CORVALLIS
ENHANCING COMMUNITY LIVABILITY

CORVALLIS CITY ATTORNEY
456 SW Monroe, #101
Corvallis, OR 97333
Telephone: (541) 766-6906
Fax: (541) 752-7532

CITY ATTORNEY'S OFFICE MEMORANDUM

To: Mayor and City Council
City Manager

From: Jim Brewer, City Attorney

Date: August 27, 2019

Subject: Affordable Housing Waivers from System Development Charges

Issue:

For a number of years, Council and community members have sought ways to encourage and assist affordable housing projects. Seeking to lower the cost of development, Council and community members asked staff and the City Attorneys' Office about providing waivers or exemptions from the System Development Charges that would otherwise be part of the cost of building affordable housing or low-income housing projects. The consistent answer from our office and consultants has been that it is legally possible to do so, but that doing so requires consideration as part of the Council's review of the methodology for SDC rates. The Parks SDC methodology will be the first review to come before the Council, but the Council is scheduled to review each of the system development charge methodologies soon. The Council may now want to address this issue and provide staff and the consultants with some general notion of the direction the methodology should follow. This is a complicated issue with technical and legal nuances. I apologize for the length and density of this memorandum, but this is a challenging issue that requires careful consideration.

Accompanying this memo is a single-page chart, with six possible actions and summary notes providing the briefest possible explanation of terms and analysis. Using the terms as defined in the notes will be an important component of this conversation. Some terms will not be defined in the notes to the chart. For example, I did not define "affordable housing," as understanding the general concept is sufficient for this memorandum. Along the same lines, I did not define "waiver" or "exemption," although I think there is a distinction. For purposes of this discussion, the distinction makes little difference, although the administration of the programs could be quite different.

I intend this memo to provide necessary background to explain the issues surrounding each of the six options, to provide a summary of the legal rules involved, and to provide an analysis of how closely each option satisfies legal requirements, with the attendant risks for taking each option. Components from any option could be combined with other options to address the Council's goals.

This memo does not provide an in-depth discussion of the practical or administrative challenges associated with each option, as that discussion is outside the appropriate scope of a legal memorandum. Having said that, I do intend this memo to be a frank discussion of the legal and practical issues surrounding this topic, and continuing this discussion should include staff commenting on the practical consequences of otherwise legal actions. Including this memo with your packet ensures that the Council and public are fully informed of the options and have time to consider the possible consequences of each option.

Background:

System Development Charges are a creature of Oregon statutes. Even so, they must be consistent with Oregon and US Constitutional requirements. By statute, the System Development Charge process is not considered a land use matter. Although these charges are related to development, they are not conditional exactions that the Council might hear discussed in land use cases as requiring a *Nollan* "essential nexus" or *Dolan* "rough proportionality" to avoid being an unconstitutional taking. Instead, while the result might be similar, SDCs are a legislative enactment of fees. Instead of "rough proportionality," SDCs need to comply with a state requirement that fees must have a reasonable relationship to the stated objective for the fees, and SDCs must also satisfy the US Constitution 5th Amendment requirement that a rational legislator would believe the enactment will advance the stated government purpose. This is not as strict a standard as the City has to meet for conditional exactions, but it is still a minimum threshold.

While most Oregon case law on the subject is devoted to the distinction between *ad valorem* property taxes and other government charges, deviating from a rate-based fee system to account for economic justice and income disparity arguably moves the charge out of the statutory SDC process and converts the fee to a tax. The SDC statutes are complicated, but complying with the statutes serves the City by providing certainty that the City can rely upon when using this source of money for needed infrastructure. If the local methodology falls outside of that statutory process, and the charges are a tax, and not a fee, then the City cannot rely upon the statute to defend the collection or use of the money. This is a risk to the public infrastructure systems that the City Council can and should avoid.

The complete text of the relevant statutes is attached. The following excerpts provide some basic rules for discussion of the options.

ORS 294.100 (1) states that "[i]t is unlawful for any public official to expend any moneys in excess of the amounts provided by law, or for any other or different purpose than provided by law." Public officials who do expend money for purposes other than provided by law are personally liable for the money expended.

"The purpose of ORS 223.297 through ORS 223.314 is to provide a uniform framework for the imposition of system development charges by local governments, to provide equitable funding for orderly growth and development in Oregon's communities and to establish that the charges may be used only for capital improvements." ORS 223.297. Charges that cannot be reasonably related to this objective or that do not advance this stated purpose are constitutionally suspect and challenging to defend.

ORS 223.299 provides definitions for ORS 223.297 through 223.314.

System Development Charges are one-time fees on new development, typically paid at the time of development (under HB 2001, some SDCs will be paid at the time of occupancy). SDCs are intended to recover a fair share of the cost of existing and planned infrastructure facilities needed for capacity to serve future growth. ORS 223.299 authorizes SDCs for capital improvements, defined as facilities or assets used for (a) water supply, treatment and distribution; (b) waste water collection, transmission, treatment and disposal; (c) drainage and flood control; (d) transportation; or (e) parks and recreation. The same statute specifically excludes the operation or routine maintenance of capital improvements from SDC eligibility. The City is required to follow the statutory process set out in ORS 223.304 to determine the amount and methodology for these one-time fees.

For the remainder of this discussion, draw your attention to ORS 223.297(2), "Improvement Fee," and ORS 223.297(3), "Reimbursement fee." This distinction is important, as ORS 223.204 requires the City to base Reimbursement fees on a different set of factors than Improvement fees. In particular, the Council might note that ORS 223.304(1)(a)(E) allows the City's "Reimbursement fee" methodology to be based on "Other relevant factors identified by the local government imposing the fee." ORS 223.304(2) does not allow Improvement fees to be based on a similar "discretionary" factor.

This SDC statutory scheme, read in the context of the constitutional requirements, is why legally providing waivers from SDCs to subsidize affordable housing is challenging— the stated objectives for the fees aren't really consistent with the use of SDC fees to address affordable housing concerns (or much else besides developing the associated infrastructure system). Wrapping in a waiver that isn't related to the purpose of the SDCs isn't going to have that relationship, so the incremental increase in the rate is likely arbitrary, even with a robust regulatory structure. From the 5th Amendment perspective, it probably doesn't pass the blush test of thinking the increase is rationally related to the stated government purpose.

ORS 197.309(5)(d)(B) is sometimes cited by cities that are providing waivers as the express authority for local governments to waive SDCs to support affordable housing. Passed in 2016 as part of SB 1533, ORS 197.309(5)(d)(B) states that a City can waive SDCs. But this is in the context of one of a number of possible incentives required to enact any regulations regarding the sales or rental price for new multifamily structures (this ability to regulate is limited to

"structures"— not developments with more than 20 units). Read in isolation, ORS 197.309 does not explain the mechanics of a waiver.[1]

But ORS 197.309 (5)(d)(B) was enacted as just one part of SB 1533. When ORS 197.309 is read in context with the rest of SB 1533, the legislative purpose is much clearer. The legislature expected that local governments would use the construction excise tax as the way to fund all the incentives for affordable housing (fifty percent of the revenue from CETs can only be used to fund the developer incentives as required by ORS 197.309(5)(c) and (d) and (7)). The codification of the bill into the ORS structure confuses the issue by pulling different components from the bill into different chapters of the ORS. Understandably, to stretch the value of the CET dollars and to provide as many incentives as possible, cities, community members and organizations would prefer to find other sources of money, including SDCs themselves, to pay for waiver programs.

