

1 **PROCEDURAL HISTORY**

2 On May 27, 2015, the City of Portland (“City”) adopted Ordinance 187150,
3 regarding new system development charges (“SDCs”) for parks and recreation.

4 On July 24, 2015, Plaintiffs filed a petition for writ of review under ORS
5 34.040. Plaintiffs asked the Court to review the City’s approval of Ordinance 187150 and
6 determine whether, in adopting Ordinance 187150, the City failed to follow the procedure
7 applicable to the matter before it (ORS 34.040(b)), made a finding or order not supported by
8 substantial evidence in the whole record (ORS 34.040(c)), and/or rendered a decision that
9 was unconstitutional (ORS 34.040(d)). If so, Plaintiffs ask the Court to annul or reverse the
10 City’s adoption of Ordinance 187150.

11 The matter was briefed and argued to the Court.

12 On May 17, 2016, the Court signed a document entitled “Order Remanding
13 Ordinance Back to City Council for Amended Capital Improvement Plan; Judgment Denying
14 Writ of Review on Other Grounds.” At pages 1-7, the Court agrees with Plaintiffs that the
15 City failed to follow the procedure applicable to the matter before it and made a finding or
16 order not supported by substantial evidence in the whole record, specifically as related to the
17 capital improvement plan (“CIP”) requirement in ORS 223.309.

18 On May 19, 2016, that document was entered on the register as “Judgment–
19 General” with the comment “Denying Writ of Review On Other Grounds & Order.”

20 Plaintiffs now move to vacate the existing judgment and ask that the Court
21 enter a corrected, modified judgment.

22 **ARGUMENT**

23 **I. The Judgment Does Not Comply With ORS 18.038**

24 As a preliminary matter, the document entered on May 19, 2016 does not
25 comply with ORS 18.038. A judgment document is not to be combined with the Court’s
26 opinion or order, but rather “must be separate from any other document in the action.” ORS

1 18.038(3). Further, a judgment document must state “in the title” whether it is a limited,
2 general, or supplemental judgment, rather than leaving it for the clerk to decide how to enter
3 the document on the register. ORS 18.038(1).

4 Former ORCP 70 contained similar requirements, which were determined by
5 the Oregon Supreme Court not to be jurisdictional with respect to appealability. *See Gibson*
6 *v. Benj. Franklin Fed. Sav. & Loan*, 294 Or 702, 662 P2d 703, 704 (1983) (addressing
7 “separate document” requirement). ORCP 70 was repealed in 2003, however, and ORS
8 18.038 was enacted the same year. Since then, the Oregon appellate courts have not
9 addressed whether non-compliance with ORS 18.038 affects jurisdiction. There is no benefit
10 to uncertainty. The existing judgment should be vacated and a new judgment entered that
11 complies with ORS 18.038, including separating the order from the judgment and specifying
12 in the title if the judgment is a general judgment.

13 **II. The Judgment Misstates the Disposition of the Writ**

14 Another more serious problem with the document entered on May 19, 2016
15 is that it misstates the disposition of the writ. ORS 34.040 provides that a writ of review
16 “shall be allowed” if the City (a) exceeded its jurisdiction, (b) failed to follow the procedure
17 applicable to the matter before it, (c) make a finding or order not supported by substantial
18 evidence in the whole record, (d) improperly construed the applicable law, or (e) rendered a
19 decision that is unconstitutional. If *any* of those five bases is satisfied, then the writ must be
20 “allowed.” ORS 34.040.

21 Here, the Court ruled that, when the City adopted Ordinance 187150, the City
22 failed to follow the procedure applicable to the matter before it, as well as made a finding or
23 order not supported by substantial evidence in the whole record. (Order/Judgment entered
24 5/19/16 at 2, 7.) Accordingly, the Court was required to “allow” the writ of review. *See*
25 ORS 34.040 (stating that the writ “shall be allowed” if any of the five bases is satisfied).
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1 In the document entered on May 19, 2016, however, the Court never states
2 that it is *allowing* the writ, in either the title or the body of the document. The only reference
3 to “judgment” anywhere in the entire document is in the title, which states “Judgment
4 Denying Writ of Review On Other Grounds.” The trial court register states the same
5 disposition. Thus, the document entered on May 19, 2016 effectively consists of an *order*
6 ruling that the standard in ORS 34.040 has been met and a *judgment* denying the writ. This
7 is contrary to ORS 34.040. The writ must be either allowed or denied, and in this case it
8 must be *allowed* based on the Court’s ruling. The opinion or order may explain the specific
9 reasons that the writ is being allowed, but the judgment must *allow* the writ.

10 Plaintiffs recognize that this error is likely unintentional, but it nonetheless is
11 confusing and may create jurisdictional issues for appeal or review. The existing judgment
12 should be vacated and a new judgment entered that *allows* the writ of review.

13 **III. The Judgment Grants Improper Relief**

14 Finally, and most seriously of all, the document entered on May 19, 2016
15 grants improper relief and thereby creates the potential for the City to avoid lawful review of
16 its attempt to increase SDCs.

