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PORTLAND, OREGON
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January 31, 2024

VIA EMAIL - puc.filingcenter@puc.oregon.gov
Public Utility Commission of Oregon
ATTN: Filing Center
201 High Street SE, Suite 100
P.O. Box 1088
Salem, OR 97308-1088

Re: NC 405 - In the Matter of Public Utility Commission of Oregon v. City of
Portland

Dear Filing Center:

The City of Portland respectfully submits its Opening Brief regarding NC 405.

Sincerely,

/s/ Eric Shaffner

Eric Shaffner
Senior Deputy City Attorney

ES/kts

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

NC 405

PUBLIC UTILITY COMMISSION OF
OREGON,

Complainant,

v.

THE CITY OF PORTLAND,

Defendant.

DEFENDANT’S OPENING BRIEF

INTRODUCTION

This is a case of mistaken identity. A property owner mistook his private sewer connection for a publicly-owned pipe and a state agency mistook the City of Portland for the type of local jurisdiction that might disclaim responsibility for its own infrastructure. To make matters worse, the property owner mistook an offer of leniency for a raw deal. But the real story will be the impact on local governments and their citizens throughout Oregon if the agency’s position on the seemingly mundane matter of utility locates for private sewers in the public right-of-way is not reversed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1930, the construction of a house at 2818 NE Ainsworth Street in Portland (“the Property”) was completed. The nearest public sewer main (“the Public Sewer”) was, and still is, located to the west of the Property on the other side of the neighboring lot at 2806 NE Ainsworth Street.¹ The builders connected the Property to the Public Sewer a year earlier through a pipe (“the Private Lateral”) that, according to available information, runs east to

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¹ Response Testimony City of Portland/101 at 7.

1 west in a narrow alley to the south of the Property (“the Alley”).² The Alley is located in a
2 public right-of-way. Since the Private Lateral and the house it serves are not on the same
3 property, the Private Lateral is considered a nonconforming sewer under the Portland City
4 Code.³

5 Defendant City of Portland (“the City”) has known that the Private Lateral is a
6 nonconforming sewer since at least 2009 but has not required the Property’s owners to
7 replace it with a conforming sewer,⁴ for which the authority exists under the Portland City
8 Code.⁵

9 In November 2021, the then-owner of the Property, Mr. Scott Donnell,⁶ hired a
10 contractor to perform work on the Private Lateral.⁷ The contractor contacted the Oregon
11 Utility Notification Center (“the OUNC”), as required by law,⁸ requesting that “all utilities
12 including sewer on entire property including all [rights-of-way] and easements” be located.⁹
13 The City received a notification thereof from the OUNC on November 15.¹⁰ The next day, a
14 utility locator for the Portland Bureau of Transportation “located all City infrastructure
15 within the requested excavation area,” as attested by the then-supervisor of the City’s utility
16 locates group.¹¹ That infrastructure consisted of two sections of public sewer main and two
17 public sewer service laterals, all within the NE 28th Avenue public right-of-way adjacent to
18 the Alley.¹² The Private Lateral is connected to the southernmost of those public sewer

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20 ² Response Testimony City of Portland/102.

21 ³ Response Testimony City of Portland/100 at 1-2.

22 ⁴ *Id.* at 2.

23 ⁵ PORTLAND, OR., CODE § 17.33.050, available at <https://www.portland.gov/code/17/33/050>
24 [hereinafter PCC].

25 ⁶ Mr. Donnell sold the Property in October 2023. See PortlandMaps,
26 https://www.portlandmaps.com/detail/assessor/2818-NE-AINSWORTH-ST/R190229_did/.

⁷ Opening Testimony Staff/101 at 4.

⁸ OAR 952-001-0050.