Other cities in Oregon certainly have programs that waive system development charges for a variety of reasons, including waivers for commercial development to aid economic development, and general hiatus, to promote all development. The most discussed method, and the manner followed by Portland and Bend, and possibly Eugene, is evidently to provide a waiver for affordable housing without consideration of the fee methodology, and without express consideration of the impacts of the waivers on the funds, the systems or the future rates. As SDC rates are calculated based on the estimated costs of projects, providing waivers without offsetting them in some manner necessarily causes a shortfall, with uncertainty about how the shortfall is made up, except by increasing rates at a later date, or delaying or not building projects needed for development, or finding other ways to pay for required infrastructure.

The Council also needs to keep unintended consequences in mind. Established waivers may not lower the cost of development on a dollar-for-dollar basis, if at all. City Staff point out that buyers currently can use the cost of development including SDC charges as a bargaining tool to lower the price of land. Sophisticated Sellers of property would be aware of a program of waivers, and increase the price of land accordingly. Similarly, increases in SDCs to offset the amounts waived for affordable housing projects would necessarily increase the cost of other housing subject to the increased SDC rates, or increase the cost of living, whether because of the need for increased utility rates or special assessments required to provide needed infrastructure projects. I've included this consideration in the chart as a risk to the system.

General Advice:

My legal opinion is that an SDC waiver that is not authorized by an ordinance, which includes express consideration of the consequences of that waiver in the fee setting methodology, cannot meet the minimum statutory requirements for Reimbursement Fees or Improvement Fees. Such a waiver would not be part of a methodology based on the required factors set out in ORS 223.304. I am concerned that providing a waiver without addressing the required basis for the methodology necessarily means that some of the SDCs collected from other developments are

[1] HB 2001, passed in the 2019 legislative session requires "consideration" of waiving or deferring SDCs as part of the regulations addressing missing middle housing.

used to subsidize the cost of the waiver. This would not be consistent with the legislative purpose set out in ORS 223.297, and would therefore also be in violation of ORS 223.307. If this argument were to be successfully raised, the City would be required to repay the SDC funds expended on waivers from sources other than system development charges, as required by ORS 223.302(1). Councilors authorizing the expenditure of the SDC funds to "cover" a waiver in this manner are potentially personally liable for those funds under ORS 294.100.

On the other hand, if the methodology expressly includes a waiver component, and as long as no challenge under ORS 223.304(7)(b) is filed within 60 days of the adoption of the methodology, the methodology would fall into a statutory safe harbor where the methodology can no longer be challenged. Money spent consistent with that methodology arguably would be spent consistent with ORS 223.297 through ORS 223.214, reducing the potential risk that money intended for other City programs would be needed to refund the SDC amounts waived. Depending on how the waiver is funded, the risk to the system and potential personal liability can be avoided or reduced. But, if the methodology itself moves far enough out of the statutory process to convert the fee into a tax, the safe harbor will not apply.

Background Summary Points:

i. SDCs need to comply with a state requirement that fees must have a reasonable relationship to the stated objective for the fees.

ii. The SDC statutes are complicated, but complying with the statutes serves the City by providing certainty that the City can rely upon when using this source of money for needed infrastructure. If the local methodology falls outside of that statutory process, and the charges are a tax, and not a fee, then the City cannot rely upon the statute to defend the collection or use of the money. This is a risk to the public infrastructure systems that the City Council can and should avoid.

iii. "The purpose of ORS 223.297 through ORS 223.314 is to provide a uniform framework for the imposition of system development charges by local governments, to provide equitable funding for orderly growth and development in Oregon's communities and to establish that the charges may be used only for capital improvements." ORS 223.297.

iv. ORS 223.304(1)(a)(E) allows the City's "Reimbursement fee" methodology to be based on "Other relevant factors identified by the local government imposing the fee."

v. ORS 197.309(5)(d)(B) states that a City can waive SDCs. But this is in the context of one of a number of possible incentives required to enact any regulations regarding the sales or rental price for new multifamily structures.

vi. The legislature expected that local governments would use the construction excise tax as the way to fund all the incentives for affordable housing.

vii. As SDC rates are calculated based on the estimated costs of projects, providing waivers without offsetting them in some manner necessarily causes a shortfall.

viii. An SDC waiver that is not authorized by an ordinance, which includes express consideration of the consequences of that waiver in the fee setting methodology, cannot meet the minimum statutory requirements for Reimbursement Fees or Improvement Fees.

ix. If the methodology expressly includes a waiver component, and as long as no challenge under ORS 223.304(7)(b) is filed within 60 days of the adoption of the methodology, the methodology would fall into a statutory safe harbor where the methodology can no longer be successfully challenged. The next session describes six options. As you will see, components of each option could be combined in a number of ways, and the discussion that follows is not intended to limit those variations.

The Council's discussion of the following options (or combinations or variations of these options) should return to this background as needed.

Discussion of Options:

1. "Make No Change"

   The "Make No Change" option maintains the status quo for SDC methodology and maintains the City's current practice (which is not to use SDC money as an incentive or support for affordable housing). The current methodology is consistent with the legislative purpose from ORS 223.297, and the use of the money raised through SDCs is limited to infrastructure needed for growth and development. The methodology takes into consideration each of the factors from ORS 223.304. As the Council addresses the methodologies for the various SDCs, the Council would not incorporate any SDC waiver into the methodology. The City would not use waivers from SDCs as an incentive or subsidy for affordable or low- income housing. City Staff and the City's consultants are familiar and comfortable with this standard methodology type. There is no additional cost to implement, because there is no change to the current practice. There is no additional impact to the system; there is no required increase in fees to cover waivers. Consequently, there is no risk that the methodology or the use of the funds can be successfully challenged based on this issue. If this option is not challenged within sixty days after the Council adopts it, the methodology would fall within the safe harbor of ROS 223.304(7)(b).

   The Council should note that this option would not prohibit the City Council from providing other affordable housing or low-income housing incentives, which could include payment of all or part of applicable SDCs. The Council would necessarily use sources of money other than SDCs to do this. Administratively, this type of incentive could continue to be based on specific requests and ad hoc agreements, or the City could create some other process. The City has infrequent experience with the City Council rarely choosing to pay some or all of the SDCs for specific projects, using general fund money. The lack of a formal process or criteria has occasionally put the Council in an awkward position, when the City doesn't have sufficient funds or when competing priorities have meant the Council has refused to support otherwise compelling and desirable projects. This approach does not itself offer incentives for the development of

affordable housing. On the other hand, this approach does not remove a negotiating tool from an affordable housing developer.

This option is easy to recommend, but does not provide any assured waiver or funding, and the option itself provides no express support for affordable housing.

