BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WORKERS FOR A LIVABLE OREGON,
Petitioner,

vs.

CITY OF ALBANY,
Respondent,

and

SVC MANUFACTURING, INC.,
Intervenor-Respondent.

LUBA No. 2007-256

FINAL OPINION
AND ORDER

Appeal from the City of Albany.

Kenneth D. Helm, Beaverton, represented petitioner.

James V.B. Delapoer, Albany, represented respondent.

Steven L. Pfeiffer, Portland, represented intervenor-respondent.

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

DISMISSED 07/09/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a city resolution approving an amendment to a development agreement.

MOTION TO INTERVENE

SVC Manufacturing, Inc. (intervenor), moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is granted.

FACTS

In October of 2006, the city, intervenor, and several other parties entered into a development agreement regarding the construction of a bottling plant. The agreement provided that the city would be responsible for providing necessary infrastructure to develop the bottling plant. The development agreement indicated that the city planned to provide the infrastructure through the creation of an urban renewal district.

Seven months after the original development agreement was signed, intervenor advised the other parties to the development agreement that it wished to postpone construction of the bottling plant. The parties then negotiated an amendment to the development agreement that established a new timetable for development of the bottling plant and installation of the necessary infrastructure. In December 2007, the city approved the amendment to the development agreement by resolution. This appeal followed.

MOTION TO DISMISS

The city moves to dismiss this appeal because the challenged decision is not a land use decision subject to our jurisdiction. The city argues that the challenged decision is not a statutory "development agreement" as defined by ORS 94.504, which would be subject to our jurisdiction, and that the challenged decision is also not a significant impact land use decision.

A. Statutory Development Agreements

ORS 94.504 *et seq.* authorizes local governments to enter into a "development agreement" and provides that the adoption and amendments of such development agreements are land use decisions subject to LUBA's jurisdiction. ORS 94.508(2). Such statutory development agreements must conform to the specific requirements of the statute.

Petitioner's argument appears to be that the city does not have the authority under any home rule charter or other authority to enter into development agreements, and that therefore the disputed development agreement must be a statutory development agreement, notwithstanding any expressed intentions to the contrary.[1] Petitioner relies on our decision in *ZRZ Realty Company v. City of Portland*, 49 Or LUBA 309 (2005) to argue:

> "* * * [LUBA] held that only in instances where a local government has specific charter authority, such as Portland, can the local government proceed without following ORS 94.504. If a local government is not a home rule entity, or lacks sufficient contracting authority under its charter, then ORS 94.504, with its related procedural requirements must be required." Response to Motion to Dismiss 5.

Petitioner mischaracterizes our decision in *ZRZ Realty*. In *ZRZ Realty*, we held that statutory development agreements permitted under ORS 94.504 *et seq.* "do not provide the exclusive avenue for a city to adopt a development agreement[.]" Our decision expressed no opinion on what the result of a local government, allegedly without home rule authority, entering into

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[1] Paragraph 11 of the amendment to the development agreement states:

> "For avoidance of doubt, the City and the County each do hereby confirm that each has approved and executed this Amendment, as well as the Development Agreement, pursuant to their respective governing charters, and *not pursuant to [ORS]94.504, et seq.*, and do further confirm that neither this Amendment, nor the Development Agreement, constitutes or concerns the adoption, amendment, or application of the goals, a comprehensive plan provision or a land use regulation, the City and the County and the other Parties hereto acknowledging and agreeing that *any and all land use approvals required for the Project are to be obtained in due course at a later date in accordance with all applicable laws and regulations*." (Emphases added.)

a non-statutory development agreement would be.[2] More importantly, even if a local government entered into a development agreement without any authority to do so, we disagree with petitioner's argument that that development agreement would somehow become a statutory development agreement over which we have jurisdiction under ORS 94.508.

Recently in *Povey v. City of Mosier*, ___ Or App ___, ___ P3d ___ (June 18, 2008), the Court of Appeals specifically rejected the plaintiffs' argument that all development agreements must conform to the provisions of ORS 94.504 *et seq*., and found that local governments are free to enter into development agreements that do not meet the requirements of the statute:

> "Thus, the legislative history indicates that the purpose of the [statutory development agreement] bill was to create a 'safe harbor' for government attorneys and developers who feared that, without such legislation, agreements for future development would be susceptible to attack as unlawful attempts to bind future councils. Nothing in the legislative history indicates that ORS 94.504 to 94.528 were intended to prevent less cautious parties, or parties to agreements that did not invite invalidation based on binding future councils, from entering into agreements that did not meet the requirements of statutory development agreements. * * * Local governments and developers that choose to use different forms of agreement remain susceptible to such attacks * * *." Slip op 3-4.

We agree with the city that the challenged decision approving the amendment does not approve an amendment to a development agreement entered into under ORS 94.504 *et seq.* and therefore, we do not have jurisdiction over the challenged decision under that statute.[3]

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[2] Although the City of Portland argued that it had authority under its charter (home rule) to enter into development agreements outside the context of ORS 94.504 *et seq*., and the petitioners in that appeal argued that the city's home rule authority did not allow the city to legislate on statewide concerns such as land use, we ultimately held that the question was not a home rule issue. We instead stated that the question was whether the statutory development agreements permitted under ORS 94.504 *et seq.* were the exclusive method of entering development agreements, and we concluded they were not. 49 Or LUBA at 315-16.

[3] Petitioner does not argue that the challenged decision is a "land use decision" under the statutory definition at ORS 197.015(11).

B. Significant Impact Test

Petitioner argues that even if the challenged decision is not a statutory development agreement subject to LUBA's jurisdiction under ORS 94.504 *et seq.*, LUBA nonetheless has jurisdiction because the challenged decision will have a significant impact on the present and future use of land. *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985). Petitioner argues that the challenged decision actually approves land use actions and therefore has a significant impact on the present and future use of land in the city. The city responds that all proposed land use activities will require future approval.

The significant impact test does not apply to decisions that have only a potential impact on land uses. *Id*. at 479; *McKenzie River Guides Assoc. v. Lane County*, 19 Or LUBA 207, 213 (1990). We agree with the city that the challenged decision does not approve any land use actions. As paragraph 11 of the amendment to the development agreement, quoted earlier, provides, "any and all land use approvals required for the Project are to be obtained in due course at a later date in accordance with all applicable laws and regulations." Thus, the specific projects set forth in the development agreement will still need to obtain approval under the city's land use regulations. The challenged decision merely anticipates that those activities might occur in the future. The challenged decision is thus not a significant impact land use decision.

Because the challenged decision is not a statutory development agreement under ORS 94.504 *et seq*., and does not meet the significant impact test, it is not a land use decision subject to our jurisdiction.

The city's motion to dismiss is granted. Accordingly, this appeal is dismissed.