BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

D & B HOME INVESTMENTS,
Petitioner,

vs.

CITY OF DONALD,
Respondent.

LUBA No. 2005-107

ORDER

FINAL OPINION
AND ORDER

Appeal from City of Donald.

M. Chapin Milbank, Salem, filed the petition for review and argued on behalf of petitioner.

Andrew M. Cole, West Linn, filed the response brief and argued on behalf of respondent. With him on the brief were Andrew M. Cole and Associates, PC.

BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 01/05/2006

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city decision approving its application to convert an existing mobile home park to a mobile home subdivision.

FACTS

In April 1995, the city approved a 114-space "mobile home park" or "manufactured dwelling park" on the subject property, in four phases.[1] Conditions of approval included a requirement that the applicant submit final construction plans showing public water and sewer design and specifications, and construct and dedicate public water and sewer facilities prior to the issuance of building permits. The applicant eventually developed 50 spaces in phases 1 and 2. At some point the remaining phases were sold and developed as a separate subdivision with site-built dwellings.

In 1997, the city adopted Ordinance 108-97, which established system development charges (SDCs), payable at the time the city issues a building permit or a placement permit, or connects existing structures to the city water and sewer system. Section 152.12(4) of the ordinance provided an exemption for development approved by the City planning commission as of the date of the ordinance, provided that the "development is completed or substantial and continuous progress has been made to complete such development within one year" of the date of the ordinance.

In 1999, the city became aware that the sewer and water systems constructed for the mobile home park did not meet city standards required for public dedication, and had never been inspected. The city notified the park owners that the city would not issue any further placement permits for mobile homes until the sewer and water systems were constructed to city standards and approved. In response, the owners sought and obtained the city's approval to amend the 1995

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[1] As defined in the relevant statutes, the terms "mobile home park" and "manufactured dwelling park" appear to be interchangeable. ORS 92.830(4), 446.003(27), 446.003(32).

1 conditions of approval to allow private sewer and water systems. However, no further placement
2 permits were sought or approved from 1999 to 2004.
3 In August 2004, petitioner informed the city that he was interested in purchasing the subject
4 property and converting it to a mobile home subdivision. Petitioner asked whether the city would
5 assess SDCs for homes placed on lots in the subdivision. The city responded that it would, based
6 on Ordinance 108-97, which the city understands to require SDCs whenever a new placement
7 permit is issued for a manufactured dwelling, whether that dwelling is placed in a mobile home park
8 or a mobile home subdivision.
9 Petitioner purchased the park and requested placement permits for six manufactured
10 dwellings. The city required SDCs for those permits, but petitioner refused to pay, taking the
11 position that there had been substantial and continuous progress to complete the park within one
12 year of the adoption of Ordinance 108-97, and thus all future development in the park falls within
13 the Section 152.12(4) exemption. The city has taken the position that the exemption was lost or no
14 longer applies, and apparently the dispute regarding those six placement permits remains outstanding
15 between the parties.
16 In March 2005, petitioner applied to convert the subject property to a 50-lot mobile home
17 subdivision. The planning commission approved the application, but included condition of approval
18 D, which states:

19 "Development of the individual lots shall be limited to manufactured dwellings and
20 shall comply with applicable provisions in Section 2.403.02 of the Donald
21 Development Ordinance. *All new homes shall be subject to applicable system*
22 *development charges*." Record 221 (emphasis added).

23 Petitioner appealed the planning commission decision to the city council, arguing in relevant
24 part that the city cannot impose SDCs for placement permits for lots within the proposed
25 subdivision, because (1) development within the park is exempt from SDCs under Ordinance 108-
26 97 and (2) imposition of SDCs as a condition of approving conversion of a mobile home park to a

1 subdivision is prohibited by ORS 92.845(1)(b).[2] The city council declined to remove the
2 emphasized language in condition D, and approved the application with the condition unchanged.
3 This appeal followed.