2. "Front Fill"

The Council can think of the "Front Fill" option as formalizing the ad hoc subsidy just discussed. The Council would adopt an ordinance that establishes a program to pay the SDCs for some projects. Consistent with ORS 197.309, the most likely source of funds is CET money—although other funds could be used as they are available. To provide the incentive, the City Council would manage the cost of the program by identifying a particular amount and source of non-SDC money that will be available for waivers during some period of time, say a fiscal year. Establishing criteria, timelines, any required agreements, staffing and otherwise administratively putting the program into place would require some additional up-front costs, in addition to the amounts reserved for SDC payments. Ongoing costs include administering the program. Because SDCs at the standard rate would be paid by the front fill program, there is little, if any, impact to the systems. Depending on the source of money used to front fill a program, this option would be consistent with the legislative purpose from ORS 223.297, and the SDC methodology would consider the required factors from ORS 223.304, so the City would have very little risk of a successful challenge to this program. If this option is not challenged within 60 days after the Council enacts it, the methodology would fall within the safe harbor from ORS 223.304(7)(b).

The City would have some risk that in any given budget cycle, worthy projects that are proposed later in time, might not be funded immediately. On the other hand, if the Council goal is to provide an incentive for affordable projects to get underway, strict timelines for when the money is available on a first-come/first-serve basis, along with a limited amount of available money, might motivate developers to get their projects underway. Uncertainty about the availability of the waiver might also somewhat reduce the risk that sophisticated sellers would simply increase the cost of land, maintaining SDCs as a negotiation point for the price of land.

This is option is easy to recommend, and would provide express support for affordable housing.

3. "Back Fill"

Similar to "Front Fill", the "Back Fill" option requires the City to pay SDCs for some projects. A program would be enacted by ordinance. The most likely source of funds would be CET money, consistent with ORS 197.309. The difference is that the amount of the subsidy is not necessarily set in advance. The advantage is that the order or timing of equally worthy projects wouldn't necessarily matter as much as for "Front Fill," and depending on how much certainty is built into the program, this approach would not

necessarily decrease the ability to use SDC costs as a negotiating tool to reduce the price of land. The City would not need to transfer funds until an eligible project needs them. If this option is not challenged within 60 days after the Council enacts it, the methodology would fall within the safe harbor from ORS 223.304(7)(b).

The disadvantage is that the more flexible the City is with authorizing the waiver, the more challenging the City will find it to manage the overall costs. This option would have some additional up-front costs to set up a program, along with ongoing administration. The impact to the system and the risks are very similar to the "Front Fill" option, with the exception that the risk of a particular development not getting funding for the subsidy might be less, depending on the available funds and the process used to vet projects. This option does not necessarily provide an incentive to get eligible projects underway sooner rather than later.

This option is easy to recommend, and would provide express support for affordable housing.

4. "Interest Only"

The "Interest Only" option would supply the money for SDC waivers from the interest earnings in each SDC fund. Using this money could take the form of either a "Front Fill" or a "Back Fill" with the same possible variations in programs. The amount of a waiver available would be limited to the interest earning available. As interest earnings are currently used to help pay for projects, a variation would be to use CET money for some number of years to build interest earnings, then reduce the CET support over time. This would be consistent with ORS 197.309, and have the virtue of potentially stretching the CET incentives over time.

Under the current SDC methodology, interest earnings are not part of the calculation. This option would require a change in SDC ordinance, directing the use of interest earnings as a source of waivers for affordable housing projects. The SDC statutes do not require interest earning to be used for capital projects, so this option is defensible and does not risk unintentionally converting the SDCs to a tax. Funds collected as SDCs themselves would not be used to offset waivers, so this option is consistent with the legislative purpose set out in ORS 223.297. The methodology would still consider only the factors set out in ORS 223.304.

This option does have a cost to the system, as the interest would no longer be available for infrastructure projects. Interest earnings are not particularly robust, so this option may require the use of CET money permanently or for longer than expected. Over time, SDC rates might need to increase faster to be able to complete projects without the interest earnings being used to soften inflation. Costs to set up a program and administration would be about the same as "Front Fill" or "Back Fill", and the other considerations are about the same as for those programs. If this option is not challenged

within 60 days after the Council enacts it, the methodology would fall within the safe harbor from ORS 223.304(7)(b).

This option is legally defensible. It provides express support for affordable housing, while also possibly stretching the availability of CET money for other incentives. Because this option uses money that is currently available for capital projects, City Staff cannot recommend it. From a legal perspective, if the Council wants to pursue a way to subsidize affordable housing through waivers from SDCs without using money from other sources to pay for those waivers, this is the most defensible of the remaining options, as it still complies with the statutory requirements.

5. "Low Income Projects"

With this option the City Council would include a project for a set amount of money in each of the affected SDC categories for an affordable housing subsidy. Waivers and exemptions are offset by this set amount, and overall SDC rates are increased by the increment required to fund this project. This option is not consistent with the legislative purpose from ORS 223.297. Adopting this option recognizes that it is not possible for the City to meet legal requirements, preserve CET money for other purposes, and also provide waivers without increasing SDC rates to pay for the waivers in some manner. Nonetheless, if the City Council rejects the first four options, then this option provides some basis for an argument that the City met the statutory and constitutional requirements for the SDC rate-setting methodology.

Costs to establish and manage a program would be similar to those for other options, with the same alternatives for processes to determine the basis, timing and amounts of support. The Council would establish the maximum amount available for waivers for the planning period as the project amount. Presumably this would also establish the overall risk to the City for repayment (not including legal fees and costs required in any defense). The City should anticipate increases in the cost of development that does not obtain the waivers. These costs will ultimately be passed on to purchasers and tenants.

As ORS 223.304(1)(a)(E) allows, including "other relevant factors" as part of the rate-setting methodology for Reimbursement fees, if the Council pursues this option, doing so only for the Reimbursement fee component of SDCs is more defensible than for Improvement fees. The current methodology does not identify projects for Reimbursement fees, and staff cannot recommend doing so, as it increases the overall complexity of the system. From a purely legal perspective, while this option will be very challenging to successfully defend, if the City Council wants to pursue this option, limiting the waivers to reimbursement fees and establishing the amount for waivers as a project, allows some defense that arguably supports this method. Even if this option is not challenged within 60 days from enactment, the methodology, may not fall within the safe harbor from ORS 223.304(7)(b), especially if applied to Improvement fees.

This option is not recommended.

6. "Waiver"

   The "Waiver" option is simply a waiver by fiat. Like many simple solutions, this option is a bad idea. Other communities have taken this approach, and they have not yet been legally challenged, as far as we know. There is no legal authority for this approach, and no coherent argument is available to support it. The best argument is simply that other cities are doing it. This option does not include a project or set amount of money in any of the affected SDC categories, because there is no specified manner to offset the amount that is waived.

