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

HOME BUILDERS ASSOCIATION OF LANE COUNTY, an Oregon Non-Profit Corporation, and HOME BUILDERS CONSTRUCTION COMPANY, an Oregon Corporation,

Petitioners,

vs.

CITY OF SPRINGFIELD, a Municipal Corporation,

Respondent,

and

METROPOLITAN WASTEWATER MANAGEMENT COMMISSION,

Intervenor-Respondent.

Case No. 16-04-15534
Case No. 16-04-15996

OPINION AND ORDER

HOME BUILDERS ASSOCIATION OF LANE COUNTY, an Oregon Non-Profit Corporation, and HOME BUILDERS CONSTRUCTION COMPANY, an Oregon Corporation,

Petitioners,

vs.

CITY OF EUGENE, a Municipal Corporation,

Respondent,

and

METROPOLITAN WASTEWATER MANAGEMENT COMMISSION,

Intervenor-Respondent.

This matter came before the Court on May 16, 2005, for argument on Petitioners' Writ of Review. Andrew Stamp appeared on behalf of Petitioners. G. David Jewett and Heather Young appeared on behalf of Intervenor MWMC, Meg Kieran appeared on behalf of Respondent City of Springfield, and Jerome Lidz appeared on behalf of Respondent City of Eugene.

1. Summary of the Case

This case concerns the legality of a System Development Charge (SDC) Methodology that was drafted by the Metropolitan Wastewater Management Commission (MWMC), and formally adopted by the cities of Eugene and Springfield. An SDC is a one-time charge requiring new development to pay a proportionate share of existing utility capital investment and/or future growth-related capital costs. The purpose of the SDC Methodology in this case is to establish the basis for an SDC to fund improvements and expansions in wastewater treatment facilities for projected growth. The SDC Methodology challenged here was adopted in 2004 by the city councils for Springfield and Eugene through Resolutions 04-28 and 4794, respectively.

In their nine assignments of error, Petitioners initially allege that Respondents have developed a novel approach in developing this SDC Methodology—an approach Petitioners allege does not comport with the requirements of the SDC statute. Petitioners also argue that the SDC Methodology improperly shifts costs for wastewater treatment to persons involved in new development (a.k.a. "growth"). Petitioners contend that, as a result of Respondents' alleged errors, growth is being overcharged tens of millions of dollars.

On behalf of Respondents, Intervenor argues that the SDC statute requires a methodology that provides a framework for the imposition of SDCs. It does not, however, mandate any particular type of methodology. Furthermore, Intervenor argues that the SDC methodology demonstrates consideration of all statutorily required criteria.

This court agrees with Intervenor's interpretation of the SDC statute and its application of facts to that statute. Accordingly, this court affirms the decisions made by Respondents as challenged by Petitioners.

2. Factual and Procedural Background

MWMC is a local government agency that was created by an intergovernmental agreement between Eugene, Springfield, and Lane County in 1977. MWMC's general functions are to construct, operate, and maintain regional sewerage facilities to serve the Eugene-Springfield metropolitan area.

Eugene and Springfield have had a regional wastewater SDC since 1991, which was updated in 1997. MWMC attempted to update the SDC Methodology again in 2002, but Petitioners opposed. In a settlement agreement, MWMC agreed to postpone the changes and do a comprehensive update to the 1997 Methodology by July 2004. MWMC was to develop an SDC Methodology that would comply with the SDC statute, produce adequate revenue, and be

equitable to both existing and new users of the wastewater system.

MWMC retained CH2M Hill, a global engineering firm, to assist in updating the SDC Methodology. A draft of the SDC Methodology was produced in March 2004. MWMC approved the SDC Methodology created by CH2M Hill in May 2004. Also in May, MWMC approved its 2004 Facilities Plan, which includes a statutorily required list of projects to be funded by SDCs (this list is commonly referred to as the "309 plan and list" in reference to its governing statute, ORS 223.309).

