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September 28, 2015

Lake Oswego Planning Commission
City of Lake Oswego
380 A Avenue
Lake Oswego, OR 97034

Dear Commissioners:

We submitted a letter for the September 14, 2015 public hearing regarding the “sensitive lands” (SL) program and Healthy Eco-Systems Comp Plan chapter that outlined several concerns:

- **Lack of Measure 56 notice to more than 1200 property owners.**
- **Option 2 Increases the SL Program, Counter Council Policy/Goal**
- **HBA Program Likely to Become Regulatory**
- **New Program Remains an Arbitrary and Inequitable/“Trade” Program**
- **TMDL Implementation Plan Content based on Overreaching new EPA Rule**
- **Lacks Scientific Basis and is Pseudo-Science**

We have reviewed the September 23 supplemental staff report and appreciate that the hearing was held open for additional comment. We ask your careful review and consideration of our September 14th letter as well as these additional comments:

Measure 56

During the September 14 hearing and in the supplemental staff report, staff provided explanation for not providing Measure 56 notice to more than 1200 current SL property owners. We do not agree with staff rationale that the current 1200 plus SL property owners didn’t need noticed because they already have a SL overlay on their property and *“The proposed map and code amendments do not restrict property use beyond that which would be required under the present code if all designated RP districts were accurately mapped.”* The proposed code is increasing the buffers to 50 feet. This is beyond the current code’s 25 or 30 foot buffers and is an increase in restrictions, therefore, Measure 56 notice should have been provided. Additionally, “Sensitive lands” is a zoning overlay that impacts a limited/defined area of the property—defined by the code, particularly the buffer measurement. Within the SL zoning overlay, property is more limited and treated differently than other areas of the property not in that discreet SL zone. So much so, that staff measures specifically the size of the impacted area—for example 233.11 acres over 1194 lots. The complete acreage of those 1194 lots would be far more than 233.11 acres so this indicates that this is a discreet overlay zone. *Measure 56/ORS 227.186(9) defines rezoning as (a) Changes the base zoning classification of the property; or (b) Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone.”*

We believe that the proposed changes to the code, which increase buffers, fall under section (b) because the new buffers increase the overlay zone on the impacted property. Land that was

previously not impacted by the SL code will now be under SL code and therefore have limited or prohibited uses on property that was previously not affected (not in the discreet SL zone). It also concerns us that effort was made to send two separate mailings and that a decision was made not to send Measure 56 notice to current SL owners who would lose more property to the SL program due to the buffer increase. As the supplemental staff report explains Measure 56, *"The intent of the statute is to put property owners on alert where a proposed zone change may adversely affect property values."* Yet, a decision was made not to alert the current SL owners to the changes. As the CCI, we would think it would concern you that the majority of those impacted by SL did not get the Measure 56 mailing that **would have alerted them to something specific to their property that could impact permissible use and value.**

Again, we question the validity of holding this hearing without Measure 56 notice being given to all impacted property owners. We believe the City is in violation of Measure 56/ORS 227.186 and should stop the process and provide proper Measure 56 notice.

Lacks Scientific Basis and is Pseudo-Science

On September 14th, an engineer testified about the lack of science related to this program. To further his argument: the LIDAR effective shade numbers presented on May 11 compared the current SL program to the original new proposal that reduced buffers on private property. The data showed that the new proposal actually provided better shade in Springbrook and Tryon and about a 1% or less reduction elsewhere (see chart attached). **How exactly does a 1% or less reduction in effective shade on "tiny streams" (staff's characterization of city streams) negatively impact water temperature and water quality? Or, even the almost 2% reduction of the revised effective shade numbers presented to City Council on May 18th?** These differences would seem to be de-minimus and easily made up given that trees grow as shown by the city-wide tree canopy increase from 44.6% in 2007 to 50% in 2014...despite only 15% of the land in the city being protected under SL and the majority of development taking place on non-SL properties.

In their May 11, 2015 letter, DEQ acknowledges that the city is *"close to meeting"* TMDL shade allocations in some areas of the city and already *"exceeds"* in others and they write *"This finding suggests the existence of other factors not yet identified that contribute to protecting water quality within the city."* So the question becomes, **why have we abandoned the original proposal and instead moved to increasing buffer sizes and increasing the number of properties involved when the proposal to decrease buffers on private property had such a minimal impact and we are almost meeting, and in some cases, already exceeding the TMDL shade requirement?**

Additionally, on Page 6 of the staff report, it states: *"The State Department of Environmental Quality (DEQ) has clearly said that decreasing the regulatory protection of riparian areas (as compared to existing Sensitive Lands) would be a violation of state water quality regulations under Oregon Administrative Rules (OAR 340-42)."* **Where have they said this?** The DEQ letter of May 11, 2015 states: *"DEQ does not preclude the adoption of less stringent code... We look forward to seeing the final model results and program descriptions."* **Did the city provide this information? If so, where's DEQ's written response? Also, where in OAR 340-42 does it indicate that buffers cannot be reduced?**

