IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

PORTLAND METROPOLITAN ASSOCIATION OF REALTORS, et al,	)	
	)	Case No. 15CV19696
Plaintiffs,	)	
v.	)	
	)	ORDER REMANDING
CITY OF PORTLAND,	)	ORDINANCE BACK TO
	)	CITY COUNCIL FOR
Defendant.	)	AMENDED CAPITAL
	)	IMPROVEMENT PLAN;
	)	JUDGMENT DENYING WRIT OF
	)	REVIEW ON OTHER GROUNDS

This case came before me upon petitioners' request for a Writ of Review in relation to the City's adoption of Ordinance 187150, which established a new methodology for System Development Charges (SDCs). Plaintiffs request the court reverse the City's adoption of the ordinance pursuant to ORS 223.302(2), which provides for challenges to calculations of SDCs via a Writ of Review. Petitioners argue the writ should be allowed pursuant to 34.040(1)(b),(c) and (d) in that the City failed to follow the applicable procedure, made a finding or order not supported by substantial evidence in the whole record, or improperly construed the applicable law. Petitioners bear the burden of establishing evidence is insufficient to support the Council's findings. *Chrysler Corp. v. City of Beaverton,* 25 Or App 361, 364 (1976). Substantial evidence is evidence such as a reasonable mind might accept as adequate to support the City's conclusion. *Hutchinson v. City of Corvallis,* 134 Or App 519, 523 (1995); *Johnson v.Civil Service Board,* 161 Or App 489, 500 (1999). The City requests that the court dismiss the petition.

Before moving to the merits of the arguments, the court considers the City's motion to exclude Exhibits 4 and 5 submitted with the Opening Brief of Plaintiffs. In making determinations under ORS 34.040, a court reviews the record and does not take new evidence, *Alt v. City of Salem,* 306 Or 80, 84 (1988). See, also, *Lincoln Loan Co. v. City of Portland,* 317 Or 192, 197, n. 2 (1993) (The circuit court confines its review to the record of the inferior tribunal. It does not take new evidence and does not

pass on questions of fact.); and *Johnson v. Deschutes County ex rel. Board of County Commissioners,* 249 Or App 60, 68-69 (2012) ([T]he reviewing court does not decide what the facts are but merely decides the legal question of whether the evidence is sufficient to support the decision.) Under certain circumstances, the record may be supplemented, but if any supplement is controverted, the reviewing court cannot decide the facts but can only remand for a factual determination. *Alt v. City of Salem,* 306 Or at 84, n. 7.

Exhibit 4 is a page from the Capital Budget of the Portland Parks and Recreation Requested Budget for the Fiscal Year 2015-2016. Plaintiffs argue that Exhibit 4 discusses service deficiencies and so contradicts the statements in the Ordinance and System Development Charge Methodology Update Report that there are no deficiencies in the current level of service. That information duplicates the discussion of deficiencies already included in the Parks 2020 Vision report, which is part of the record. Exhibit 4 is cumulative of that information and is properly excluded.

Exhibit 5 is Metro's census results from 2010 and a 2013 "Revised Draft" of population and occupied housing projections for 2010 to 2035. Plaintiffs argue that the Metro projections are part of the record because Ordinance 187150 includes the statement that "the Metro population and employment data for the City of Portland projects population growth of about 99,000 by the year 2035 with employment growth of about 53,000 for the same period." Exhibit 1, p. 3 of 54. The Metro report cited by the City as support is properly included as evidence for purposes of the court's review under ORS 34.040. As noted above in *Alt v. City of Salem, supra,* though the court may not pass on any questions of fact, the court retains jurisdiction to remand the case back to the City for new factual determinations.

Plaintiffs make numerous challenges to various facets of the Ordinance and the findings on which it is based.

I**. Capital Improvement Plan**

Plaintiffs first argue the City did not comply with applicable procedure and failed to make an order supported by substantial evidence in the whole record by failing to prepare a sufficient capital improvement plan (CIP) as required by ORS 223.309. That statute provides:

> (1) 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, in whole or in part, with revenues from an improvement fee and the estimated cost, timing and percentage of costs eligible to be funded with revenues from the improvement fee for each improvement.
>
> (2) A local government that has prepared a plan and the list described in subsection (1) of this section may modify the plan and list at any time. If a system development charge will be

increased by a proposed modification of the list to include a capacity increasing capital improvement, as described in ORS 223.307 (2):

> (a) The local government shall provide, at least 30 days prior to the adoption of the modification, notice of the proposed modification to the persons who have requested written notice under ORS 223.304 (6).
> (b) The local government shall hold a public hearing if the local government receives a written request for a hearing on the proposed modification within seven days of the date the proposed modification is scheduled for adoption.
> (c) Notwithstanding ORS 294.160, a public hearing is not required if the local government does not receive a written request for a hearing;
> (d) The decision of a local government to increase the system development charge by modifying the list may be judicially reviewed only as provided in ORS 34.010 to 34.100.

ORS 223.309 does not define the term Capital Improvement Plan. The statute merely contains elements that are included in such a plan. *Home Builders Association of Lane County v. City of Springfield,* 204 Or App 270, 278, n. 7 (2006).