4 **JURISDICTION**

5 **A. Writ of Mandamus**

6 On November 18, 2005, the city filed a motion to dismiss this appeal, arguing that LUBA
7 lost jurisdiction when petitioner filed a writ of mandamus in circuit court seeking an order requiring
8 the city to issue placement permits for manufactured homes in the park without imposition of SDCs.
9 The city argues that pursuant to ORS 227.179(2) the filing of a writ of mandamus with the circuit
10 court vests all jurisdiction over the application with the circuit court.[3]

11 The city attaches to its motion the writ filed by petitioner. As far as we can tell from the
12 allegations, the writ concerns the issue of SDCs imposed on new placement permits within the
13 existing mobile home park. The writ does not reference or appear to challenge the subdivision
14 decision that is before us. For that reason alone, the motion to dismiss would seem to have no
15 merit. In any case, we note that ORS 227.179(2) authorizes writs to be filed when a local
16 government fails to take final action on an application within 120 days after the application is

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[2] ORS 92.845(1) is quoted in full at n 10, below. In relevant part, ORS 92.845(1)(b) provides that a mobile home subdivision created in a mobile home park under ORS 92.830 to 92.845 is "not subject to system development charges" that are "based on approval of the subdivision[.]"

[3] ORS 227.179 provides, in relevant part:

> "(1) Except when an applicant requests an extension under ORS 227.178 (5), if the governing body of a city or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete, the applicant may file a petition for a writ of mandamus under ORS 34.130 in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval.
>
> "(2) The governing body shall retain jurisdiction to make a land use decision on the application until a petition for a writ of mandamus is filed. Upon filing a petition under ORS 34.130, jurisdiction for all decisions regarding the application, including settlement, shall be with the circuit court."

deemed complete. The city does not argue, and it does not seem to be the case, that the writ that petitioner filed with the circuit court is based on ORS 227.179(2) or the city's failure to take action within the 120 day deadline. As far as we are informed, the city in fact issued its final decision on the subdivision application within the 120-day deadline. The challenged decision approves a subdivision within an urban growth boundary and is therefore a limited land use decision that is subject to our jurisdiction, unless some exception to our jurisdiction applies.[4] The city has not demonstrated that LUBA lost jurisdiction when petitioner filed the writ attached to the city's motion.[5]

The motion to dismiss is denied.

B. Fiscal Exception

In the city's response brief, the city also argues that LUBA lacks jurisdiction over the challenged decision because the only issue raised in this appeal concerns the city's authority to impose SDCs on new placement permits within the subdivision. According to the city, LUBA lacks jurisdiction to review decisions involving adoption or imposition of SDCs and similar "fiscal matters." *See State Housing Council v. City of Lake Oswego*, 48 Or App 525, 530, 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635 P2d 647 (1981) (the Land Conservation and Development Commission lacks jurisdiction to review city ordinance adopting SDCs on new construction); *Jesinghaus v. City of Grants Pass*, 42 Or LUBA 477, 483 (2002) (creation of a reimbursement district is fiscal decision not subject to LUBA's jurisdiction); *Baker v. City of Woodburn*, 37 Or LUBA 563, 568-69, *aff'd* 167 Or App 259, 4 P3d 775 (2000) (creation of LID is fiscal decision not subject to LUBA's jurisdiction).

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[4] Under ORS 197.825(1) LUBA has exclusive jurisdiction over "limited land use decisions." ORS 197.015(12)(a) defines "limited land use decision" in relevant part as a "a final decision or determination made by a local government pertaining to a site within an urban growth boundary" that concerns "[t]he approval or denial of a subdivision or partition, as described in ORS chapter 92."

[5] At oral argument, petitioner stated that it had filed a request to dismiss the writ, and the city agreed that dismissal of the writ would moot the motion to dismiss. As of the date of this opinion, however, the parties have not advised us that the court has in fact dismissed the writ.

