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29 April 2019

VIA EMAIL

Coos County Planning Dept.
Attn: Jill Rolfe
250 N. Baxter Street
Coquille, OR 97423

Re: Request for Additional Evidence and/or Briefing
Land Use Applications for Trans Pacific Parkway alteration
Coos County File Nos. AM-18-009/HBCU-18-001/RZ-18-005

To Staff and All Parties Concerned;

In drafting a recommendation on this series of land use applications, I have encountered a series of technical questions which do not seem to be adequately addressed by the evidence in the record.

Various parties raise the issue of "ownership" of the land in question and how that relates to CCZLZO 5.0.150.1, which provides:

> ***All applications shall include the following:***
>
> ***1. Applications shall be submitted by the property owner or a purchaser under a recorded land sale contract. "Property owner" means the owner of record, including a contract purchaser. The application shall include the signature of all owners of the property. A legal representative may sign on behalf of an owner upon providing evidence of formal legal authority to sign.***

The applicant submitted a "Property Owner and Consent" signed by John Burns, the CEO of the Oregon International Port of Coos Bay (the "Port"). The document states that the Port "is or may be the owner" of Tax Lot 601, T24S, R13W, Section 34. The use of the phrase "*or may be* the owner" is curious, and casts doubt as to whether the signor actually knows whether the Port is the owner. The applicant provides no deed that backs up the statement in the consent form, which is unusual because deeds are the best evidence of ownership and are generally

included with every land use application. The only evidence that tends to corroborate Mr. Burn's statement comes - ironically - from Ms. Jody McCaffree, who provided a screen shot of the ArcGIS database that seems to indicate that the Port may own that strip of land known as TL 601, or at the very least is getting the tax statements for that land sent to it. *See* Letter from Jody McCaffrree dated February 22, 2019 at p. 2.

The applicant also states in the application narrative that "JCEP has also requested a consent from ODOT, which has jurisdiction over Highway 101, and will submit that to the County as soon as it is signed." The hearings officer searched the record but did not see that any ODOT consent was ever forthcoming. The applicant's final argument glosses over this issue in a manner that again casts doubt on the conclusions asserted.

In her letter of March 7, 2019 (Exhibit 18), Katy Eymann raises the issue of ownership of the land underlying the section of the Trans Pacific Parkway at issue in the applications. Ms. Eymann first cites to ORS 196.805, which deals with state policy concerning DSL's authority to regulate fill and removal, and not ownership. Although that argument seems to miss the mark, Ms. Eymann's second argument warrants more attention: she argues that the Oregon Department of Transportation ("ODOT") merely has a right of way easement over the area, as opposed to fee title, and thus "the application is incomplete and should be dismissed as improperly filed" because the applications have not been signed by the legal owner as required by CCZLDO 5.0.150(1). Unfortunately, Ms. Eymann does not further develop her argument or otherwise provide evidence to support the claim that ODOT only has an easement.

Whether Ms. Eymann is correct that ODOT merely has a right of way easement or fee simple title for the TPP depends on the relevant instrument(s) in question, which is not in the record. When roadways are "dedicated" to the government, the government generally obtains only a right-of-way easement, not title in fee simple. ORS 92.010(11); ORS 92.150; *Huddleston v. Eugene*, 34 Or 343, 35 P 868 (1899); *McCoy v. Thompson*, 84 Or 148, 164 P 589 (1917); *Kurtz v. Southern Pac. Co.*, 80 Or. 213, 156 P 367, *on reh'g,* 80 Or 213, 156 P 794(1916); *McQuaid v. Portland Ry. Co*., 18 Or 237, 22 P 899 (1889). However, the Highway Commission (aka ODOT) will often condemn land for road purposes, and when it does so, it generally takes a fee simple title to the land condemned. *State by State Highway Com. v. Bailey*, 212 Or. 261, 319 P.2d 906 (1957) (citing ORS 366.360; *State Highway Com. v. Burk*, 200 Or 211, 227, 265 P.2d 783 (1954); *State Highway Commission v. Efem Warehouse Co.*, 207 Or 237, 295 P.2d 1101 (1956). Note, however, that ORS 366.360 does not require ODOT to acquire fee simple title; it is still free to acquire a lesser estate such as an easement. *See* Oregon Cadestral Map System Manual, First ed. 2003, Vol. 4, entitled Highways and the Law of Dedication, Oregon Department of Revenue, Chapter 16, p. 15-16 (Discussing ORS 366.360). A copy of this somewhat obscure but valuable legal reference manual can be found at: http://www.ormap.net/index.cfm?opt=mappingspecs

