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VIA E-MAIL

Hon. Kent Studebaker
Mayor
City of Lake Oswego
PO Box 369
Lake Oswego, OR 97034

RE: Proposed Home Demolition Tax and Related Amendments to LOC Chapter 45

Dear Mayor Studebaker and Councilors:

This office represents the Home Builders Association of Metropolitan Portland ("HBA"). This letter is respectfully submitted in opposition to Proposed Ord. 2831/PP 19-0007, commonly known as the Home Demolition Tax (the "Demolition Tax"). As I explain below, the Council should reject the proposed tax for two important reasons. First, it is clearly intended to avoid the development density and middle housing mandates of House Bill 2001. Second, it is legally flawed and violates the U.S. and Oregon constitutions, particularly because it constitutes an unlawful taking without just compensation.

Please understand that HBA seeks to be a cooperative and collaborative partner with each of the jurisdictions in which its members work. However, HBA is compelled to take deliberate and clear action to stop the City of Lake Oswego (the "City") from enacting the Demolition Tax because it is unfair, overly burdensome, will exert even more downward pressure on infill development and housing production, and is illegal.

1. **The Demolition Tax is plainly intended to avoid HB 2001 and violates that law.**

The Demolition Tax is plainly anti-housing. The tax punishes homeowners who have acquired equity in their older homes and makes it even more difficult for developers to construct new housing. Consequently, the Demolition Tax also harms homebuyers who will pay more for new housing. However, most concerning is what appears to be the City's attempt to discourage and reduce middle housing opportunities outlined in House Bill 2001, which allows for duplexes, triplexes and quads in single family zones.[1] By increasing residential

[1] This is evidenced by Councilor LaMotte's comment during a September 17 work session on the Demolition Tax that "hopefully we'll stem the tide on HB 2001."

redevelopment costs, the Demolition Tax will create yet another barrier to new middle housing options.

HB 2001's mandate is clear: "[A] local government shall consider ways to increase the affordability of middle housing […]." It requires Lake Oswego to allow the development of "all middle housing types in areas zoned for residential that allow for development of detached single-family dwellings." Section 10 of HB 2001 states that "[i]t is the policy of the State of Oregon to reduce to the extent practicable administrative and permitting costs and barriers to the construction of middle housing." Most importantly, HB 2001 provides that "[a] provision in a governing document that is adopted or amended on or after the effective date of this 2019 Act, is void and unenforceable to the extent that the provision would prohibit or have the effect of unreasonably restricting the development of housing that is otherwise allowable under the maximum density of the zoning for the land." By making unreasonable the costs of providing middle housing in Lake Oswego, the Demolition Tax is directly at odds with HB 2001 and violates the plain terms of the bill.

Councilor O'Neill was recently quoted by the Wall Street Journal as saying that "the people that are moving here, they are not moving here for affordable housing."[2] This statement misses the point: the City is obligated to remove barriers to such housing, not create new ones. In fact, families in all communities, including Lake Oswego, desperately need these smaller, attainable homes which, through scaling and land cost-sharing, are relatively more affordable than a single existing or new home built on a vacant lot.[3] By erecting a financial barrier to higher density replacement housing, Lake Oswego is saying "no" to families in need of diverse middle housing options. House Bill 2001 opened the door to housing affordability in Oregon's cities, but the Demolition Tax seeks to close that door by making infill development even more difficult.

2. The Demolition Tax is unconstitutional and illegal.

a. The Demolition Tax violates the Fifth Amendment of the U.S. Constitution and Art. I § 18 of the Oregon Constitution.

The Fifth Amendment of the U.S. Constitution and its counterpart in the Oregon Constitution, Art. I § 18, prohibit the taking of private property without just compensation. The Demolition Tax is a fee charged for a permit necessary for redevelopment and as such, it is not essentially different from a system development charge or other development exaction.

[2] Will Parker, Portland Suburb's Proposed Law Could Discourage Home Development, Wall St. J. Nov. 12, 2019, https://www.wsj.com/articles/portland-suburbs-proposed-law-could-discourage-home-development-11573563601.

[3] The City's own Housing Needs Analysis explains that "The demographic and housing trends and conditions suggest that higher housing costs in Lake Oswego compared with neighboring jurisdictions may be a barrier for young families. In order to provide a diversity of housing types and densities, the City may want to consider providing additional opportunities for housing types more affordable for these families." Pg. 32.

Requiring a landowner to dedicate its private property rights in exchange for development approval is a compensable taking unless there is an "essential nexus" between the condition and the government interest. *Nollan v. California Coastal Com.*, 483 U.S. 825, 836-37 (1987). Additionally, such exactions must be "roughly proportional" to the expected impacts caused by the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374, 391-395 (1994).

