BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DON DUNN, Petitioner, vs. CITY OF REDMOND and DESCHUTES COUNTY, Respondent.	LUBA No. 84-074 FINAL OPINION AND ORDER

Appeal from City of Redmond.

Daniel E. Van Vactor, and Roger Ellingson, Bend, filed the petition for review. Roger Ellingson and William Van Vactor argued on behalf of petitioner.

Edward P. Fitch, Redmond, filed a response brief and argued on behalf of Respondent City of Redmond. With him on the brief were Bryant, Fitch and Filer.

Edward J. Sullivan, Portland, filed a response brief and argued on behalf of Respondent City of Remond.

BAGG, Referee; KRESSEL, Referee; DUBAY, Referee; participated in the decision.

AFFIRMED 07/08/86

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioner Donald Dunn and Intervenor John Bampz ("Petitioners") appeal Redmond City Ordinances 595 and 596. Ordinance 595 amends the Redmond Zoning and Subdivision Ordinance and applies the Open Space Park Reserve (OSPR) Zone to Petitioner Dunn's and Intervenor Bampzes' properties. Ordinance 596 amends the Redmond Urban Area Comprehensive Plan by adopting the Redmond Canyon Plan and Maps. The Canyon Plan and Maps control uses within the Redmond Dry Canyon Area.

PROCEDURAL HISTORY AND FACTS

The petition for review includes several assignments of error which may be summarized as a general claim that the challenged ordinances take petitioners' property without just compensation. Along with the petition for review, petitioner filed a motion for evidentiary hearing. The purpose for the evidentiary hearing was to show facts, not in the city's record, which would prove petitioners' claim. See ORS 197.830(11). We granted the motion and we requested that the parties prepare a prehearing order which includes agreed facts and disputed facts and also summarizes the evidence of all parties. It is from the prehearing order and the testimony (by deposition) and exhibits presented to us during the course of the evidentiary hearing that we conclude the facts which follow are true.[1]

Petitioners' properties are within the Redmond Dry Canyon.

On June 9, 1970, the city passed a resolution adopting a comprehensive plan which designated petitioners' lands as park lands. At that time, however, the properties were outside the city limits.

In 1978, the city zoned, as open space, Dry Canyon land within city limits. Intervenor Bampzes' property was subject to this 1978 interim zoning. At the same time, the city council asked Deschutes County to adopt a similar ordinance for portions of the Dry Canyon outside the city limits. The county did not do so, and Petitioner Dunn's property remained residential under county zoning.

On May 22, 1979, the city passed Ordinance 476 which, among other things, prohibited discarding or storage of solid waste and other "unsightly" materials. The council asked, by resolution, that Deschutes County take all steps to halt any activities within its jursidiction in the Dry Canyon which were inconsistent with City Ordinance 476. In August of the same year, the Dunns were performing excavation work on the property. At the city's request, Deschutes County issued a stop work order and served the Dunns with eight citations in connection with the excavation work, none of which were prosecuted successfully. On November 9, 1979, Deschutes County adopted the Redmond Plan and Redmond Zoning Ordinance, which applied the Open Space Park Reserve designation to Petitioner Dunn's land.

On August 6, 1980, the city council adopted Resolution 527,

directing staff to purchase Petitioner Dunn's property. No similar ordinance was adopted regarding Intervenor Bampzes' property. The city also entered into a contract with the state Highway Division to appraise the Dunn property. On January 1, 1982 the city annexed the Dunn property. On August 14, 1985, the city adopted the two challenged ordinances, planning and zoning the property for Open Space Park Reserve.

The provisions of the Open Space Park Reserve zone permit limited activity. The only uses permitted outright are grazing and crop production. There are, however, conditional uses permitted in "enhancement" areas. Enhancement areas are "those areas found to have the lowest and second lowest preservation potential." Ordinance 596, p. 22.

