IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR COOS COUNTY

ROB TAYLOR, Plaintiff, v. CITY OF BANDON, an Oregon Municipal Corporation, Defendant.	Case No. 19CV28149 **PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

Defendant's response and declarations fail to establish any genuine issue of material fact that would prevent summary judgment in favor of Plaintiff. Accordingly, Plaintiff requests that the trial court grant his Motion for Summary Judgment and enter a judgment for declaratory relief as requested.

ARGUMENT ON REPLY

I. Defendant's Response Conflates Issues of Fact and Questions of Law.

Defendant's Response mistakes clear questions of law for issues of material fact subject to trial:

> The parties can now argue whether the court now has the ability to examine each of the statutes in question as to its possible applicability to the setting of rates, and deduce whether the Charter provisions prohibit compliance with those statutes, or whether those statutes preempt the Charter restrictions; it is a material fact subject to trial as to the breadth applicability of the City's covenants, which pre-date the Charter initiatives, that cannot be impaired by the restrictive Charter provisions.

Defendant's Response at 3, lines 13–18. Notwithstanding Defendant's assertions, preemption is a straightforward question of law eminently appropriate for summary judgment. *E.g.*, *State ex rel. Juv. Dept. v. Shuey*, 119 Or App 185, 187 (1993) ("Whether state law is preempted by federal law is a question of law."). Further, "the meaning of a statute is [a question] of law for the court," and

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1 the "same rules that govern the construction of statutes apply to the construction of municipal
2 ordinances." *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 199 (1993). There is no need to
3 go through the expense of trial, as the material facts are undisputed, and Plaintiff is entitled to
4 prevail as a matter of law.

5 The undisputed material facts are as follows. Bandon is a home rule municipality
6 governed by the "2002 City of Bandon Charter" ("Charter"). The Charter is effectively Bandon's
7 constitution, and any city council resolution or ordinance conflicting with the Charter is null and
8 void. *Portland Police Assn. v. Civil Service Bd. Of Portland*, 292 Or 433, 440 (1982). The
9 Charter restricts water, sewer, and utility rate increases to those specifically approved "by consent
10 of the voters." Charter Sections 46–48. The voters passed these provisions in 1995. *Stadelman*
11 *v. City of Bandon*, 173 Or App 106, 109–10 (2001) (referring to Sections 47–49, which were
12 renumbered Sections 46–48).

13 In spite of the Charter provisions, on June 3, 2019, the city council ("Council") voted to
14 increase rates for both water and wastewater utilities by resolution. *See* Declaration of William
15 Sherlock in Support of Plaintiff's Motion for Summary Judgment, *Exhibits 1 and 2*. The Council
16 passed these resolutions to deal with "[a]n actual budgetary emergency." Defendant's Response
17 at 2, line 30. Despite alluding to an emergency, neither of the resolutions were passed under an
18 actual, officially declared emergency. Even had the Council officially declared an emergency,
19 taxation is a referendum power reserved to the voters that cannot be overcome by an emergency
20 declaration. *Advance Resorts of Am., Inc. v. City of Wheeler*, 141 Or App 166, 175–177 (1996).

21 The "emergency" Defendants refer to is a budgetary shortfall of their own making. Since
22 passing the relevant Charter provisions in 1995, Bandon "has made attempts to live within the
23 confines" of the Charter restrictions on rate increases. Declaration of Matt Winkel in Support of
24 Defendant's Response at 2, lines 9–10. As is relevant to this case, these "attempts" include
25 repeated renewals of Bandon's operating permit under the National Pollutant Discharge
26

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1 Elimination System Waste Discharge ("NPDES Permit") issued under the federal Clean Water
2 Act. *See* Declaration of Dennis Lewis in Support of Defendant's Response, *Ex. 1*.
3 The Clean Water Act requires NPDES permit holders to renew their permits at least every
4 five years. 33 U.S.C. § 1342(b)(1)(B). Bandon most recently renewed its NPDES Permit in
5 2019. As they had previously at least every five years, Defendant renewed its permit despite the
6 litany of necessary improvements and budget shortcomings described in Defendant's various
7 Declarations attached to their Response. At any point since 1995, after the relevant Charter
8 provision enactments, Bandon could have availed themselves of the proper initiative and
9 referendum process. Instead of educating the public and putting rate increases to vote, as
10 mandated under its Charter, the Council kicked the can down the road until the budget became an
11 "emergency" (again, not an officially declared emergency).

