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2
3 IN THE CIRCUIT COURT OF THE STATE OF OREGON

4 FOR THE COUNTY OF CLACKAMAS COUNTY

5 MARK KRAMER and TODD PRAGER,

Case No.: CV12100913

6 Plaintiffs,

7 v.

OPINION AND ORDER

8 CITY OF LAKE OSWEGO; and the STATE
9 OF OREGON, by and through the State Land
10 Board and Department of State Lands,

11 Defendants,

12 and

13 LAKE OSWEGO COPORATION,

14 Intervenor-Defendant.

15
16 Women didn't used to be attorneys or judges, yet here we are. Life changes.

17 Old deeds to properties on Oswego Lake used to prohibit the sale or ownership by minorities.

18 Life changes.

19 In 1972, The United States Congress passed Title IX, prohibiting gender discrimination for

20 Public Schools receiving public funding. Life changes.

21 In 1974, women in Oregon could not open a bank account without either their parents or their

22 husbands co-signing. Life changes.

23 Until 2014, Oregon same-gender couples could not legally marry another person of the same
24 gender. Life changes.

25 The issue before the court here is, under current laws, regulations, and rules, has life changed
26 enough to affect how we treat and protect the public's interest in Oswego Lake.

27 In 1972, Defendant City of Lake Oswego ("City") passed Resolution 12-12 and related Park

28 Rules, which barred public access to the waters of Oswego Lake from certain of the city's

1 waterfront parks in downtown Lake Oswego. The waterfront parks subject to Resolution 12-12
2 are Sundeleaf Plaza, Millenium Park, and Headlee Walkway.

3 In an earlier appeal of this case, the Oregon Supreme Court held that "...the public's interest in
4 the navigable waterways that are held in trust by the State includes a right of access to publicly
5 owned water from abutting public land and that State interference with the public's exercise of
6 that right must be objectively reasonable in light of the purpose of the trust and the circumstances
7 of each case." Kramer v. City of Lake Oswego, 365 Or. 422, 462, 446 P.3d 1, 25, opinion
8 adhered to as modified on reconsideration, 365 Or. 691, 455 P.3d 922 (2019).

9 In Kramer, the court found that government actions may not substantially impair the public's
10 right to use waterbodies subject to the public trust doctrine for public trust purposes without
11 adequate justification. In other words, the City may not substantially impair the public's right to
12 use Oswego Lake for public trust purposes without adequate justification.

13 The Supreme Court remanded to this court two remaining questions for resolution.

- 14 1) "...[T]he preliminary question of whether the lake is subject to the public trust doctrine,"
15 and
- 16 2) "...[I]f the lake is subject to that trust, the resolution of the factual dispute regarding
17 whether the city's restriction on entering the lake from the waterfront parks unreasonably
18 interferes with the public's right to enter the lake from the abutting waterfront parks." *Id.*
19 at 426.

20 After the Phase 1 trial, this court concluded that Oswego Lake is subject to the public trust
21 doctrine and that there is a public right of access to the waters of Oswego Lake from the City's
22 waterfront parks under the public trust doctrine. The court rejected Defendant Lake Oswego
23 Corporation's argument that the portion of Oswego Lake known as "Lakewood Bay" is a
24 separate body of water from the rest of Oswego Lake. This resolved the first remanded question.
25 On to the second question, as explained in their operative complaint, Plaintiffs seek three
26 declaratory judgements as set out at paragraphs 11-12 in the Second Amended Complaint (July
27 15, 2021):

28 Plaintiffs also sought injunctive relief:

- 1) Enjoining the city from enforcing its exclusionary lake use policies, including Resolution 12-12,
- 2) Enjoining the City from erecting or maintaining fences, boulders, metal reeds, “no trespassing” signs, and “private lake” signs on publicly owned property abutting Oswego Lake,
- 3) Enjoining the City from erecting or maintaining other obstacles designed to prevent or discourage the exercise by the public to the right to reasonable access and use of Oswego Lake, and
- 4) Enjoining public access into the design and development of future lake-front facilities on public owned properties. *Id.* at 12-13.