   Adopting this option recognizes that the City will make no attempt to meet legal requirements, and assumes that no one will object. The amounts waived under this option are made up in the future through the SDCs paid for projects that are not eligible for a waiver. Necessarily, this option requires SDC rates to generally increase to offset amounts that are not available for infrastructure projects, or for necessary infrastructure to be financed in some other manner. The upfront costs are very low, as this option requires very little other than direction from Council to provide the waiver. This option is the most expensive to the system, as the shortfalls are not managed. It is the highest risk, as it cannot be successfully defended except to say that other communities have done so and have not been challenged. On its face, the risks include personal liability for the Council members under ORS 294.100. Even if this option is not challenged within 60 days from enactment, the methodology probably would not fall within the safe harbor from ORS 223.304(7)(b).

   This option is not recommended.

I will be available along with the City Manager and affected staff to answer questions.

ORS 294.100. Public official expending money in excess of amount or for different purpose than provided by law unlawful

(1) It is unlawful for any public official to expend any moneys in excess of the amounts provided by law, or for any other or different purpose than provided by law.

(2) Any public official who expends any public moneys in excess of the amounts or for any other or different purpose than authorized by law shall be civilly liable for the return of the money by suit of the district attorney of the district in which the offense is committed, or at the suit of any taxpayer of such district, if the expenditure constitutes malfeasance in office or willful or wanton neglect of duty.

(3) On the demand in writing of 10 taxpayers of any municipal corporation with a population exceeding 100,000 inhabitants, filed with the tax supervising and conservation commission in the county in which the municipal corporation is situated, which demand sets forth that a public official has unlawfully expended public moneys in excess of the amount or for any other or different purpose than provided by law and that the expenditure constitutes malfeasance in office or willful or wanton neglect of duty, the tax supervising and conservation commission shall make an investigation of the facts as to the expenditure. If the tax supervising and conservation commission finds that public moneys have been unlawfully expended and that the expenditure constitutes malfeasance in office or willful or wanton neglect of duty, the commission shall proceed at law in the courts against the public official who has unlawfully expended the moneys for the return of the moneys unlawfully expended to the treasury of the municipal corporation. A right of action hereby is granted to the tax supervising and conservation commission for the purposes of this section.

(4) This section does not apply to the expenditure of revenues that are allowed to be accrued from a fiscal year to the prior fiscal year under ORS 294.383.

Or. Rev. Stat. Ann. § 294.100 (West)

ORS 223.297 – ORS 223.413 System Development Charges

223.297 Policy. The purpose of ORS 223.297 to 223.314 is to provide a uniform framework for the imposition of system development charges by local governments, to provide equitable funding for orderly growth and development in Oregon's communities and to establish that the charges may be used only for capital improvements. [1989 c.449 §1; 1991 c.902 §25; 2003 c.765 §1; 2003 c.802 §17]

223.299 Definitions for ORS 223.297 to 223.314. As used in ORS 223.297 to 223.314:

(1)(a) "Capital improvement" means facilities or assets used for the following:

(A) Water supply, treatment and distribution;

(B) Waste water collection, transmission, treatment and disposal;

(C) Drainage and flood control;

(D) Transportation; or

(E) Parks and recreation.

(b) "Capital improvement" does not include costs of the operation or routine maintenance of capital improvements.

(2) "Improvement fee" means a fee for costs associated with capital improvements to be constructed.

(3) "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 capacity exists.

(4)(a) "System development charge" means a reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a development permit, building permit or connection to the capital improvement. "System development charge" includes that portion of a sewer or water system connection charge that is greater than the amount necessary to reimburse the local government for its average cost of inspecting and installing connections with water and sewer facilities.

(b) "System development charge" does not include any fees assessed or collected as part of a local improvement district or a charge in lieu of a local improvement district assessment, or the cost of complying with requirements or conditions imposed upon a land use decision, expedited land division or limited land use decision. [1989 c.449 §2; 1991 c.817 §29; 1991 c.902 §26; 1995 c.595 §28; 2003 c.765 §2a; 2003 c.802 §18]

223.300 [Repealed by 1975 c.642 §26]

223.301 Certain system development charges and methodologies prohibited. (1) As used in this section, "employer" means any person who contracts to pay remuneration for, and secures the right to direct and control the services of, any person.

(2) A local government may not establish or impose a system development charge that requires an employer to pay a reimbursement fee or an improvement fee based on:

(a) The number of individuals hired by the employer after a specified date; or

(b) A methodology that assumes that costs are necessarily incurred for capital improvements when an employer hires an additional employee.

(3) A methodology set forth in an ordinance or resolution that establishes an improvement fee or a reimbursement fee shall not include or incorporate any method or system under which the payment of the fee or the amount of the fee is determined by the number of employees of an employer without regard to new construction, new development or new use of an existing structure by the employer. [1999 c.1098 §2; 2003 c.802 §19]

223.302 System development charges; use of revenues; review procedures. (1) Local governments are authorized to establish system development charges, but the revenues produced therefrom must be expended only in accordance with ORS 223.297 to 223.314. If a local government expends revenues from system development charges in violation of the limitations described in ORS 223.307, the local government shall replace the misspent amount with moneys derived from sources other than system development charges. Replacement moneys must be deposited in a fund designated for the system development charge revenues not later than one year following a determination that the funds were misspent.

(2) Local governments shall adopt administrative review procedures by which any citizen or other interested person may challenge an expenditure of system development charge revenues.

Such procedures shall provide that such a challenge must be filed within two years of the expenditure of the system development charge revenues. The decision of the local government shall be judicially reviewed only as provided in ORS 34.010 to 34.100.

(3)(a) A local government must advise a person who makes a written objection to the calculation of a system development charge of the right to petition for review pursuant to ORS 34.010 to 34.100.

(b) If a local government has adopted an administrative review procedure for objections to the calculation of a system development charge, the local government shall provide adequate notice regarding the procedure for review to a person who makes a written objection to the calculation of a system development charge. [1989 c.449 §3; 1991 c.902 §27; 2001 c.662 §2; 2003 c.765 §3; 2003 c.802 §20]

223.304 Determination of amount of system development charges; methodology; credit allowed against charge; limitation of action contesting methodology for imposing charge; notification request. (1)(a) Reimbursement fees must be established or modified by ordinance or resolution setting forth a methodology that is, when applicable, based on:

(A) Ratemaking principles employed to finance publicly owned capital improvements;

(B) Prior contributions by existing users;

(C) Gifts or grants from federal or state government or private persons;

(D) The value of unused capacity available to future system users or the cost of the existing facilities; and

(E) Other relevant factors identified by the local government imposing the fee.

(b) The methodology for establishing or modifying a reimbursement fee must:

(A) Promote the objective of future system users contributing no more than an equitable share to the cost of existing facilities.

(B) Be available for public inspection.

(2) Improvement fees 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.

(3) A local government may establish and impose a system development charge that is a combination of a reimbursement fee and an improvement fee, if the methodology demonstrates that the charge is not based on providing the same system capacity.