When construing a statute, a court must first look to the text and context of a statute and may look to legislative history to the extent it is helpful to the court's determination. *State v. Gaines,* 346 Or 160, 171-172 (2009). The pertinent context includes other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted. *Bell v. Tri-Met,* 353 Or 535, 540 (2013). In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

In looking to the text of the statute, the exact form of the plan is not prescribed. The plan that is prepared must include a list of capital improvements the city intends to fund with the fees. Plaintiffs are correct that the plan must include the estimated cost, timing and percentage of costs eligible to be funded for each improvement. However, the statute includes nothing to indicate how detailed that information needs to be.

Costs are eligible for funding from system development charges only if they are used for capital improvements. ORS 223.297. The term "capital improvement" means facilities or assets used for certain purposes including parks and recreation. ORS 223.299(1)(a)(E). Capital improvements do not include costs of the operation or routine maintenance of the capital improvement. ORS 223.299(1)(b).

The system development charges that fund capital improvements may take the form of either "reimbursement fees," or "improvement fees," or a combination of the two. ORS 223.299(4)(a). An improvement fee means a fee for costs associated with capital improvements to be constructed. ORS 223.229(2). Improvement fees amount to a fee requiring new users to pay for increasing the capacity of the system to accommodate the new users. *Home Builders Association of Metropolitan Portland v. City of West Linn,* 204 Or App 655, 657 (2006). To avoid the prohibition on using system development charges for operation or maintenance, improvement fees must be calculated so that new users bear

only the burden of maintaining the existing level of service attributable to the new users and do not bear the burden of increasing the level of service for the existing population. *Id.,* 204 Or App at 658.

Reimbursement fee means a fee for costs associated with capital improvements already constructed, or under construction when the fee is established, for which the local government determines that future capacity exists. ORS 223.299(3). If a city determines that its existing system has excess capacity and is capable of meeting the needs of new users, the city may impose a reimbursement fee to allow new users to buy into the existing system. *Home Builders Association of Metropolitan Portland v. City of West Linn,* 204 Or App at 657.

Here, the City's plan proposes only projects that increase capacity and so are considered eligible only for improvement fees. Record at 300. Thus, under ORS 299.309, the capital improvement plan must include the costs, timing and percentage of costs to be funded by improvement fees for "each improvement" that serves to increase capacity for future users.

In considering what is required to comply with the CIP statute, it is helpful to consider other statutes within the statutory scheme. ORS 223.304(2) sets out the requirements for Improvement fees. They must:

(a) Be established or modified by ordinance or resolution setting forth a methodology that is available for public inspection and demonstrates consideration of:

(A) The projected cost of the capital improvements identified in the plan and list adopted pursuant to ORS 223.309 that are needed to increase the capacity of the systems to which the fee is related; and

(B) The need for increased capacity in the system to which the fee is related that will be required to serve the demands placed on the system by future users.

(b) Be calculated to obtain the cost of capital improvements for the projected need for available system capacity for future users.

Considering the statutes in conjunction, the ordinance must set forth a methodology that demonstrates consideration of the projected costs of the capital improvements as identified by a capital improvement plan that includes the estimated cost, timing and percentage of costs eligible to be funded for each improvement. The purpose of the plan is to project the costs needed to increase capacity for future users.

The plan presented to the City Council is titled "2015 Park System Development Charge 20-Year Capital Plan (Summary)." Record at 77-83. The plan summary begins with an aggregation of costs for the cost of Acquisition and Development Projects city wide, in the central city and in the non-central city. Record at 77. It then breaks those broader categories down into sub-categories including Land Acquisition, New Park Development, Capacity Increasing Improvements in Existing Parks, Trail Acquisition, Trail Development, Natural Area Acquisition, and Natural Area Restoration. There is a total cost projection which is then broken down to projections for the fiscal years 2015-16, 2016-17, 2017-18, 2018-19, 2020-25, and 2026-35.

Under those categories, the plan includes individual projects, such as creating a destination play area in an existing Northeast park, expanding the Japanese Garden or converting fields in Delta Park to synthetic turf. Some projects are less descriptive, such as East Holladay Park General Improvements, or acquisition in St. Johns, Hillsdale, and Unidentified Non-Central City Acquisitions. None of those individual items are accompanied by particular costs or details. In all, there are about 247 various projects broken down into 16 collected sub-categories.

There is no definition of what constitutes an "improvement" for purposes of the CIP's requirement that certain information be included for "each improvement." In adopting previous CIPs, the City has a history of aggregating improvements by compiling them into various categories. Record at 213-222. The categories listed in the 2004 and 2008 CIPs include such items as "Local Access Park Land Acquisition Central City" with generalized descriptive terms such as "Acquire land for local access parks to serve growth needs" and "Develop local access parks to repair deficiencies and serve growth" Those generalized terms do not break down into any more specific categories. Many are repeated verbatim for numerous categories. The categories do address precise acreage utilizing the prior level of service model, which was based on acres of park land per 1,000 people. They also differentiate between the portions eligible or not eligible for funding by SDCs and delineate the purpose of the improvements to establish whether they included costs of routine maintenance or operation or not. They do not identify individual projects or provide a cost estimation per project.