On February 8, 2019, Planning Director Jill Rolfe wrote a memo entitled "Staff's Supplemental Response" that stated a recorded "deed" found at Coos County Clerk's records (Volume 286 Pages 597-601) indicated the Oregon Highway Commission (*i.e.* the Oregon

Department of Transportation) "owns" the relevant submerged land located within the 101 ROW. A portion of this land is identified as the Silver Point No. 1 Amended Oyster Bed Plat.

In reviewing that 1961 Instrument, it appears to constitute a recorded easement, not a deed. The Instrument was created to settle a lawsuit between the "Coos County Oyster Co-operative" and the State Highway Commission. While this "Release and Easement" does state that "the Highway Commission is the owner of and has constructed a highway along a strip of land at the mouth of Haynes Slough, Coos County Oregon," it then goes on to describe what I assume to be the Highway 101 ROW between Engineer Stations 172.40 and 215 (as opposed the TPP ROW). While this statement is perhaps some marginal evidence of ownership, it is not an actual conveyance of ownership.

Furthermore, it does not, as far as I can tell, acknowledge any ownership of the TTP and associated adjacent tide land. In short, this instrument is not a "deed" and does not appear to be dispositive as to any "ownership" of land within the definition of CCZLZO 5.0.150.1.

The 1961 instrument does contain what is described as an "easement" to "interfere with the Claimant's use of the real property by the maintenance of fill * * *," but unless the hearings officer is missing something, it does not appear that such an easement constitutes "ownership" within the definition of CCZLZO 5.0.150.1.

In thinking about the ownership issue, the hearing officer has also considered the case law that discusses state "ownership" of submerged and submersible lands. *See* Atty Gen Op 8281 (April 21, 2015) (extensive discussion of issue with citation to case law). For example, in *Martin v. Weddell*, 41 US 234, 16 Pet. 367 (1842), the United Stated States Supreme Court stated that certain New Jersey mudflats belonged to the state and not to private property owners, declaring that under federal common law that "dominion and property in navigable waters, and in the lands under them [were] held by the king as a public trust." Id. at 263. The court went on to say that when the Revolution took place, the people of each state became themselves sovereign, and in character hold the absolute right to all their navigable waters and the soils under them for their own common use. * * *." *Id*. at 262-3; *See also Pollard's Lessee v. Hagen*, 44 US (How.) 212 (1845). The case law further suggests that the federal government, as successor to the crown, claimed "title" to the navigable rivers and their submerged lands. *Shively v. Bowlby*, 152 US 1, 14 SCt 548 (1894), and that this land was held in trust by the federal government to be given to given to the states upon admission to the union. *Pollard's Lessee v. Hagen*, 44 US (How.) 212 (1845). It has been said that by virtue of the Tenth Amendment, ownership of these waters was reserved to the states, subject only to limitations imposed by expressly conferred federal powers, such as the regulation of interstate commerce.[1] *PPL Montana, LLC v. Montana*, 565 U.S. 576, 132 SCt 1215, 1234 (2012). By the terms of the Oregon Admission Act, Oregon entered the union "on an equal footing with the other states * * *." Thus, upon its admission in 1859, "title" to submerged and submersible lands underlying navigable waters devolved upon the state as sovereign. As a result, the state of Oregon owns all navigable waters within the state as well as the land underneath such waters.

