

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 PAUL CONTE,
5 *Petitioner,*

6
7 vs.

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9 CITY OF EUGENE,
10 *Respondent,*

11
12 and

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14 CAPSTONE COLLEGIATE COMMUNITIES, LLC,
15 *Intervenor-Respondent.*

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18 LUBA No. 2012-041

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20 FINAL OPINION
21 AND ORDER

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23 Appeal from City of Eugene.

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25 William K. Kabeiseman and Jennifer Bragar, Portland, represented petitioner.

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27 Emily N. Jerome, Deputy City Attorney, Eugene, represented respondent.

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29 James W. Spickerman, Eugene, represented intervenor-respondent.

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

33
34 DISMISSED

08/14/2012

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

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NATURE OF THE DECISION

Petitioner appeals a city council resolution that approves an ad valorem property tax exemption under the city’s Multiple-Unit Property Tax Exemption (MUPTE) program.

MOTION TO INTERVENE

Capstone Collegiate Communities, LLC (intervenor), moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

BACKGROUND

ORS 307.600 to 307.637 authorize the city to provide a property tax exemption for certain multi-family development, pursuant to criteria set forth in ORS 307.618. The city’s MUPTE program, which implements ORS 307.600 to 307.637, is set out in Eugene Code (EC) 2.945 and 2.947.

ORS 307.618(1) provides in relevant part that

“The city or county may approve an application filed under ORS 307.615 if the city or county finds that:

“(1) In the case of the construction, addition or conversion of multiple-unit housing:

“* * * * *

“(b) The proposed construction, addition or conversion project is or will be, at the time of completion, in conformance with all local plans and planning regulations, including special or district-wide plans developed and adopted pursuant to ORS chapters 195, 196, 197, 215 and 227, that are applicable at the time the application is approved.”

EC 2.945(6)(g)(3) imposes an identical requirement. ORS 307.621(1) provides that the city or county shall approve or deny an application filed under ORS 307.618 within 180 days after receipt of the application, and that an application not acted upon within 180 days shall be deemed approved. ORS 307.631(1) provides that “[r]eview of a denial of an application under ORS 307.621 * * * shall be as provided by ORS 34.010 to 34.100.” The latter statutes

1 provide for writ of review in circuit court. EC 2.947(4) similarly provides that “[a]ll reviews
2 of council action in denying, approving, or terminating an application shall be governed by
3 the procedures set forth in ORS 34.010 to 34.100 * * *.”

4 Intervenor submitted an application to the city’s MUPTE program for an exemption
5 for a multi-unit housing development that is or will be the subject of a separate land use
6 review application. The planning director recommended that the city council grant the
7 requested tax exemption for the multi-unit housing development, subject to conditions. On
8 May 9, 2012, the city council adopted a resolution approving the tax exemption under EC
9 2.945 and 2.947. As required by ORS 307.618(1)(b) and EC 2.945(6)(g)(3), the city council
10 resolution includes a finding that:

11 “The proposed project will be in conformance with all local plans and
12 planning regulations, including special or district-wide plans developed and
13 adopted pursuant to ORS chapters 195, 196, 197, 215 and 227, that are
14 applicable at the time the application is approved.” Notice of Intent to Appeal
15 Exhibit A, page 3.

16 **MOTION TO DISMISS**

17 The city moves to dismiss this appeal, arguing that the challenged decision is
18 excluded from LUBA’s jurisdiction under the so-called “fiscal” exception described in *State*
19 *Housing Council v. City of Lake Oswego*, 48 Or App 525, 537, 617 P2d 655 (1980), *rev*
20 *dismissed* 291 Or 878, 635 P2d 647 (1981). In *State Housing Council*, the Court of Appeals
21 held that local ordinances establishing tax or fiscal policies are not subject to review by the
22 Land Conservation and Development Commission for compliance with the statewide
23 planning goals, even if those tax or fiscal policies have impacts on land use. In *Westside*
24 *Neighborhood v. School Dist. 4J*, 58 Or App 154, 161-62, 647 P2d 962 (1982), the Court of
25 Appeals extended the fiscal exception doctrine to LUBA’s review, concluding that LUBA
26 lacked jurisdiction over a fiscally motivated decision to close a school. Subsequently, LUBA
27 has applied the fiscal exception in a number of cases to determine that decisions that are
28 fundamentally fiscal, taxation or budgetary decisions are not within its jurisdiction.