The City and its consultant opine in conclusory fashion that the 20-Year Capital Plan Summary complies with all the information that is required by ORS 223.309(1). Listing as many as 100 potential projects that cover every neighborhood in the city under a single aggregate amount of $69 million over the course of 20 years would seem to fall short of ORS 299.309's requirement of providing the estimated cost, timing and percentage to be funded by development charges for "each improvement." Record at 82-83. However, the court recognizes the elastic nature of what constitutes "an improvement." Whether improvements cover a single fiscal year or a five-year period, aggregation of individual projects into categories may be necessary for purposes of efficiency while still allowing the plan to serve its function of projecting costs for future capacity increases. There is a demonstrated history of doing just that.

Here, the 2015 CIP is an unwieldy aggregation that sweeps a voluminous array of projects into various categories and lumps them under a single dollar amount. It becomes difficult to discern exactly how the costs of the improvements serve to increase capacity or what the costs are. The question becomes whether the lack of ability to discern with precision how the projected costs relate to ability to increase capacity or how the costs break down means the ordinance fails to demonstrate consideration of the projected costs of the capital improvements needed to increase capacity as required in ORS 223.304(2). The statute does not require a detailed assessment of exactly how the improvements increase capacity, but merely requires the ability to determine whether the ordinance demonstrated that the projected costs in the plan will meet increased capacity needs generally.

That distinction is a fine one. The statute setting forth requirements for improvement fees still goes on to require the city to demonstrate that it considered the need for increased capacity to meet future demands and to set an improvement fee that is calculated to obtain the cost of improvements to meet those future needs. Neither one of those functions relies on a capital improvement plan to be carried out. Put another way, and breaking the statute down to its elements, the ordinance must present a methodology. That methodology must demonstrate the council: (A) considered projected costs of capital improvements needed to increase capacity as identified in the plan. The methodology must also demonstrate the council: (B) considered the increased capacity required to serve future demands. With those estimations in mind, the City must then: (C) calculate the fees so as to obtain the costs needed for the projected increased capacity. The statute does not require the City at that point to precisely match the amount of improvements to the amount of increased capacity. The statute requires only consideration of the enumerated factors and speaks in terms of the projected need for available system capacity for future users. *Home Builders Association v. City of Springfield,* 211 Or App at 666 (2007).

In testimony submitted to the council, NAIOP cited the 2004 and 2008 CIPs as passing the specificity muster because they addressed "current deficiencies" with the park system and non-SDC funded expenditures to correct such deficiencies. Record at 210. Other than that, the 2004 and 2008 CIPs are no more specific than the plan at issue. In some ways, the current plan is more specific by aggregating and naming individual projects such as splash pads, play areas and field conversions that are capable of specific estimations of cost. The 2004 and 2008 CIPs did not drill down to such details but merely projected costs for broadly labeled items, i.e., developing 45.46 acres of trails city wide over the years 2008-20 to serve growth at a cost of $18.1 million. Record at 216.

The 2015 list adopts the sweeping position that all items within constitute capital projects to address growth and that 89 percent of the projects will be funded with SDCs. Record at 77. However, nothing in ORS 299.309 requires the capital improvement plan to identify expenditures that are not capital improvements. It merely requires the plan to list projects intended to be funded "in whole or in part" by SDCs. The prior CIPs cannot be said to provide materially greater information within the plans that detail the estimated cost, timing and percentage of costs eligible for SDC funding for each and every capital improvement project undertaken by the City. The 2015 plan provides as much information as the prior ones -- an aggregation of individual projects, a projection of their total costs, the timing of when the costs will be incurred, and the percentage to be funded by SDCs.

On one hand, the plan, immensely summary as it is, meets the most basic aspect of its purpose of setting forth projected costs needed to increase the capacity of the park system for future users. Given that ORS 299.309 does not define capital improvements and merely "contains elements that are included in such a plan," the statute gives cities flexibility in determining how to identify improvements. That being said, the plan *in toto* seems woefully short on the sort of detail contemplated by the statute's use of the phrase "each improvement." Identifying the improvements takes on greater importance under this methodology, which moves from an acquisition-based model of providing a set amount of acreage per 1000 people to a development-based model of calculating the value of assets per person

and making the limited acreage available meet the needs of more people. As Randy Young told the Council, "What we're recommending is for the first time in the City's history, a 100% recovery rate program." Record at 42.

In the end, the question becomes whether the CIP enables the Council to demonstrate "the projected cost of the capital improvements identified in the plan and list adopted pursuant to ORS 223.309 that are needed to increase the capacity of the systems to which the fee is related." ORS 223.304(2). When considered in conjunction with ORS 223.309's requirement that the plan provide the estimated cost, timing and percentage of costs eligible to be funded for each improvement, the 2015 CIP falls short of that standard. The sheer number of projects aggregated and the loose descriptions do not provide sufficient evidence to demonstrate to the detail contemplated by the statutes. The level of sufficient demonstration is anything but a bright line, but the current CIP falls on the short side.