Lastly, the in-stream data at seven locations that the City has collected for the last ten years shows that our monitored "streams" meet the actual temperature requirement. But this actual in

water temperature testing seems to not matter. Instead, a surrogate—“effective shade”—is the standard for compliance—measured with LIDAR data and extrapolated with the “Shade-O-Later” model that was developed as a water quality trade scheme by a non-profit group—benefitting industry and public utilities. **This use of the effective shade surrogate and water quality trading is “practice” and “preference”, not rule/law and we object to citizens’ properties being regulated using such arbitrary standards. Like the engineer on September 14th, we question the “science” and approach and ask you not to approve this pseudo-science.**

Remains an Arbitrary and Inequitable/”Trade” Program—“Systems-Wide Approach”

During the September 14 hearing, the Commission reviewed the draft Healthy Eco-Systems Comp Plan chapter and did not address our concerns about establishing trades as a policy. We are greatly concerned about establishing policy that allows trading of private residential property and question the legality of using citizens’ yards to mitigate for development elsewhere. **Again, we request that you review Attachment B, page 9 of 35, Policy 1 that states “Develop a systems-wide approach to urban forestry, watershed protection, and other environmental management issues, to protect, restore, and enhance the City’s natural resources.” While it sounds nice, “systems-wide approach” or “systems approach” or “off-site mitigation” are terms that have been used for environmental trading—off setting/reducing regulations in one area by increasing it in another. We do not support this approach. And, we don’t see a definition of “systems-wide approach” in the packet so clarity should be provided via requiring a definition of “systems-wide approach”.**

Size of the Proposed Option 2 SL Program and the HBA Program TMDL Relationship

While staff maintains that *“More properties are having regulations removed than added.”*, the numbers, taken from staff created documents, speak for themselves. **Option 2 increases the SL program.** We’ve attached the comparison chart again for your review. Additionally, as staff indicates in the supplemental report, the TMDL Implementation plan does impact our codes and the SL program. Within the 2015 TMDL Implementation plan (bottom of page 26 to top of page 27), staff very clearly promises DEQ that any voluntary incentive based programs that are adopted (such as the HBA program), will be reviewed within 2 ½ years and made regulatory if deemed necessary. There is no specific criteria outlined for how to assess this. **We believe the HBA program is regulation in waiting; and that based on the TMDL Implementation Plan, DEQ and city staff will find a reason to shift these properties back to the regulatory SL program. We would like all HBA owners to be made aware of the TMDL commitment.**

Tax Reduction

While tax reduction is not a Planning Commission/land use issue, we believe that SL property owners should receive a reduction in taxes on the area designated SL. **We hope you will recommend a tax reduction to SL owners given that the SL area is greatly restricted and done so for community benefit.**

Thank you for keeping the hearing open and considering our additional testimony.

Regards,
Dr. David Streiff
President, LO Stewards

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Comparison of Land Involved in Current Sensitive Lands Program versus Latest “Option 2” Proposal

Resources	Existing SL Program Lots	Proposed “Option 2” Lots (Sept 2015)	Existing SL Program Acres	Proposed “Option 2” Acres
Regulated Resources Breakdown by type:				
Total Single Family	1054	1194	203	233.11
Total Other Private	123	166	131	120.77
Total Private Dedic OS	76	91	104	114.78
Total Public	190	206	512	585.09
Total Regulated Resources	1443	1657	950	1053.75
Proposed HBA/Incentive Breakdown by Type*:				
Total Single Family Dividable	0	226	0	71
Total Single Family Non-Dividable	0	181		11
Total Other Private	0	38	0	12
Single Family Other	0	8	0	0
Total Proposed HBA	0	453	0	94
Total Regulated and HBA	1443	2110	950	1147.75

*Note that HBA is only relevant for private property, not public in the Proposed “Option 2” program.

Sources: Existing SL Program data is from Sensitive Lands Data Summary report dated April 28, 2010 prepared by Morgan Holen and Roger Shepherd to the Second Look Task Force. Note that this does not include property annexed and designated SL from mid -2010 until now nor does it include the properties removed from SL under the Isolated Tree Groves ordinance. We estimate that those two issue balance out and that the 2010 data is still viable for overall comparison sake.

Proposed “Option 2” September 2015 Data from LU 15-0019 September 3, 2015 Planning Commission hearing packet, Exhibit E-1, page 3 of 3 chart titled “Option 2 RP and/or RC – Breakdown by Property Type.” And HBA data is from Exhibit E-2.1 of the same packet.

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