> "Conditional Uses Permitted. In an OSPR zone, the following are permitted when authorized in accordance with the provisions of the Canyon Park Master Plan and Article VII; provided, however, Sections (A) through (F) and (H) herein shall only be allowed in or within one hundred 100 feet of an enhancement area as defined by the Canyon Master Plan:
>
> "a. Other farms uses as defined in ORS Chapter 215.203 but not including those uses listed in ORS Chapter 215.213.
> "b. Public parks and trails or reserve areas of natural, historical or geological significance.
> "c. Public sewage and water system facilities.
> "d. Public or private recreational facilities, including golf, swimming, tennis and country clubs.
> "e. Public or private museums, civic theatres, botanical gardens and community centers.
> "f. A single-family dwelling customarily provided in conjunction with a use permitted by this section.
> "g. The transfer of single and multi-family development and neighborhood commercial uses in accordance with the density transfer provisions of this section.

"h. Incidental and subordinant commercial accessory uses including eating and drinking, retail trade, entertainment and service commercial."

Petitioner Don Dunn's and Intervenor Bampzes' properties are within an enhancement area.

ASSIGNMENT OF ERROR NO. 1

Redmond Ordinances 595 and 596 violate Article I, Section 18 of the Oregon Constitution.

Petitioners allege they are precluded from any economically feasible use of their property. In addition, they argue the challenged ordinances violate the Oregon Constitution by taking their property for public use without just compensation.[2] By zoning the properties to preserve their natural character, the city has intruded into petitioner's property rights. This intrusion allegedly inflicts "virtually irreversible damage" to petitioner's and intervenor's property rights.

Both petitioners and respondent rely on Fifth Avenue Corporation v. Washington County, 282 Or 591, 581 P2d 50 (1978). In that case, the Supreme Court established a test against which to measure claims of unconstitutional taking. The Court held that where planning and zoning designations for public use[3] affect a loss of value of the owner's land, the owner is not entitled to compensation unless he can show

"1. He is precluded from all economically feasible private uses pending eventual taking for public use; or

"2. The designation results in such governmental intrusion as to inflict virtually irreversible damage." Fifth Avenue Corporation, 282 Or at 614.

Petitioners claim the uses permitted in the OSPR zone are so limited as to preclude economically feasible use of the property. In support of this claim, petitioners introduce appraisals showing a considerable loss in value as a result of the OSPR zone designation. See appraisal by "Lewis Appraisals" and testimony of Jack C. Lewis and Chuck Lewis.[4] The appraisals, we note, however, do not consider the potential development value if petitioners are able to secure a conditional use permit for one of the commercial uses allowed in the OSPR zone. Ibid. However, petitioners argue that the conditional uses are not available to them because the city's comprehensive plan provides that lands within

> "lots totally within the canyon with residences will become nonconforming uses and will be allowed to remain in place until acquired by public agency for park uses." Ordinance 596 at 27.

According to petitioners, this language makes it clear that there will be no conditional uses, notwithstanding the apparent allowance of conditional uses in the zoning ordinance.

Petitioners do not explain why the new designation causing their present use to become nonconforming results in a taking. Petitioners have houses on the properties. They are entitled to live in and use their respective properties. The designation of a use as nonconforming does not result in a taking. Indeed, the designation works to avoid a taking where new zoning allows uses not consistent with the existing use. See 1 R. Anderson, American Law of Zoning, Section 6.01, 6.02

(2d Ed., 1976).

Further, we do not agree with petitioners' assessment of the comprehensive plan. The Redmond Canyon Development Plan provides for development of public and private recreational and other commercial uses. The plan elsewhere provides as follows:

> "Development of public and private recreational uses and community centers, theatres, museums or botanical gardens within the canyon shall occur only in or adjacent to designated enhancement areas. All other areas shall be committed to open space, agricultural uses, public parks, trails or utility facilities. These enhancement areas are set forth in Exhibit 'A' and incorporated herein by reference.
>
> "Development of public and private recreational uses and community centers, theatres, museums or botanical gardens shall only be allowed as a conditional use and must, at a minimum, meet the following standards and shall be subject to the development criteria set forth in the Redmond Zoning Ordinance:
>
> "1. Must be in or within one hundred feet (100') of an enhancement area as defined on the map.
>
> "2. Access to a specific parcel must be provided from existing routes accessing the canyon or routes designated in the plan maps set forth in Exhibit 'B', which is incorporated herein by reference.
>
> "3. Must be reasonably accessible for people of all ages and social and economic groups and for all geographic areas of the community.
>
> "4. Must be coordinated with adjacent open space areas and other land uses so they enhance one another and together contribute to a satisfying park environment.
>
> "5. Must provide for the preservation or enhancement of natural features, resources, and amenities, including views and vistas, canyon walls, native juniper stands, and exposed rock out-croppings."

We conclude the plan allows commercial uses within canyon

"enhancement" areas. Petitioners have not shown that the ordinance prohibits all economically feasible use of their properties.

Petitioners' reliance on the second part of the test in Fifth Avenue is based on facts they believe demonstrate that the city intended to acquire their property and that it would be futile to pursue any further development application.[5] Petitioners rely on Suess Builders v. City of Beaverton, 294 Or 254, 656 P2d 306 (1982) to support their view that the city's conduct so inhibited use of the property as to prohibit economic benefit. In Suess, the court said adoption of a plan designating property as a park could, under some circumstances, be the equivalent of a taking of the property until the government decides to purchase it or release it. See Suess Builders, 294 Or at 260. Petitioner Dunn stresses that denial of his 1978 subdivision request, the city resolution requesting Deschutes County to enforce the city ordinance within county jurisdiction, the adoption of Ordinance 527 and the city's alleged bad faith negotiations for purchase show the city did freeze Petitioner Dunn's property so as to render it without any economically feasible use.[6]

The facts recited by petitioners, if assumed to be true, establish that the city desired that petitioner's and intervenor's properties be devoted to uses consistent with preservation of the Dry Canyon. Indeed, it appears that the city intended to purchase at least the Dunn property. However,

Petitioner Dunn has not shown that during this period he was precluded from "all economically feasible private uses" of the property. See Fifth Avenue, 282 Or at 614. Neither Petitioner Dunn nor Intervenor Bampz present any evidence of any applications for development subsequent to the denial of the subdivision. Williamson Co. Regional Planning Commission v. Hamilton Bank of Johnson Co., 105 S. Ct. 3108 (1985). In addition, the fact that the city desired that the county prohibit petitioners from excavating the property does not indicate that petitioners were prohibited putting the land to feasible economic use.

Also, we note Ordinance 527, directing acquisition, follows ORS 226.320. The ordinance is a necessary prerequisite to acquisition of unincorporated land for park purposes. The ordinance, by itself, does not indicate a purchase is about to occur or that condemnation will occur.

What emerges is that there were on-again off-again negotiations to purchase the Dunn property. The negotiations broke down. It is apparent that the city did not wish to pay as much as the Dunns wished to receive for the property. This fact alone, and in concert with the others relied upon by petitioners, does not show a course of conduct depriving petitioners of all feasible use of their property.

The first assignment of error is denied.[7]

SECOND ASSIGNMENT OF ERROR

Redmond Ordinances 595 and 596 violate ORS 197.175(2).

Petitioners argue that the ordinances violate the Redmond Comprehensive Plan by requiring exclusive agricultural uses on buildable lands. Petitioners claim this is a violation of ORS 197.175(2).[8]

Petitioners' claim under this assignment of error is unclear. Petitioners' explanation of the allegation is that by zoning the property for farm use, the city prohibits all economically feasible private use. This claim simply echoes that made in the first assignment of error. Petitioners' reference may be to ORS 197.752. Our discussion of that statute is under Assignment of Error No. 4, infra.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> Redmond Ordinances 595 and 596 violate petitioner's and intervenor's rights as guaranteed by the Fifth Amendment of the United States Constitution.