As noted above, the calculation is not dependent on the precise list and cost of improvements in the CIP. Nevertheless, the calculation is dependent upon a sufficient demonstration. Under *Baker v. City of Woodburn,* 190 Or App 445, 457 (2003), when the record was insufficient to determine whether there was an error that resulted in a miscalculation, the court should have remanded the case back to the City to determine the proper basis for the calculation. For the foregoing reasons, the court remands the 2015 CIP to the city for greater specificity in the costs, timing and percentage of costs eligible for SDCs for capital improvements needed to increase capacity. [1]

II. Level of Service Standard.

Plaintiffs next argue that the City's conclusions regarding the current capacity of the parks is not supported by substantial evidence. In the Level of Service section of Exhibit A to the ordinance, the City notes the following:

> "The capacity of the existing park system has been acquired for the use and benefit of the current population. There is no existing unused capacity, nor is there any existing deficiency. The SDC will recover the true cost of providing additional parks facilities to serve the increased demands on the system created by the new development. Because there is no existing unused capacity, the SDC is not recovering the costs of existing development. And because there is no existing deficiency, the SDC is not attempting to recover the cost of filling deficiencies in the existing level of service." Record at 147.

As noted above, SDCs can only be imposed to reimburse for existing capacity that will be utilized by new users or to add improvements to increase capacity. Plaintiffs argue this assertion by the City is a self-serving fiction that would allow the majority of funding for all new parks projects to come from

[1] As the court was finishing up this ruling, the City notified Plaintiffs that the Council would be considering an updated 2015 CIP. That CIP is not before the court as part of the record for the Writ of Review and the court does not consider whether the modified plan would be sufficient to meet the statutory requirements for an adequate demonstration.

SDCs even though the projects might not be eligible. They further argue that other evidence, including that presented in the Parks 2020 Vision and the 2015 budget, establishes that there are many existing deficiencies which could not be legally funded by SDCs.

The plaintiffs illuminate a concern that occurs when CIPs are imprecise, which is that it becomes difficult to determine whether the projects in the CIP are truly focused on increasing capacity or whether they are non-eligible projects surreptitiously and improperly funded by SDCs. They argue that the City's conclusion in its CIP that all items listed constitute improvements geared to increasing capacity is not supported by substantial evidence and in fact is contradicted by substantial evidence. They further argue that the assertion is used as a justification to support the newly adopted methodology.

In its response, the City notes that the SDCs can only be used for new capital improvement projects, whether they are included in the original CIP or one amended pursuant to ORS 223.309(2). The City argues the projects identified in the current CIP are immaterial as long as: a) the CIP projects future need; and b) what is ultimately funded is capital improvements for that projected need. Both the City Code and state law require the funds be spent only on capital improvements and both allow people to challenge the legality of any SDC expenditure.

The court agrees with the city that the CIP is ultimately a snapshot (or perhaps in modern parlance, snapchat). The court disagrees with the City that it is immaterial whether the projects listed in the CIP include projects inappropriately aimed at deficiencies as long as what is ultimately funded is limited to capital improvements. It matters because the fees are set now and only change if modifications cause the fees to increase. If improper expenditures are included within the formula that sets the fees, then the authorized amount could be artificially high. Even if the expenditures ultimately only go toward capital improvements, the fees need to be set with some eye toward matching the projected need since ORS 223.304(2) requires the fees to be calculated to obtain the cost of improvements to meet that need. The City needs to "demonstrate consideration" of the costs of increases for future capacity. A number that improperly includes deficiencies or includes a random amount of costs for unknown future modifications does not indicate the City demonstrated consideration of the projected costs of capital improvements.[2]

In *Home Builders Association of Metropolitan Portland v. City of West Linn,* 204 Or App 655 (2005), petitioners argued SDCs were artificially high when the city did not create a record showing that all nonqualifying open space had been removed from city inventory for purposes of determining the existing level of service. The Court of Appeals found the city had created an adequate record demonstrating exclusion of nonqualifying land, which supported the conclusion that the city properly

[2] The City argues that there is no justiciable controversy regarding improper use of funds until the City determines how it actually will spend the SDC funds. *Home Builders Association of Metropolitan Portland v. City of West Linn,* 204 Or App 655, 671, n. 11 (2006). However, that controversy relates to the expenditures referenced in ORS 223.303(2), and not the sufficiency of the change of methodology pursuant to ORS 223.304(7).

calculated the SDC. *Id,* at 671. The City does not point to any similar item in the record that shows the exclusion of deficiencies from the calculation.

It is true that capital improvements that increase capacity fall within a broad range. An increase in system capacity may be established if a capital improvement increases the level of performance or service provided by existing facilities or provides new facilities. ORS 223.307(2). The project descriptions in the CIP are very generalized; nevertheless, most of the projects and categories listed in the CIP appear to fall within that broad definition. A more detailed CIP specifying the nature of capital improvements will help alleviate that concern.

More importantly, the change in the methodology changes the base used for the level of service. The level of service becomes the current investment per person in park land and improvements. Record at 147. What exists has been acquired for the use and benefit of the current population. With every new person added, the investment becomes diluted. Capital improvements return the investment to the existing level of service per person. In that sense, there is equilibrium and the starting point remains static. The City acknowledges that setting that number without taking into account deficiencies per person is an assumption. However, it is not so much a justification for the new methodology as it is a result. Despite the concerns outlined above, the court agrees with the City that setting the number to exclude deficiencies would actually result in a higher SDC. Under the new system, the SDC is not artificially high as was the concern in *Home Builders v. City of West Linn, supra.* Using a base level of service set at the current investment per person means the portion of the improvements funded by improvement fees is related to the need for increased capacity to provide service for future users as required by ORS 223.307(2).

