare a detailed capital improvement plan, including a list of capital projects to be funded by the fee. Here, the City made only a token effort to satisfy its obligations to prepare and submit such a plan. When it approved Ordinance 187150, the City adopted a one-page document called "the Park System Development Charge Capital Improvements Plan." (Ordinance 187150, pg. 5 and 22 (App'x B).) This "plan" is referred to below as "the Adopted Plan."

28.

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

29.

Prior to establishment of a new improvement fee by ordinance, the City is required to prepare a "capital improvement plan * * * or comparable plan." (ORS 223.309(1).) The plan must include "a list of the capital improvements that the [City] intends to fund, in whole or in part, with revenues from an improvement fee." (ORS 223.309(1).) In

1 addition, the City must identify (1) the estimated cost, (2) timing, and (3) percentage of costs
2 eligible to be funded with revenues from the improvement fee for each capital improvement
3 it includes in the list. (ORS 223.309(1).)

4 **The Adopted Plan Is Wholly Inadequate**

5 **30.**

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

11 **31.**

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

23 **32.**

24 At the April 15, 2015, public hearing, interested parties criticized the City for
25 failing to comply with the requirements of ORS 223.309. After the meeting, the City
26

1 inserted into the record the 2015 Park System Development Charge Plan 20-Year Capital
2 Plan (the "20 Year Wish List").⁵ As described below, the 20 Year Wish List does not satisfy
3 the requirements of ORS 223.309 either.

4 **33.**

5 The 20 Year Wish List includes the following statement:

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

13 The project list and capital plan is a "living" document that, per
14 ORS 223.309(2), maybe (sic) modified at anytime (sic). It should be
15 noted that potential modifications to the project list will not impact the fee
16 since the fee is not based on the project list, but rather the level of service
17 established by the adopted Park SDC Methodology.

18 **34.**

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

⁵ A true copy is attached as Exhibit 2.

1 | **35.**

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

11 | **36.**

12 | The City "note[s] that potential modifications to the project list will not
13 | impact the fee since the fee is not based on the project list." But this is directly contrary to
14 | the requirements for improvement fees under the Act. The Act states that improvement fees
15 | "must" be "calculated to obtain the cost of capital improvements for the projected need for
16 | available system capacity for future users." (ORS 223.304(2)(b).) Yet the City admits that
17 | its new method for calculating improvement fees "is not based" on "the project list" of capital
18 | increasing projects needed for growth. The Act envisions that the City will prepare a detailed
19 | list of capital projects and then impose improvement fees to fund those specific projects.
20 | Here, the City has, by its own admission, taken the exact opposite approach. The City has
21 | designed its fee to raise a large pool of money that "is not based" on capital projects. This
22 | approach violates the legal standard for improvement fees.

23 | **37.**

24 | Close analysis of the numbers included in the 20 Year Wish List demonstrates
25 | how aggressively the City tries to create an unallocated pool of improvement fees. The City
26 | states in the 20 Year Wish List that capital projects "to be undertaken in the 1-5 year

1 timeframe are identified in the Parks Adopted Budget." It also includes summaries of
2 "capital improvements" for the "FY2020-25" and "FY2026-35" periods, which have not been
3 a part of a budgeting process.

4 **38.**

5 The "capital improvements" the City intends to pay for with improvement fees
6 explode starting in 2020. As an example, the "Total Park SDC Eligible City-Wide Capital
7 Increasing Projects" from 2015 to 2019 is \$18,932,574 or approximately \$4.75 million per
8 year. In stark contrast, the City estimates \$268,145,709 of "Total Park SDC Eligible City-
9 Wide Capital Increasing Projects" projects for 2020 through 2025, or approximately \$53
10 million per year. The City provides no explanation for this approximately eleven-fold
11 increase starting in 2020. It appears the City prepared a set of bloated numbers, which have
12 no connection to any actual capital improvement plan, to pay for "unidentified" capital
13 improvements in order to fill its coffers with improvement fee revenues.

14 **39.**

15 The City also suggests that line items in the Parks Budget and the 20 Year
16 Wish List can be compared. This is not so. Given the complete lack of specificity in the 20
17 Year Wish List, it is impossible to responsibly compare these two documents. Where
18 comparison is possible, there is more evidence of the City padding the 20 Year Wish List to
19 support charging excessive Parks SDCs. For example, the budgeted amount for non-central
20 city land acquisitions is \$500,000 for the 2018-2019 fiscal year, but the comparable figure in
21 the 20 Year Wish List is \$3,203,809. The statute requires specificity to avoid this very issue:
22 making up numbers to support overcharging for projects that don't even exist.

