

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

3
4 GAIL A. MAXWELL,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF HAPPY VALLEY,
10 *Respondent.*

11
12 LUBA No. 2003-048

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Happy Valley.

18
19 William C. Cox and Gary P. Shepherd, Portland, represented petitioner.

20
21 Paul C. Elsner and Christopher A. Gilmore, Portland, represented respondent.

22
23 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
24 participated in the decision.

25
26 TRANSFERRED 04/24/2003

27
28 You are entitled to judicial review of this Order. Judicial review is governed by the
29 provisions of ORS 197.850.

1 Holstun, Board Member.

2 Petitioner appeals city Resolution 03-08, which is entitled “A Resolution Establishing
3 a Preliminary Methodology and Area for a Reimbursement District for the Improvement of
4 SE 147th Avenue.” Record 3. As far as we can tell from the decision and the parties
5 arguments, the resolution does not itself approve any roadway improvements; it merely
6 provides a mechanism for recovering part of the cost of roadway improvements from certain
7 undeveloped benefited properties, and identifies those benefited properties and the
8 contribution that each property will be expected to make. Record 10.

9 As relevant, LUBA’s jurisdiction is limited to land use decisions. ORS 197.825(1).
10 Respondent moves to dismiss this appeal, arguing the challenged decision is not a land use
11 decision that is subject to review by LUBA. We have previously held that reimbursement
12 district decisions that are purely fiscal in nature, such as the one that is at issue in this appeal,
13 are not land use decisions subject to LUBA review. *Jesinghaus v. City of Grants Pass*, 42 Or
14 LUBA 477 (2002) (ordinance creating a reimbursement district); *Baker v. City of Woodburn*,
15 37 Or LUBA 563 (2000) (ordinance establishing a process for forming reimbursement
16 districts, and resolution forming a reimbursement district for improvement of a particular
17 road). Citing *Jesinghuaus* and *Baker*, respondent moves to dismiss this appeal.

18 Petitioner asserts the following in response to the motion to dismiss:

19 “Because of varying legal interpretations of whether establishing a
20 reimbursement district is a land use decision, statutorily or judicially, and
21 therefore reviewable by LUBA, and as a cautious approach in protecting
22 petitioner’s appeal rights, petitioner appealed the challenged decision to
23 LUBA. * * *” Petitioner’s Response to Motion to Dismiss 1 (footnotes
24 omitted).

25 Petitioner cites *State ex rel Moore v. City of Fairview*, 170 Or App 771, 13 P3d 1031 (2000)
26 and *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 2002-090,
27 November 5, 2002) in support of her concern that the challenged reimbursement district
28 might be viewed as a land use decision that is subject to review by LUBA.

1 *State ex rel Moore v. City of Fairview* concerned a mandamus action. When the
2 relator's subdivision was approved by the city in 1997, it was approved with a condition that
3 required payment of sewer and water connection fees. That condition also provided that a
4 reimbursement agreement to reimburse downstream developers of sewer and water facilities
5 might be required. The relator did not appeal that subdivision decision to LUBA. When the
6 relator later developed his subdivision, he paid the sewer and water connection fees under
7 protest and filed the mandamus action to recover those fees. The Court of Appeals held that
8 because the issues the relator sought to raise in the mandamus action concerning the
9 reimbursement district could have been presented in a LUBA appeal of the conditional
10 subdivision approval decision in 1997, the relator waived his right to challenge the legality of
11 the sewer and water connection fees. 170 Or App at 777. Although *State ex rel Moore v.*
12 *City of Fairview* indirectly involves a reimbursement district, it does not hold that LUBA has
13 jurisdiction to review a local decision that authorizes formation of a reimbursement district.
14 It simply observes that LUBA has jurisdiction to review a condition of subdivision approval
15 that (1) provides that a reimbursement district may be formed in the future and (2) requires
16 that the subdivision developer must pay sewer and water connection fees. Based on that
17 observation, the Court of Appeals held that a belated petition for a writ of mandamus that
18 was essentially a challenge of that condition of subdivision approval was barred because no
19 LUBA appeal of the subdivision approval decision was filed to challenge the condition. We
20 fail to see how *State ex rel Moore v. City of Fairview* has any direct bearing on the question
21 of our jurisdiction in this appeal, and petitioner makes no attempt to explain why she believes
22 it does.

23 *Friends of Yamhill County v. Yamhill County* concerned an appeal of a county
24 ordinance that amended the fees the county charged to request public hearings for certain
25 decisions and to file local appeals of certain planning director and planning commission
26 decisions under the county's zoning ordinance. In that case, we relied on our decision in

1 *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995) to conclude that the so-called “fiscal
2 exception” to LUBA’s review jurisdiction did not apply to such an amendment of the
3 county’s zoning ordinance. Slip op at 6. We do not see that *Friends of Yamhill County*
4 offers any support for concluding that the challenged decision is a land use decision subject
5 to our review.

6 For the reasons explained in our decisions in *Jesinghaus* and *Baker*, we conclude that
7 we do not have jurisdiction to review the decision that is the subject of this appeal.

8 **MOTION TO TRANSFER**

9 In her notice of intent to appeal, petitioner included a precautionary motion to transfer
10 this matter to circuit court, in the event we conclude that the challenged decision is not
11 reviewable by LUBA as a land use decision. ORS 34.102(4); OAR 660-010-0075(11).
12 Petitioner’s motion is granted.

13 This appeal is transferred to Clackamas County Circuit Court.