1 Even more to the point, the city argues, is ORS 223.314, which provides that:

2 "The establishment, modification or implementation of a system development
3 charge, or a plan or list adopted pursuant to ORS 223.309, or any modification of a
4 plan or list, is not a land use decision pursuant to ORS chapters 195 and 197."

5 *See Home Builders Assoc. v. City of Springfield*, __ Or LUBA __ (LUBA Nos. 2004-
6 090/105/114, September 2, 2005) (dismissing under ORS 223.314 an ordinance that adopts
7 pursuant to ORS 223.309 a public facilities plan and list of public facilities projects to be funded by
8 SDCs). We understand the city to argue that imposition of SDCs in a tentative subdivision plat
9 approval involves the "implementation" of a system development charge, and thus the challenged
10 decision is not a land use decision subject to LUBA's jurisdiction.

11 Finally, we understand the city to argue that LUBA lacks jurisdiction over this appeal, or at
12 least the issues raised in this appeal, because the sole focus of petitioner's assignment of error is the
13 imposition of fees that are allegedly invalid for reasons that have nothing to do with land use matters
14 or the fact that the fees are embodied in a limited land use decision. *See Scappoose Sand and*
15 *Gravel, Inc. v. Columbia County*, 161 Or App 325, 332, 984 P2d 876 (1999) (jurisdiction over
16 an ordinance amending a land use regulation lies with circuit court, not LUBA, where the
17 amendment is limited to adding a new regulatory fee and petitioner's challenges to the new fee have
18 no direct bearing on the fact that the fee is part of a land use regulation).

19 As noted above, the challenged decision approves a subdivision plat within an urban growth
20 boundary, and thus on its face appears to be a "limited land use decision" subject to our exclusive
21 jurisdiction. The decision is not an ordinance adopting a scheme of system development charges, as
22 in *Housing Council*, or a similar decision that involves only or principally "fiscal matters." Many
23 land use decisions and limited land use decisions include conditions or findings that impose or
24 reference SDCs.[6] If such conditions suffice to exempt such decisions from our jurisdiction, then

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[6] As discussed below, we understand the city to argue that Condition D does not *impose* SDCs, it simply reminds the applicant that the city's existing SDC ordinance will apply to any new placement permits obtained within the new mobile home subdivision.

LUBA's jurisdiction over land use and limited land use decisions would be far from exclusive. *See State ex rel Moore v. City of Fairview*, 170 Or App 771, 778-79, 13 P3d 1031 (2000) (exclusive jurisdiction to challenge condition of subdivision approval requiring payment to reimbursement district lies with LUBA).

Similarly, with respect to ORS 223.314, in our view that statute removes from the ambit of LUBA's jurisdiction decisions that adopt an ordinance or similar legislative action that establishes, modifies or implements a system development charge, or that adopt the plan or list described in ORS 223.309. For example, the ordinance at issue in *Home Builders* was a legislative decision that adopted the plan and list as authorized by ORS 223.309, and accordingly LUBA dismissed that appeal pursuant to ORS 223.314. We disagree with the city in the present case that a quasi-judicial decision approving a tentative subdivision plat "implements" a system development charge within the meaning of ORS 223.314, simply because that decision includes a condition of approval that imposes or references SDCs.

Whether LUBA lacks jurisdiction over the decision under the reasoning in *Scappoose Sand and Gravel, Inc.* is a more difficult question. The decision at issue in that case was an ordinance that amended the county's Surface Mining Ordinance, a land use regulation, to add a new regulatory fee. As the court explained, even though decisions that amend land use regulations are unquestionably "land use decisions" subject to LUBA's jurisdiction, the circuit court may nonetheless exercise its declaratory judgment jurisdiction, where the decision "imposes a tax or a fee that is invalid for reasons apart from any direct bearing that the ordinance has as a regulation of land use." 161 Or App at 332.[7] In a footnote, the court stated that it might resolve the

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[7] The court stated, in relevant part:

