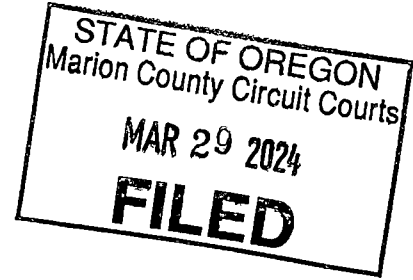




CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OREGON 97309-0869



JOSEPH A. BURETA
Circuit Court Judge
PHONE (503) 585-4939
FAX: (503) 373-4360

March 29, 2024

Joseph Schaefer
Plaintiff pro se
15140 Park Avenue N.E.
Aurora, Oregon 97002

Joseph Franco
Attorney for TLM Holdings and Ted L. Millar
Holland & Knight LLP
601 SW Second Ave Ste 1800
Portland, Oregon 97204

Seth Karpinski
Attorney for Defendant's Oregon Department of Aviation and DEQ
Oregon Department of Justice
1162 Court St NE
Salem, Oregon 97301

Scott Norris
Attorney for Defendant Marion County and Jan Fritz
Marion County Legal Counsel
555 Court St NE Ste 5242
PO Box 14500
Salem, Oregon 97309

Thomas Hutchinson
Attorney for HDSE Sewer Systems Owners Association and Tony Helbling
Bullivant Houser Bailey PC
1 SW Columbia St Ste 80-0
Portland, Oregon 97204

RE: *Joseph Schaefer vs. Oregon Dept. of Aviation, Oregon Department of Environmental Quality, Marion County, TLM Holdings, LLC, Aurora Business Center et al*, Marion County Circuit Court No. 23CV14126 Defendant's Separate Motions to Dismiss

Mr. Schaefer and Counsel,

Due to the voluminous pleadings, and extensive briefing in this matter this opinion is being issued much later than the Court intended. I apologize.

Plaintiff filed an amended complaint with multiple claims against each of the defendants. Each defendant filed motions to dismiss the claims. The matter came before the Court for oral arguments on January 9, 2024. Plaintiff appeared personally and pro se. Each of the defendant's appeared through counsel. Prior to the hearing on defendant's motions to dismiss, plaintiff moved to dismiss all claims against Oregon Department of Environmental Quality and its Director Leah Feldon. That motion was granted. After review of the complaint, the defendants' motions, responses, replies and having carefully considered arguments of the parties, the Court rules as follows:

Plaintiff has filed this complaint specifically to enforce LUBA's Final Order which reversed Marion County Land Use Approval (Ordinance 1424). The LUBA Final Order came after Plaintiff successfully appealed previous orders. The LUBA Final Order sustained plaintiff's assignment of error regarding the Marion County Land Use Approval being based on an inapplicable exception to Statewide Planning Goal 3. The LUBA Final Order became final on April 4, 2023, and did not direct any future action. While the plaintiff followed all statutory procedures to effectively appeal LUBA's previous orders upholding the Marion County Land Use Approval, plaintiff never requested a stay per ORS 197.625(3), ORS 197.845, and OAR 661-010-0068 during the appeal process and defendants continued to operate in accordance with the Land Use Approval.

TLM Holdings

Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Court has considered the affidavits, declarations and other evidence submitted for the purpose of this motion to dismiss for lack of subject matter jurisdiction. Plaintiff has not presented any evidence that there is *presently* a controversy between the parties. Defendant TLM appears to be abiding by the LUBA Final Order. Plaintiff submitted a declaration which opines that TLM is continuing to operate in "apparent reliance" on the Marion County decision, however that declaration and the evidence it purports to contain is from after the filing of the amended complaint and therefore cannot cure any jurisdictional deficiency in the complaint. Any action taken by TLM while the LUBA orders were being appealed was done without an order to stay. Any harm that could come is speculative and hypothetical and a Court order enforcing the LUBA Final Order would not have any practical affect since it is already being complied with. There is not a justiciable controversy.

The defendant is not a party to any of the contracts, permits, or approvals he seeks to have undone and therefore lacks standing for the relief he is requesting in regard to voiding other agreements. Plaintiff alleges only possible future harm, or harm that results from the mere existence of the airport unrelated to any of the defendants and therefore lacks standing. Plaintiff

has not alleged a cognizable injury. TLM's motion to dismiss for lack of subject matter jurisdiction is GRANTED. The Court further adopts the arguments incorporated in TLM's hearing memorandum on their motion to dismiss. Even though the Court is granting TLM's motion regarding subject matter jurisdiction, the Court also considered TLM's motion to dismiss for failure to state a claim.

Motion to Strike Plaintiff's Declaration in Support of Response to Defendant's Motion to Dismiss

Plaintiff submitted a declaration attached to his response to the motion to dismiss with factual allegations that were not included in the amended complaint. The Court GRANTS defendants' motion to strike that declaration for the reasons cited in the defendant's motion. That declaration and any arguments based on the declaration are not considered in the decision on the motion to dismiss for failure to state a claim.