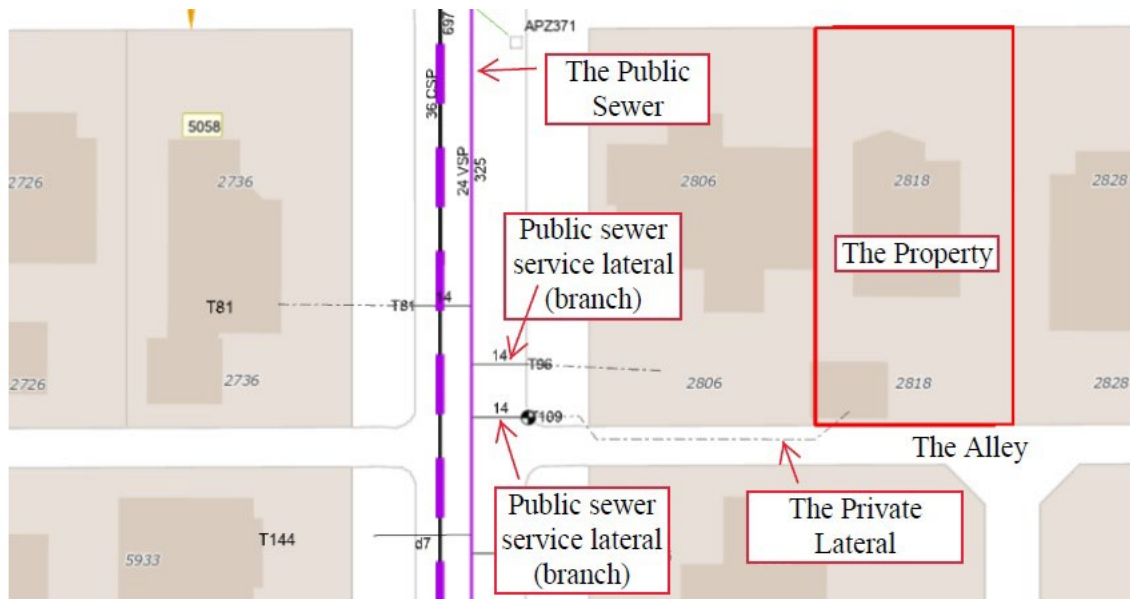
⁹ *Id.*

¹⁰ Answer City of Portland, Ex. B, ¶ 4.

¹¹ *Id.*, ¶ 5.

¹² *Id.* See also Response Testimony City of Portland/200 at 3, ll. 11-20.

1 service laterals and runs east to the Property.¹³ The following image may be of assistance
2 here:¹⁴



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13 In early 2022, prompted by an inquiry from a real estate agent, the City asked Mr.
14 Donnell to apply for an encroachment permit.¹⁵ The Private Lateral, as a nonconforming
15 sewer, is considered an encroachment in the public right-of-way.¹⁶ An encroachment permit
16 provides formal permission from the City for the encroachment to remain until the

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20 ¹³ *Id.*

¹⁴ Adapted from Answer City of Portland, Ex. A.

¹⁵ Response Testimony City of Portland/100 at 2, ll. 14-17.

¹⁶ PCC, *supra* note 5, § 17.24.005 C. (“No person may occupy or encroach on a public right-of-way without the permission of the City, as provided under Portland City Code.”), available at <https://www.portland.gov/code/17/24/005>. See also *id.* § 17.24.014 A., available at <https://www.portland.gov/code/17/24/010>:

24 Except as otherwise provided in this Code, permits to construct, install and/or
25 maintain privately-owned structures in dedicated street area may be issued by
26 the Director of the Bureau of Transportation only to the owner of the property
abutting the half of the street area in which the structure is proposed to be
built. Such permits shall be revocable at any time

1 occurrence of a specified event (here, the eventual installation of a new public sewer main
2 closer to the Property than NE 28th Avenue¹⁷).

3 In May 2022, Mr. Donnell executed the encroachment permit.¹⁸ One of the
4 requirements of that permit is that the applicant must “register the property and the location
5 of all below grade utilities which are associated with the encroachments authorized under this
6 ‘Permit’, with the Oregon Utility Notification Center”¹⁹ The applicant must also agree
7 “to locate all utilities by means of survey or potholing in order to [ensure] that the assumed
8 depths that have been indicated on plans are accurate and that public and city operated
9 utilities are safeguarded against any damage due to construction activities. . . .”²⁰

10 On February 23, 2023, the Public Utility Commission (“the PUC”), on behalf of the
11 OUNC, filed its complaint in this matter, alleging in part that the City
12 violated OAR 952-001-0070 . . . [by] fail[ing] to mark with reasonable
13 accuracy all of the locatable underground facilities or provide marks of
14 unlocatable facilities or notify excavator that no facilities exist in the NE
15 Ainsworth – NE Jarrett St. Right of Way or notify excavator that any facilities
16 within the Right of Way are unlocatable within two business days of
17 notification of OUNC locate ticket number 21334979.²¹

18 ARGUMENT

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20 The PUC’s complaint should be dismissed because the allegations it contains are
21 based on an apparent misinterpretation of the applicable law and because it is factually

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24 ¹⁷ Response Testimony City of Portland/100 at 2-3.