(4) The ordinance or resolution that establishes or modifies an improvement fee shall also provide for a credit against such fee for the construction of a qualified public improvement. A "qualified public improvement" means a capital improvement that is required as a condition of development approval, identified in the plan and list adopted pursuant to ORS 223.309 and either:

(a) Not located on or contiguous to property that is the subject of development approval; or

(b) Located in whole or in part on or contiguous to property that is the subject of development approval and required to be built larger or with greater capacity than is necessary for the particular development project to which the improvement fee is related.

(5)(a) The credit provided for in subsection (4) of this section is only for the improvement fee charged for the type of improvement being constructed, and credit for qualified public improvements under subsection (4)(b) of this section may be granted only for the cost of that portion of such improvement that exceeds the local government's minimum standard facility size or capacity needed to serve the particular development project or property. The applicant shall have the burden of demonstrating that a particular improvement qualifies for credit under subsection (4)(b) of this section.

(b) A local government may deny the credit provided for in subsection (4) of this section if the local government demonstrates:

(A) That the application does not meet the requirements of subsection (4) of this section; or

(B) By reference to the list adopted pursuant to ORS 223.309, that the improvement for which credit is sought was not included in the plan and list adopted pursuant to ORS 223.309.

(c) When the construction of a qualified public improvement gives rise to a credit amount greater than the improvement fee that would otherwise be levied against the project receiving development approval, the excess credit may be applied against improvement fees that accrue in subsequent phases of the original development project. This subsection does not prohibit a local government from providing a greater credit, or from establishing a system providing for the transferability of credits, or from providing a credit for a capital improvement not identified in the plan and list adopted pursuant to ORS 223.309, or from providing a share of the cost of such improvement by other means, if a local government so chooses.

(d) Credits must be used in the time specified in the ordinance but not later than 10 years from the date the credit is given.

(6) Any local government that proposes to establish or modify a system development charge shall maintain a list of persons who have made a written request for notification prior to adoption or amendment of a methodology for any system development charge.

(7)(a) Written notice must be mailed to persons on the list at least 90 days prior to the first hearing to establish or modify a system development charge, and the methodology supporting the system development charge must be available at least 60 days prior to the first hearing. The failure of a person on the list to receive a notice that was mailed does not invalidate the action of the local government. The local government may periodically delete names from the list, but at least 30 days prior to removing a name from the list shall notify the person whose name is to be deleted that a new written request for notification is required if the person wishes to remain on the notification list.

(b) Legal action intended to contest the methodology used for calculating a system development charge may not be filed after 60 days following adoption or modification of the system development charge ordinance or resolution by the local government. A person shall request judicial review of the methodology used for calculating a system development charge only as provided in ORS 34.010 to 34.100.

(8) A change in the amount of a reimbursement fee or an improvement fee is not a modification of the system development charge methodology if the change in amount is based on:

(a) A change in the cost of materials, labor or real property applied to projects or project capacity as set forth on the list adopted pursuant to ORS 223.309; or

(b) The periodic application of one or more specific cost indexes or other periodic data sources. A specific cost index or periodic data source must be:

(A) A relevant measurement of the average change in prices or costs over an identified time period for materials, labor, real property or a combination of the three;

(B) Published by a recognized organization or agency that produces the index or data source for reasons that are independent of the system development charge methodology; and

(C) Incorporated as part of the established methodology or identified and adopted in a separate ordinance, resolution or order. [1989 c.449 §4; 1991 c.902 §28; 1993 c.804 §20; 2001 c.662 §3; 2003 c.765 §§4a,5a; 2003 c.802 §21]

223.305 [Repealed by 1971 c.325 §1]

223.307 Authorized expenditure of system development charges. (1) Reimbursement fees may be spent only on capital improvements associated with the systems for which the fees are assessed including expenditures relating to repayment of indebtedness.

(2) Improvement fees may be spent only on capacity increasing capital improvements, including expenditures relating to repayment of debt for such improvements. 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. The portion of the improvements funded by improvement fees must be related to the need for increased capacity to provide service for future users.

(3) System development charges may not be expended for costs associated with the construction of administrative office facilities that are more than an incidental part of other capital improvements or for the expenses of the operation or maintenance of the facilities constructed with system development charge revenues.

(4) Any capital improvement being funded wholly or in part with system development charge revenues must be included in the plan and list adopted by a local government pursuant to ORS 223.309.

(5) Notwithstanding subsections (1) and (2) of this section, system development charge revenues may be expended on the costs of complying with the provisions of ORS 223.297 to 223.314, including the costs of developing system development charge methodologies and providing an annual accounting of system development charge expenditures. [1989 c.449 §5; 1991 c.902 §29; 2003 c.765 §6; 2003 c.802 §22]

223.309 Preparation of plan for capital improvements financed by system development charges; modification. (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. [1989 c.449 §6; 1991 c.902 §30; 2001 c.662 §4; 2003 c.765 §7a; 2003 c.802 §23]

223.310 [Amended by 1957 c.397 §3; repealed by 1971 c.325 §1]

223.311 Deposit of system development charge revenues; annual accounting. (1) System development charge revenues must be deposited in accounts designated for such moneys. The local government shall provide an annual accounting, to be completed by January 1 of each year, for system development charges showing the total amount of system development charge revenues collected for each system and the projects that were funded in the previous fiscal year.

(2) The local government shall include in the annual accounting:

(a) A list of the amount spent on each project funded, in whole or in part, with system development charge revenues; and

(b) The amount of revenue collected by the local government from system development charges and attributed to the costs of complying with the provisions of ORS 223.297 to 223.314, as described in ORS 223.307. [1989 c.449 §7; 1991 c.902 §31; 2001 c.662 §5; 2003 c.765 §8a; 2003 c.802 §24]

223.312 [1957 c.95 §4; repealed by 1971 c.325 §1]

223.313 Applicability of ORS 223.297 to 223.314. (1) ORS 223.297 to 223.314 shall apply only to system development charges in effect on or after July 1, 1991.

(2) The provisions of ORS 223.297 to 223.314 shall not be applicable if they are construed to impair bond obligations for which system development charges have been pledged or to impair the ability of local governments to issue new bonds or other financing as provided by law for improvements allowed under ORS 223.297 to 223.314. [1989 c.449 §8; 1991 c.902 §32; 2003 c.802 §25]

223.314 Establishment or modification of system development charge not a land use decision. The establishment, modification or implementation of a system development charge, or a plan or list adopted pursuant to ORS 223.309, or any modification of a plan or list, is not a land use decision pursuant to ORS chapters 195 and 197. [1989 c.449 §9; 2001 c.662 §6; 2003 c.765 §9]

197.309. Designation of housing unit or residential building lot or parcel for sale or rent as affordable housing

(1) As used in this section:

(a) "Affordable housing" means housing that is affordable to households with incomes equal to or higher than 80 percent of the median family income for the county in which the housing is built.

(b) "Multifamily structure" means a structure that contains three or more housing units sharing at least one wall, floor or ceiling surface in common with another unit within the same structure.

(2) Except as provided in subsection (3) of this section, a metropolitan service district may not adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178 a requirement, that has the effect of establishing the sales or rental price for a housing unit or residential building lot or parcel, or that requires a housing unit or residential building lot or parcel to be designated for sale or rent to a particular class or group of purchasers or renters.