[1] *United States v. Holt Bank*, 270 U.S. 49, 46 S Ct 197, 70 L Ed 465 (1926); *Scott v. Lattig*, 227 U.S. 229, 33 S Ct 242, 57 L Ed 490, 44 LRA (ns) 107 (1913); *Shively v. Bowlby*, 152 U.S. 1, 14 S Ct 548, 38 L Ed 331 (1894).

There are two elements to the state's interest, known by the Latin terms *jus privatum* and *jus publicum. See Shively v. Bowlby*, 152 U.S. 1, 11, 14 S Ct 548, 38 L Ed 331 (1894). The recent and long-awaited Oregon of Appeals case titled *Chernaik v. Brown*, 295 Or App 584 (2019) discusses

> We start with a brief discussion of the historical underpinnings of Oregon's public-trust doctrine. Under the "equal-footing doctrine," upon admission to the union, Oregon obtained title to the submerged and submersible land underlying "title-navigable" water by virtue of the state's sovereignty. *Kramer v. City of Lake Oswego*, 285 Or App 181, 201, 395 P3d 592, *rev allowed*, 362 Or 38 (2017). The state's ownership of those lands "is comprised of an interrelationship of two distinct aspects, each possessing its own characteristics." *Brusco Towboat v. State Land Bd.*, 30 Or App 509, 516, 567 P2d 1037 (1977), *rev'd in part on other grounds*, 284 Or 627, 589 P2d 712 (1978). First, the state holds full fee title in the property, called the *jus privatum*, which includes the power of alienation, *viz.*, the power to convey private interests in and use of that property for any purpose. *Id.* at 516-17; *see also Corvallis & Eastern R. Co. v. Benson*, 61 Or 359, 370, 121 P 418 (1912) ("This private property in tidelands, the State by its legislative assembly, may grant to any one in any manner, or for any purpose, not forbidden by the constitution[.]").
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> "Th[e] second aspect of the state's ownership is called the *jus publicum*," *Brusco Towboat*, 30 Or App at 516, and is rooted in the principle that "[n]avigable waterways are a valuable and essential resource and as such all people have an interest in maintaining them for commerce, fishing, and recreation," *id.* at 517. That aspect of the state's ownership is the common-law public-trust doctrine *per se—viz.*, the state "takes title to the submerged and submersible lands underlying navigable waters *in trust for the public* for purposes of navigation, fishing, and recreation." *Kramer*, 285 Or App at 201 (emphasis in original); *see also Illinois Cent. R. Co. v. State of Illinois*, 146 US 387, 436, 13 S Ct 110, 36 L Ed 1018 (1892) ("The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment[.]").

In this case, the hearings officer could determine that the pertinent aspect of "ownership" relevant to CCZLZO 5.0.150.1 is the "fee title" of the property; (i.e. the *jus privatum* interest, but the hearings officer will entertain arguments to the contrary. The *Chernaik* court states that the *jus privatum* can be alienated, and presumably, that is why the Port and various private ownership exist for these mudflats. If, on the other hand, the *jus publicum* interest must also factor in to the ownership question raised by CCZLZO 5.0.150.1, then it appears that the Division of State Lands (DSL) may also have to consent to the application. In *Summa Corp v. California State Lands Comm'n*, 466 US 198, 102 SCt 1751, 80 LE2d 237 (1984), the Court

described the state's public trust rights as in the nature of an easement or a servitude rather than as fee title, that cannot be fully alienated. The hearings officer would appreciate more briefing from the parties and staff on this issue.

Given these uncertainties in the status of ownership, the hearings officer is reopening the record for a very limited purpose: I invite the parties and staff to submit additional evidence, deeds, Court records, and accompanying legal argument as to the ownership of the underlying parcel(s). If the Port does in fact own fee simple title to TL 601, the vesting deed for that property should be made a part of the record. Ownership information and consents from ODOT should also be submitted.

Any additional submissions should be delivered to the Coos County Planning Department by the close of the business day on May 3, 2019.

Only materials relevant to the legal ownership of the parcels involved in these land use applications will be accepted.

Please forward this letter to the parties of record.

Sincerely,

ANDREW H. STAMP, P.C.

/s/

Andrew H. Stamp

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