The cities of Springfield and Eugene both adopted the MWMC 2004 Facilities Plan. The SDC Methodology was subsequently adopted by both cities in June 2004, despite opposition to the Methodology expressed by Petitioners at public hearings.

Pursuant to the procedure for judicial review set forth in ORS 223.304(7)(b) (2004),[1] Petitioners timely filed a petition for writ of review in this court in August 2004. The petition was granted, and MWMC subsequently intervened on behalf of Respondents. Upon receiving a copy of the complete record and the briefs of the parties, this court heard oral argument on May 16, 2005.

3. Standard of Review

The statute governing the allowance of a writ of review, ORS 34.040, delineates five errors that are reviewable by the circuit court, two of which are relevant here: (1) making a finding or order not supported by substantial evidence in the whole record, and (2) improperly construing applicable law.

In those assignments of error that challenge Respondents' application of the law, this court must discern the intent of the legislature in creating the statute. *PGE v. BOLI,* 317 Or 606, 610 (1993). In so doing, this court will afford very little deference to Respondents' statutory interpretations.

In the assignments of error asserting a finding of fact unsupported by substantial evidence, the standard of review is significantly different. When reviewing for substantial evidence, the court may not substitute its judgment for that of the city or reweigh the evidence. Substantial evidence exists where a reasonable person could accept the finding as adequate to support a conclusion. *Baker v. City of Woodburn*, 190 Or App 445, 455-56 (2003). Therefore, a much higher degree of deference is owed to Respondents when reviewing their factual determinations.

The parties raise a further question as to whether the adoption of Resolutions 04-28 and 4794 by the cities of Springfield and Eugene constitute quasi-legislative actions, or quasi-judicial actions. If these actions are quasi-judicial, as Petitioners argue, then this court owes the decisions of the cities little deference. If these actions are quasi-legislative, as Intervenor asks the court to believe, then this court owes the cities a very high degree of deference. *Homebuilders Assn. v.*

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[1]The version of the SDC statute in effect in June 2004 controls here, as the Resolutions challenged by Respondents were adopted in June 2004.

Tualatin Hills Park & Rec., 185 Or App 729, 738 (2003).

This issue is complicated by two factors. First, the writ of review statute indicates that the procedures outlined therein are applicable to quasi-judicial actions: "This writ shall be allowed in all cases in which a substantial interest of a plaintiff has been injured and an inferior court including an officer or tribunal other than an agency . . . in the exercise of judicial or *quasi-judicial functions* appears to have [made one of five errors]." ORS 34.040(1) (emphasis added). Petitioners urge that, even though the process undertaken by the cities appears to have been quasi-legislative, the Oregon legislature has specifically identified this action as quasi-judicial by assigning it a method of judicial review intended for quasi-judicial actions.

Intervenor disagrees, raising the second complicating factor—that the Oregon Court of Appeals discussed the process of enacting an SDC as a quasi-legislative action in another recent case involving a challenge from Petitioners. In *Homebuilders Assn. v. Tualatin Hills Park & Rec.*, 185 Or App 729, 738 (2003), the court indicated that "the SDC at issue here is not an *ad hoc* exaction, but a quasi-legislative one." Because of its characterization as quasi-legislative, the court of appeals determined that adoption of an SDC by a city enjoys a high degree of judicial deference. *Id.*

It is this court's opinion that the adoption of an SDC Methodology is a quasi-legislative act. Although the legislature chose to assign judicial review under a statute intended for quasi-judicial actions, this fact does not change the inherent nature of the proceeding. Instead, the legislature merely bootstrapped a quasi-legislative action to the writ of review procedure to effectuate a just method of judicial review.

Even as a quasi-legislative proceeding, however, this Court must follow the standard delineated in the statute providing for review of the SDC Methodology. In directing the court as to the procedure on a writ of review, the statute specifies that findings of fact are to be considered using the substantial evidence standard.[2] ORS 34.040(1)(c).