17 Plaintiffs request in their petition that the Court grant the writ of review and
18 “annul or reverse the City’s adoption of Ordinance 187150” pursuant to ORS 34.040.
19 (Petition at ¶ 1 & p. 32.) That is the correct relief where, as here, the City failed to follow
20 proper procedure in adopting Ordinance 187150 and made an unsubstantiated finding or
21 order, in violation of ORS 223.309(1), which requires the City to prepare a valid CIP “prior
22 to” establishing SDCs. The City’s violation of ORS 223.309 renders its approval of
23 Ordinance 187150 on May 27, 2015 unlawful. The only appropriate relief is to annul or
24 reverse the City’s action so that the City can start over and prepare a valid CIP “prior to”
25 establishing any new SDCs. If the City does so, excellent. If not, then interested parties will
26 have the opportunity to seek a writ of review under ORS 34.040.

1 Instead, in the document entered on May 19, 2016, the Court “remands the
2 2015 CIP to the city for greater specificity in the costs, timing and percentage of costs
3 eligible for SDCs for capital improvements needed to increase capacity.” (Order/Judgment
4 entered 5/19/16 at 7.) The title of the document refers to this as “Order Remanding
5 Ordinance Back to City Council for Amended Capital Improvement Plan.” (*Id.* at 1.) The
6 document does not say that the Court is annulling or reversing the City’s adoption of the
7 SDCs in Ordinance 187150 on May 27, 2015, and the document is silent about the
8 ordinance’s upcoming July 1, 2016 effective date. The result is a serious problem.

9 Because the document entered on May 19, 2016 refers to “remand” only, the
10 City is taking the position that existing Ordinance 187150 *will go into effect* on July 1, 2016,
11 despite the Court’s ruling that it was improperly adopted without a valid CIP. It is unclear
12 whether the Court intended that result, but in any event it is wrong. Under ORS 223.309(1),
13 the City must prepare a valid CIP *before* establishing SDCs. The Court has ruled that the
14 City did *not* prepare a valid CIP before passing Ordinance 187150 on May 27, 2015, so the
15 adoption of the existing ordinance was unlawful and that ordinance cannot and should not go
16 into effect. The City must start over. That is the only legally correct result, as already
17 explained. Moreover, it is the relief requested in the petition. *See* ORCP 67 C (“Every
18 judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A
19 judgment for relief different in kind from or exceeding the amount prayed for in the
20 pleadings may not be rendered unless reasonable notice and opportunity to be heard are given
21 to any party against whom the judgment is to be entered.”). It also is easy for the City. As
22 soon as the City completes what it believes to be a valid CIP to support the desired SDCs, it
23 can vote again on the desired SDCs, and the normal writ of review procedure will apply.

24 If Ordinance 187150 improperly goes into effect on July 1, 2016, then not
25 only will the unlawfully adopted SDCs become law (which is bad enough), but it is unclear
26 whether there will be any mechanism for review of whatever the City does on remand. A

1 writ of review is the only way to challenge the City’s adoption of SDCs. ORS 223.302(3)(a).
2 Once SDCs are lawfully adopted—which necessarily includes having a lawful CPI “prior to”
3 adoption—the City is free to “modify” its CPI “at any time” and only is subject to review if
4 the proposed modification results in an SDC “increase.” ORS 223.309(2). Thus, if
5 Ordinance 187150 is improperly permitted to go into effect on July 1, 2016, the City can
6 characterize its action on remand as an “amendment” of the CPI for an existing SDC and
7 may thereby avoid review under ORS 223.309(2). Indeed, the existing judgment document
8 invites this result by inaccurately referring to an “amended” CIP in the document title
9 describing the order. (Order/Judgment entered 5/19/16 at 1.)

10 An unlawfully enacted ordinance cannot be allowed to go into effect once it
11 has been determined to have been unlawfully enacted. This is another reason to vacate the
12 existing judgment. The new judgment should grant proper relief, specifically annulment and
13 reversal of the City’s adoption of Ordinance 187150 on May 27, 2015.

14 CONCLUSION

15 Plaintiffs appreciate the Court’s careful review of the merits of this case. The
16 existing judgment document entered on May 19, 2016, does not properly reflect the Court’s
17 decision, however, and inadvertently creates unnecessary confusion and potential problems
18 for further review. Plaintiffs respectfully ask that the Court vacate the document entered on
19 May 19, 2016, and enter a new judgment that complies with ORS 18.038, “allows” the writ
20 of review, and expressly nullifies and reverses the City’s approval of Ordinance 187150 on
21 May 27, 2015. In accordance with UTCR 5.100, as prevailing parties, Plaintiffs are ready
22 and willing to submit a form of judgment for the Court’s consideration.

23 Dated this ___ day of May, 2016.

24 TONKON TORP LLP

25 By s/ Paul Conable

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CERTIFICATE OF SERVICE

I certify that the foregoing **PLAINTIFFS' MOTION TO VACATE JUDGMENT** was served on the following, via email and mailing, by depositing with the U.S. Mail in Portland, Oregon, enclosed in a sealed envelope with first class postage prepaid, addressed as follows:

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Chief Deputy City Attorney
Portland City Attorney's Office
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Portland, OR 97204

Dated this ____ day of May, 2016.

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