25 ¹⁸ Response Testimony City of Portland/101 at 5.

26 ¹⁹ *Id.* at 4, § 15.

²⁰ *Id.*

²¹ Complaint, ¶ 29.

1 inaccurate. In addition, the complaint incorrectly assumes that local jurisdictions operate all
2 facilities within the public rights-of-way.

3
4 **1. The PUC’s Allegations Are Based on a Misinterpretation of the Law**

5 ***a. Notification of an Excavator Is Not Necessarily Required***

6 The complaint alleges that the City failed to comply with the requirements of OAR
7 952-001-0070(1). Under that rule, upon receiving notice from the OUNC an “operator” is
8 required to do the following:

9 (a) Mark within 24 inches of the outside lateral dimensions of both
10 sides of all its locatable underground facilities within the area of
11 proposed excavation. . . .

12 (b) Provide marks to the excavator of the unlocatable underground
13 facilities in the area of proposed excavation, using the best
14 information available including as constructed drawings or other
15 facility records that are maintained by the facility operator; or

16 (c) Notify the excavator that the operator does not have any
17 underground facilities in the area of the proposed excavation. . . .

18 More specifically, the complaint alleges that the City “did not respond to Ticket
19 number 21334979 within two business days of notification by providing locating service or
20 notifying the excavator of unlocatable facilities”²² and that the City did not “provide any
21 response to the excavator within two days of the notification of Ticket number 21334979.”²³

22 These allegations misstate the rule. An operator is not required to “respond” to a
23 ticket, “provid[e] locating service,” or “provide [a] response to the excavator,” in a general

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26 ²² Complaint, ¶ 24.

²³ Complaint, ¶ 25.

1 sense. In addition, an operator is not required to “notify[] the excavator of unlocatable
2 facilities” in the sense the rules envision.

3 Instead, OAR 952-001-0070(1) requires the following:

- 4 1) If an underground facility belonging to an operator is present in the
5 excavation area and is “locatable,” the operator must mark the ground
6 surface to indicate it. OAR 952-001-0010(11) defines a “locatable”
7 underground facility as one that “can be marked with reasonable
8 accuracy.”
- 9 2) If an underground facility belonging to an operator is present in the
10 excavation area and is “unlocatable,” the operator must make an informed
11 guess about its location and “[p]rovide marks to the excavator”
12 thereof. OAR 952-001-0010(27) and ORS 757.542(7) both define an
13 “unlocatable” underground facility as one that “cannot be marked with
14 reasonable accuracy, including nonconductive sewers and nonmetallic
15 underground facilities that have no trace wires.” In other words, an
16 “unlocatable” facility is not one that cannot be found; it is one that modern
17 locating technology cannot be used to mark with reasonable accuracy.
- 18 3) If the operator has no underground facilities in the excavation area, the
19 operator must notify the excavator thereof.

20 Importantly, only when an operator has no facilities in the excavation area is
21 notification to the excavator required. OAR 952-001-0010(14) defines “notify” as “to make
22 known by any reasonable and legal means of communication.” By contrast, as discussed
23 above, “locatable” facilities must be marked and “unlocatable” facilities must have marks
24 provided to the excavator (the language is not identical but it is clear that in neither case is
25 “communication” involved except to the extent that paint on pavement communicates
26 information to a knowledgeable observer). In other words, as explained by the then-

1 supervisor of the City’s utility locates group, “the rules do not require notification to the
2 excavator unless (1) no locatable utilities were marked and (2) no marks were provided to the
3 excavator indicating the likely presence of unlocatable utilities.”²⁴ This interpretation makes
4 sense, because where locatable and unlocatable facilities are marked at a site, the marks
5 themselves provide notice to the excavator.