1 The city does not dispute that, pursuant to ORS 307.618(1)(b) and EC 2.945(6)(g)(3),
2 the challenged resolution “concerns” the application of comprehensive plan provisions or
3 land use regulations, and thus falls within the definition of a “land use decision” subject to
4 LUBA’s jurisdiction at ORS 197.015(10)(a). However, the city argues that a decision
5 approving or denying a tax exemption under ORS 307.600 *et seq* and EC 2.945 and 2.947
6 falls within the fiscal exception to LUBA’s jurisdiction as described in *State Housing*
7 *Council* and therefore is not subject to review under the state’s land use review process, even
8 though such fiscal decisions have incidental impacts on land use and even concern the
9 application of land use regulations. The city notes that in *State Housing Council* the Court of
10 Appeals listed tax exemptions for multi-family housing under ORS 307.600 *et seq* as one
11 example of fiscal decisions that would fall within the fiscal exception. 48 Or App at 533.

12 We agree with the city that the challenged resolution does not fall within our
13 jurisdiction. As noted, ORS 307.631(1) provides that “[r]eview of a denial of an application
14 under ORS 307.621 * * * shall be as provided by ORS 34.010 to 34.100,” a writ of review to
15 circuit court. Thus, if a city denied a tax exemption application pursuant to ORS 307.621 for
16 any reason, presumably including a determination under ORS 307.618 that the project is or
17 will not be conformance with “all local plans and planning regulations,” it is clear that the
18 exclusive route of review for that decision would be via a writ of review in circuit court, not
19 an appeal to LUBA. That is entirely consistent with the fiscal exception doctrine articulated
20 in *State Housing Council*. A decision that simply approves or denies a property tax
21 exemption has at best only incidental impacts on land use. Although the review provisions of
22 ORS 307.631(1) refer only to a decision *denying* an application for a tax exemption, and do
23 not mention a decision *approving* a tax exemption application, we do not believe that that
24 language represents a deliberate legislative choice to provide for review of denial of tax

1 exemptions in circuit court and of approval of tax exemptions before LUBA.¹ We can
2 imagine no basis for such a distinction. We believe the city correctly implemented ORS
3 307.631(1) by providing, in EC 2.947(4), that review of all city council actions approving,
4 denying or terminating a property tax exemption is with the circuit court.

5 Even if ORS 307.631(1) is read narrowly to provide for circuit court review only for
6 decisions that deny a tax exemption, we believe a decision approving a tax exemption
7 nonetheless is excluded from LUBA's jurisdiction under the fiscal exception doctrine.
8 Petitioner argues that the fiscal exception cases cited by the city are inapposite, because none
9 of them involved, as is involved here, statutory criteria that require the local government to
10 make a determination that development "is or will be, at the time of completion, in
11 conformance with all local plans and planning regulations[.]" ORS 307.618(1)(b). According
12 to petitioner, because the legislature has explicitly linked the land use program to the multi-
13 family development tax exemption program, the rationale behind applying the fiscal
14 exception to LUBA's jurisdiction does not apply in this case. In the alternative, petitioner
15 argues that if the fiscal exception doctrine applies the Court of Appeals erred, in *Westside*
16 *Neighborhood*, in extending the court-created fiscal exception doctrine to LUBA, whose
17 jurisdiction is comprehensively governed by statute.²

18 We are not persuaded that the ORS 307.618(1) requirement that a local government
19 determine, before granting a tax exemption, that the project "is or will be, at the time of