> "Although LUBA has exclusive jurisdiction to review the adoption of amendments to 'land use regulations,' not all enactments that come within the definition of that term deal exclusively with land use. Moreover, there is authority that supports the proposition that the jurisdictional lines are not as rigid as the county supposes them to be and that subject matter jurisdiction can be allocated consistently with the reality that the topics and effects of particular local legislation can implicate more than one subject. Under *Dunn v. City of*

1 jurisdictional question differently if the ordinance had adopted other amendments to the land use
2 regulation besides the new fee.[8]

3 *Scappoose Sand and Gravel, Inc.* suggests that in certain rare circumstances jurisdiction
4 over what is otherwise a land use decision may lie *either* with LUBA or the circuit court, depending
5 on the scope and nature of the decision and petitioner's challenge to it. Because the plaintiff in
6 *Scappoose Sand and Gravel, Inc.* sought to invalidate the new fee for reasons that had no direct
7 bearing on the fact that it was an amendment to a land use regulation, the court held that the circuit
8 court properly exercised jurisdiction. Applying that reasoning here, we understand the city to argue
9 that petitioner's assignment of error challenges condition D based solely on (1) a statute that is
10 concerned with SDCs, and (2) an exemption in the city's SDC ordinance. We understand the city
11 to argue that LUBA either cannot or should not exercise jurisdiction over this appeal, because the
12 appeal is exclusively concerned with a subject matter, SDCs, that LUBA generally has little to do

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> *Redmond*, 303 Or 201, 735 P2d 609 (1987) * * *, a party who asserts that a land use decision and/or regulation gives rise to a regulatory taking may effectively choose to invoke either LUBA's authority to invalidate the land use decision *per se* or the circuit court's authority to provide an inverse condemnation remedy for the resulting taking. * * * The necessary, if unspoken, premise of *Dunn* is that a local action that could fall within LUBA's jurisdiction as a 'land use decision' could also possess the characteristics of something else--a 'compensable taking'--for which a judicial remedy traditionally has been and remains available.
>
> "In our view, the situation here is comparable. Ordinance 92-8 amends a land use regulation and, as such, is a land use decision. However, *under plaintiff's allegations, the 1992 ordinance also imposes a tax or a fee that is invalid for reasons apart from any direct bearing that the ordinance has as a regulation of land use*. We conclude that, under the circumstances of this case, plaintiff's allegations come within the declaratory judgment jurisdiction of the circuit court." 161 Or App at 332 (emphasis added; footnotes and citations omitted).

[8] The court noted:

> "We emphasize that this opinion does not sanction or give *carte blanche* to forum shopping. As we have observed in the text, it is generally not difficult to determine whether a local enactment is a land use regulation or something else. The jurisdictional flexibility that we recognize here exists only in the most marginal situations, and few situations can legitimately be located at the margins between land use regulation and regulation of other kinds. To illustrate, *our holding on the jurisdictional question in this case might have differed if the 1992 ordinance had amended the Surface Mining Ordinance in any way other than or in addition to revising its fee provisions*." *Id.* n 6 (emphasis added).

with, and petitioner's challenges are not based on or directly related to the fact that condition D is part of a limited land use decision.

The cited text and footnote in *Scappoose Sand and Gravel, Inc.* point in two potentially different directions. While the text suggests that the nature and scope of petitioner's challenges is the determinative factor, the footnote suggests that the nature and scope of the challenged decision may also be determinative. Here, unlike the ordinance at issue in *Scappoose Sand and Gravel, Inc.*, the challenged decision does far more than adopt Condition D. It is a quasi-judicial decision approving conversion of a mobile home park into a mobile home subdivision, pursuant to statutory and local standards that no one disputes are land use standards. Condition D to the decision, specifically the last sentence, is an apparently minor (and, according to the city, unnecessary) aspect of the decision. To the extent the nature and scope of the decision is a consideration under *Scappoose Sand and Gravel, Inc.*, that consideration points toward LUBA's jurisdiction.