The court does not find that the Level of Service as set forth in the Ordinance and Methodology Report is either a procedural irregularity or a finding that is not supported by substantial evidence in the whole record. The court does not grant the writ on this basis.

III. Investment Per Person Calculation

The City has traditionally based its SDC calculations on acres of park land per 1000 people. Ordinance 187150 changed that base rate to investment per capita. It became apparent that the traditional calculation was not sustainable as the city's population increases because it would be impossible to obtain enough acreage to maintain the current level of service. Record at 39. Changing the calculation to investment per person fixes a level of service and then allows for additional investment per person as the population grows, whether it is in the form of land acquisition or increased performance of existing facilities. ORS 223.307(2).

In setting the investment per capita amount, the City valued the inventory of parks and land at current replacement value because future expenditures would occur at future prices and should not be based on outdated pricing structures. Record at 40. Plaintiffs argue valuing land in this manner inflates the actual investment by current residents and that there is no evidence in the record to support a

conclusion that parks, which often consist of undeveloped land, have the same value as the average per acre real market value of all tax parcels, which would include all developed land. They argue this valuation results in a disproportionate burden on new park users. They further argue that setting the value at replacement value for new acreage is incompatible with the new methodology that discounts the importance of land acquisition for future capacity building. Plaintiffs request the court instruct the City to disregard the value of land and decrease the value by $2.2 billion.

Replacement value is a valid beginning point for the new methodology. The City is not required to base value on the assumption that future benefactors will donate land or that the City will be able to acquire parcels for minimal cost. Additionally, using current value is not arbitrary and random. Setting value based on historical acquisition and ignoring future costs artificially deflates the value. However, the court agrees with the Plaintiffs that basing the value of existing park land on the average per acre real market value of all tax parcels tends to skew what would be the actual value.

The City argues that the consultant's testimony regarding the valuation, if accepted by the Council, is substantial evidence supporting the methodology. Plaintiffs argue the lack of more specific value for park land means the City did not base its decision on substantial evidence in the record.

In reviewing a decision subject to a writ of review, a court gives due deference to the findings of the tribunal being reviewed unless the proponent of the change satisfies its burden. *Clinkscales v. City of Lake Oswego,* 47 Or App 1117, 1121 (1980). A court reviewing a city's changes to a comprehensive plan and zoning ordinance should review the record and ascertain whether findings are supported by reliable, probative and substantial evidence, and should not make an independent determination about the desirability of changes. *Tierney v. Duris,* 21 Or App 613, 626 (1975). In the event of conflicting evidence, resolution is for the council, not the court. *Id.*

The ordinance's provisions outline the procedural history involved in changing the methodology, including hiring a consulting agency, convening a task force (which included Plaintiffs Home Builders Association of Metropolitan Portland and Portland Business Alliance), and having the task force review the then-existing SDC program. Record at 4. During the third meeting, the Task Force determined the usual standard of acres of park per 1,000 population would be unrealistic, and the consultant described an alternative approach already in use in other cities based on dollar amount per capital of the "current value of park land and improvements." Record at 4. The consultant developed the approach for the City over the course of a year and presented it to the Task Force. Record at 4. The Task Force favored the approach presented by the consultant. Record at 5. The new methodology sets SDC rates based on "calculated service levels, population growth projections, cost of land and development, average occupancy rates, and administrative and compliance costs." Record at 5. The Parks department requested approval of the SDC based on "current value of park land and improvements…." Record at 6. The ordinance adopted the System Development Charge Methodology Update Report dated April 15, 2015. Record at 7.

The System Development Charge Methodology Update Report included in its introduction a notation that Appendix A summarized the inventory of parks and recreational facilities and the "replacement value" of the land and improvements. Record at 139. The report explained the difference between improvement fees and reimbursement fees and noted the limitation of use of funds for capital improvements for the improvement fees. Record at 140. In Section 3.0, the report notes that the Level of Service Standard is based on the "existing amount of investment in park land and improvements per person," but does not note that investment was based on replacement value. Record at 142. However, the report goes on to note that the current investment is the "replacement value of the existing inventory of parks, open space and recreation facilities, including the land value of each park and the replacement cost of each type of improvement." Record at 147. The report notes the replacement value is outlined in Appendix A. Record at 148. Table 3.6 contains the heading "Replacement Value of Current Investment" and distinguishes between the value for citywide, central city local access and non-central city local access. Record at 148.

Appendix A specifically notes that the values are based on the "average per acre Real Market Value of all tax parcels in Portland form Multnomah County's tax assessment data base." Record at 158. It further noted a different valuation for habitat, natural areas and trailways. Record at 158.

Testimony presented to the Council raised concerns as outlined by Plaintiffs, including a concern that there was no back up or supporting information provided that related to how park land values and/or replacement costs for park facilities were determined. Record at 273. Testimony from NAIOP also noted the concern about the overvaluation of the park system's land base as based on replacement value. Record at 224, 225. A letter from the Development Review Advisory Committee noted concern about whether the replacement value was the appropriate metric, whether facilities should have been included in the valuation and whether the value of Forest Park should be included. Record at 294.