¹ ORS 307.618 and 307.631 were originally adopted in 1975, prior to LUBA's creation. Although amended and renumbered over the years, as far as we can tell the material provisions have remained the same: a requirement to find that the proposed multiple family housing "is or will be, at the time of completion, in conformance with all local plans and planning regulations," with circuit court review of an appeal of a decision denying or terminating a tax exemption. Presumably, the reason why ORS 307.631 does not mention an appeal of a decision *approving* a tax exemption is that the legislature did not imagine that any party other than the applicant would be concerned with a tax exemption decision.

² Petitioner recognizes that LUBA has no authority to overrule *Westside Neighbors*, but presents this argument here to preserve it on appeal. We do not address the argument, other than to note that it is a debatable proposition. See *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997) (overruling a court-created tolling doctrine inconsistent with the statutory timeline for appealing decisions to LUBA).

1 completion, in conformance with all local plans and planning regulations” distinguishes the
2 fiscal exception cases cited by the city or demonstrates that the legislature intended that
3 LUBA rather than the circuit court review tax exemption approval decisions. The fiscal
4 exception cases cited by the city also involved decisions that concerned the application of
5 goals, comprehensive plan provisions or land use regulations, and thus nominally qualified as
6 land use decisions, but nonetheless were deemed to fall within the fiscal exception.
7 Moreover, the terms of ORS 307.618(1) suggest that the determination whether the project
8 “is or will be” in conformance with “all local plans and planning regulations” is a broad-
9 brush, tentative evaluation, rather than a focused determination of whether proposed multi-
10 family development in fact complies with the applicable approval criteria. That more
11 rigorous evaluation will necessarily be conducted during the local government’s review of the
12 land use application that actually approves or denies the proposed development. The
13 decision approving or denying the land use application for multi-family development can be a
14 land use decision or limited land use decision subject to LUBA’s jurisdiction.³ However, the
15 tax exemption decision itself would simply approve or deny the requested tax exemption, and
16 would not (and could not) approve or deny any proposed development of land. As a practical
17 and legal matter, a tax exemption decision under ORS 307.318 has only incidental impacts on

³ Petitioner argues that an application for a multiple-family development will almost certainly constitute an application for “needed housing” for purposes of ORS 197.307, and therefore any decision on the application will be subject to the requirement that the local government apply only “clear and objective” approval standards. ORS 197.307(4). Petitioner contends that any such decision will therefore be excluded from the definition of “land use decision” subject to LUBA’s review under ORS 197.015(10)(b)(B), which excludes from the scope of “land use decision” a decision that “approves or denies a building permit issued under clear and objective land use standards.” We reject the argument. Many cities, including respondent, allow applicants to select different approval tracks for needed housing, one that applies only clear and objective criteria, and one that does not, so it is not the case that all applications for needed housing will be subject only to clear and objective approval standards. Nor is it the case that all needed housing decisions will take the form of a building permit potentially subject to the exclusion at ORS 197.015(10)(b)(B). Further, the fact that a decision is subject to a requirement for clear and objective approval standards does not mean that the decision is not a land use decision. *See Tirumali v. City of Portland*, 41 Or LUBA 231, *aff’d* 180 Or App 613, 45 P3d 519 (2002) (where a building permit building height standard is ambiguous and requires interpretation, the permit decision does not fall within the exclusion at ORS 197.015(10)(b)(B)). Finally, even if a particular needed housing decision fell within the exclusion at ORS 197.015(10)(b)(B), that does not mean the decision is unreviewable, only that any review must be conducted by the circuit court in a writ of review proceeding rather than an appeal to LUBA.

1 land use, and thus falls squarely within the rationale for the fiscal exception to LUBA's
2 jurisdiction.

3 For the reasons set out above, we conclude that we lack jurisdiction over the
4 challenged decision. LUBA No. 2012-041 is dismissed.