

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON  
3

4                                   YVONNE LAZARUS and LES POOLE,  
5   *Petitioners,*  
6

7   vs.  
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9                                   CITY OF MILWAUKIE,  
10   *Respondent,*  
11

12   and  
13

14   TRIMET,  
15   *Intervenor-Respondent.*  
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17   LUBA No. 2012-080  
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18   ORDER

19                   Petitioners filed the petition for review, and respondent and intervenor-respondent  
20 (respondents) filed a joint response brief. In the response brief, respondents argue that  
21 petitioners do not have standing to appeal the challenged decision because they have failed to  
22 establish that they are adversely affected by the challenged decision. Respondents also argue  
23 that the Board lacks jurisdiction to review the decision to issue the tree removal permit. On  
24 December 14, 2012, we issued an order suspending all deadlines in the appeal and giving  
25 petitioners the time set forth in our rules to respond to the jurisdictional challenges in the  
26 response brief. On the same date, petitioners filed a motion to take evidence not in the  
27 record, and respondents responded to the motion. We now resolve the motion.

28                   **BACKGROUND**

29                   The challenged decision is the city's decision to issue a tree removal permit to  
30 intervenor TriMet. In a previous Land Use Final Order (LUFO) issued in 2008, Metro  
31 authorized the route for the Portland-Milwaukie Light Rail Project. In 2009, the city  
32 approved the location and design of a project that the parties refer to as the Trolley Trail, a

1 pedestrian and bicycle trail that runs somewhat adjacent to the section of light rail line that  
2 will run along McLoughlin Boulevard in the city. Record 42.<sup>1</sup> The portion of the Trolley  
3 Trail at issue in this appeal runs between River Road and Park Avenue.

4 In November, 2011, the city approved TriMet’s application for a modification to the  
5 location of the Trolley Trail as a result of a modification in the alignment of the proposed  
6 light rail line along McLoughlin Boulevard. That 2011 decision approved removal of  
7 additional trees. Record 53. In September, 2012, the city approved TriMet’s application to  
8 remove trees for construction of the Trolley Trail between River Road and Park Avenue. On  
9 October 4, 2012, petitioners filed a Notice of Intent to Appeal the city’s decision, and  
10 subsequently filed the petition for review.

11 **MOTION TO TAKE EVIDENCE**

12 In their response brief, respondents argue that petitioners do not have standing to  
13 appeal the challenged decision because they have failed to establish that they are adversely  
14 affected by the challenged decision. Respondents also argue that the Board lacks jurisdiction  
15 to review the decision to issue the tree removal permit.

16 In their jurisdictional challenge, respondents argue that the challenged decision falls  
17 within the exception to the Board’s jurisdiction set out in ORS 197.015(10)(b)(A) for  
18 decisions “made under land use standards that do not require interpretation or the exercise of  
19 policy or legal judgment.” First, respondents argue that the city’s decision did not require  
20 interpretation or the exercise of policy or legal judgment because it relied exclusively on the  
21 findings and conditions of approval in the city’s 2011 decision approving the modified  
22 location of the Trolley Trail, which was not appealed.

23 Second, respondents also argue that the city’s decision was made “under land use

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<sup>1</sup> The record does not include a copy of the 2009 city approval of the Trolley Trail, but the city’s 2011 decision refers to the 2009 decision.

1 standards that do not require interpretation or the exercise of policy or legal judgment”  
2 because Section 8(1)(b) of Oregon Laws 1996, chapter 12 (the 1996 statute) required the city  
3 to approve the application.<sup>2</sup> Section 8(1)(b) of the 1996 statute requires local governments  
4 that are affected by the light rail project to “[i]ssue the appropriate development approvals,  
5 permits, licenses, and certificates necessary for construction of the project or project  
6 extension, consistent with a land use final order.”

7 Finally, respondents also argue that the appeal is moot because the trees that are the  
8 subject of the city’s decision have been removed.