23 **The City's Level of Service Standard Is Not Supported by Substantial Evidence**

24 **40.**

25 The City also makes unsupported and unsupportable conclusions regarding
26 the current level of park service. As noted above, the City's new SDC methodology attempts

1 to place a dollar value on existing park assets and then charge an equivalent value to new
2 construction. As part of this analysis, the City reaches the remarkable conclusion that there
3 "is no existing unused capacity [in the existing park system], nor is there any existing
4 deficiency." (Ordinance 187150, Ex. A., pg. 9.) The apparent purpose of the City's
5 conclusion is to push all of the costs of park development on to new construction, based on
6 the assertion that as of the passage of the Ordinance, everything was perfect.⁶ After all, if the
7 Parks system is truly in perfect balance at this moment – with no deficiencies and no capacity
8 – then it follows that each new resident and each new building will necessarily upset this
9 equilibrium and create some new deficiency. This is the City's justification for its decision to
10 fund all new Parks projects through SDCs imposed on new construction.

11 **41.**

12 Until the moment it passed Ordinance 187150, the City has consistently
13 reported that there were significant deficiencies in existing Park capacity. The City's new
14 conclusion—that Portland has exactly the right amount and kind of Parks—is contradicted by
15 numerous of the City's own statements.

16 **42.**

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

23
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 A true copy of the relevant excerpts is attached as **Exhibit 3**.

1 | sector of the city has at least one parkland deficiency," "all areas of the city lack some park
2 | services now," and "more areas of the city will be underserved in the future." (Parks 2020
3 | Vision, pgs. 13, 27.)

4 | **43.**

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

10 | **44.**

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

14 | **45.**

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

20 | **46.**

21 | Third, the City's fiction supports its changed methodology for calculating the
22 | new improvement fee. Since 1998, the City has assessed its improvement fee by calculating
23 | the number of acres of parks per person. As the population increased, the City collected fee
24 | revenues to purchase more parks. As new parks were acquired, the number of acres of park
25 | per person moved back to the desired level. Under its new methodology, the City intends to

26 | ⁸ A true copy of the relevant excerpt is attached as **Exhibit 4**.

1 charge each new resident the "current investment per person in park land and improvements."
2 (Ordinance 187150, Ex. A., App'x A.) The City's new methodology only works if the current
3 residents, "investment" in the parks system is perfect. It is not. The City's fiction that there
4 "is no existing unused capacity, nor is there any existing deficiency" is not supported by any
5 evidence. (Ordinance 187150, Ex. A., pg. 9.) Indeed, all of the evidence in the record,
6 including evidence created by and relied upon by the City, contradicts this new, self-serving
7 fiction.

8 **The City's Investment Per Person Calculation Is Not Supported by Substantial**

9 **Evidence**

10 **47.**

11 To support its new methodology, the City purports to calculate "current
12 investment per person in park land and improvements." (Ordinance 187150, Ex. A., App.
13 A.) The City's investment "calculation" is based on three numbers—none of which the City
14 included in the record. First, the "values of park land in this study are based on the average
15 per acre Real Market Value of all tax parcels in Portland from Multnomah County's tax
16 assessment data base." (Ordinance 187150, Ex. A., pg. 20.) Second, the "value of habitat
17 and natural areas and trailways are the average of Portland's purchases of such land in the
18 years 2007-2013." (*Id.*) Finally, the "values of improvements are based on the replacement
19 value of each type of recreational facility." Examples of different types of recreational
20 facilities included are "Ball Fields," "Dock Ramps," "Furnishings," and "Horse Shoe Pits."
21 The City calculates a total investment of \$3,540,158,806.00 based on undisclosed math in
22 reliance on undisclosed numbers. (*See id.*)

23 **48.**

24 The City purposefully inflates the actual investment by current residents in its
25 calculation. Here are just three examples of the flaws in the City's investment calculations.
26 First, the City's calculation suggests that current residents invested several hundred million

1 dollars to purchase Forest Park. (*See id.*) This is not true. Forest Park was largely obtained
2 at a nominal cost based on the City's foreclosure of tax liens. Second, the City's investment
3 calculation ignores the fact that public and private contributions underwrote the acquisition
4 and development of other significant park assets, including Waterfront Park, the Eastside
5 Esplanade, the Springwater Trail, and Washington Park. Third, the City values parks as if
6 they are routinely sold. They are not. There is no evidence in the record to support a
7 conclusion that parks have the same value as the "average per acre Real Market Value of all
8 tax parcels." The City claims to be requiring future residents to make the same investment in
9 parks as current residents, but the City's investment calculation drastically inflates current
10 residents' actual investment.