4. Assignments of Error

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[2]This court recognizes that the SDC and writ of review statutes do not fit together well. While the Oregon court of appeals has unmistakably identified the process of establishing an SDC as a quasi-legislative proceeding, resulting in a high degree of deference by a reviewing court, the writ of review statute provides for a substantial evidence standard of review for factual findings. This is a very different standard, affording less deference to the initial decision maker. It is the desire of this court to remain true to the spirit of the two statutes in tandem. With this aim, it seems that the substantial evidence standard is the appropriate standard of review for this court to follow in reviewing findings of fact, as this is the standard set forth in the statute providing for review. In light of the result in this case, however, this distinction is probably not critical; even while utilizing a less deferential standard of review, this court affirms all factual decisions of Respondents. It therefore follows that the result would have been the same were a more deferential standard employed.

Of the nine assignments of error, this court finds assignments 1, 3, and 7 to be the most complicated and to require more concentrated legal analyses. These three assignments of error will be discussed first, followed by the remaining assignments (2, 4, 5, 6, 8, and 9).

A. First Assignment of Error

Petitioners' first assignment of error charges Respondents with improperly construing applicable law by establishing an SDC on the basis of a generic set of principles, instead of considering all the factual and legal issues required by ORS 223.304. The Methodology adopted by Respondents explains how the SDC will be calculated, but does not provide the actual calculations. Instead, the numbers used to determine the SDC are included in tables that were appended to the Methodology. The pivotal question that arises in this assignment of error is whether it is legally permissible to use this "shell" methodology approach. As a question of statutory interpretation, this assignment of error will be reviewed with very little deference to the decisions of Respondents.

Both parties agree that the term "methodology" is nowhere defined in the statute. Petitioners argue that language throughout the SDC statute suggests the legislature's intent to have the SDC figure included in a methodology. For example, Petitioners note that ORS 223.304 includes language discussing actual dollar amounts (i.e., "*value* of unused capacity," "*cost* of the existing facilities"), therefore indicating an expectation that a methodology would include these actual numbers. Further, Petitioners argue that the phrases "system development charge" and "system development charge methodology" are used interchangeably in the statute, again suggesting that the fee itself would be included in the methodology that establishes it.

Intervenor, on the other hand, contends that the concept of a methodology was designed by the legislature to retain flexibility in its construction; simply because other communities have adopted Methodologies inclusive of the SDC does not mean that this is the only acceptable method for creating a Methodology.

Intervenor additionally notes that it has provided all data required by the statute in the form of tables appended to the Methodology. Petitioners argue that these tables were not formally contained within the Methodology. According to Intervenor, however, one of these tables, which includes the final SDC and breaks down this fee into its component parts, was specifically adopted by the cities with the Methodology. This table, as well as others containing important figures regarding population and capacity, were available with the Methodology during the public comment and review process required by 223.304(7)(a) (setting forth the procedure for notice prior to a hearing that establishes or modifies an SDC). Intervenor argues that a public comment and judicial review process exists—and has been conducted—for every change or addition made to either the Methodology or the SDC itself, whether it be a statutory process or a procedure constructed through the city's code.[3]

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[3]Respondents note that additional procedures for challenging an SDC calculation have been adopted by the Respondent cities. *See* Springfield Code 3.418; Eugene Code 7.735.

This court agrees with Intervenor on the first assignment of error. The statutory scheme at ORS 223.297 *et seq.* does not require that the SDC calculations actually be *included* in the Methodology. On the contrary, ORS 223.304 clearly indicates that a *method*ology shall be created setting forth the *method* to be used in establishing both reimbursement and improvement SDCs. Pursuant to the statute, this methodology "shall be available for public inspection." ORS 223.304(1)(b)(B) (regarding reimbursement fees); *see also* ORS 223.304(2)(a) (regarding improvement fees). The specific procedure for notifying the public and allowing interested parties the opportunity to comment upon a proposed SDC (or modification of an existing SDC) is specified in ORS 223.304(7)(a). If a party wishes to contest the methodology, the procedure allowing for judicial review is delineated at ORS 223.304(7)(b). So long as these processes are followed and the public has ample opportunity to review both the proposed Methodology and SDC, the purposes of the statute are served. Petitioners have failed to demonstrate that Respondents' Methodology has violated any provisions of the statutory scheme, or any notice and comment procedure required therein.