The Issue to be resolved in the Phase 2 trial is whether the “City’s Resolution 12-12 and related policies prohibiting public access to Oswego Lake from public parks unreasonably interfere with the peoples right of access.” *Id.* at 14. The burden is on the Defendant City of Lake Oswego to show that its’ restriction on access to Oswego Lake is “objectively reasonable in light of the purposes of the trust and the circumstances of the case”.

The Defendant State of Oregon’s position is that it did nothing that substantially impaired the recognized public use of public trust resources. That is true. The State has taken no action to restrict public access to Oswego Lake in this case. Therefore, it is dismissed with prejudice.

The right of access to waterbodies subject to the public trust is not absolute. The assessment here of the reasonableness of the City’s Resolution is a matter of state law. See Kramer, 365 Or. at 437. This court must employ a balancing test that weighs the magnitude of the restriction against the government’s asserted interest. The greater the restriction is, the more compelling the government’s interest needs to be.

Restrictions and closures adopted by the State Land Board and the Department of State Land are tailored to meet specific concerns, are limited in geographic scope and place minimal burdens on the time, place, and manner of access. The rules reflect the State’s obligations under the public trust doctrine: to prevent a substantial impairment of the public’s right to use waterbodies subject to the Public Trust Doctrine and restrictions on access should be limited in area, duration, and

1 scope as necessary to address the need for the restriction. OAR 141-088-004 (1) through 141-
2 008-008 (3).

3 The public's right to access waterbodies subject to the public trust is not absolute, however the
4 City may not take actions that substantially impair the public's right to access those waterbodies
5 subject to the Public Trust Doctrine for Public Trust purposes. However, it must be objectively
6 reasonable in light of the purposes of the trust and the circumstances of each case. The objective
7 restriction is one that does not substantially impair the public's rights without adequate
8 justification. Clearly, this is where the balancing test comes in: it balances the magnitude of the
9 impairment of the public right with the asserted interest of the government in enacting the
10 restriction.

11 Here, the City of Lake Oswego's Resolution 12-12, restricting all public access to the lake,
12 substantially impaired the public's right of access. The restrictions must be based on a
13 determination that action is necessary to protect human life, health, or safety. OAR 141-088-004
14 (4)(a). And any restriction or closure must be "[a]s limited in area, duration, and scope as
15 necessary to address the identified need for the restriction or closure." OAR 141-088-004 (4)(b).

16 An advisory jury was chosen to determine the factual findings in this case. The advisory jury's
17 findings are not binding although its findings can be helpful in determining facts specifically.

18 The Court can accept or ignore the advisory jury. The Court makes conclusions of law and
19 whether the Resolution 12-12 is objectively reasonable is a question of law.

20 In this case, the jury found unequivocally that:

- 21 1) The property boundaries of the City of Lake Oswego's park properties provide a
22 reasonable basis for restricting physical access to Lakewood Bay at Sundeleaf Plaza and
23 Headlee Walkway only.
- 24 2) The restrictions on the City of Lake Oswego's property interests provide a reasonable
25 basis for restricting physical access to Lakewood Bay at Sundeleaf Plaza and Headlee
26 Walkway only.

- 1 3) The design and construction of the City of Lake Oswego's parks provide a reasonable
2 basis for restricting physical access to Lakewood Bay at Sundeleaf Plaza and Headlee
3 Walkway only.
- 4 4) Potential legal liability risks to the City do not provide a reasonable basis for restricting
5 physical access to Lakewood Bay at Sundeleaf Plaza and Headlee Walkway only.
- 6 5) The safety of lake users provides a reasonable basis for restricting physical access to
7 Lakewood Bay by the public from Sundeleaf Plaza only.
- 8 6) The expenditure of city resources of the City of Lake Oswego does not provide a
9 reasonable basis for restricting physical access to Lakewood Bay.
- 10 7) The water quality in Lakewood Bay does not provide a reasonable basis for restricting
11 physical access to Lakewood Bay at any of the City Parks.
- 12 8) The risk of invasive species in Lakewood Bay does not provide a reasonable basis for
13 restricting physical access to Lakewood Bay at any of the City Parks.