(3) The provisions of subsection (2) of this section do not limit the authority of a metropolitan service district to:

(a) Adopt or enforce a use regulation, provision or requirement creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or requirement designed to increase the supply of moderate or lower cost housing units; or

(b) Enter into an affordable housing covenant as provided in ORS 456.270 to 456.295.

(4) Notwithstanding ORS 91.225, a city or county may adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178 a requirement, that has the effect of establishing the sales or rental price for a new multifamily structure, or that requires a new multifamily structure to be designated for sale or rent as affordable housing.

(5) A regulation, provision or requirement adopted or imposed under subsection (4) of this section:

(a) May not require more than 20 percent of housing units within a multifamily structure to be sold or rented as affordable housing;

(b) May apply only to multifamily structures containing at least 20 housing units;

(c) Must provide developers the option to pay an in-lieu fee, in an amount determined by the city or county, in exchange for providing the requisite number of housing units within the multifamily structure to be sold or rented at below-market rates; and

(d) Must require the city or county to offer a developer of multifamily structures, other than a developer that elects to pay an in-lieu fee pursuant to paragraph (c) of this subsection, at least one of the following incentives:

(A) Whole or partial fee waivers or reductions.

(B) Whole or partial waivers of system development charges or impact fees set by the city or county.

(C) Finance-based incentives.

(D) Full or partial exemption from ad valorem property taxes on the terms described in this subparagraph. For purposes of any statute granting a full or partial exemption from ad valorem property taxes that uses a definition of "low income" to mean income at or below 60 percent of the area median income and for which the multifamily structure is otherwise eligible, the city or

county shall allow the multifamily structure of the developer to qualify using a definition of "low income" to mean income at or below 80 percent of the area median income.

(6) A regulation, provision or requirement adopted or imposed under subsection (4) of this section may offer developers one or more of the following incentives:

(a) Density adjustments.

(b) Expedited service for local permitting processes.

(c) Modification of height, floor area or other site-specific requirements.

(d) Other incentives as determined by the city or county.

(7) Subsection (4) of this section does not restrict the authority of a city or county to offer developers voluntary incentives, including incentives to:

(a) Increase the number of affordable housing units in a development.

(b) Decrease the sale or rental price of affordable housing units in a development.

(c) Build affordable housing units that are affordable to households with incomes equal to or lower than 80 percent of the median family income for the county in which the housing is built.

(8)(a) A city or county that adopts or imposes a regulation, provision or requirement described in subsection (4) of this section may not apply the regulation, provision or requirement to any multifamily structure for which an application for a permit, as defined in ORS 215.402 or 227.160, has been submitted as provided in ORS 215.416 or 227.178 (3), or, if such a permit is not required, a building permit application has been submitted to the city or county prior to the effective date of the regulation, provision or requirement.

(b) If a multifamily structure described in paragraph (a) of this subsection has not been completed within the period required by the permit issued by the city or county, the developer of the multifamily structure shall resubmit an application for a permit, as defined in ORS 215.402 or 227.160, as provided in ORS 215.416 or 227.178 (3), or, if such a permit is not required, a building permit application under the regulation, provision or requirement adopted by the city or county under subsection (4) of this section.

(9)(a) A city or county that adopts or imposes a regulation, provision or requirement under subsection (4) of this section shall adopt and apply only clear and objective standards, conditions and procedures regulating the development of affordable housing units within its jurisdiction. The standards, conditions and procedures may not have the effect, either individually or cumulatively, of discouraging development of affordable housing units through unreasonable cost or delay.

(b) Paragraph (a) of this subsection does not apply to:

(A) An application or permit for residential development in an area identified in a formally adopted central city plan, or a regional center as defined by Metro, in a city with a population of 500,000 or more.

(B) An application or permit for residential development in historic areas designated for protection under a land use planning goal protecting historic areas.

(c) In addition to an approval process for affordable housing based on clear and objective standards, conditions and procedures as provided in paragraph (a) of this subsection, a city or county may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

(A) The developer retains the option of proceeding under the approval process that meets the requirements of paragraph (a) of this subsection;

(B) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and

(C) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in paragraph (a) of this subsection.

(10) If a regulation, provision or requirement adopted or imposed by a city or county under subsection (4) of this section requires that a percentage of housing units in a new multifamily structure be designated as affordable housing, any incentives offered under subsection (5)(d) or (6) of this section shall be related in a manner determined by the city or county to the required percentage of affordable housing units.

Or. Rev. Stat. Ann. § 197.309 (West)

Enrolled
Senate Bill 1533

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Workforce and General Government)

CHAPTER .....

AN ACT

Relating to affordable housing; creating new provisions; amending ORS 197.309, 320.170, 320.176 and 320.186 and section 1, chapter 829, Oregon Laws 2007; repealing section 9, chapter 829, Oregon Laws 2007; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 197.309 is amended to read:

197.309. **(1) As used in this section:**

(a) "Affordable housing" means housing that is affordable to households with incomes equal to or higher than 80 percent of the median family income for the county in which the housing is built.

(b) "Multifamily structure" means a structure that contains three or more housing units sharing at least one wall, floor or ceiling surface in common with another unit within the same structure.

[*(1)*] **(2)** Except as provided in subsection [*(2)*] **(3)** of this section, a [*city, county or*] metropolitan service district may not adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178[,] a requirement**,** that has the effect of establishing the sales **or rental** price for a housing unit or residential building lot or parcel, or that requires a housing unit or residential building lot or parcel to be designated for sale **or rent** to [*any*] **a** particular class or group of purchasers **or renters**.

[*(2)*] **(3)** [*This*] **The provisions of subsection (2) of this** section [*does*] **do** not limit the authority of a [*city, county or*] metropolitan service district to:

(a) Adopt or enforce a [*land*] use regulation, [*functional plan*] provision or [*condition of approval*] **requirement** creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or [*condition*] **requirement** designed to increase the supply of moderate or lower cost housing units; or

(b) Enter into an affordable housing covenant as provided in ORS 456.270 to 456.295.

(4) Notwithstanding ORS 91.225, a city or county may adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178 a requirement, that has the effect of establishing the sales or rental price for a new multifamily structure, or that requires a new multifamily structure to be designated for sale or rent as affordable housing.

(5) A regulation, provision or requirement adopted or imposed under subsection (4) of this section:

(a) May not require more than 20 percent of housing units within a multifamily structure to be sold or rented as affordable housing;

(b) May apply only to multifamily structures containing at least 20 housing units;

(c) Must provide developers the option to pay an in-lieu fee, in an amount determined by the city or county, in exchange for providing the requisite number of housing units within the multifamily structure to be sold or rented at below-market rates; and

(d) Must require the city or county to offer a developer of multifamily structures, other than a developer that elects to pay an in-lieu fee pursuant to paragraph (c) of this subsection, at least one of the following incentives:

(A) Whole or partial fee waivers or reductions.

(B) Whole or partial waivers of system development charges or impact fees set by the city or county.

(C) Finance-based incentives.