12 **II. The provisions of the NPDES Permit do not preempt the Charter provisions**
13 **restricting rate increases to those approved by the voters.**

14 The material facts described above being undisputed, the only issue of law for the court is
15 whether anything in state or federal law preempts the relevant Charter provisions restricting rate
16 increases. Defendant argues that the NPDES Permit contains obligations that Bandon cannot
17 afford to meet without increasing rates immediately (without voter approval). Therefore, under
18 Defendant's logic, the NPDES Permit is an existing contract that cannot be impaired by the
19 subsequent passage of laws such as the Charter provisions at issue here. *See* Oregon Constitution,
20 Article I, Section 21 (prohibiting laws that impair existing contracts); *see also* United States
21 Constitution, Article I, Section 10 (prohibiting state laws that impair existing contracts). As
22 explained below, although Defendant correctly states the rule against impairing existing contracts,
23 that prohibition does not apply to the facts of this case.
24 Plaintiff and Defendant agree that *Stadelman*, 173 Or App 106, is controlling. *See*
25 Defendant's Response at 3, line 19. In *Stadelman*, the very same Bandon Charter provisions
26 conflicted with a Loan Agreement made between Bandon and the Oregon Department of

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1 Environmental Quality (DEQ). *Id.* at 109–10. The Loan Agreement contained an express "rate
2 covenant" requiring Bandon to charge rates "adequate to generate Net Operation Revenues in
3 each fiscal year at least" sufficient to cover Bandon's indebtedness to the DEQ. *See id.* Vitally,
4 Bandon secured the Loan Agreement *prior* to the passage of the relevant Charter provisions. *Id.*
5 The court cited ORS 288.594, "which expressly provides that 'charter provisions affecting
6 rates . . . shall not be given any force or effect if to do so would impair *existing* covenants' like
7 those in the loan agreement." *Id.* at 114 (emphasis added). The court held the Charter provisions
8 did not apply in that case "at least insofar as the application of the local provisions actually
9 reduced the available funding to a level less than necessary for the city's satisfactory performance
10 of the contract." *Id.* (emphasis in original removed).

11 *Stadelman* is distinguishable from the present case in multiple ways. First, unlike the
12 Loan Agreement from *Stadelman*, the NPDES Permit is in no way a promise to pay anything to
13 anyone. Defendant itself concedes that "the Permit . . . [does] not clearly require revenues to
14 equal operation and maintenance . . . ." Defendant's Reply at 6, lines 9–10. Nevertheless,
15 Defendant argues, "the Defendant must meet these obligations regardless, and failure to do so
16 breaches their permit . . . ." *Id.* lines 12–13. While Defendant may be correct that failure to meet
17 the requirements of the NPDES Permit will result in breach of their obligations, the only proper
18 remedy for Defendants is to take the issue to the voters as the Charter requires. In any respect,
19 the NPDES Permit is not a preexisting contract or debt covenant of the sort contemplated in
20 *Stadelman*.

21 Further, the Charter provisions outdate the current NPDES Permit by twenty-four years.
22 Defendant most recently renewed its NPDES Permit in 2019. Counting back five years at a
23 time—the statutory maximum for NPDES permit renewal—Defendant would have had to renew
24 their permit at least four times after the Charter provisions' passage in 1995. (2014, 2009, 2004,
25 and 1999). Each renewal was an agreement to meet the Permit obligations separate from any
26 commitment made prior to 1995. Prior to making any such commitment *after* 1995, Defendant

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1 was required to follow the Charter and ask the voters' consent if a rate increase was necessary to
2 meet operation and maintenance costs.

3 Defendant now claims that any decision "to live with the restrictions passed by the voters
4 was [in part] a political one." Declaration of Matt Winkel in Support of Defendant's Response at
5 2, lines 12–13. However, in the same breath, Defendant admits that "sewer and electric rates
6 were not immediately impacted by the charter measure, because of preexisting revenue bonds . . .
7 and rates were set accordingly." *Id.* lines 13–15. In other words, the Charter provisions had no
8 effect on Defendant's contractual obligations under any permit in place in 1995. Further,
9 Defendant clearly understood the validity of the Charter provisions at one time, as Defendant
10 "has, on occasion, gone to the voters to request adjustments or raises." *Id.* lines 10–11. Having
11 failed in the past to obtain the voters' consent, Defendant, through the city council, now seeks to
12 circumvent the will of its citizens as established in the Charter by asking the court to save it from
13 the budgetary shortfall they themselves created. For better or worse, Defendant's only available
14 remedy, however, is to educate the public on the necessity of rate increases and put the measure
15 to vote.