6
7 ***b. An Operator Is Only Responsible for the Facilities It Owns***

8 The complaint also alleges that the City “failed to mark with reasonable accuracy all
9 of the locatable underground facilities”²⁵ But the rules do not require an operator to
10 locate all of the locatable underground facilities in an excavation area. OAR 952-001-
11 0070(1)(a) requires an operator to mark “all of its locatable underground facilities”
12 (emphasis added). That three-letter possessive adjective holds outsized importance and
13 indicates that the rule’s drafters correctly understood this basic truth: A utility operator is
14 only responsible for operating, maintaining, repairing, and, in this context, locating
15 infrastructure that it owns.

16 That understanding is reflected in the requirement for “unlocatable” facilities as well,
17 since the operator is expected to “us[e] the best information available including as-
18 constructed drawings or other facility records that are maintained by the facility operator . . .

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26 ²⁴ Response Testimony City of Portland/300 at 2, ll. 8-10.

²⁵ Complaint, ¶ 29.

1 .²⁶ Utility operators do not, and cannot be expected to, maintain records about other
2 operators' facilities as a practical matter.

3 The possessive criterion also applies to situations in which an operator has no
4 facilities in the excavation area, since the operator must "[n]otify the excavator that the
5 operator does not have any underground facilities"²⁷

6 The complaint seeks to circumvent that basic criterion of ownership by focusing on
7 the definition of "operator":

8 Defendant is the operator of the facilities located in the [Alley] under ORS
9 757.542(5), which specifies that "operator" for purposes of OAR 952-001-
10 0070 means ["]any person, public utility, municipal corporation, political
11 subdivision of the state or other person with control over underground
12 facilities.["]²⁸

13 A definition in isolation and without context is meaningless. OAR 952-001-0070(1) does not
14 say that an operator must mark facilities in the excavation area, period. It says an operator
15 must mark that operator's facilities. To separate the locate requirements from an operator's
16 ownership of a facility would create absurd results. For example, if NW Natural or PGE had
17 facilities in the same area, would they have been required to mark the City's locatable or
18 unlocatable facilities?

20 **2. The OUNC's Allegation Is Factually Incorrect**

21 Because the complaint misstates the law, its presentation of the facts of this case is
22 also incorrect. The complaint suggests that the City failed to mark any underground facilities
23 in the excavation area.²⁹ But while it is true that the City did not "mark with reasonable

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25 ²⁶ OAR 952-001-0070(1)(b) (emphasis added).

26 ²⁷ OAR 952-001-0070(1)(c) (emphasis added).

²⁸ Complaint, ¶ 28.

²⁹ Complaint, ¶ 29.

1 accuracy all of the locatable underground facilities” in the excavation area,³⁰ the City
2 did mark all of its underground facilities in that area. As explained in the declaration of the
3 utility locates group’s supervisor, those facilities were limited to the public sewer main and
4 two public sewer service laterals—publicly-owned stubs of pipe to which private laterals
5 connect³¹—in NE 28th Avenue.³² The utility locator “did not locate the private sewer lateral
6 connecting the real property located at 2818 NE Ainsworth Street in Portland to the public
7 sewer”³³ because, in the words of the Chief Engineer of the Portland Bureau of
8 Environmental Services, that pipe was a nonconforming sewer that “was not constructed by
9 the City, has not been ‘accepted’ by the City, and will not be maintained by the City.”³⁴
10 Therefore, the City complied with its obligations under OAR 952-001-0070(1).

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12 **3. Local Jurisdictions Do Not Operate All Facilities Within Their Rights-of-Way**

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14 ***a. The PUC’s Position Is at Odds with Right-of-Way Management and with the
Legislative History***

15 The complaint evinces an apparent belief that a road authority, such as the City, is the
16 operator of all underground utilities within a public right-of-way simply because the road

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21 ³⁰ *Id.*

22 ³¹ *See, e.g., PCC, supra* note 5, § 17.34.020 A. (“‘Branch Sewer’ means the public portion of
23 the underground piping system that connects from the plumbing system of a building or
24 buildings to a public sewer.”), available at <https://www.portland.gov/code/17/34/020>. *See also* Response Testimony City of Portland/200 at 2, ll. 12-15, in which the Chief Engineer of
25 the Portland Bureau of Environmental Service testified as follows: “I understand ‘sewer
26 service lateral’ to refer only to the publicly-owned portion, which runs from the tee or wye to
the property line, typically represented by the curb. It is also referred to as a ‘public sewer
lateral’ or a ‘branch.’”

