

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

4                                   JAMES VanGRINSVEN AND ROBIN HURT,  
5   *Petitioners,*

6  
7   vs.  
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9                                   KLAMATH COUNTY,  
10   *Respondent.*

11   LUBA No. 2009-041

12                                   ORDER ON MOTION TO TAKE EVIDENCE  
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15   **INTRODUCTION**

16           The challenged decision is a letter from a county planner to petitioners, dated  
17 February 27, 2009. That letter informed petitioners that their land use compatibility  
18 statement (LUCS) dated August 28, 2008, had expired. The LUCS decision approved an  
19 expansion of a grocery store to include a deli, as one part of a comprehensive remodel of  
20 petitioners' motel and RV park that apparently involves several other permits and site plan  
21 approvals. The August 28, 2008 LUCS decision included a condition of approval requiring  
22 petitioners to obtain approvals from the county Sanitation and Building Departments within  
23 180 days of the date of the LUCS decision. The existing motel and RV park is served by an  
24 on-site septic system, and in the 180 days following issuance of the LUCS decision  
25 petitioners and the county were apparently unable to agree on whether an upgrade to the  
26 existing septic system is required. The challenged letter advises petitioners that that due to  
27 petitioners' failure to obtain the required approvals within 180 days of the date of the LUCS  
28 decision, the LUCS authorization is now expired.<sup>1</sup> The letter also advises petitioners that to

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<sup>1</sup> The challenged February 27, 2009 letter states, in relevant part:

1 authorize the deli expansion (which petitioners have apparently already constructed)  
2 petitioners must submit a new application to the Planning Department, in order to avoid an  
3 enforcement action.

4 The record includes documents related to the August 28, 2008 LUCS decision and  
5 various correspondence and e-mails between petitioners and the county regarding the  
6 disputed septic system upgrade. The record also includes a number of other documents  
7 related to other permit and site plan approvals for the proposed expansion/remodel of the RV  
8 park/motel as a whole.

9 On August 7, 2009 LUBA issued an order settling the record and denying petitioners'  
10 first motion to take evidence. On August 24, 2009, petitioners filed a second motion to take  
11 extra-record evidence, requesting that LUBA consider five additional sets of documents  
12 (exhibits 1-5): (1) a building permit application dated December 21, 2007; (2) an application  
13 for a site plan review dated December 28, 2007; (3) various building permits issued during  
14 2008; (4) a county letter dated April 29, 2008, noting that the site-plan review application is  
15 incomplete; and (5) a county permit-and-inspection record for a walk-in freezer. The county  
16 opposes the motion to take evidence, arguing that petitioners have not established a basis to  
17 consider extra-record evidence under OAR 661-010-0045.

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“Please accept this letter as follow up documentation to the issuance of Planning Department approval regarding a deli expansion for Jo’s Motel.

“For reference, the Planning Department issued a Land Use Compatibility Statement (LUCS08-0681) on August 28, 2008. This approval is good for 180 days to allow you time to secure proper Septic and Building permits. This land use approval had conditions, which require final signatures from the On-Site Sanitation Department and Building Department. Because permits were never issued as required by this approval, we must notify you that your Planning approval has expired, effective February 24, 2009.” Record 27.

1    **JURISDICTION**

2           Before resolving the motion to take evidence, we first note that it is unclear to us that  
3 the challenged February 27, 2009 letter is subject to our jurisdiction.<sup>2</sup> In relevant part,  
4 LUBA’s jurisdiction extends only to land use decisions and limited land use decisions. A  
5 limited land use decision is defined at ORS 197.015(12), to include certain discretionary  
6 decisions regarding property within urban growth boundaries.<sup>3</sup> As far as we can tell from the  
7 record, the subject property is not within an urban growth boundary.

8           ORS 197.015(10)(a) (A) defines a “land use decision” in pertinent part as a local  
9 government decision that “concerns the adoption, amendment, or application of” the  
10 statewide planning goals, a comprehensive plan provision, a land use regulation, or a new  
11 land use regulation. We note that the February 27, 2009 letter does not mention or appear to  
12 concern the application of any statewide planning goal, comprehensive plan or land use  
13 regulation. *See n 1.* In *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004), we held  
14 that a local government decision “concerns” the application of a plan provision or land use  
15 regulation if (1) the decision maker was required by law to apply its plan or land use  
16 regulations as approval standards, but did not, or (2) the decision maker in fact applied plan  
17 provisions or land use regulations. Generally, a decision that simply determines that a

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<sup>2</sup> No party has yet raised a jurisdictional question, however, LUBA may examine its jurisdiction *sua sponte*, regardless of whether the parties raise the issue. *Adams v. City of Ashland*, 33 Or LUBA 552, 554 (1997).

<sup>3</sup> ORS 197.015(12)(a) defines a limited land use decision to mean :

“\* \* \* [A] final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

“(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).