Motion to Dismiss for Failure to State a Claim

Fourth Claim – Action for Declaratory Judgment

Plaintiff requests declaratory relief that the DEQ NPDES Permit, and other approvals and contracts are null and void under Oregon law. Plaintiff has not plead any facts that would support him being a party to any of those contracts, permits, or approvals. Plaintiff also seeks a judgment that all improvements on the properties that were made pursuant to those agreements and permits must be removed. Plaintiff does not plead any facts that TLM Holdings is violating or otherwise disavowing the LUBA Final Order, but instead relies on the fact that they continued to operate pursuant to the Marion County Land Use Approval while the appeal was pending. Plaintiff is not a party to any of TLM's permits, approvals or contracts and makes no attempt to plead otherwise. Plaintiff does not plead any facts indicating that an order was entered while the LUBA decision was being appealed that required the defendants to cease operating under the Marion County Land Use Approval.

Ninth Claim – Action for Injunctive Relief

Plaintiff requests injunctive relief so he will not be permanently deprived of his right to circuit court enforcement of the LUBA Final Order. That does not amount to alleging a cognizable harm to him resulting from TLM's actions at the time of the complaint. He asks the Court to enjoin TLM from implementing permits and contracts that are not mentioned and are not a part of the LUBA Final Order. Plaintiff does not plead any facts that any TLM contracts or permits are addressed in the LUBA Final Order.

Fourteenth Claim – Petition for Writ of Mandamus

Plaintiff asks for a writ of mandamus directing TLM to 1) terminate their Through the Fence Agreement with ODAV, 2) remove the grading and excavation improvements from TLM's property, and 3) remove the improvements from the septic drain field on ODAV's property. Plaintiff fails to plead any facts that indicate the LUBA Final Order directs such action.

TLM is not an officer of the Court or subject to any other “duty resulting from an office, trust or station”. Therefore, plaintiff’s request for writ of mandamus fails to state a claim as a matter of law.

TLM’s Motion to Dismiss for Failure to State a Claim is GRANTED as to all claims.

Oregon Department of Aviation

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Factually this defendant is in the same position as TLM. There are no allegations or evidence that ODOV has violated the LUBA Final Order reversing the Marion County Land Use Approval. For the reasons articulated above, Oregon Department of Aviation’s Motion to Dismiss for Lack of Subject Matter Jurisdiction is GRANTED.

Motion to Dismiss for Failure to State a Claim

First Claim – Action for Declaratory Judgment

Plaintiff requests a declaratory judgment that (1) the TLM Through the Fence Agreement violates Oregon statute and is null and void; (2) the Notice Authorizing Representative violates Oregon statute and is null and void, (3) the HDSE Drain Field Easement Amendment violates Oregon statute and is Null and Void, and (4) Figures of the Draft Aurora State Airport Master Plan violates Oregon statute and are null and void.

The LUBA Final Order does not address the Through the Fence Agreement, the Marion County Septic Field Approval, the Notice Authorizing Representative, the HDSE Drain Field Easement Amendment, or the Figures of the Draft Aurora State Airport Master Plan. Plaintiff has not plead any facts regarding how the LUBA Final Order affects any of these things. The LUBA Final Order simply reverses the Marion County Land Use Approval as of the time of the order. Plaintiff pleads no facts regarding defendant ODAV violating the LUBA Final Order or otherwise disavowing it. **Additionally, plaintiff is not a party to the TLM Through the Fence Agreement and therefore lacks standing for this claim.** The Notice Authorizing Representative is not dependent upon the Marion County Land Use Approval, nor is it addressed in the LUBA opinion reversing the Marion County Decision. Plaintiff is also not a party to the Notice and therefore lacks standing. The HDSE Drain Field Easement Amendment does not exist as it was rejected by ODV therefore there is no ripe justiciable issue. The Figures of the Draft Aurora State Airport Master Plan are not part of a final order or decision and therefore this Court lacks subject matter jurisdiction.

Sixth Claim – Action for Injunctive Relief

Plaintiff seeks a temporary and permanent injunction enjoining ODAV from implementing (1) the TLM Through the Fence Agreement; (2) the Notice Authorizing Representative; (3) the HDSE Drain Field Easement Amendment; and (4) Figures of the Draft Aurora State Airport Master Plan; and enjoining ODAV from entering any new agreements for the use of ODAV property pursuant to the Marion County Land Use Approval or the Land Use

Compatibility Statement. Plaintiff has not plead any facts indicating ODAV is currently violating the LUBA Final Order. The LUBA Final Order itself does not address or mention any of the action’s plaintiff wishes to have enjoined. Plaintiff also fails to identify any injury he is suffering due to the actions he wishes to have enjoined.

Eleventh Claim – Petition to Compel Agency Action

Plaintiff petitions the Court for an order compelling ODAV and its director to (1) terminate the HDSE Drain Field Easement Amendment and inform EMS, HDSE and TLM that ODAV is not able to grant any easement or other property right to allow a septic drain field on the ODAV property to serve the HDSE and TLM properties; and (2) terminate the Notice Authorizing Representative and inform EMS and DEQ that EMS is no longer authorized to act as ODAV’s agent to obtain wastewater permits for septic drain fields; and (3) remove the ODAV Property Septic Drain Field Improvements installed by TLM, EMS and HDSE from the ODAV Property; and (4) terminate the TLM Through the Fence Agreement; and (5) remove the TLM Property from the “TTF Parcel” overlay; and (6) remove the TLM Property from the :Southern TTF Development Area”. Plaintiff essentially requests that everything that has been done in the time between the Marion County Land Use Approval and the LUBA Final Order be ordered “undone”.