In any case, we question the city's premise that petitioner's assignment of error is unrelated to the fact that condition D is part of a subdivision approval, a limited land use decision. The central argument under the assignment of error is that the city erred in imposing SDCs as a condition of converting the park to a subdivision, contrary to ORS 92.845(1). In other words, the fact that Condition D is part of a *subdivision* approval is at the heart of the assignment of error. For that reason, we disagree with the city that LUBA lacks jurisdiction over the challenged decision under the reasoning in *Scappoose Sand and Gravel, Inc*.

C. Ministerial Exception

Finally, the city's response brief argues that LUBA lacks jurisdiction over the challenged decision because Condition D was imposed based on "land use standards which do not require interpretation or the exercise of policy or legal judgment." ORS 197.015(10)(b)(A).[9] According to

[9] ORS 197.015(10) defines "land use decision" in relevant part to exclude "decisions of a local government" that are "made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]" We refer to this exception as the ministerial or nondiscretionary exception.

1 the city, payment of SDCs under the city's ordinance is mandatory and fixed in price. The city
2 argues that the SDC ordinance requires no interpretation and imposition of SDCs does not require
3 the exercise of policy or legal judgment. Therefore, the city argues, the decision is subject to the
4 ORS 197.015(10)(b)(A) exception to the definition of "land use decision," and hence not subject to
5 LUBA's jurisdiction.

6 As discussed above, the challenged decision is a limited land use decision, not a land use
7 decision. Assuming without deciding that ORS 197.015(10)(b)(a) has a bearing on what
8 constitutes a limited land use decision, to qualify for the exception to LUBA's jurisdiction at
9 ORS 197.015(10)(b)(A), the decision itself, not a single condition, must be made based on land use
10 standards that do not require interpretation or the exercise of policy or legal judgment. However
11 nondiscretionary the imposition of SDCs under the city's SDC ordinance may be in other contexts,
12 for example, in issuing a building permit or placement permit, as discussed below the standards that
13 are applicable to this subdivision decision include standards that clearly require interpretation.

14 For the foregoing reasons, we have jurisdiction over this appeal.

15 **ASSIGNMENT OF ERROR**

16 As noted, the last sentence of Condition D states that "[a]ll new homes shall be subject to
17 applicable system development charges." Petitioner argues that the last sentence of Condition D is
18 inconsistent with ORS 92.845(1)(b), which prohibits the city from imposing SDCs "based on
19 approval of the subdivision."[10] Petitioner also argues that the city erred in concluding that

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[10] ORS 92.845(1) provides:

> "A planned community subdivision of manufactured dwellings created in a manufactured dwelling park or mobile home park under ORS 92.830 to 92.845:
>
> "(a) Is subject to ORS 94.550 to 94.783;
>
> "(b) Is not subject to system development charges or other similar charges that are based on approval of the subdivision; and
>
> "(c) Remains subject to system development charges that are based on the prior approval of the manufactured dwelling park or mobile home park."

placement of new dwellings in the park or the new subdivision is not exempt under the city's SDC ordinance.

A. ORS 92.845(1)

Petitioner argues that the overarching purpose of ORS 92.830 to 92.845 is to encourage conversion of existing mobile home parks to mobile home subdivisions. Accordingly, petitioner argues, ORS 92.832 provides that it is the policy of the state that local governments shall not "place unreasonable constraints on the conversion of existing parks," or "impose an undue financial burden on the owner of a park."[11] Petitioner contends that ORS 92.845(1) furthers that policy, by providing that a converted park is subject to SDCs only if the SDCs are "based on the prior approval" of the mobile home park. Indeed, petitioner argues, with a few statutory exceptions the only conditions that can be imposed on the subdivision are those that were imposed at the time the existing mobile home park was approved. ORS 92.835(1)(d) and (2).[12] *See also* ORS 92.837(1)

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[11] ORS 92.832 provides:

> "(1) There is a need to create a mechanism for owners of manufactured dwellings in existing manufactured dwelling parks and mobile home parks to acquire individual ownership interest in the lot on which the dwelling is located;
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> "(2) The creation of an individual ownership interest should not impose an undue financial burden on the owner of a park;
>
> "(3) The public interest is furthered by regulating the promotion, subdivision and sale of individual ownership interests in the lots in a park to owners of manufactured dwellings to ensure that local jurisdictions do not place unreasonable constraints on the conversion of existing parks into planned community subdivisions of manufactured dwellings; and
>
> "(4) The orderly conversion of manufactured dwelling parks and mobile home parks to subdivisions has effects on infrastructure and access that make it appropriate to require assurances that public health and safety standards are met by persons buying or selling lots converted from a park."

[12] ORS 92.835 provides, in relevant part:

> "Notwithstanding the standards and procedures established under ordinances and regulations adopted by the governing body of a city or a county under ORS 92.044 or 92.048, when application for approval of the subdivision of a manufactured dwelling park or mobile home park that was lawfully approved before July 2, 2001, is made under ORS 92.040 to the governing body of a city or county, the governing body of the city or county shall approve:

1 (only comprehensive plan and land use regulation provisions that applied at the time the park was

2 approved continue to apply to the subdivision, until all the lots or sold or 10 years).[13] Because the

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(1) A tentative plan upon receipt and verification of evidence that:

(a) The park is in compliance with the governing body's standards for a manufactured dwelling park or a mobile home park or is an approved nonconforming use. For the purposes of this paragraph, a park is in compliance if the governing body of the city or county has not issued a written notice of noncompliance on or before July 2, 2001;

(b) Except as provided in this paragraph, the tentative plan does not make changes from the approved manufactured dwelling park or mobile home park development * * *;

(c) The tentative plan restricts the use of lots in the subdivision to the installation of manufactured dwellings and restricts any other property in the subdivision to use as common property as defined in ORS 94.550 or for public purposes;

(d) *The tentative plan does not contain conditions of approval or require development agreements except the original conditions of approval and development agreements contained in the original approval for the park or conditions required by ORS 92.830 to 92.845*; and

(e) The property owners applying for the conversion have signed and recorded a waiver of the right of remonstrance, in a form approved by the city or county, for the formation of a local improvement district by a city or county. * * *.

"(2) A plat in compliance with the applicable requirements of ORS 92.010 to 92.190, except standards and procedures adopted by regulation or ordinance under ORS 92.044 or 92.048. *The plat may not contain conditions of approval or require development agreements except the original conditions of approval and development agreements contained in the original plat for the park or conditions required by ORS 92.830 to 92.845*." (Emphasis added.)

[13] ORS 92.837(1) provides:

"Except as provided in subsection (2) of this section, city or county comprehensive plans and land use regulations that applied at the time the manufactured dwelling park or mobile home park was approved continue to apply to park land that is converted to a subdivision pursuant to ORS 92.830 to 92.845 until the earlier of:

"(a) The sale of all of the newly created lots in accordance with ORS 92.840 and the issuance of permits to allow the placement of a manufactured dwelling on each of those lots; or

"(b) Ten years after conversion of the manufactured dwelling park or mobile home park to a subdivision."

1 1995 approval of the existing park did not require payment of SDCs as a condition of the park
2 approval or of obtaining placement permits, petitioner argues, the city cannot impose such
3 conditions now.

4 The city's decision does not address ORS 92.845(1)(b) or (c). On its face, the last
5 sentence of Condition D seems inconsistent with ORS 92.845(1)(b), because it purports to impose
6 SDCs as a condition of approving the requested conversion from a mobile home park to a mobile
7 home subdivision. For that matter, it also seems inconsistent with ORS 92.835(1)(d) and (2),
8 which as noted above prohibit placing conditions of approval on the subdivision that were not
9 imposed on the mobile home park approval. We understand the city to argue, in part, that the last
10 sentence of Condition D is not intended to impose SDCs, but rather to simply advise the applicant
11 that SDCs will be imposed on future development within the subdivision, pursuant to Ordinance
12 108-97. However, the city adopted findings that make it clear that "the payment of SDCs will be
13 placed as a condition of approval" *because* the park is being converted to a subdivision.[14] Such a
14 condition is expressly prohibited by ORS 92.845(1)(b), unless it falls within some exception to that
15 statute.