The City carries the burden of proof to demonstrate that the Demolition Fee has the required nexus and is roughly proportional to the impacts of demolishing a dwelling. The City is required to make an "individualized determination" of rough proportionality and "some effort to quantify" a project's impacts to support its conclusions. *Dolan*, 512 U.S. at 391. The rough proportionality analysis applies to fees such as this one, where in the City requires the payment of money for development permitting. *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013).

As explained below, the City has not met its burden of proof under *Nollan*, *Dolan* or *Koontz.* First, there is no essential nexus between the demolition of a given home and its impact on the City's park services. Second, a flat fee of $15,000 makes plain the City's refusal to determine the costs of such an impact, even it were to occur.[4]

Third, the U.S. Supreme Court was clear in *Koontz* that a local government cannot avoid a takings claim simply by labeling the required payment of money a "tax." This is so because payment of the Demolition Tax is part of obtaining permission to use a specific parcel of land for redevelopment or infill development. The following excerpt from *Koontz* illustrates this point:

> "[T]he demand for money at issue here did "operate upon ... an identified property interest" by directing the owner of a particular piece of property to make a monetary payment. […]. In this case, […] the monetary obligation burdened petitioner's ownership of a specific parcel of land. […] The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property."

Koontz, 570 U.S. at 613–14.

Simply put, the Demolition Tax is no more and no less than a payment to support City park services in return for the City's permission for the use of property for ostensibly permissible

[4] We note that it is unlikely that replacement of existing dwellings will have any impact on the demand for parks services, unlike the construction of new "greenfield" dwellings. What is more, infill development tends to create a smaller demand for new parks and park maintenance than does new development at the periphery of a city.

purposes. It susceptible to a takings analysis, but the City has made no effort to justify it under *Nollan*, *Dolan*, or *Koontz*. Given that such a justification is necessary under the strict scrutiny review applicable to Fifth Amendment rights, the City has a high bar to cross. The City has made no effort whatsoever to satisfy its constitutional burdens in this instance, and HBA seriously doubts the City will be able to make the necessary showing in light of the express purpose of the Demolition Tax.

b. The Demolition Tax violates the equal protection guarantees under the Oregon and U.S. Constitutions.

The final clause of Sec. 1 of the Fourteenth Amendment provides that a government may not "deny to any person within its jurisdiction the equal protections of the laws." Similarly, the Oregon Constitution provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const. Art. 1 § 20. The proposed Demolition Tax effectively makes distinctions between two classes of property owners. First, it defines a class of people who own and wish to develop residential land without existing dwelling units. Second, it defines of class who own residential land with existing dwelling units who also want to develop their land. The latter class will pay a $15,000 premium for each dwelling unit that must be demolished to make way for new structures.

There is no rational basis for this distinction. Indeed, the rationale for the demolition stated in the November 5, 2019 Staff Report demonstrates that the Demolition Tax is nothing more than an effort to generate operating revenue for parks. To wit: "The proposed tax is designed to meet the Parks Department goal of raising $400,000 annually for maintenance and small capital projects."[5] Staff was similarly forthright in assessing the unfairness of the fee:

> "The tax would target neighborhoods that are redeveloping rather than the city as a whole, which could be viewed as unfair if the tax is used for parks maintenance citywide. Further, unless the tax is tied to the value of the demolished structure, or some other measure, it would be regressive because the same tax would apply to all demolitions."

Staff's observation identifies the very essence of the equal protection problem here: the Demolition Tax would to force a small minority of property owners to pay for parks that benefit all. The stated goal of revenue generation is not rational basis for this distinction, any more than the need for government revenue can justify any other discriminatory tax.

[5] Note that any money collected from the tax used for "capital projects" would violate ORS 223.297 *et. seq*. because use of such funds for capital funds must be consistent with an acceptable SDC program and methodology.

c. The Demolition Tax is probably not a "tax."

HBA has considerable doubt that the Demolition Tax is, in fact, a tax. Because it is imposed by the City on a small class of property owners in return for a permit to use property in a certain way, and is intended to be used for a specific purpose, it has all the attributes of a regulatory fee that distinguish such fees from taxes. *See, e.g., Hexom v. Oregon Department of Transportation*, 177 F3d 1134, 1137 (9th Cir. 1999). The Council should be aware that if the Demolition Tax is properly considered a "fee," it may not unreasonably exceed the value of the specific services for which it is charged. *See, e.g, National Cable Television Ass'n, Inc. v. F.C.C.*, 554 F.2d 1094, 1106–07 (1976) (citing numerous examples of state court cases standing for the proposition). There can be no serious argument that a $15,000 charge is justified by the costs incurred by the City in reviewing and approving a demolition. In fact, the current cost of such a permit is limited to a $54.00 notification fee.

d. If the Demolition Tax is a "tax", it violates the Oregon Constitution's requirement for uniformity of taxation, as well as Oregon's statutory allowance for construction taxes.