14 The court recognizes the jury verdict. It will accept as binding only the above factual findings.
15 Clearly, the Defendants did not present evidence sufficient to find that Millenium Park was
16 affected by potential legal liability risk to the City, the risk of invasive species, water quality,
17 safety of lake users, and the design and construction of the park such that restricting legal access
18 to Lakewood Bay was required.

19 The court can only speculate that the "few inches" between the water of Lakewood Bay and the
20 fence line at Sundeleaf Plaza provided a "potential legal liability" to the City. Of course, the
21 Defendant Lakewood Corporation assured the city that there was no litigation over the 1-inch
22 difference between the water line and the fence line. And the risk of liability is limited by the
23 City's immunity from liability.

24 The court can also only speculate that the dearth of evidence concerning the ownership and lease
25 agreement regarding Headlee Parkway provided a "potential liability" to the City. It is too bad as
26 this would seem to be perfect as a place for boats to launch without much cost.

27 That leaves Millenium Park. The jury found no reasonable restriction to entering the lake from
28 Millenium Park, and so no potential legal liability risk to the City. The risk of invasive species,

1 water quality and safety of lake users was also not proven. While the City claimed that it was
2 unreasonable to allow entrance to the lake there because of the park's design and construction,
3 the design and construction of the park was provided by the city. They cannot be the cause of the
4 "unreasonableness", and yet use that unreasonableness as a defense, as was done here. LOC
5 Exhibit 36.

6 The construction of the steps can be adjusted so that they avoid the easement of the railroad, can
7 be made ADA compliant (height and width of steps) pursuant to State regulations, and have
8 access to the sloped area to the left of the steps, which can be safe with the vegetation removed
9 for improvement of the area, The "vegetation" of metal sculpture could be moved from the area
10 in the water to elsewhere along Headlee Walkway, for example, making the area safe for the
11 entrance of people and their boats.

12 Reasonable use restrictions could be determined and advertised by the City (i.e.,
13 permits/fees/cleaning of boats/numbers over time/enforcement by Lake Oswego Police
14 Department or Clackamas County Sheriff Office). This would not be too expensive, according to
15 the advisory jury. Furthermore, reasonable use restrictions can be limited in area, duration, and
16 scope as necessary to address the needs for the Resolution 12-12 restrictions. And the magnitude
17 of the above restrictions is minimal when compared with the public's right to use the
18 waterbodies. Managing the risks is reasonable in Oswego Lake. Banning the public outright is
19 unreasonable.

20 Kramer said one can invalidate legislation (as it did the five times listed at the beginning of this
21 opinion) if the legislation is unreasonable. The advisory jury found that it was unreasonable to
22 consider budget. Riparian plantings, Americans with Disabilities Act, and the building code all
23 offer opportunities that are within the City's budget, according to the jury. The Conditions and
24 Restrictions declared by Defendant Lake Oswego Corporation are easily revised. LOC Exhibit
25 641.

26 The City needs the opportunity or chance to fix the public access. Perhaps the timing of this
27 opinion provides the opportunity to do so. Clearly the City may not violate the public trust
28 doctrine and shall correct the violation. The Court has the authority, based on the evidence and

1 jury verdict, to tell the City to take down the “No Access” sign and remove the restrictions. The
2 Resolution 12-12 is unlawful, and the Kramer 1 ruling applies.

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4 Dated this 13th Day of November, 2024

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6 _____
7 The Honorable Kathie F. Steele