The record further reflects that Commissioner Fish considered concerns and responded to them. In addressing the concern of overvaluation of existing park lands, the response was that the value of the land as it sits today is what will be required for development in the future. Record at 298.

The record shows that the Council knew and understood that the valuation would be based on replacement value based on the Real Market Value of all tax parcels in Portland. Though a more studied valuation of park lands is desirable, there is nothing arbitrary or random about choosing that basis for the calculation. The record further reflects that the Council understood and considered the Plaintiff's concerns about overvaluation. The use of replacement value for land is not inherently incompatible with the new methodology. Acquisition and development remain as factors under the new methodology and abandoning land value altogether as Plaintiff's request would substantially undervalue the investment per person. The City's choice to adopt a methodology that uses replacement value at an average market rate per parcel is a rational decision based on the information before it. As such, it meets the standard for substantial evidence required in *Hutchinson v. City of Corvallis,* supra; and *Johnson v. Civil Service Board,* supra.

Nor is there evidence that the valuation is based on a procedural irregularity. A court can grant a Writ of Review when a council fails to follow procedure applicable to the matter before it. *Bullock v. City of Ashland,* 241 Or App 378, 386 (2011). Nothing in the record indicates the Council failed to follow any procedure applicable to the proceedings.

IV. Inclusion of open space

Plaintiffs argue that because improvement fees may only be used for capital improvements for facilities or assets for parks and recreation, the City improperly included within the total valuation the portion of lands that are habitat and natural areas, which are treated differently than parks and recreation facilities. *Home Builders Association of Metropolitan Portland v. City of West Linn,* 204 Or App 655, 670-671 (2006), discusses the issue of "nonqualifying open space" and whether it was removed from the inventory considered for total valuation. The Court of Appeals found there was a sufficient record to show the parks director excluded lands that were "not generally available to the public as a park or recreation asset or facility." *Id,* at 671. With that record, the Court concluded that the remaining lands were available as a park or recreation asset or facility so that there was sufficient substantial evidence to support the SDCs. In so stating, the Court did not specifically address what constitutes "nonqualifying" open space.

The City of Portland argues that the open space considered by the City in the valuation falls within the City Code as property "placed under the jurisdiction of Portland Parks and Recreation for park or recreational purposes." PCC 20.04.010. Commissioner Fish responded to the question regarding whether natural areas are considered "recreation" by noting that parks and recreation refer to a "wide variety of places and facilities that serve the diverse recreational needs of the City. For example, recreation for some people emphasizes sports, for others it emphasizes fitness, for others aesthetics." Record at 300-301. The City argues that a reasonable person could conclude that the CPI and methodology include only natural areas that would be available as park or recreation assets or facilities.

The System Development Charge Methodology Update Report notes that "Habitat and Trails are considered to be Citywide service facilities." Record at 148. The Report notes the total investment is the replacement value of the existing inventory of "parks, open space and recreation facilities, including the land value of each park and the replacement cost of each type of improvement." Record at 158.

There is no definition under ORS Chapter 223 for "parks and recreation." Though the Portland City Code defines parks as any property placed under the parks department for "park or recreational purposes," nothing in the city code defines those purposes. Nor is there anything in the Code that appears to guide the parameters of that jurisdictional placement. The *West Linn* court does not specifically adopt a definition, but mentions with approval the City of West Linn's exclusion of land that was "not generally available to the public as a park or recreation asset or facility." 204 Or App at 671.

When a disputed term in a rule is undefined by that rule, a court assumes that it partakes of its ordinary meaning." *State v. Moss,* 352 Or 46, 48 (2012). Absent a special definition, a court ordinarily

resorts to dictionary definitions. *State v. Murray,* 340 Or 599, 604 (2006). Recreation means something people do to relax or have fun: activities done for enjoyment. http://www.merriam-webster.com/dictionary/recreation. Recreation is also defined as activity done for enjoyment when one is not working: *areas used for recreation such as hiking* or *biking*. http://www.oxforddictionaries.com/us/definition/american_english/recreation.

Park is defined as a large public garden or area of land used for recreation. http://www.oxforddictionaries.com/definition/english/park?q=parks. Park is also defined as a piece of public land in or near a city that is kept free of houses and other buildings and can be used for pleasure and exercise: a large area of public land kept in its natural state to protect plants and animals. http://www.merriam-webster.com/dictionary/park.

The holding in *City of West Linn, supra,* is not a clear holding that defines what is or what is not "nonqualifying land." The Court there addressed whether there was evidence in the record and found there was evidence in the record. The case does not qualify as direct authority for a definition of "parks and recreation" for purposes of the statutes. That leaves the City some leeway to determine what qualifies as parks. Though a definition would be preferable, the City has chosen to identify parks or recreation by placing those areas intended to be used as such under the department's jurisdiction. Given the definition of "park" listed above and the lack of any more specific definition in the statutes, a rational person could find that the natural areas and habitat included in the valuation for the facilities or assets for parks or recreation. The court does not grant the writ on this basis or remand to the City for an amended valuation.