16 **III. None of the state statutes Defendant cites otherwise preempt the Charter**
17 **provisions.**

18 Defendant cites several state statutes that "[a]rguably" preempt or otherwise necessitate
19 rate increases without voter consent. Defendant's Response at 6, line 27. The noted statutes are
20 ORS 224.510, 454.225, 454.030(1), and 454.010(5)(a). *Id.* at 6. Defendant also mentions its
21 obligations under the Oregon Safe Drinking Water Quality Act codified at ORS 448.119–285. *Id.*
22 at 4. Defendant's Response fails to articulate its preemption argument and instead readily admits
23 that the matter is an issue of contract addressed under *Stadelman*. Defendant's Response at 6,
24 line 29. Plaintiff agrees. As explained below, none of the statutes offered by Defendant create
25 the sort of preexisting covenant discussed in *Stadelman* that would otherwise invalidate the
26 Charter provisions.

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The Oregon Drinking Water Quality Act ("ODWQA") is the most expansive set of statutes Defendant cites. ORS 448.119–285. Defendant fails to cite to any specific provision from the ODWQA that creates any sort of contract or covenant between Defendant and anyone else. That is likely because there is no such provision. Instead, Defendant merely states that the ODWQA "requirements include a number of things that are all paid for through the revenue generated by the rate payers . . . ." Defendant's Response at 4, lines 14–15. Because Defendant failed to secure the voters' consent to raise rates, Defendant cannot afford to meet its obligations under its current budget. Again, this is a problem of Defendant's own making. Defendant, by its admission, made a political decision not to pursue rate increases through a vote. Declaration of Matt Winkel at 2, lines 12–13. The Charter provisions would have allowed for any number of voter-approved rate increases to cover the costs of ODWQA compliance. Defendant cannot now ignore the Charter absent a preexisting contract or covenant requiring specific amounts to be paid to a specific obligee as per *Stadelman*. The ODWQA creates no such covenant, and Defendant's argument therefore fails for this reason as well.

Defendant's Response also notes several sections from ORS Chapter 454. Defendant's Response at 6, lines 20–26. Specifically, ORS 454.225 allows municipalities to "establish just and equitable" sewer rates. However, ORS 454.225 cannot be read out of context with ORS 454.030, which states that sewer rates are meant "to assure that each recipient of treatment works services . . . will pay its proportionate share." When read together, the statutes simply state that "just and equitable" rates mean that no one shall pay either a disproportionately high or low rate. The statutes say nothing about requiring certain absolute levels of rates so long as they are proportionate, just, and equitable. Thus, the statutes are perfectly compatible with the Charter provisions requiring rate increases to be put to vote. Additionally, ORS 454.215(2) states that the authority in ORS 454.225 to set rates is "not in derogation of any power existing in the municipality under any . . . charter provisions now or hereafter existing." That language makes

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adherence to the Charter provisions mandatory, and Defendant's arguments regarding ORS 454 fail by the plain language of the statutes themselves.

Defendant's final statutory argument also fails for a similar plain-language reason. ORS 224.510(2), cited in Defendant's Response at 6, lines 17–19, reads as follows: "the sewage charge shall be established and the rate fixed by the city's governing body." Defendant neglects to mention 224.510(1), which begins with "[u]nless prohibited by its charter." The opening text of the statute obviously undoes any argument Defendant might make that ORS 224.510(2) preempts the Charter in any way.

CONCLUSION

For the foregoing reasons, the court should grant Plaintiff's claims for relief and declare that the City Council of Bandon's increase in the rates for water and wastewater utilities as set forth in Resolutions 19-08 and 19-09 occurred without the consent of the voters and are therefore void as a matter of law.

DATED this 21st day of November, 2019

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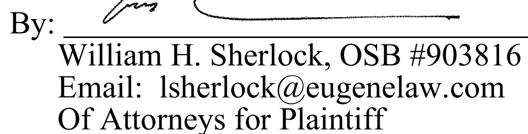

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CERTIFICATE OF SERVICE

I certify that on November 21, 2019, I served or caused to be served a true and complete copy of the foregoing **PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** on the party or parties listed below as follows:

- ☐ Via the Court's E-filing System
- ☒ Via First-Class Mail, Postage Prepaid
- ☒ Via Email
- ☐ Via Personal Delivery
- ☐ Via Facsimile

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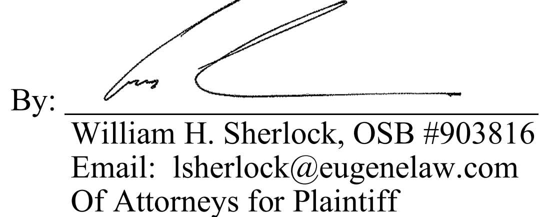

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