Respondents' decisions are affirmed as to the first assignment of error.

B. Third Assignment of Error

Petitioners' third assignment of error states that Respondents' SDC Methodology improperly shifts costs to future growth resulting from existing deficiencies in the system. Petitioners argue that Respondents have misconstrued the language of the SDC statute, which requires that an SDC "[b]e calculated to obtain the cost of capital improvements for the projected need for available system capacity for future users." ORS 223.304(2)(b). In essence, Petitioners believe that Respondents have not adhered to the statute's requirement that improvement fees be allocated equitably to future users.

The factual posture of this assignment of error is complicated. In general terms, the wastewater treatment system that serves both the cities of Eugene and Springfield is in need of repair to correct deficiencies with infiltration and inflow (I&I). Because Respondents are looking to correct the deficiencies in the current system *and* add more capacity for future growth, the process of establishing an SDC for future users becomes more complicated. Petitioners want to ensure that future users are not paying more than their share to fix deficiencies in the current system. Further, Petitioners want to ensure that costs resulting from new regulatory requirements are not improperly shifted to growth.

The primary issue in this assignment of error is the standard of review. Petitioners cast this assignment of error as one of statutory interpretation—Petitioners believe that both parties agree on all the facts, but Respondents' misapplication of the law has caused the current error. Intervenor contends that Respondents understood and applied the law just as they were supposed to, but Petitioners simply dispute the factual data used by Respondents to calculate the fee. Intervenor thereby argues that substantial evidence is the proper standard to be used in reviewing this assignment of error.

Petitioners support their argument by citing *Emmons v. Lane County*, LUBA no. 2004-111, February 2005. The dispositive issue in *Emmons* was whether the subject property was located within a "farm unit." While the petitioners believed this question to be a legal one, the intervenor argued that it was a factual question and therefore subject to the substantial evidence standard. The court ultimately agreed with the petitioners on this issue: "Intervenor and the county are correct that the determination under this provision depends largely on the facts, and petitioners do challenge some of the county's findings. However, the issue on appeal is purely a legal question; *i.e.*, whether the subject property is part of a 'farm unit.' The county relied on three cases applying the *farm unit test*" (emphasis added). Petitioners here believe *Emmons* supports their contention that the equitable and proportionate allocation of SDCs is a legal question, as opposed to a factual determination.

Petitioners' reliance on *Emmons* is misguided. In the land use context, the concept of a farm unit—although once a factual inquiry—has evolved into a legal question, complete with its own legal test (appropriately dubbed the "farm unit test"). While the facts remain important in such a case, they are only useful in the context of the legal structure that has been established over time by the courts. In contrast, Petitioners rely on no such legal test here. The SDC statute simply directs that the allocation of fees is done equitably and proportionately—concepts that are not rooted in any legal test, but are dependent wholly upon the facts of a given situation. Given the purely factual nature of this assignment of error, it will be reviewed by this court under the substantial evidence standard (*i.e.*, whether a reasonable person could accept the finding as adequate to support a conclusion).

The inquiry then follows—what kind of evidence serves to satisfy the substantial evidence standard? Intervenor asserts that the testimony of an expert witness can constitute substantial evidence on which a finding is based. *Hillsboro Neigh. Dev. Comm. v. City of Hillsboro*, 15 Or LUBA 426, 441 (1987). Contrary to the view held by Petitioners, Intervenor argues that all of the factual assumptions underlying the expert's opinion need not be contained in the record. As such, Intervenor posits that the opinions and recommendations by CH2M Hill, Galardi Consulting, and MWMC—the organizations that participated in creating or reviewing the Methodology—constitute substantial evidence, as each of these organizations is an expert in the wastewater management field. This court accepts the argument of Intervenor regarding expert testimony, and will consider the recommendations of these expert bodies as constituting substantial evidence.