V. Population Estimates

Plaintiffs argue the City purposefully distorted population growth estimates to hide the actual financial impact of the new methodology. If population growth outpaces the City's distorted low estimate, the Plaintiffs argue the result is that more fees will be raised, which in turn creates a huge, hidden slush fund.

The ordinance lists a population growth of about 99,000 and cites Metro figures. However, the Metro report actually projects a population growth by 2035 of 205,594. Exhibit 5 to Plaintiffs' Opening Brief. The City's own draft Comprehensive Plan Update lists projected population growth of 260,000. The result is that the projected SDC revenues of $27.6 million per year under the low estimate is actually $62.5 million under the higher estimate. Plaintiffs assert that based on the actual growth numbers, the City's proposed fees will raise more than $1 billion over the next 20 years, and with the inadequate CIP, there is no sufficient explanation how the City will spend that vast amount.[3]

The ordinance sets the fees at a set amount depending on the square footage of the dwelling unit, with lower rates for Central City and somewhat higher rates for Non-Central City. Record at 5. It also sets a rate per square foot for non-residential property. Record at 6. More population growth

[3] Plaintiffs argue the City purposefully didn't just reduce by half, but reduced by 51.63 percent. That extra 1.63 percent is not material to the court's finding on this matter.

means more development, which in turn means more fees. The Park SDC Report calculates rates to recover 88 percent of the cost of the impact of the growth. Record at 5. The rate is based on calculated service levels (investment per person), population growth projections, cost of land and development, average occupancy rates, and administrative and compliance costs. Record at 5. The City estimates the impact at $552 million of revenue over 20 years. Record at 6.

The City noted that the projections from Metro were "adjusted" in order to "be conservative in estimating future needs for growth." Record at 142. The Methodology Report states the conservative number – half of the Metro population projections -- reduces the total investment needed in the CIP to "levels consistent with the City's experience," Record at 142. If the growth is greater than the conservative estimate, adjustments could be made at the next SDC update. Id. The conservative number has no effect on the SDC rates per person. Id. There does not appear to be any justification in the record for the reduction other than the desire to be conservative because that approach is more in line with "the City's experience."

Under the City's approach, the SDCs are set to raise approximately $500 million over the next 20 years for growth of 99,000 people. If population growth is actually lower, the decreased number means lower projected fees that go to fund projects listed in the CIP. If the city set SDCs to raise $1 billion over 20 years for 200,000 people, the increased number means higher fees that go to fund projects listed in the CIP. Under either scenario, the rate per person, which is the starting point, remains static – more people means more funds, fewer people means fewer funds.

Plaintiffs' argument is that because there is no evidence for the City's lower population projection, there is no evidence for the lower projected revenue, and further, that because there is no evidence to support the lower projected revenue, the CIP, based on that projection, is necessarily flawed.

The problem with this argument is that the CIP is not based on projected revenue. Rather, the CIP is based on projected costs to increase capacity generally. Though the aim of the CIP is to list improvements needed to meet the increased capacity, the CIP is not dependent on population numbers. As noted above, the statute does not require the City to precisely match the amount of improvements in the CIP to the amount of increased capacity. While it is true the improvement fees are calculated to recover the costs associated with increasing capacity, that calculation is not based on expected expenditures but on the level of service of investment per person. There is no secret slush fund that gets created in this process if the population numbers in fact come in higher. Rather, the money collected supports the increased capacity, whatever the increased capacity may be. Put another way, the City isn't matching the money to the CIP, it is matching the CIP to the money.

The CIP lists eligible projects as totaling $893,675,267. The SDCs will generate $551,986,465 over 20 years, which means approximately $342 million of projects that would not be funded. If population growth was double and fees collected doubled to about $1 billion, then there would be an excess of approximately $107 million. Though a significant number, this does not equate to a hidden

slush fund. As indicated in the Methodology Report, the City will adjust rates and the CIP at the five-year milestones if population growth outpaces the conservative estimate. Additionally, the law requires all SDC funds go into a designated account solely used for SDCs and an annual accounting showing total fees collected and what projects were funded with the fees. ORS 223.311. The City Code contains a similar provision at PCC 17.13.110. If the rates were adjusted to collect $893 million over 20 years, then the rates would be significantly higher now. Using 200,000 as the estimated population growth could also result in a higher projected cost in the CIP.

The decision to purposefully reduce population estimates is curious and the justification provided is unsupported by any explanation of why lower estimates are appropriate in the City's experience. In the end, the actual population increase is not required for the rate calculation under the new methodology. The Council acted with knowledge that the projections reflected the conservative estimate. Other than speculating that the City had a set narrative it wished to put forth, Plaintiffs have not established that there is anything improper in making conservative projections. The court finds that use of a lower population growth estimate is not a basis to remand or grant the writ of review.

VI. The City's Financial Impact Statement

The City included a Financial Impact Statement comparing the 2009 methodology, with its targeted potential revenue of around $27.7 million per year, to the new methodology, which targets potential revenue of around $27.6 million per year. Record at 93. The effect, Plaintiffs argue, is to hide the true financial impact, which will be as much as twice that under the more accurate population estimates. Plaintiffs further argue that the real effect would be to create a "pool of unallocated cash unrelated to real capital improvement projects."