³² Answer City of Portland, Ex. B, ¶ 5.

³³ *Id.* ¶ 9.

³⁴ Response Testimony City of Portland/200 at 3, ll. 19-20.

1 authority exercises jurisdiction over that area. That belief ignores basic concepts of public
2 governance and infrastructure regulation.

3 As noted above, the complaint places considerable weight on the definitions of
4 “operator” in ORS 757.542(5) and OAR 952-001-0010(15) and their focus on “control over
5 underground utilities.” Those definitions, as already discussed, do not stand alone and they
6 certainly do not override the ownership criterion evident in OAR 952-001-0070(1).

7 Importantly, though, they also do not equate control or jurisdiction with ownership or even,
8 broadly speaking, operation. The City, like all road authorities, manages the public right-of-
9 way on behalf of the public. The *McQuillin* legal treatise explains the concept as follows:

10 The municipal corporation, generally speaking, may exercise supervision and
11 control, and may enact ordinances affecting streets although the title may not
12 be in the municipality. Its authority, in this respect, is not dependent upon
13 ownership of the soil in the street. The right to possession, use and control of
14 the street by the municipal corporation is regarded as a legal, and not a mere
15 equitable right, even where the adjoining proprietor retains the fee. . . . But
16 whatever rights or title the city or town may have over its streets, its powers
17 are those of a trustee for the benefit of the public to be liberally construed for
18 its benefit, strictly construed to its detriment. Whatever may be the quality or
19 quantity of the estate of the city in its streets, that estate is essentially public
20 and not private property, and the city in holding it is considered the agent and
21 trustee of the public and not a private owner for profit or emolument. The
22 interest is exclusively public and is in any respect wholly unlike property of a
23 private corporation, which is held for its own benefit and used for its private
24 gain and advantage. Expressed otherwise, whatever the nature of the title of
25 the municipality in streets and alleys, whether a fee simple or only a qualified
26 or conditional fee or a perpetual easement, it is such as to enable the public

1 authorities to devote them to public purposes. The power to maintain and
2 regulate the use of the streets is a trust for the benefit of the general public . . .

3 .³⁵

4 That regulation, the treatise explains, “may take the form either of prohibiting certain uses of
5 or encroachments on the street, or of granting a right to use the streets in a particular way or
6 for a particular purpose.”³⁶

7 In Portland, the management of the public right-of-way relies on tools such as street-
8 opening permits,³⁷ the encroachment permit Mr. Donnell signed, and franchises³⁸ issued to
9 public utilities such as Portland General Electric. Those forms of permission do not assign
10 ownership or even operational authority to the City for those elements of infrastructure. As
11 explained in the Portland City Code, “The exercise of jurisdiction and regulatory
12 management of a public right-of-way by the City is not official acceptance of the right-of-
13 way, and does not obligate the City to maintain or repair any part of the right of way.”³⁹

14 Nevertheless, the complaint concludes that the City “is the operator” of the Private
15 Lateral because the City has “control over underground facilities.”⁴⁰ That conclusion
16 appears to be based in part on a misapplication of legislative history to the facts of this case.
17 In his written testimony, Kevin Hennessy, the PUC’s Chief of Pipeline Safety, quotes at
18 length from comments explaining amendments to the OUNC’s rules.⁴¹ In particular, the
19 rules changed the focus from “owner” to “operator” since, as the comments reasoned, “an

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23 ³⁵ Municipal powers, 10A MCQUILLIN MUN. CORP. § 30:41 (3d ed.).

24 ³⁶ *Id.*

24 ³⁷ PCC, *supra* note 5, § 17.24.010 A., available at <https://www.portland.gov/code/17/24/010>.

25 ³⁸ *Id.* § 17.24.010 B.

25 ³⁹ PCC, *supra* note 5, § 17.24.005 D.

26 ⁴⁰ Complaint, ¶ 28.

26 ⁴¹ Opening Testimony Staff/100 at 9-10.