Plaintiff does not plead any facts indicating he sought, or obtained a stay in this case while the orders were being appealed. Plaintiff does not plead sufficient facts that the LUBA Final Order addresses any of the actions he wishes to compel.

Plaintiff fails to state a claim and defendant ODAV’s Motion to Dismiss these claims is GRANTED as to all claims.

Marion County

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Factually this defendant is in the same position as TLM. For the reasons articulated above, Marion County’s motion to dismiss for lack of subject matter jurisdiction is GRANTED.

Motion to Dismiss for Failure to State a Claim

Second Claim -Action for Declaratory Judgment

Plaintiff seeks declaratory relief stating that various agreements, permits, and statements are null and void. Plaintiff does not plead any facts that indicate the LUBA Final Order is currently being violated. The LUBA order does not address any of the agreements, permits or statements the plaintiff seeks to have nullified.

Seventh Claim – Action for Injunctive Relief

Plaintiff seeks a court order enjoining Marion County from implementing the Marion County Land Use Approval, the Septic Field Approval, the Notice Authorizing Representative and various statements. Plaintiff alleges no facts that Marion County is currently implementing

the Marion County Land Use Approval which is addressed by the LUBA Final Order. The other actions plaintiff wishes to enjoin are not affected by or mentioned in the LUBA Final Order. Plaintiff fails to sufficiently plead a cognizable injury.

Thirteenth Claim – Petition for Writ of Mandamus

The relief plaintiff prays for in this claim is essentially the same as his other claims against Marion County. The relief is not addressed in the LUBA Final Order.

Marion County’s Motion to Dismiss for Failure to State a Claim is GRANTED as to all claims.

HDSE

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Plaintiff seeks to have this Court grant relief based on DEQ and ODAV Land Use Compatibility Statements, Marion County Septic Field Approval, and the Notice Authorizing Representative in regard to this defendant. Each of those was the result of a different land use decision, and not the Marion County Land Use Approval which is the decision reversed by the LUBA Final Order. The land use decisions underlying HSDE’s involvement are under the exclusive jurisdiction of LUBA because the time to appeal or request review as expired. For the reasons articulated in HDSE’s hearing memorandum, HDSE’s Motion to Dismiss for Lack of Subject Matter Jurisdiction is GRANTED.

Motion to Dismiss for Failure to State a Claim

Fifth Claim – Action for Declaratory Judgment

Plaintiff seeks declaratory judgment that addresses the extension of the HDSE Sewer System, the Marion County Septic Field Approval, the HDSE Drain Field Easement Amendment, the construction of the septic drain field improvements and removal of those improvements. Plaintiff does not allege any facts that these things were addressed in the LUBA Final Order or that the actions are prohibited by the LUBA Final Order that went into effect after these were implemented. Any action HDSE took in relation to the land at issue in this case was done pursuant to other land use decisions which were not appealed, and the time has now passed. Plaintiff has also not plead any facts indicating HDSE has or even will violate the LUBA Final Order reversing the Marion County Land Use Approval. Plaintiff and this defendant are in agreement about what other regulations will control extensions of the sewer system and therefore there is no dispute.

Tenth Claim – Action for Injunctive Relief

Plaintiff seeks to enjoin defendant from implementing amendments and improvements related to extending sewer service from the ODAV to the TLM property. Plaintiff has not plead any facts indicating that HDSE has violated the LUBA Final Order following its effective date.

Plaintiff has not plead sufficient facts regarding any irreparable, continuing harm he would suffer if defendant was not enjoined.

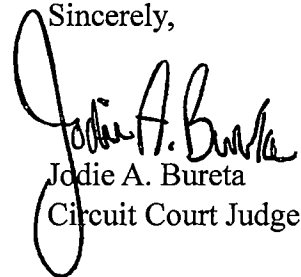
Fifteenth Claim – Petition for Writ of Mandamus

HDSE is not an officer of the Court or subject to any other “duty resulting from an office, trust or station”. Therefore, plaintiff’s request for writ of mandamus fails to state a claim as a matter of law.

The Court adopts the arguments contained in HDSE’s hearing memorandum. HDSE’s Motion to Dismiss for Failure to State a Claim is GRANTED as to all claims.

Plaintiff’s claims exceed this Court’s jurisdiction to enforce the decisions of LUBA. There are no allegations that any person, entity, or agency has violated or is currently violating the LUBA Final Order reversing the Marion County Land Use Approval. The Defendant’s will kindly prepare and submit judgments consistent with this opinion. The complaint is dismissed, without leave to replead, without prejudice.

Sincerely,



Jodie A. Bureta
Circuit Court Judge

jab/jl