Because Respondents' experts determined the allocation of fees as set forth in the Methodology to be equitable in compliance with the statutory requirement, the substantial evidence test is summarily satisfied, and further explanation of the facts is unwarranted.

Respondents' decisions are affirmed as to the third assignment of error.

C. Seventh Assignment of Error

In their seventh assignment of error, Petitioners argue that the SDC is based on a 309 plan and

list that was drawn from a Public Facilities and Services Plan (PFSP) not in compliance with state and local land use laws. This being an issue of statutory interpretation, the substantial evidence standard does not apply.

Petitioners explain that the SDC Methodology must be based on projects contained in the 309 plan and list, pursuant to ORS 223.309. This list must come from the city's comprehensive plan, which is a planning document that draws its projects from the city's PFSP. While the SDC statute specifically states that an SDC methodology is not a land use decision (thereby disallowing jurisdiction by LUBA), Petitioners assert that the comprehensive plan and the PFSP are both land use documents. Because the projects included in the SDC methodology are dependent upon projects from the 309 plan and list, and this list comes from the PFSP, Petitioners believe there is a "link" between the land use statutes and the SDC statute. On this basis, Petitioners argue that the projects identified in the 309 plan and list were improperly adopted before these projects were formally amended to the PFSP.

Intervenor reads the statute differently. The statute in question, ORS 223.309(1), states:

> Prior to the establishment of a system development charge by ordinance or resolution, a local government shall prepare a capital improvement plan, public facilities plan, master plan or comparable plan that includes a list of the capital improvements that the local government intends to fund . . . .

Intervenor argues that Respondents complied with the statute. The 309 Plan and List, required by the statute, was taken from the 2004 MWMC Facilities Plan. Nowhere does the statute require that this list come from a land use document. Intervenor further argues that the SDC statute was intended to have no relation to land use statutes—it is a funding statute. It is meant to fund improvements, such as are needed in wastewater treatment plants—not land use planning. *See* ORS 223.314 (indicating that the establishment or modification of an SDC is not a land use decision).

This Court agrees with Intervenor's understanding of the operative statute. The statute simply requires that a facilities plan (in generic terms) be created prior to the adoption of an SDC. The purpose of this plan is to contain the list of projects to be funded by the SDC, and thereby give the public notice of the purpose of the charge. The statute clearly does not require that these projects be included in a land use plan prior to their inclusion in the 309 plan and list, and there is no reason to do so. Even if the Petitioners were correct, they have not been harmed in any way—they were given notice of the projects in the 309 Plan and List through the 2004 MWMC Facilities Plan, and they had the opportunity to challenge them in that context.

Respondents' decisions are affirmed as to the seventh assignment of error.

D. Assignments of Error 2, 4, 5, 6, 8, and 9

Each of the remaining assignments of error asserted by Petitioners are issues of fact, and

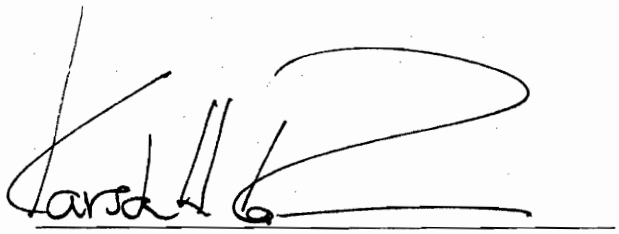
therefore reviewable under the substantial evidence standard. In light of the analysis in the third assignment of error, this court will refrain from an explanation of each assignment. Given the testimony presented by Respondents' wastewater treatment experts, this court finds that substantial evidence exists such that a reasonable person could agree with the decisions of Respondents.

The cities' decisions are affirmed as to the second, fourth, fifth, sixth, eighth, and ninth assignments of error.

Mr. Jewett shall prepare the Judgment, which shall, by reference, incorporate this Opinion and Order.

IT IS SO ORDERED.

Dated this 17 day of June, 2005.



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