1 owner may not always have control over the buried facility. Therefore, responsibility is
2 shifted from ownership to administrative or operational control.”⁴²

3 But those comments also make it clear that the rule changes were not intended to
4 address the type of situation that led to the OUNC’s involvement in this matter. Those
5 changes targeted situations in which local jurisdictions apparently refuse to locate their own
6 pipes:

7 [S]ewer service laterals are normally installed from the sewer main in the
8 street to the building. The city or service district requires the occupant to
9 install a lateral, to their specifications from the main to the building. The city
10 or service district then asserts that the lateral is owned by the building
11 occupant. However, the owner of the lateral has no administrative or
12 operational control over the lateral in the right-of-way. It is controlled and
13 operated by the city or sewer district. . . .

14 That description is an over-simplification of the way sewer infrastructure is built. Sewer
15 service laterals do not run from a sewer main all the way to a building on private property.

16 As discussed, the sewer service lateral, or branch,⁴³ is a length of publicly-constructed pipe
17 that runs from the sewer main to the edge of the public right-of-way, often delineated by a
18 curb. A different length of pipe, the private lateral, completes the connection from there.

19 Regardless of the accuracy of the description above, though, what is clear is that at
20 one time there must have been jurisdictions that disclaimed responsibility even for their own
21 sewer service laterals. In Portland, that has never been the case. As the Chief Engineer of

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26 ⁴² *Id.* at 9, ll. 19-21.

⁴³ *See* discussion at note 31 and associated text.

1 the Portland Bureau of Environmental Services explained in response to a question in his
2 written testimony:

3 Q. The official quoted in the legislative history went on to say that “[t]he city
4 or service district then asserts that the lateral is owned by the building
5 occupant.” Is that true for the City of Portland?

6 A. To my knowledge, the City has never asserted that a sewer service lateral
7 constructed by the City is owned by anyone other than the City. That is made
8 clear in the Code provisions establishing the limits of the City’s maintenance
9 responsibility:

10 The City maintains City sewer and drainage improvements that are
11 located in City rights-of-way and that are described as part of the City
12 public sewer, storm sewer and drainage system. However, the City
13 only maintains laterals as follows:

- 14 a. For a City-paved street with curbs, the City will maintain a
15 lateral from the sewer main to the street-side curb face
16 nearest the property being served. . . .
- 17 f. Those portions of a lateral not addressed by Subsections
18 17.32.070 B.1.a. through d. are the responsibility of the
19 property owner receiving service through the lateral. . . .⁴⁴

20 There is one important difference between the private laterals described above and the
21 Private Lateral at issue here: The private length of pipe connected to the Property appears to
22 leave the public branch in NE 28th Avenue, veer around the neighboring property at 2806
23 NE Ainsworth Street, and run 106 feet under the Alley, a public right-of-way. Because the
24 City controls access to the public right-of-way, that length of pipe is not as available to the
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26 ⁴⁴ Response Testimony City of Portland/200 at 2-3 (quoting PCC, *supra* note 5, § 17.32.070
B.1., available at <https://www.portland.gov/code/17/32/070>).

1 owner of the Property for inspection, maintenance, or repair as it would be if it were located
2 entirely on the Property, as is the case with most other private sewer laterals.

3 Nevertheless, that does not make it a City pipe. The comments in the legislative
4 history argued that “[t]he operator of the sewer main (city or service district) would have the
5 best knowledge of where the lateral would be (they installed it or controlled the installation) .
6 . . .”⁴⁵ Here, the City did not install or control the installation of the Private Lateral. The
7 City issued a permit for the connection of the Property to the public sewer system but, as the
8 manager of the City’s Nonconforming Sewer Conversion Program explained in her written
9 testimony:

10 Developers and plumbers did not always provide the City with the routes of
11 the private sewer laterals they installed. The plumbing permit for Mr.
12 Donnell’s connection indicates that the private sewer lateral was a
13 “connection to main sewer out from alley” in 1929. . . . It does not provide
14 information about the location of the remaining length of pipe. The plumbing
15 permit only indicates that the end of the private sewer lateral was correctly
16 connected to the public wye.⁴⁶

17
18 ***b. The 2014 DOJ Legal Memorandum Is Misleading***

19 The confusion about the ownership and operation of public sewer systems is also
20 evident in a legal memorandum that figures prominently in this matter. In 2014, Johanna
21 Riemenschneider, an Assistant Attorney General at the Oregon Department of Justice (“the
22 DOJ”), wrote the memorandum (“the Memo”), titled “Locating Sewer Laterals,” to Mr.
23 Hennessy.⁴⁷ The PUC’s Safety Inspection Report for this matter concluded with the

24 ⁴⁵ Opening Testimony Staff/100 at 10, ll. 5-7.