Petitioners argue that the fifth amendment prohibits the taking of private property for public use without compensation, and the amendment is applied to the state through the fourteenth amendment. This charge echoes that in the first assignment of error, and we need not discuss it further.

FOURTH ASSIGNMENT OF ERROR

> Redmond Ordinances 595 and 596 violate petitioner's and intervenor's rights as guaranteed by the Fourteenth Amendment of the US Constitution, Article 1, Section 20 of the Oregon Constitution.

Petitioners do not explain the alleged violation of the U.S. and Oregon Constitution but rather argue that state law

requires that all lands designated urban growth boundary shall be buildable. Petitioners cite ORS 197.175(2) as authority for this proposition. ORS 197.175(2) does not so provide. It reads:

> (2) Pursuant to ORS 197.005 to 197.855, each city and county in this state shall:
>
> "(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;
>
> "(b) Enact land use regulations to implement their comprehensive plans;
>
> "(c) Except as provided in ORS 197.835(7), if its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions in compliance with the goals; and
>
> "(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions in compliance with the acknowledged plan and land use regulations."

Petitioners' reference is probably to ORS 197.752. This statute provides

> "(1) Lands within urban growth boundaries shall be available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards.
>
> "(2) Notwithstanding subsection (1) of this section, lands not needed for urban uses during the planning period may be designated for agricutural, forest or other nonurban uses."

Petitioners do not explain how the violation arises. The city's plan includes urban area policies and open space policies. See ORS 197.015(15). The plan has been acknowledged

by LCDC as being in compliance with all statewide planning goals. We note the plan calls for

> "1. Neighborhood parks in locations that serve the needs of people.
>
> "2. Open space to provide linkages betwen parks, the various segments of the community and federal open space multiple-use program areas."

Without an explanation of how the plan fails to comply with the statute, we are unable to review petitioners' complaint.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The fifth assignment of error applied to Intervenors Muth and Phillips, both of whom have been dismissed from this proceeding.

The ordinances of the City of Redmond are affirmed.

FOOTNOTES

[1] Petitioner and intervenor argue that the prehearing order does not accurately reflect the agreed to facts and disputed facts negotiated by the parties in March and April of this year. We accept the prehearing order as correct. The parties, and each of them, agreed to be bound by a prehearing order early in the proceeding. It appears to us the dispute about the accuracy of the prehearing order is largely one of form and not of substance and that those items listed by a petitioner and intervenor as inaccurate do not affect the outcome of this case. We add that for all of the facts reviewed by us in the prehearing order, we have found support in other evidentiary documents submitted by the parties.

[2] The witnesses dispute these valves. See Dana Bratton's testimony.

[3] Article 1, Section 18 provides:

"Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."

[4] In the Fifth Avenue case, the zoning designations complained of provided for a transit station and and a greenway area. The court discussed cases from other jurisdictions in which plan and zone designations which were "merely tentative and subject to change" were applied and challenged as resulting in a taking of private property. The court noted the cases from other jurisdictions rejected the charge that a taking had occurred. The court also, however, distinguished the cases in light of Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975). In Oregon, under the Baker decision, the comprehensive plan is not a tentative document. The court noted that under

Baker, the intensity of private land use in a comprehensive plan could not be exceeded by the zoning ordinance.

> "More intensive private development of that allow by the plan is not likely to be reversable in favor of less intensive private use. The same is not necessariy true with respect to eventual public acquisition of land tentatively designated as a site of a future public facility. There the question of the interim use of the land involves the eventual cost of the plan public use rather than its entire preclusion by allowing a present private use. Thus, until the land owner has explored what economically feasible private uses the city or county will permit pending the eventual taking for public use, its claim of inverse condemnation is premature." 591 Or at 611-612.

Prior to adoption of the challenged ordinances and inclusion of the Dunn property within the city limits, the city's actions regarding properties in the Dry Canyon may be considered "tentative" not unlike those in the case cited by the court in Fifth Avenue.