11 **49.**

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

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53.

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

54.

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

55.

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

56.

Remarkably, however, the City does not follow Metro's population projections. Instead, the City states that its "SDC methodology reduces the 2035 projections so that the increase from 2013 to 2035 is half the increase in Metro's estimates." (Ordinance 187150, Ex. A, pg. 4) (emphasis added.) The City does not justify this departure from Metro's projections with any evidence or analysis. Nowhere in the record does the City

1 suggest that Metro's population growth estimates are inaccurate, let alone provide evidence to
2 support such a suggestion.

3 **57.**

4 In fact, the City has not cut Metro's population estimates "in half." Although
5 the City did not make the Metro Report part of the record, Metro's population projections are
6 available online at Metro's website. (See Population for Housing Forecasts for 2035 by City
7 and County, pg. 2.)⁹ Metro's actual projected 2010-2035 population growth for Portland is
8 205,594. The City does not use this estimate. Instead, the City substitutes its own population
9 growth estimate of 99,452. (Ordinance 187150, Ex. A, pg. 5.) This is a reduction of Metro's
10 estimate by 51.63%, not by half. The importance of this highly specific alteration is
11 discussed below. But to summarize, the City says that it based its population growth
12 estimate on the Metro study, but reduced Metro's estimate by 51.63% without evidence or
13 explanation. There is no evidence in the record to support an estimate that Portland's
14 population will grow by 99,452 by 2035.

15 **58.**

16 The City bases its conclusions regarding the projected financial impact of the
17 new improvement fees on its unsupported population estimate. To be clear, there is
18 absolutely no evidence in the record to support the finding that the City's population will
19 grow by 99,452 by 2035, and not by 205,594 as Metro predicts. The only evidence that the
20 City even refers to regarding projected population growth is the Metro Urban Growth Report,
21 which projects more than twice the City's projected level of population growth.

22 **59.**

23 This is not a trivial issue. As noted above, the City's financial projections in
24 connection with the new SDCs are derived from the City's population growth estimates. Had
25 the City used Metro's actual population projections, the projected financial impact of the

26 ⁹ A true copy is attached as Exhibit 5.

1 Parks SDCs would be approximately twice as high. Simply put, the only evidence in the
2 record is that the new SDCs will raise twice the money, and cost twice as much, as the City
3 claims.

4 **60.**

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

12 **61.**

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

20 **The City's Financial Impact Statement is not Supported by Substantial Evidence**

21 **62.**

22 Because the City's population estimates are not supported by evidence, it
23 follows that the financial projections based on the City's estimates are also unsupported by
24 evidence.

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63.

In connection with the passage of Ordinance 187150, the City prepared a financial Impact Statement. (Impact Statement for Requested Council Action (Dec. 2014 Version).)¹⁰ Using its reduced population estimates, the City concludes that the new improvement fees will have essentially no additional financial impact as compared to the existing fees. In its Financial Impact Statement, the City states that its existing fees are projected to generate \$27.7 million per year, and projects that the new fees will raise just slightly less, approximately \$27.6 million per year. (*Id.*) This conclusion is puzzling on its face, since even the City concedes that the new fees are higher than the current fees virtually across the board. Nevertheless, the City projects that these higher fees will generate slightly lower annual revenue.

64.

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

¹⁰ A true copy is attached as **Exhibit 6**.