25 ⁴⁶ Response Testimony City of Portland/100 at 3-4.

26 ⁴⁷ Oregon Utility Notification Center, “Standards Manual,” at 34-35, *available at*
<https://digsafelyoregon.com/wp-content/uploads/2019/05/Standards-Manual-1-1-19.pdf>
[hereinafter Standards Manual].

1 following, in part:

2 Correspondence also included reference to Oregon Department of Justice
3 letter – “Locating Sewer Laterals” dated June 4, 2014 Based on the
4 findings of this investigation and review of the DOJ interpretation, Staff
5 determined the sewer lateral of approximate 106 feet long that is within the
6 [right-of-way] and under control of City of Portland Therefore, subject
7 to this complaint [the City] is responsible for providing locating and marking
8 services as required per OAR 952-001-0070.⁴⁸

9 The Memo, which revisited and confirmed a 1998 DOJ memorandum, advised Mr. Hennessy
10 that “cities that have the control over or the right to bury sewers that are in the public right-
11 of-way . . . are operators that must . . . comply with the requirements of the Oregon Utility
12 Notification Center, including the location of sewer laterals.” In the abstract, that summary
13 of the rules is correct: A local jurisdiction that controls access to the public right-of-way is
14 considered an “operator” and must comply with the OUNC’s rules concerning sewer locates.

15 As discussed above, though, the authority to manage access to the public right-of-way
16 does not confer on the local jurisdiction operational control, much less ownership, of the
17 facilities in the right-of-way.

18 The confusion stems, in no small part, from a problem of terminology. Unlike the
19 Portland City Code, with its clear definitions of terms like “branch sewer”⁴⁹ and its
20 delineations of operational and maintenance responsibilities for public and private pipes,⁵⁰
21 even the question to which the Memo ostensibly responded was ambiguous: “You ask
22 whether cities or homeowners and businesses are responsible for locating sewer laterals.”⁵¹
23 That ambiguity was carried throughout the Memo’s analysis, e.g.:

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25 ⁴⁸ Opening Testimony Staff/101 at 4.

⁴⁹ See discussion at note 31 and associated text.

⁵⁰ PCC, *supra* note 5, § 17.32.070, available at <https://www.portland.gov/code/17/32/070>.

⁵¹ Standards Manual, *supra* note 47, at 34.

1 You have told us that cities typically require owners of homes and businesses
2 to install laterals to city specifications. Although protesting cities assert that
3 the owner has legal title to the lateral, the owner in fact has no administrative
4 or operational control over the lateral in the public right-of-way. That part of
5 the lateral is controlled and operated by the city. The part of the lateral on
6 private property, on the other hand, is the responsibility of the owner because
7 the owner does have the operational and administrative control of that piece of
8 it. Thus, you are concerned with only those parts of laterals that are in the
9 public right-of-way.⁵²

10 Nowhere does the Memo consider such factors as governmental oversight and
11 authority, private development decisions, capital asset expenditures, the fiduciary
12 responsibility of ratepayer-funded utilities,⁵³ or legal liability. Instead, the primary
13 consideration for the Memo, the OUNC's report that relied on the Memo, and the
14 PUC's complaint is the limited question of jurisdictional control over the public right-
15 of-way.

16 Because of the unusual availability of a document that, in most situations, would
17 remain a confidential communication between an attorney and her clients, the Memo is
18 frequently relied upon by developers, contractors, and private property owners to support an
19 argument that the City is responsible for locating all sewer infrastructure in the right-of-
20 way.⁵⁴ The Memo is mentioned in a misleadingly-worded and accusatory frequently-asked

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22 ⁵² *Id.*

23 ⁵³ *See, e.g.,* Response Testimony City of Portland/200 at 4-5 (“[T]he City’s sewer and
24 stormwater utility . . . is funded by ratepayer money. The use of that money is restricted by
the City’s Charter and by state law. [The City] does not spend ratepayer funds on
infrastructure that is not part of the public sewer system.”).