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[5] Petitioner Dunn says the following events illustrate his view: The city declared by resolution in 1970 that the Dry Canyon was necessary for development of a park; Ordinance 596 states that lots within the canyon are nonconforming uses and will remain so until acquired for park purposes; City Ordinance 527 authorizes condemnation of the proceedings against Petitioner Dunn's property; the city discussed moving and relocation costs with petitioner apparently prefatory to purchase or condemnation proceedings; petitioner's evidence shows the property has been reduced in value; the city passed an ordinance and resolution asking Deschutes County to enforce city ordinances against petitioner; the city annexed petitioner's property in 1982; the city assessed over $31,000.00 against the Dunn property for sewer services but deferred the amount until sale of the property which, in petitioner's view, limits the property's marketability; from 1982 to 1984 the city zoned intervenor's property in a manner not allowing disturbance in natural vegetation thus limiting petitioner's use of the property. Finally, according to petitioner, the city's failure to "follow through" with purchase of the property shows the city did not bargain for purchase in good faith.

The city had an appraisal made of petitioners' property for the purpose of securing federal funds to purchase it. The responsible federal agency rejected the appraisal, but the city did not pursue any remedy with the appraisal. Petitioners say this fact shows the city did not bargain for purchase in good faith.

6

The subdivision denial was not appealed. The complaint of city conduct applies only to the Dunn property. There is no evidence of similar actions by Intervenor Bampz.

Mr. Dunn testified that he was inhibited from seeking development permits for his property. See Agreed Facts, 30-34, and testimony of Donald Dunn. His view, however, is not based on an understanding of the regulations affecting his land (See Agreed Fact 39), and his assertions about restrictions on his property appear to be more in the nature of fears than concrete facts showing that development proposals would indeed be futile.

7

Respondent claims we are not entitled to review this claim. Respondent states our authority to review a decision for unconstitutionality does not extend to cases in which the petitioners have failed to develop a record showing a violation of the constitution before the local government. In other words, LUBA has no power to review a land use decision for unconstitutionality without there first being a record, made at the local level, available for LUBA's review.

We do not agree. The Board is entitled to take evidence in pursuit of contraverted claims of unconstitutionality of the decision. ORS 197.830(11). While we agree we have no authority, in a case of this kind, to assess a dollar loss suffered by a land owner should we find a taking to have occurred, we believe we do have authority to decide whether there has or has not been a taking. The legislature did not limit our review of the kind of challenge to a local land use decision, but gave LUBA the broad power to review any claim that a decision is "unconstitutional." ORS 197.835(a)(E).

8

ORS 197.175(2) requires cities and counties to adopt, amend and revise comprehensive plans in compliance with statewide planning goals, enact regulations to implement the comprehensive plans, and make land use decisions in compliance with acknowledged comprehensive plans and land use regulations.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DON DUNN,

Petitioner,

v.

CITY OF REDMOND,

Respondent,

and

DESCHUTES COUNTY,

Respondent below.

(LUBA 84-074; CA A40877)

Judicial Review from Land Use Board of Appeals.

Argued and submitted September 5, 1986.

Roger L. Ellingson, Bend, argued the cause and filed the brief for petitioner.

Edward J. Sullivan, Portland, argued the cause for respondent City of Redmond. With him on the brief was Sullivan, Sherton, Pfeiffer, Johnson & Kloos, Portland.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

RICHARDSON, P.J.

Reversed and remanded with instructions to dismiss on the taking issue; otherwise affirmed.

0425N

FILED: October 29, 1986

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Case Name: Dunn v. City of Redmond

Appellate case number: A40877

Trial Court or agency case number: LUBA 84-074

Prevailing party or parties: Petitioner

[ ] No costs awarded

[XXX] Costs awarded to the prevailing party or parties, payable by Respondent City of Redmond

* * * * * * * * * * * * *

FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

costs and disbursements taxed at $, and attorney fees in the amount of $. (ORAP 11.03, 11.05, and 11.10.)

IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $ for filing fees not waived and unpaid at the time of entry of the final written disposition of this case. ORS 21.605.

Date Supreme Court denied review:

DATED:

COURT OF APPEALS
(seal)

*This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03(3). See also ORS 19.190(1).

The threshold question, which the parties do not address and which LUBA mentioned only in passing, is whether LUBA had jurisdiciton over petitioner's appeal. It is clear that the city's adoption of the two ordinances was a "land use decision," ORS 197.015(10)(a)(A), that LUBA has exclusive jurisdiction to review such decisions, ORS 197.825(1), and that LUBA may consider constitutional questions in exercising its review authority. ORS 197.835(8)(a)(E). It is also clear that the cited provisions of the federal and state constitutions forbid public takings of private property without just compensation. It is far from clear, however, that the land use decision, which was the nominal subject of petitioner's appeal to LUBA, was its real subject. The issue petitioner raised and LUBA decided was whether there was a taking. Petitioner ascribed the purported taking to a combination of factors, and the challenged ordinances were not claimed to be independently conclusive or even the most significant of the factors involved. LUBA observed in a footnote to its opinion:

> "* * * While we agree we have no authority, in a case of this kind, to assess a dollar loss suffered by a land owner should we find a taking to have occurred, we believe we do have authority to decide whether there has or has not been a taking. The legislature did not limit our review of the kind of challenge to a local land use decision, but gave LUBA the broad power to review any claim that a decision is 'unconstitutional.' ORS 197.835[8](a)(E)."

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Although LUBA's observation would be correct, given its assumption that the subject of petitioner's appeal was a land use decision, the critical question is whether that assumption is correct. The parties' arguments and LUBA's decision are not confined to the two ordinances from which petitioner ostensibly appealed. They discuss the entire course of dealing between the city and petitioner, including the earlier regulatory and enforcement activities and the deliberations concerning the city's acquisition of the property. In other words, the parties and LUBA treated the matter as the equivalent of an inverse condemnation action--albeit one in which the remedies available in such an action could not be accorded--rather than a review of two specific ordinances.

We do not fault LUBA's analytical approach. Petitioner's taking claim could not be decided on the basis of the ordinances alone because, under the case law as applied to the facts here, the ordinances could not have given rise to a taking independently of the city's other actions with respect to the property. Moreover, these facts are not unique in that respect. In Suess Builders v. City of Beaverton, supra, the court distinguished between "[r]egulation in pursuit of a public policy [which] is not equivalent to taking for a public use" and a "governmental plan to acquire private land for

public ownership" in which regulation plays the subservient role of making "the property unusable for anything other than the indicated public taking." 294 Or at 259-60. In the latter case, regulations and actions more overtly related to public acquisition can combine to create a taking, and the essence of petitioner's argument is that that happened here. The essence of LUBA's reasoning is that that is not what happened here.

However, the correctness of LUBA's analytical approach to the problem reveals why LUBA erred in assuming jurisdiction over it: if no taking could arise from the ordinances independently of the historical events which preceded their adoption,[2] the ordinances were not the real focus of LUBA's review. What LUBA was called upon to review, and did review, was a sequence of events dating from 1970. Some of the events LUBA considered were land use decisions which petitioner did not and could not challenge in this appeal; others, such as the unproductive negotiations concerning the purchase of the property, were not land use decisions at all.