1 | **65.**

2 | In this respect, the City's methodology appears particularly cynical. Recall
3 | that the City did not in fact reduce the Metro population estimate "by half," as it claims, but
4 | by 51.63%. This is exactly the reduction necessary to make the new financial impact
5 | estimate (\$27.6 million annually) just slightly lower than the current projected financial
6 | impact (\$27.7 million). If in fact the City had reduced Metro's estimate "by half," the new
7 | SDCs would appear to generate slightly higher fees (though not the massively higher fees
8 | shown if the actual Metro estimates are used). So instead, the City tweaked Metro's numbers
9 | until it hit the desired 51.63% reduction, and then announced that the new improvement fees
10 | would somehow raise less money than the current fees, despite being higher almost across
11 | the board. It is hard to imagine that the City accidentally chose to reduce the Metro population
12 | estimate to exactly the decimal necessary to support a finding that the new improvement fees
13 | will have no financial impact. This suggests that the City was willing to ignore or rewrite
14 | evidence to disguise the plain fact that the new fees project to raise twice as much money as
15 | the current fees. But the City does not have carte blanche to invent financial projections that
16 | dovetail with its policy goals. Its factual findings must be supported by substantial evidence.
17 | There is no evidence in the record to justify the City's projections of financial impact.

18 | **66.**

19 | One additional point. When the real financial impact of the new improvement
20 | fees is calculated, the inadequacy of the City's capital improvement plan is further exposed.
21 | If the population estimates are not manipulated, the estimated improvement fee revenues for
22 | the 20-year period skyrockets to approximately \$1 billion. But the City's capital
23 | improvement plan is based on projected revenue of \$552 million. Even with that artificially
24 | reduced revenue estimate, the Plan is woefully lacking in detail. But the Plan does not even
25 | hint how the City would spend \$1 billion. Even the City's "20 Year Wish List" only includes
26 | \$893,675, 267 of "eligible capacity increasing projects." In other words, the City has not

1 | even dreamed up enough new projects to pay for with the estimated improvement fees that
2 | Ordinance 187150 should generate. This plainly shows that the real effect of the new
3 | improvement fees would be to create a slush fund, a pool of unallocated cash unrelated to
4 | real capital improvement projects.

5 | **The City's Capital Improvement Plan Includes Unauthorized Charges for Costs of**
6 | **Passive Open Space and Habitat Restoration**

7 | **67.**

8 | Improvement fees may only be used for costs associated with facilities "to be
9 | constructed" in association with Parks. ORS 223.299(2). This statute defines "improvement
10 | fee" as "a fee for costs associated with capital improvements to be constructed." (ORS
11 | 223.299(2).) This may include site costs, but only if those costs are "associated" the
12 | proposed construction of capital improvements.

13 | **68.**

14 | Acquisitions of land for watersheds, riparian zones, wildlife corridors, or
15 | passive open space unconnected with "capital improvements to be constructed" are not
16 | permissible SDC costs. Such costs may only be included in SDCs if there is substantial
17 | evidence in the record that links such open spaces with specific Parks and recreation facilities
18 | that will be constructed pursuant to the new SDCs.

19 | **69.**

20 | Here, the Adopted Plan does not specify how any of the new improvement fee
21 | funds will be spent, as noted above. However, the City does state that it intends to spend
22 | significant funds on open spaces. The 20 year Wish List includes – without specificity –
23 | \$34,966,257 for "natural area acquisition and restoration." Unless there is substantial
24 | evidence linking those proposed expenditures with "capital improvements to be constructed,"
25 | the expenditures are not permitted under ORS 223.299(2).
26 |

1 70.

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

8 71.

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

22 **The City's SDCs Inappropriately Link Square Footage to Park Use**

23 72.

24 The City's new improvement fees propose to charge higher fees based on the
25 square footage of new construction. (Ordinance 187150, Ex. A., pg. 15.) This is a departure
26 from the existing practice, which charges uniform fees for single family and multifamily

1 construction. The record contains no evidence even attempting to link square footage of new
2 construction to use of park facilities. To date, no other jurisdiction in Oregon has attempted
3 to impose higher improvement fees on larger homes.

4 **73.**

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

12 **74.**

13 The real purpose of this differential treatment is to penalize construction of
14 homes over 2,250 square feet. Comments in the record praise the City for using the
15 improvement fees process to create a disincentive for construction of larger homes. (*See,*
16 *e.g.,* Testimony of Terry Parker Apr. 15, 2015.)¹¹ Reasonable parties may debate whether
17 this is good public policy. But it has nothing to do with the permissible purposes for
18 improvement fees. They are intended as means to finance capital projects, not as tools to
19 prioritize one type of home construction over another.

20 **75.**

21 Simply put, there is no evidence in the record to support these differential
22 improvement fees. If the City believes it is too difficult to gather such evidence, then the
23 answer is to continue with the existing system of uniform fees. It is not appropriate to make
24 such significant decisions without evidence, as the City has done here.