16 In its response brief, the city argues that Condition D is authorized by ORS 92.845(1)(c),
17 which as noted above provides that a mobile home park converted to a subdivision "[r]emains
18 subject to system development charges that are based on the prior approval" of the mobile home
19 park. *See* n 10. According to the city, Condition D simply reflects the fact that under Ordinance

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[14] Although the city did not address ORS 92.845(1), it adopted findings explaining why the park and subdivision were not exempt from SDCs under Ordinance 108-97. The city council adopted the following planning commission finding on that point:

> "The manufactured home park was developed at a time when the City of Donald was beginning to establish systems development charges. Charges for this park were waived for a period of one year after adoption [of the SDC ordinance] or if there was a change in use. Since this will convert the park to a subdivision—in effect changing the use of the property—the payment of SDCs will be placed as a condition of approval. For the record, existing homes are not subject to these charges. However, any new home will be subject to all applicable SDC fees. This is consistent with City requirements for all new subdivisions." Record 198 (emphasis in original).

1 108-97, adopted in 1997, any placement of a dwelling within the existing park triggered imposition
2 of SDCs. Because the existing mobile home park has been subject to SDCs since 1999, the city
3 argues, the subdivision is also subject to SDCs, pursuant to ORS 92.845(1)(c). Thus, the city
4 contends, any SDCs ultimately imposed on development of the subdivision under Ordinance 108-
5 97 will be "based on the prior approval" of the mobile home park and would not be "based on
6 approval of the subdivision."

7 We disagree with the city that SDCs imposed pursuant to Ordinance 108-97 would be
8 "based on the prior approval of the manufactured dwelling park or mobile home park," within the
9 meaning of ORS 92.845(1)(c). That language clearly refers to circumstances where SDCs are
10 imposed as a condition of approving the prior mobile home park or otherwise as part of that
11 decision. That limited view of ORS 92.845(1)(c) is buttressed by its context. As petitioner notes,
12 with exceptions not relevant here ORS 92.835(1)(d) and (2) essentially prohibit local governments
13 from imposing new conditions of approval on the subdivision that were not imposed on the park.
14 The tentative subdivision plan and plat may include only "the original conditions of approval and
15 developments agreements contained in the original approval for the park[.]" ORS 92.835(2). That
16 context strongly suggests that ORS 92.845(1)(c) exempts only SDCs that are imposed under an
17 original condition of approval or in the original development agreement. Consequently,
18 ORS 92.845(1)(c) does not govern circumstances where the prior mobile home park approval says
19 nothing about SDCs, and SDCs are based solely on operation of an entirely separate ordinance.
20 In that circumstance, it is difficult to understand how the SDCs could possibly be "based on the
21 prior approval" of the mobile home park.

22 Because the last sentence of Condition D is prohibited by ORS 92.845(1)(b) and not
23 authorized by ORS 92.845(1)(c), remand is necessary to strike that sentence. Remand on that
24 limited basis leaves unresolved the question of whether the city can, after correcting Condition D,
25 nonetheless impose SDCs on placement permits within the new subdivision, based solely on
26 Ordinance 108-97. We understand petitioner to argue that imposition of SDCs under such

1 circumstances is inconsistent with the intent of ORS 92.830 to 92.845, to encourage conversion of
2 mobile home parks to mobile home subdivisions by making such subdivisions free of "undue
3 financial burdens" and "unreasonable restraints." Conversely, we understand the city to argue that
4 ORS 92.830 to 92.845 protects converted parks only from SDCs that are *triggered* by the
5 conversion, not SDCs imposed pursuant to an independent ordinance that applies equally to
6 placement permits within the existing park or the new subdivision. ORS 92.845(1) does not
7 provide a clear answer to that question. Arguably, that statutory provision simply does not address
8 circumstances where SDCs are imposed pursuant to some means other than the subdivision
9 approval or the prior mobile home park approval.