(D) Full or partial exemption from ad valorem property taxes on the terms described in this subparagraph. For purposes of any statute granting a full or partial exemption from ad valorem property taxes that uses a definition of "low income" to mean income at or below 60 percent of the area median income and for which the multifamily structure is otherwise eligible, the city or county shall allow the multifamily structure of the developer to qualify using a definition of "low income" to mean income at or below 80 percent of the area median income.

(6) A regulation, provision or requirement adopted or imposed under subsection (4) of this section may offer developers one or more of the following incentives:

(a) Density adjustments.

(b) Expedited service for local permitting processes.

(c) Modification of height, floor area or other site-specific requirements.

(d) Other incentives as determined by the city or county.

(7) Subsection (4) of this section does not restrict the authority of a city or county to offer developers voluntary incentives, including incentives to:

(a) Increase the number of affordable housing units in a development.

(b) Decrease the sale or rental price of affordable housing units in a development.

(c) Build affordable housing units that are affordable to households with incomes equal to or lower than 80 percent of the median family income for the county in which the housing is built.

(8)(a) A city or county that adopts or imposes a regulation, provision or requirement described in subsection (4) of this section may not apply the regulation, provision or requirement to any multifamily structure for which an application for a permit, as defined in ORS 215.402 or 227.160, has been submitted as provided in ORS 215.416 or 227.178 (3), or, if such a permit is not required, a building permit application has been submitted to the city or county prior to the effective date of the regulation, provision or requirement.

(b) If a multifamily structure described in paragraph (a) of this subsection has not been completed within the period required by the permit issued by the city or county, the developer of the multifamily structure shall resubmit an application for a permit, as defined in ORS 215.402 or 227.160, as provided in ORS 215.416 or 227.178 (3), or, if such a permit is not required, a building permit application under the regulation, provision or requirement adopted by the city or county under subsection (4) of this section.

(9)(a) A city or county that adopts or imposes a regulation, provision or requirement under subsection (4) of this section shall adopt and apply only clear and objective standards, conditions and procedures regulating the development of affordable housing units within its jurisdiction. The standards, conditions and procedures may not have the effect, either individually or cumulatively, of discouraging development of affordable housing units through unreasonable cost or delay.

(b) Paragraph (a) of this subsection does not apply to:

(A) An application or permit for residential development in an area identified in a formally adopted central city plan, or a regional center as defined by Metro, in a city with a population of 500,000 or more.

(B) An application or permit for residential development in historic areas designated for protection under a land use planning goal protecting historic areas.

(c) In addition to an approval process for affordable housing based on clear and objective standards, conditions and procedures as provided in paragraph (a) of this subsection, a city or county may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

(A) The developer retains the option of proceeding under the approval process that meets the requirements of paragraph (a) of this subsection;

(B) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and

(C) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in paragraph (a) of this subsection.

(10) If a regulation, provision or requirement adopted or imposed by a city or county under subsection (4) of this section requires that a percentage of housing units in a new multifamily structure be designated as affordable housing, any incentives offered under subsection (5)(d) or (6) of this section shall be related in a manner determined by the city or county to the required percentage of affordable housing units.

SECTION 2. ORS 320.170 is amended to read:

320.170. (1) [*Construction taxes may be imposed by*] A school district, as defined in ORS 330.005, **may impose a construction tax only** in accordance with ORS 320.170 to 320.189.

(2) Construction taxes imposed by a school district must be collected, subject to ORS 320.179, by a local government, local service district, special government body, state agency or state official that issues a permit for structural improvements regulated by the state building code.

SECTION 3. Section 1, chapter 829, Oregon Laws 2007, is added to and made a part of ORS 320.170 to 320.189.

SECTION 4. Section 1, chapter 829, Oregon Laws 2007, is amended to read:

Sec. 1. (1) A local government or local service district, as defined in ORS 174.116, or a special government body, as defined in ORS 174.117, may not impose a tax on the privilege of constructing improvements to real property except as provided in [*sections 2 to 8 of this 2007 Act*] **ORS 320.170 to 320.189**.

(2) Subsection (1) of this section does not apply to:

(a) A tax that is in effect as of May 1, 2007, or to the extension or continuation of such a tax, provided that the rate of tax does not increase from the rate in effect as of May 1, 2007;

(b) A tax on which a public hearing was held before May 1, 2007; or

(c) The amendment or increase of a tax adopted by a county for transportation purposes prior to May 1, 2007, provided that the proceeds of such a tax continue to be used for those purposes.

(3) For purposes of [*this section and sections 2 to 8 of this 2007 Act*] **ORS 320.170 to 320.189**, construction taxes are limited to privilege taxes imposed under [*sections 2 to 8 of this 2007 Act*] **ORS 320.170 to 320.189** and do not include any other financial obligations such as building permit fees, financial obligations that qualify as system development charges under ORS 223.297 to 223.314 or financial obligations imposed on the basis of factors such as income.

SECTION 5. ORS 320.176 is amended to read:

320.176. (1) Construction taxes imposed [*under ORS 320.170 to 320.189*] **by a school district pursuant to ORS 320.170** may be imposed only on improvements to real property that result in a new structure or additional square footage in an existing structure and may not exceed:

(a) $1 per square foot on structures or portions of structures intended for residential use, including but not limited to single-unit or multiple-unit housing; and

(b) $0.50 per square foot on structures or portions of structures intended for nonresidential use, not including multiple-unit housing of any kind.

(2) In addition to the limitations under subsection (1) of this section, a construction tax imposed on structures intended for nonresidential use may not exceed $25,000 per building permit or $25,000 per structure, whichever is less.

(3)(a) For years beginning on or after June 30, 2009, the limitations under subsections (1) and (2) of this section shall be adjusted for changes in construction costs by multiplying the limitations set forth in subsections (1) and (2) of this section by the ratio of the averaged monthly construction cost index for the 12-month period ending June 30 of the preceding calendar year over the averaged monthly construction cost index for the 12-month period ending June 30, 2008.

(b) The Department of Revenue shall determine the adjusted limitations under this section and shall report those limitations to entities imposing construction taxes. The department shall round the adjusted limitation under subsection (2) of this section to the nearest multiple of $100.

(c) As used in this subsection, "construction cost index" means the Engineering News-Record Construction Cost Index, or a similar nationally recognized index of construction costs as identified by the department by rule.

SECTION 6. ORS 320.186 is amended to read:

320.186. A school district may pledge construction taxes **imposed pursuant to ORS 320.170** to the payment of obligations issued to finance or refinance capital improvements as defined in ORS 320.183.

SECTION 7. Sections 8 and 9 of this 2016 Act are added to and made a part of ORS 320.170 to 320.189.

SECTION 8. (1) The governing body of a city or county may impose a construction tax by adoption of an ordinance or resolution that conforms to the requirements of this section and section 9 of this 2016 Act.

(2)(a) A tax may be imposed on improvements to residential real property that result in a new residential structure or additional square footage in an existing residential structure, including remodeling that adds living space.