9 In response to some of respondents’ standing and jurisdictional challenges, petitioners  
10 then filed a motion to take evidence not in the record pursuant to OAR 661-010-0045.<sup>3</sup>

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<sup>2</sup> The 1996 statute sets out special procedures and standards for siting the light rail line. Section 8(1) of the 1996 statute provides in relevant part that:

“The state, and all affected counties, cities, special districts and political subdivisions shall:

“ \* \* \* \* \*

“(b) Issue the appropriate development approvals, permits, licenses and certificates necessary for construction of the project or project extension consistent with a land use final order. Development approvals, permits license and certificates may be subject to reasonable and necessary conditions of approval but may not, by themselves or cumulatively, prevent implementation of a land use final order.”

<sup>3</sup> OAR 661-010-0045 provides, in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. \* \* \*

“(2) Motions to Take Evidence:

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

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

1 Petitioners take the position that OAR 661-010-0045(9) suspends the deadline for petitioners  
2 to file a reply brief or other response to respond to respondents' other jurisdictional  
3 challenges, and petitioners have not filed a response to those challenges.

4 In their motion to take evidence, petitioners first request that the Board consider  
5 affidavits from petitioners that petitioners argue demonstrate that they are "adversely  
6 affected" by the decision to allow the trees to be removed. As grounds for the motion, we  
7 understand petitioners to argue that the extra-record evidence will establish petitioners'  
8 standing to appeal the challenged decision. OAR 661-010-0045(1). One of the permissible  
9 grounds for a motion to take evidence is to resolve disputed factual allegations regarding  
10 standing. OAR 661-010-0045(1). The affidavits are allowed in order to assist the Board in  
11 resolving the challenge to petitioners' standing.

12 Petitioners next request that they be allowed to depose unnamed "Tri-Met  
13 representatives who are familiar with the Land Use Final Order (LUFO) which Metro  
14 approved in 2008 \* \* \*." Memorandum in Support of Motion to Take Evidence 2. We  
15 understand petitioners to argue that the extra-record evidence is permissible to assist the  
16 Board in resolving a jurisdictional challenge. *Yost v. Deschutes County*, 37 Or LUBA 653,  
17 658 (2000).

18 As we understand it, petitioners seek to elicit testimony in order to defend against one

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

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

“(c) Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. Depositions under this rule shall be conducted in the same manner prescribed by law for depositions in civil actions (ORCP 38-40).”

1 of the bases for respondents’ jurisdictional challenges. As we understand it, petitioners seek  
2 to establish through depositions that LUBA has jurisdiction to review the decision and that  
3 LUBA should reject respondents’ jurisdictional challenge that argues that LUBA does not  
4 have jurisdiction to review the decision under ORS 197.015(10)(b)(A) because in making the  
5 decision, the city was without discretion, pursuant to Section 8(1)(b) of the 1996 statute, to  
6 deny the tree removal permit application and that the decision thus falls within the exception  
7 to our jurisdiction.

8 OAR 661-010-0045(2) requires a motion to take evidence to contain “a statement  
9 explaining with particularity what facts the moving party seeks to establish, how those facts  
10 pertain to the grounds to take evidence specified in section (1) of this rule, *and how those*  
11 *facts will affect the outcome of the review proceeding.*” (Emphasis added.) Petitioners have  
12 not established under OAR 661-010-0045(2) that the testimony that they seek to elicit  
13 through depositions would assist the Board in resolving the jurisdictional challenge, because  
14 whether the decision is inconsistent with the 2008 LUFO has no bearing on whether the land  
15 use standards that the city applied or should have applied are “land use standards that do not  
16 require interpretation or the exercise of policy or legal judgment” so that the city’s decision  
17 applying those land use standards falls within the ORS 197.015(10)(b)(A) exception.<sup>4</sup>

18 Petitioners’ motion to depose TriMet’s representatives is denied.

19 **SCHEDULE**

20 In an order dated December 14, 2012, we suspended all deadlines in the appeal. The  
21 appeal remains suspended. Petitioners shall have 14 days from the date of this order to file a  
22 reply brief to respond to the jurisdictional challenges and any other new matters raised in the  
23 response brief. Thereafter, the Board will resolve the jurisdictional challenges.

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<sup>4</sup> The petition for review does not contain an assignment of error or argument that, under Section 8(1)(b) of the 1996 statute, the city’s decision to issue the tree removal permit is inconsistent with the 2008 LUFO.

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Dated this 12<sup>th</sup> day of February, 2013.

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Melissa M. Ryan  
Board Member