10 Because the present case does not require us to resolve that dispute, we decline to do so.
11 That issue is perhaps best resolved in a context where the city applies Ordinance 108-97 to impose
12 SDCs on a placement permit in the new subdivision.[15]

13 **B. Ordinance 108-97**

14 Petitioner next challenges the city's finding that the mobile home park is no longer exempt
15 from SDCs under Section 152.12(D) of Ordinance 108-97.[16] *See* n 14 and also Record 54 (city
16 council finding that the Ordinance 108-97 exemption expired in 1998 because the park owner failed
17 to make "substantial and continuing progress"). Petitioner argues that the city misinterpreted

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[15] However, we note, as petitioner does, that ORS 92.837(1) provides that comprehensive plan and land use regulations that applied at the time the mobile home park was approved continue to apply to the mobile home subdivision until the earlier of (1) sale of all lots and issuance of placement permits on those lots, or (2) 10 years after conversion. *See* n 13. The arguable negative implication is that comprehensive plan provisions and land use regulations that post-date the mobile home park approval do *not* apply to the mobile home subdivision until one of the two conditions occurs. As noted, Ordinance 108-97 post-dates the 1995 mobile home park approval. Of course, given that adoption, modification or implementation of a SDC ordinance is not a "land use decision" pursuant to ORS 223.315, it is at least debatable whether Ordinance 108-97 is a "land use regulation" as that term is defined at ORS 197.015(11). *But see Housing Council*, 291 Or at 885 (1981) (suggesting without deciding that a SDC ordinance could be viewed as a land use regulation as defined under the predecessor to ORS 197.015(11)).

[16] Section 152.12(D) of Ordinance 108-97 provides:

> "Development for which, at the time of the effective date of this subchapter, approval has been granted by the City Planning Commission [is exempt from SDCs]; provided, however, that the development is completed or substantial and continuing progress has been made to complete the development within 1 year from the effective date of this subchapter." Record 276.

Ordinance 108-97 and adopted findings not supported by substantial evidence. According to petitioner, the record in fact reflects that "substantial and continuing progress" was made within one year of the 1997 adoption of Ordinance 108-97, if that ordinance is correctly interpreted, and therefore the mobile home park enjoys perpetual immunity from SDCs.

The city responds that the city council correctly interpreted Ordinance 108-97 in concluding that the park owners failed to make "substantial and continuing progress" within the one-year time frame. According to the city, the city council interpreted Ordinance 108-97 to require not only that substantial and continuing progress is made during the one-year period, but that that progress leads to completion in accordance with the original city approvals. It is undisputed, the city contends, that the park owner failed to complete sewer and water facilities that met the standards for public dedication, as required by the 1995 approval, and that the conditions of approval were ultimately modified to allow for private facilities. The city argues that the city council interpretation of Ordinance 108-97 is consistent with its text, context, purpose and policy, and must be affirmed under ORS 197.829(1).

We need not and do not address the parties' contentions regarding the Ordinance 108-97 exemption. We have already concluded that the last sentence of Condition D is inconsistent with ORS 92.845(1)(b) and not authorized by ORS 92.845(1)(c). With the last sentence of Condition D removed on that basis there is no condition of approval in the challenged decision that purports to authorize imposition of SDCs under Ordinance 108-97. Thus, our resolution of the parties' dispute over Ordinance 108-97 would be *dicta* in the present appeal. As explained above, the parties' dispute over direct application of Ordinance 108-97 will likely be ripe for review only when and if the city imposes SDCs as a condition of approving a placement permit for individual mobile homes within the new subdivision. Accordingly, we do not reach those issues.

C. Conclusion

The city's decision is remanded to delete the last sentence of Condition D.