

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

3
4 MIKE R. LOVE, FRANCIS W. MOON, SUSAN L. WOOD,
5 BENJAMIN D. JENSEN, and DON DOELLING,
6 *Petitioners,*

7
8 vs.

9
10 KLAMATH COUNTY,
11 *Respondent.*

12
13 LUBA No. 2006-174

14 ORDER
15

16 **MOTION TO DISMISS**

17 Petitioners appeal a county counsel letter to petitioner Love stating, among other
18 things, that the county will not take action to regulate or stop use of a property located near
19 petitioner Love’s property as a motorcycle track and that such use of the property as a
20 motorcycle track is a permitted use under the Klamath County Land Development Code
21 (KCLDC). The county moves to dismiss this appeal, arguing that the decision not to bring
22 an enforcement action against the neighboring property owners is not a land use decision
23 subject to LUBA’s jurisdiction.

24 The challenged decision is a three-page letter that sets forth the county’s position
25 regarding the disputed motorcycle track. The letter explains what county counsel believes to
26 be the background history of the complaints regarding use of the property. The letter further
27 explains that the track operator has not applied for any permits, and the county does not
28 intend to hold any hearings on the matter. As material here, the letter states:

29 “Please accept this letter as indication that Klamath County does not presently
30 intend to cite the property owner or the tenant, nor does the County intend to
31 file any proceeding to abate the track. You may also accept this letter as an
32 interpretation of the KCLDC to the extent that it reflects the determination
33 that reasonable personal use of motorcycles, to include the construction of a
34 riding track, is allowed in the R-5 zone.” Record 19.

1 The county moves to dismiss the appeal, arguing that county counsel’s letter is not a
2 land use decision subject to our jurisdiction.¹ The county cites and discusses two recent
3 LUBA opinions concerning county decisions that enforcement action would not be taken
4 based on alleged violation of a zoning ordinance. *Wells v. Yamhill County*, 51 Or LUBA
5 659, *aff’d* 206 Or App 769, 140 P3d 582, *rev den* 341 Or 80 (2006); *Johnston v. Marion*
6 *County*, 51 Or LUBA 250 (2006).

7 In *Johnston*, the petitioners appealed a county counsel letter refusing to revoke
8 previously issued building permits. We eventually dismissed the appeal because the county
9 counsel letter merely reiterated the county’s original rationale for issuing the building
10 permits, and therefore the appeal of the county counsel letter was essentially a collateral
11 attack on those prior permits. 51 Or LUBA at 262-63. In considering the county’s motion to
12 dismiss, we discussed when a local government’s decision not to take any action regarding a
13 complaint because the local government does not believe any land use violation has occurred
14 constitutes a land use decision. We elaborated on that analysis in *Wells*, where the petitioner
15 claimed that a land use violation had occurred and asked the county to take enforcement
16 action. While both of those cases are very fact specific and involve unusual circumstances,
17 they illustrate that the manner in which a local government decides whether to take action
18 against an alleged violation affects whether the local government’s decision is ultimately
19 viewed as a land use decision. Those cases, however, do not appear to have any bearing on

¹ ORS 197.015(11)(a) defines “land use decision” to include:

- “(A) A *final* decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
 - “(i) The goals;
 - “(ii) A comprehensive plan provision;
 - “(iii) A land use regulation; or
 - “(iv) A new land use regulation[.]” (Emphasis added.)

1 whether the county’s decision that the existing use is an allowed use in the underlying zone
2 is a land use decision.²

3 While our opinions in *Johnston* and *Wells* were ultimately decided on other issues,
4 neither of those decisions support the county’s argument that a local government decision not
5 to take any enforcement action because it believes no land use violation has occurred can
6 never be a “land use decision.” In the present appeal, the county’s decision that it will not
7 take action against the track operators might be viewed as a non-binding, non-final
8 determination. If that were the case, the county’s decision would not satisfy the finality
9 requirement of ORS 197.015(11)(a), *see* n 1, and for that reason would not constitute a land
10 use decision. The statement in the county counsel’s letter, however, that “reasonable
11 personal use of motorcycles, to include the construction of a riding track, is allowed in the R-
12 5 zone” does not appear to be tentative or nonbinding. To the contrary, it purports to be a
13 final and binding county “interpretation” of the KCLDC by a person who has apparent
14 authority to do so. Unless some exception applies, which the county does not allege, a final
15 written decision that applies a land use regulation is a land use decision subject to our
16 review. ORS 197.015(11)(a)(A). The county counsel’s letter is a land use decision.