Art. I § 32 of the Oregon Constitution provides that "no tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax." This section applies to all taxation, be it state or local. *Jarvill v. City of Eugene*, 289 Or 157, 171 n. 15 (1980).

As explained in Section 3.b, the Demolition Tax makes an unlawful distinction between similarly-situated property owners. By way of illustration: if I develop a lot partitioned from a larger property, the City will charge me at least $15,000 less in "taxes" than if I replace an older dwelling on an existing lot. This is so even if replacing an existing dwelling is more efficient than remodeling it or otherwise preserving it.[6] The outcome in both cases is the same, but only the latter proposal is subject to the Demolition Tax.

The Demolition Tax also violates the statutory provision for construction taxes, which is set forth in ORS 320.170–195. It is a construction tax because it is expressly intended to be charged for property redevelopment. ORS 320.192 provides that any such tax "may not exceed one percent of the permit valuation for residential construction permits." Moreover, the tax is not being proposed for any of the allowable purposes stated in ORS 320.195.

3. The Demolition Tax violates a number of the City's Comprehensive Plan provisions.

By limiting redevelopment and density within existing neighborhoods, the Demolition Tax reduces the opportunities for a variety of housing types and affordable housing. It will also

[6] It is also the case that, under Measures 5 and 50, replacement or redevelopment of older residential structures entails a higher tax burden even without the Demolition Tax.

increase the demand for undeveloped "greenfield" land at the City's periphery by creating a substantial barrier to infill development within the City's existing limits. In so doing, it violates the following provisions of the Comprehensive Plan and 2013 Housing Needs Analysis:

- Lake Oswego Comprehensive Plan – Complete Neighborhoods and Housing
    - "[T]he City's land use standards cannot create a situation whereby they prevent affordable housing from being built or increase its cost through discretionary standards." Id. 87.
    - Goal 1: "Provide the opportunity for a wide variety of housing types in locations and environments to meet the needs and preferences of current and future households."
    - Goal 2: "Provide opportunities for housing at price and rent levels commensurate with the needs of current and anticipated residents."
    - Goal 4: "Provide opportunity for needed housing while using land and public facilities as efficiently as possible and facilitating greater walking, biking and transit use."
    - Housing Choice and Affordability, Policy B-1: "Provide and maintain zoning and development regulations that allow the opportunity to develop an adequate supply and variety of housing types, and that accommodate the needs of existing and future Lake Oswego residents."
    - Action Item K: "Develop and maintain a system development charge methodology and ordinance that requires developers to be responsible for their proportionate share of the cost of providing required public facilities and services."
- Lake Oswego Comprehensive Plan – Urbanization
    - Goal 1: "Ensure that…the City… Supports a compact form of urban growth, compatible with the City's neighborhood character, that uses land efficiently, focusing redevelopment within the current urban service boundary to discourage urban sprawl, and preserving rural lands outside the boundary."
    - Policy A.1: "The City will not expand the existing Urban Service Boundary* (USB) and will resist efforts to require expansion […]".
- 2013 Housing Needs Analysis (March 19, 2013):

- "Specifically, the analysis indicates that under the medium forecast, there is an additional need to accommodate approximately 349 medium density (townhouse, duplex, SDU, etc.) dwelling units, which would require approximately 48 acres. This need could mainly be addressed by redevelopment in appropriate locations within the existing USB area." *Id*. 29.

- "Policies and regulations should not prohibit or discourage the provision of affordable and needed housing." *Id*. 32.

- "Lake Oswego has a relatively limited supply of vacant land area inside the USB, and now must rely on redevelopment and optimization of the remaining vacant land inventory to meet future needs and be consistent with MHR requirements." *Id*. 33.

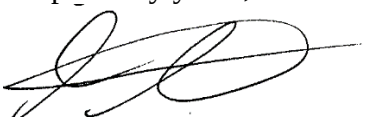
- "Lake Oswego must provide for an overall density of ten or more dwelling units per net buildable acre." *Id*. 33.

4. Conclusion

HBA is frankly dismayed that the Council is seriously considering this proposal. It would have a direct and immediate harm on the City's ability to comply with HB 2001 and what is worse, it would raise the cost for new infill and redevelopment units, which are the cornerstone of middle housing. As Staff explained, it is also regressive and unfair. Consequently, HBA is seriously considering all of its legal options and venues, including redress in federal court, to challenge the Demolition Tax. The Council should be aware that, under the recent Supreme Court decision in *Knick v. Township of Scott*, 588 US ___ (*slip op*) (June 21, 2019), HBA is entitled to directly bring its constitutional claims in federal court without intervening state court litigation.

For all of the foregoing reasons, HBA respectfully requests that the Council not adopt Ord. 2831.

Respectfully yours,



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cc: Ezra L. Hammer *(via email)*
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