Issues of the kind petitioner raised and LUBA decided have traditionally been litigated in inverse condemnation actions. It is true that LUBA's exclusive statutory jurisdiction to review "land use decisions" was established long after the judicial inverse condemnation remedy evolved and could arguably have been intended to supplement or supersede

the judicial remedy.[3] In our view, the answer to that arguable proposition turns on whether the actual subject of a taking claim is the consequence of, and the underlying pattern of governmental activity which assertedly results in, a deprivation of property rights or can be restricted to a particular part of that activity which happens to come within the statutory definition of a "land use decision." The fact that a land use decision is somehow involved in a protracted and multi-faceted governmental action, the ultimate effects of which go beyond mere land use regulation, cannot mean that all possible ramifications of the action fall exclusively within LUBA's realm of review. We have said before in a different context that we thought the legislature's intent in creating the land use regulatory system and agencies was that they "be part of the state government, not [that they] be the state government." Housing Council v. City of Lake Oswego, 48 Or App 525, 538, 617 P2d 655 (1980), rev dismissed 291 Or 878, 635 P2d 647 (1981).

We regard it as unlikely to the point of being impossible that, in creating LUBA and defining its jurisdiction, the legislature intended to give LUBA review authority over the panoply of matters that have historically been resolved through inverse condemnation actions, simply because "land use decisions" may have some bearing on some of

those matters. The first basis for our conclusion is that LUBA can provide no meaningful remedy for a taking. It cannot award damages. LUBA's orders are judicially enforceable, ORS 197.825(4)(b), but it is difficult to imagine what enforcement proceedings could ensue from a decision by LUBA that there has been a taking. In this case, for example, there is no contention that the city may not ultimately take and use petitioner's property as a park. If LUBA had concluded that the events to date amount to a taking, the city's options with respect to the property would be very much what they were before LUBA's decision: it could purchase the property, or condemn it, or do nothing except await an action for damages by petitioner.

Because the challenged ordinances in themselves did not cause the taking, they would remain in place; and any past history of bad faith negotiations would remain water over the dam. The only subsequent judicial proceedings that would be available to the parties would be very similar if not identical to a direct condemnation or an inverse condemnation action, and such an action or the standard precursors to it would be necessary for the city to obtain the property or for petitioner to recover compensation. We do not think the legislature meant to require a superfluous sidetrip to LUBA on the way to the courthouse. For similar reasons, we do not think that the

legislature intended to substitute LUBA for the courts in cases where land use regulations allegedly give rise to takings. To conclude otherwise would be to ascribe an intent to the legislature to eliminate an adequate existing remedy and replace it with an illusory one.

We hold that, although some of the events which contribute to a taking may come within the definition of a "land use decision," the governmental action which is really at issue when a taking claim is asserted is not that kind of component decision. It is the purported taking itself, and the courts rather than LUBA are the forum for its redress.

In Forman v. Clatsop County, 297 Or 129, 681 P2d 786 (1984), the court held that questions of vested rights and nonconforming uses, which were formerly triable in the courts, now come within LUBA's exclusive jurisdiction to review land use decisions. Forman is distinguishable, and our conclusion here is not inconsistent with it. A local determination concerning a claimed vested right is a single decision concerning the use of land, and LUBA's review of the decision can readily result in an answer on which complete relief can be based; conversely, a taking can seldom arise out of a single decision pertaining to the regulation of land and, on the rare occasions when it can, see note 2, supra, LUBA does not have the remedial capacity to provide relief.

LUBA did not have jurisdiction over petitioner's taking claim.

Reversed and remanded with instructions to dismiss on the taking issue; otherwise affirmed.

FOOTNOTES

1

We note that the negotiations were abortive. Petitioner also makes one assignment that does not pertain to the taking contention. That assignment is unmeritorious and does not call for discussion.

2

We do not suggest, nor did the court suggest in Suess Builders, that a regulation alone can never effect a taking. However, the ordinances here could not arguably have done so. They did not deprive petitioner of all economically feasible uses of the property, Fifth Avenue Corp. v. Washington County, supra, 282 Or at 614, nor could they qualify as a taking under the other tests set forth in Fifth Avenue and Suess Builders except to the extent that they were adjuncts of the other events LUBA considered.

3

The relevant events in Suess Builders and Fifth Avenue, which were inverse condemnation actions, occurred before LUBA was created; however, the Supreme Court's decision in Suess Builders was issued after LUBA's creation and does not refer to LUBA's existence.