25 ⁵⁴ *See, e.g.,* Opening Testimony Staff/102 at 2-3, in which I responded to Mr. Donnell, the
26 then-owner of the Property, discussing the memorandum (Standards Manual, *supra* note 47).
(Note that Opening Testimony Staff/102 is incomplete; the full document contains Mr.
Donnell’s communications as well.)

1 question that appears on the OUNC’s website⁵⁵ and in the OUNC’s Standards Manual⁵⁶:

2 [Q:] Who is responsible for marking sewer laterals . . . the operator of the
3 sewer main or the home/business owner? Sewer laterals in the right of way
4 are a constant problem because some cities/operators refuse to mark them
5 because they say that they do not own the laterals.

6 [A:] The Oregon excavation laws make it clear that operators are responsible
7 for marking the laterals within the public right of way and easements.

8 The definition of “Operator” is found under OAR 952-001-0010(15). The
9 laws do not address “owners” of underground facilities, only operators. Please
10 read the letter from the Oregon Department of Justice, found on page 34-35,
11 which provides a complete discussion concerning sewer laterals. OAR 952-
12 001-0070.

13 Despite having no legally-binding weight, the Memo also appears in full in that manual.⁵⁷

14
15 **CONCLUSION**

16 Through no fault of Mr. Donnell or his successors, the Property was incorrectly
17 connected to the public sewer in 1929, creating an encroachment in the public right-of-way.
18 But the City played no role in that error, either. The Property is a victim of decisions made a
19 century ago. Nevertheless, the burdens of those decisions must remain on the Property, just
20 as they would if the Private Lateral crossed adjacent private property without the benefit of
21 an easement.

22 The complaint is framed as a simple effort to require the City to locate the pipe, but
23 since the OUNC’s arguments are based on the definition of “operator” and on an incorrect

24
25 ⁵⁵ Oregon Utility Notification Center, Oregon 811, “FAQs,”
<https://digsafelyoregon.com/resources/faq-2/>.

26 ⁵⁶ Standards Manual, *supra* note 47, at 44-45.

⁵⁷ Standards Manual, *supra* note 47, at 34-35.

1 understanding of local jurisdictions’ control over the right-of-way, the effect of the OUNC’s
2 position would be to require the City to accept responsibility for the Private Lateral. And
3 since the City cannot use public funds on private infrastructure, accepting responsibility for
4 the Private Lateral would mean City ownership of it.

5 The OUNC, the PUC, and, for that matter, the DOJ do not have the authority to
6 determine—much less assign—ownership of underground facilities. Similarly, there is no
7 authority to direct the misuse of public funds to support private infrastructure. As relevant
8 here, the statutes and rules require operators to subscribe to the OUNC,⁵⁸ they assign
9 responsibility for injuries and damage resulting from a failure to subscribe,⁵⁹ and they require
10 operators to mark their own locatable and unlocatable facilities or notify excavators that they
11 have no facilities.⁶⁰ Nothing more. Ownership and operation are matters reserved to those
12 jurisdictions.

13 Far from being installed, controlled, or operated by the City, the Private Lateral and
14 pipes like it are considered public nuisances and are subject to abatement.⁶¹ As explained
15 above,⁶² though, the issuance of an encroachment permit to Mr. Donnell will allow the
16 Private Lateral to remain within the Alley for the foreseeable future. In fact, the City, by
17 requiring Mr. Donnell to locate the Private Lateral, furthered the OUNC’s stated purpose of
18 “help[ing] to reduce underground facility damage, which threatens the public’s safety and
19 costs millions of dollars each year.”⁶³

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24 ⁵⁸ ORS 757.557(1).

25 ⁵⁹ ORS 757.557(3).

26 ⁶⁰ OAR 952-001-0070.

⁶¹ PCC, *supra* note 5, § 17.33.080, available at <https://www.portland.gov/code/17/33/080>.

⁶² See notes 15-17 and associated text.

⁶³ Standards Manual, *supra* note 47, at 8.

1 For the reasons stated above, the complaint should be dismissed.

2
3 Dated this 31st day of January, 2024.

4 Respectfully submitted,

5
6 */s/ Eric Shaffner*

7

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