25
26

¹¹ A true copy is attached as **Exhibit 7**.

1 **The New Improvement Fees Will Make Homes Less Affordable**

2 **76.**

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

8 **77.**

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

13 • Citywide, Multi-Family residential would have paid over 31%
14 higher improvement fees based on the proposed rates. That includes a 17% increase for the
15 Central City and a 47% increase in the non-central City. All Multi-Family units in the non-
16 central City would have an increase, including the smallest units. The average increase
17 would have been over \$1,700.

18 • Citywide, Single-Family residential would have paid over 42%
19 higher improvement fees based on the proposed rates. 99% of all Single-Family was built in
20 the non-central City. The average increase would have been over \$3,500.

21 • Overall, Single-Family and Multi-Family combined, over 83%
22 of all new residential units would have seen an increased improvement fees. Every new
23 Single-Family residential units would have seen an increase.

24 • The National Association of Home Builders calculates how
25 many median family income homebuyers in each major metropolitan market are priced out

26 ¹² A true copy is attached as **Exhibit 9**.

1 of being able to afford a median-priced home with every \$1,000 increase in home price.

2 Based on their analysis of the Portland Metro market, and the average fee increases shown
3 above, these increases will prevent more than 4,100 homebuyers/families from being able to
4 afford a home.

5 • The new improvement fees are said to encourage smaller units,
6 including ADUs, by creating a new sub 700 sq. ft. category. However, this new category has
7 fees that are actually higher than the previous fees for ADUs. In addition, almost 50% of
8 fees permitted in 2014 were in the 700-1200 sq. ft. category. These would see an 85%
9 increase in fees. Overall, ADUs permitted in the City would see a 54% increase in fees on
10 average, so this methodology does nothing to increase affordability of smaller units. In fact,
11 given that the City has waived improvement fees the last few years for ADUs, the bottom
12 line is that ADUs will now have a huge increase in fees. This will not encourage smaller
13 development.

14 **78.**

15 The new SDCs will also impose even greater increases on non-residential
16 construction. The evidence in the record shows that the improvement fees for non-residential
17 construction will increase by more than 300% from their present level. (*See Letter from*
18 *Kelly Ross, NAIOP, to Mayor Hales, April 15, 2015, and compare Ordinance 187150, Ex.*
19 *A, pg. 17-19.*) Such an enormous increase is not justified. Again, it would be one thing if
20 the City had presented an actual list of needed capital improvements that would be financed
21 by these improvement fees. But the City has not met this basic statutory requirement.
22 Instead, the City is asking for huge increases for unidentified and undisclosed future
23 expenses, which may or may not be related to capital improvements. This is not how
24 improvement fees are supposed to work, especially not improvement fees of this magnitude.

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79.

The City is proposing to inequitably shift park-related costs to new residents and new construction. As discussed above, the City is attempting to unfairly shift costs by (1) seriously overstating the investment by current residents in the existing Park system; and (2) seriously understating the projected revenue that would be obtained from the new improvement fees.

80.

Under ORS 223.304(b)(A), the City's new improvement fees are required to "Promote the objective of future system users contributing no more than an equitable share" of park costs. The new improvement fees are not consistent with that statutory mandate. They shift a disproportionate share of costs to new residents and new homeowners, the groups most likely to be affected by rising home prices and least able to protect themselves through the political process. The City should not be permitted to create an enormous Parks "slush fund" unconnected to specific projects, financed solely by new construction.

Conclusion

Oregon law carefully governs when and how municipalities may assess system development charges. These rules ensure that the public knows how much money will be generated by development fees, and knows how the money will be spent. Here, the City has side-stepped the rules at every turn. As a result, the City has misled the public about the amount of money that will be generated by its new development fee program, and left the public to guess at how this 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.

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WHEREFORE, Plaintiffs pray for relief as follows:

- a. Annulment or reversal of Ordinance 187150; and,
- b. Any other relief that this Court deems appropriate or equitable.

Dated this 24th day of July, 2015.

TONKON TORP LLP

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VERIFICATION

I, Paul Conable, an attorney of record for the Plaintiffs, hereby verify and certify that I have examined the process or proceeding, and the decision or determination therein, and that it is erroneous as alleged in the petition.

Dated this 24th day of July, 2015.

TONKON TORP LLP

By 
Paul Conable, OSB 975368
Attorney for Plaintiffs

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