As noted above, all SDCs collected must go into a designated account with an annual accounting to show the amount collected and capital improvement projects funded. The law also provides for challenges to expenditures from that fund. The City is not inventing a shell game to hide vast pools of unallocated cash.

Reviewing the tables in the Methodology Report helps reveal the role of population. Investment needed for growth is calculated at the current investment per population, $3,187, multiplied by the 20 year population growth prediction, 107,163, which totals $341,511,388. Record at 149. If the multiplier was twice that, 214,326, then the number would be $683,022,776. The portion of that funded by SDCs is $302,607,596. Record at 150. Under higher population estimates, that number would be $605,226,482. The cost for residential growth is a portion of that $302 million, totaling $280,831,806. Record at 151. With the higher population number, that comes out to $561,650,175. The cost for residential growth divided by population of 99,452 results in the cost per person of $2,824. Record at 153. If the amount were $561,650,175 divided by 200,000, the cost per person is $2,808.

The record has numerous references to service value as set at investment per person and targeting fees to maintain an ongoing service level at the same amount per person. The fact that more

people would mean more income is inherent in the record. The City also specifically noted that estimates could be adjusted upward in the event population numbers come in higher. The Financial Impact Statement does not alter any of that information in the record. The standard for granting a writ of review is whether there exists substantial evidence in the whole record and there is. The court does not grant the writ of review on that basis.

VII. Unauthorized Charges for Open Space and Habitat Restoration

As noted in Section IV above, the court found that open space and habitat restoration could be considered as capital improvement assets or facilities for purpose of ORS 223.299(1)(a)(E). That leaves it eligible to be funded with improvement fees.

VIII. Linking Square Footage to Park Use

Plaintiffs argue there is no evidence in the record to support linking fees to square footage of new property. The new methodology charges SDC rates based on sizes of dwelling units, with the highest charges for residences that are 2,200 square feet or higher. Record at 154. The calculation is based on the average number of persons per dwelling unit as determined by a review of data gathered by Portland State University's Population Research Center. Record at 144. The number of people per dwelling unit is smaller in the Central City than in the Non-Central City. The persons per dwelling unit average was determined for five size categories that were "tabulated" from the 2011 American Housing Survey. Record at 144.

Plaintiffs assert that in absence of any evidence demonstrating that people who live in larger homes make greater use of park facilities, there is nothing in the record to support the finding. Plaintiffs point to Exhibit 7 as evidence that the primary motive was to penalize large-scale house construction, but that exhibit also points out that while there may be one-for-one unit replacement when homes are demolished, the larger replacement units tend to extend to the lot lines and have less yard than the previous home. It is not the size of the home that determines use but the number of people inside the home that determines use. Record at 40.

As Plaintiffs point out in their Reply, the five size categories used by the City do not equate to the categories used in the 2011 American Housing Survey. Exhibit 11 to Plaintiff's Reply. The City did not report on why it chose to alter the parameters on the size categories or how it parsed out the numbers into the different size categories. The City does not "show its math" as to how it determined the precise person per dwelling unit figures, nor does the information in Exhibit 11 suggest how the data was supplemented and analyzed. There is no justification given as to why the City did not explain the basis of its computations.

The record does establish that, with the help of "demography experts" from PSU, the City conducted a "detailed analysis of census data" that revealed a variation in the average number of persons per dwelling unit based on the size of the dwelling unit. Record at 40. Though it would be

preferable to trace how the data was analyzed, a reasonable person could accept the representation that the numbers are the result of a detailed analysis and then use the numbers in setting the formula for the methodology. *See, School Dist. No. 3J v. City of Wilsonville,* 87 Or App 246, 251 (1987) (The city Council could rely on the opinions in an engineer's report as the basis for its findings on setting property boundaries); *Baker v. City of Woodburn,* 190 Or App at 455 (In the absence of evidence contradicting the director's recommendation, the city could reasonably rely on the director's report in support of its finding concerning the properties that are specially benefitted and that should be included in the district.) *See, also, Younger v. City of Portland,* 305 Or 346, 360 (1988) (In determining whether all evidence in record, including countervailing evidence, supports local government's land use decision, the Land Use Board of Appeals is merely required to determine whether the decision was reasonable. It need not be the decision the board would have made on the same evidence.) Reviewing all the evidence in the record, the court finds sufficient evidence exists to link the square footage of homes to impact on park use and to use the figures of persons per dwelling unit as provided in the Methodology Report.

IX. Affordability

Plaintiff's argue that the new methodology will increase fees that will be passed on to consumers and thus negatively affect affordability at a time when the City has declared a housing emergency. They argue the fees do not comply with ORS 223.304(1)(b)(A), which requires improvement fees to "promote the objective of future system users contributing no more than an equitable share." That statute does not require a limitation of fees, but rather that the fees be equitable. The fact that fees will ultimately burden residents is not itself inequitable and there is nothing else in the methodology that indicates that the fee structure is inequitable under the statute.

The court shares the concern for members of the community struggling to find affordable housing. However, the policy decisions are an issue for the Council and the reviewing judge is not permitted to pass on any questions of fact. *Baker v. City of Woodburn,* 190 Or App at 445. The court does not grant a Writ of Review on this basis.

IT IS SO ORDERED this 17TH day of May, 2016.

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Judge Cheryl Albrecht