(b) An ordinance or resolution imposing the tax described in paragraph (a) of this subsection must state the rate of the tax. The tax may not exceed one percent of the permit valuation for residential construction permits issued by the city or county either directly or through the Building Codes Division of the Department of Consumer and Business Services.

(3)(a) A tax may be imposed on improvements to commercial and industrial real property, including the commercial and industrial portions of mixed-use property, that result in a new structure or additional square footage in an existing structure, including remodeling that adds living space.

(b) An ordinance or resolution imposing the tax described in paragraph (a) of this subsection must state the rate and base of the tax.

(4) Taxes imposed pursuant to this section shall be paid at the time specified in ORS 320.189 to the city or county that imposed the tax.

(5)(a) This section and section 9 of this 2016 Act do not apply to a tax described in section 1 (2), chapter 829, Oregon Laws 2007.

(b) Conformity of a tax imposed pursuant to this section by a city or county to the requirements of this section and section 9 of this 2016 Act shall be determined without regard to any tax described in section 1 (2), chapter 829, Oregon Laws 2007, that is imposed by the city or county.

SECTION 9. (1) As soon as practicable after the end of each fiscal quarter, a city or county that imposes a construction tax pursuant to section 8 of this 2016 Act shall deposit the construction tax revenues collected in the fiscal quarter just ended in the general fund of the city or county.

(2) Of the revenues deposited pursuant to subsection (1) of this section, the city or county may retain an amount not to exceed four percent as an administrative fee to recoup the expenses of the city or county incurred in complying with this section.

(3) After deducting the administrative fee authorized under subsection (2) of this section and paying any refunds, the city or county shall use the remaining revenues received under section 8 (2) of this 2016 Act as follows:

(a) Fifty percent to fund developer incentives allowed or offered pursuant to ORS 197.309 (5)(c) and (d) and (7);

(b) Fifteen percent to be distributed to the Housing and Community Services Department to fund home ownership programs that provide down payment assistance; and

(c) Thirty-five percent for programs and incentives of the city or county related to affordable housing as defined by the city or county, respectively, for purposes of this section and section 8 of this 2016 Act.

(4) After deducting the administrative fee authorized under subsection (2) of this section and paying any refunds, the city or county shall use 50 percent of the remaining revenues received under section 8 (3) of this 2016 Act to fund programs of the city or county related to housing.

SECTION 10. Section 9, chapter 829, Oregon Laws 2007, is repealed.

SECTION 11. A city or county may not adopt a regulation, provision or requirement under ORS 197.309, as amended by section 1 of this 2016 Act, until the 180th day after the effective date of this 2016 Act.

SECTION 12. This 2016 Act takes effect on the 91st day after the date on which the 2016 regular session of the Seventy-eighth Legislative Assembly adjourns sine die.

Passed by Senate February 26, 2016

.....
Lori L. Brocker, Secretary of Senate

.....
Peter Courtney, President of Senate

Passed by House March 3, 2016

.....
Tina Kotek, Speaker of House

Received by Governor:

.....M.,....., 2016

Approved:

.....M.,....., 2016

.....
Kate Brown, Governor

Filed in Office of Secretary of State:

.....M.,....., 2016

.....
Jeanne P. Atkins, Secretary of State

SDC Waiver Options, Expenses and Risks

Actions →	Make No Change	Front Fill—establish a set dollar amount for waivers	Back Fill	Interest Only—use SDC account interest earnings for waivers	Create Low Income Projects	Waiver
Cost to Implement Change	No Cost	Cost (Managed)	Cost (Can Be Managed)	On-going Administrative Cost	Cost (Managed)	Low Upfront Cost
Impact to SDC System and Ability to Complete Projects as Scheduled	No Impact	Managed Impact	Managed Impact	Short and Long Term Impact	Long Term Impact	Long Term Impact
Risk of a Challenge to the Methodology	No Risk	Low Risk	Low Risk	Low Risk	Medium Risk for SDC Reimbursement Funds High Risk for SDC Improvement Funds	High Risk
Reimburse SDC Account from Another Funding Source	N/A	Yes	Yes	No	No	No
SDC rates adjusted to Keep SDC Fund Whole	N/A	No	No	Yes/long - term	Yes	Yes
Impact to community members (rate payers and taxpayers)	None	Required money not available for other purposes	Required money not available for other purposes	Long-term SDC rates may increase to cover interest earnings	SDC rates increase to pay for projects	SDC rates, utility rates, special assessments increase

For purposes of this analysis, I'm defining terms in the following way:

1) Actions:
    a. "Make No Change" is maintaining the status quo, taking no new or additional action regarding SDC waivers or subsidies.
    b. "Front Filling" is establishing a set total dollar amount for SDC waivers (by type and system) and transferring non-SDC money (e.g. CET money) to cover that amount to the SDC funds prior to issuing waivers.
    c. "Back Filling" is paying for SDC waivers as they occur. The Council could establish a set total dollar amount for SDC waivers that uses an alternate funding source (e.g., CET money), but not transferring funds until waivers are granted.
    d. "Interest Only" is using interest earned on SDC balances as the funding source for either the equivalent of Front Filling or Back Filling. Interest earnings are currently used to help pay for CIP projects. Depending on the fund, some time may be needed for large enough earnings to serve as a funding source, so an alternative might be needed in the interim. The SDC fee methodology does not need to include how interest earnings would be used.
    e. "Create Low Income Projects" is establishing a project in the CIP for each SDC type using a defined percentage of SDCs to provide waivers up to the project amount. SDC fee calculation would need to include this amount.
    f. "Waiver" is not collecting some or all SDCs from some developments based on the nature of the development. SDC methodology could recognize the waivers and rates would be adjusted to accommodate them and keep the fund whole.
2) Cost is the additional amount required to put an action in place, including staff time and the transfer of funds from sources other than SDCs. It does not include litigation or settlement amounts, or impact on the systems (which is treated as an expense).
    a. "Cost (Managed)" means amounts that the City can determine or establish in advance of the action or as part of the action.
    b. "Cost (Can be Managed) means the Council could determine or establish an eligible amount in advance of the action, but the action does not require that determination.
    c. "Low upfront cost" means minimal costs related to staff time, meeting time and ordinance preparation.
3) "Impact" is the burden on the infrastructure system funded by SDCs, which includes lost or delayed opportunity for projects and inflationary increases for projects that are delayed by insufficient funding.
4) "Risk" is the likelihood that the action cannot be successfully defended if challenged, with the likely consequence that resources other than SDC funds will be required to resolve a challenge through litigation or settlement. The major consideration of risk is whether the action complies with the requirements of the statutory scheme that authorizes SDCs, which also requires replacing misspent SDCs with funds from sources other than SDCs. Note that a low-income project as part of the methodology is more defensible for Reimbursement Fees than Improvement Fees, due to authority to include "other relevant factors" as part of the basis for reimbursement fees found in ORS 223.304(1)(a)(E).
5) "SDC Rates Adjusted. . ." is the need to increase general SDC rates to offset any waiver.
6) "Impact to Community Members" is the need for community members to pay for required infrastructure in some manner other than through SDCs.