17 The county may be correct that many of the issues petitioners wish to raise in this
18 appeal, for example, whether the track is a nuisance, may not be raised in this appeal of the
19 county counsel’s letter. The county may argue in its response brief that some or all of the
20 assignments of error should be denied because they raise issues that are outside LUBA’s
21 scope of our review. However, the reviewability of any issues that petitioners might raise in
22 this appeal has no bearing on whether the appealed decision qualifies as a land use decision.³
23 *See Papst v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 2006-170, February 8, 2007,

² Those two cases may have some bearing on whether the county’s actions regarding the petitioners’
nuisance allegations are issues that may be reviewed by LUBA.

³ The petition for review has already been filed in this appeal.

1 slip op 4) (even if there are nonreviewable issues in an appeal, that merely affects LUBA’s
2 scope of review; it does not eliminate LUBA’s jurisdiction to review the appealed decision).
3 For the reasons explained above, we conclude that the county counsel’s letter qualifies as a
4 land use decision.

5 The county’s motion to dismiss is denied.

6 **MOTION TO TAKE EVIDENCE**

7 While the county’s motion to dismiss was pending, petitioners filed a motion to take
8 evidence outside of the record. OAR 661-010-0045 sets forth the grounds for granting a
9 motion to take evidence not in the record and the required contents for such motions. OAR
10 661-010-0045 provides in relevant part:

11 “(1) Grounds for Motion to Take Evidence Not in the Record: The Board
12 may, upon written motion, take evidence not in the record in the case
13 of disputed factual allegations in the parties’ briefs concerning
14 unconstitutionality of the decision, standing, ex parte contacts, actions
15 for the purpose of avoiding the requirements of ORS 215.427 or
16 227.178, or other procedural irregularities not shown in the record and
17 which, if proved, would warrant reversal or remand of the decision.
18 The Board may also upon motion or at its direction take evidence to
19 resolve disputes regarding the content of the record, requests for stays,
20 attorney fees, or actual damages under ORS 197.845.

21 “(2) Motions to Take Evidence:

22 “(a) A motion to take evidence shall contain a statement explaining
23 with particularity what facts the moving party seeks to
24 establish, how those facts pertain to the grounds to take
25 evidence specified in section (1) of this rule, and how those
26 facts will affect the outcome of the review proceeding.

27 “(b) A motion to take evidence shall be accompanied by:

28 “(A) An affidavit or documentation that sets forth the facts
29 the moving party seeks to establish; or

30 “(B) An affidavit establishing the need to take evidence not
31 available to the moving party, in the form of
32 depositions or documents as provided in subsection
33 (2)(c) or (d) of this rule. * * *.”

1 The evidence petitioners seek to introduce consists of photographs of the property
2 and e-mail communications between county counsel and petitioner Love. Petitioners’ main
3 argument in support of introducing the photographs is that county counsel agreed to include
4 the photographs in the record, but the film was developed after the record had been
5 established. Petitioners’ main argument that the emails should be included in the record is a
6 general reference to “procedural irregularities,” without explanation of why the e-mails
7 demonstrate procedural irregularities not shown in the record.

8 Petitioners have not established that any of the grounds for granting a motion to take
9 evidence outside the record are present in this appeal. *See Meredith v. Lincoln County*, 44 Or
10 LUBA 821, 826 (2003) (an evidentiary proceeding before LUBA is not a vehicle to belatedly
11 introduce evidence that could have been introduced below). Petitioners’ motion is denied.

12 **SCHEDULING**

13 We suspended this appeal pending our resolution of the county’s motion to dismiss.
14 Now that we have denied the motion to dismiss, the basis for suspension no longer applies.
15 The county’s response brief shall be due 21 days after the date of this order.

16 Dated this 9th day of April, 2007.

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Melissa M. Ryan
Board Member