“(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

1 condition of approval is or is not satisfied does not apply any land use regulations and is  
2 therefore not a land use decision. *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509,  
3 514-15, 944 P2d 976 (1997). On facts similar to the present case, we held in *Balk v.*  
4 *Multnomah County*, 38 Or LUBA 1, 6-7 (2000), that a determination that a permit had  
5 expired because required additional permits had not issued within a specified time was not a  
6 land use decision, where the decision did not apply any comprehensive plan policies or land  
7 use regulations.

8           Nonetheless, we do not further address the question of jurisdiction in this order,  
9 because the present appeal is in its early stages and without some assistance from the parties  
10 we cannot be sure based on the present record and pleadings that the challenged decision  
11 falls outside our jurisdiction. In the event the county files a motion to dismiss or otherwise  
12 challenges our jurisdiction, petitioners will have the time provided for in our rules to respond  
13 and to request transfer of this appeal to circuit court under OAR OAR 661-010-0075(11), in  
14 the event LUBA determines it does not have jurisdiction.

15 **MOTION TO TAKE EVIDENCE**

16           With few exceptions, LUBA’s review is confined to the local record. OAR 661-010-  
17 0045 sets out a limited range of circumstances under which LUBA may consider evidence  
18 that is not included in the local record. OAR 661-010-045(1) provides, in relevant part:

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

1 Petitioners argue that LUBA should consider exhibits 1-5, alleging that there are “disputed  
2 factual allegations” regarding (1) unconstitutionality of the decision, and (2) procedural  
3 irregularities not shown in the record.<sup>4</sup>

4 **A. Constitutionality of the February 27, 2009 Letter**

5 Petitioners state that the assignments of error in the petition for review will allege  
6 constitutional error, and they argue that LUBA must consider exhibits 1-5 to resolve such  
7 assignments of error. However, to grant a motion to take evidence based on allegations of  
8 constitutional error, the petitioner must set out their theory for why the decision is  
9 unconstitutional in sufficient detail so that LUBA can determine whether it is appropriate to  
10 grant the motion. In the present case, petitioners merely state that they wish to advance  
11 unspecified “constitutional issues.” Petitioners’ Reply 2. Moreover, petitioners do not  
12 identify any “disputed factual allegations” that bear on the constitutionality of the decision.  
13 Finally, petitioners do not show any connection between the five sets of documents in  
14 exhibits 1-5 and any claim that the challenged decision is unconstitutional.

15 **B. Procedural Irregularities**

16 Petitioners also argue that the extra-record evidence establishes facts that show the  
17 county committed procedural irregularities, which if proved, would warrant dismissal of the  
18 county’s decision. According to petitioners, exhibits 1-5 demonstrate that the county issued  
19 a site plan review approval and related permits to petitioners, and that the permits authorized

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<sup>4</sup> Petitioners also cite “misapplication of the law” as a basis for considering extra-record evidence, arguing that the county’s code does not include specific provisions authorizing expiration of the LUCS permit. However, OAR 661-010-0045(1) does not list “misapplication of the law” as one of the grounds for taking evidence outside the record. If the county misapplied its land use code in making the challenged decision, that would have a bearing on the jurisdictional question noted above, and could potentially provide a basis for reversal or remand. However, it does not provide a basis for considering extra-record evidence. We further note that whether or not the county’s code authorizes a condition of approval providing for expiration of a permit is a legal question, not a factual issue. Finally, petitioners’ arguments on this point would appear to be directed at the August 28, 2008 LUCS decision, which cannot be challenged in this appeal of the February 27, 2009 letter.

1 various construction projects, which petitioners began and completed, and the county has  
2 inspected and approved. Although it is not clear, we understand petitioners to argue that  
3 exhibits 1-5 demonstrate that the county erred in concluding, in the challenged February 27,  
4 2009 letter, that petitioners failed to obtain all required permits and approvals for the deli  
5 expansion authorized by the August 28, 2008 LUCS decision.

6 Exhibits 1-4 establish that petitioners submitted various site plan review and building  
7 permit applications in 2007 and 2008, and the county approved building permits, but it is  
8 unclear how these applications and the resulting permits relate to the deli expansion  
9 authorized by the August 28, 2008 LUCS decision. Even if there is a relationship, petitioners  
10 do not explain how LUBA's consideration of exhibits 1-4 would support a claim of  
11 procedural error in issuing the January 27, 2009 letter. The August 28, 2008 LUCS decision  
12 requires that petitioners obtain final approvals from the On-Site Sanitation Department and  
13 Building Department for the proposed deli expansion. The building permits in exhibits 1-4  
14 are dated prior to August 28, 2008, and none purport to constitute final approvals from On-  
15 Site Sanitation Department and Building Department for the proposed deli expansion.  
16 Further, we note that one of petitioners' apparent concerns in submitting the 2007 and 2008  
17 applications for LUBA's consideration is to establish the date the applications were  
18 submitted, and hence what land use standards applied to those applications. However, as far  
19 as we are informed there is no "disputed factual allegation" in this appeal regarding the date  
20 those applications were submitted.

21 Exhibit 5 is an inspection sign-off sheet indicating that the county inspected a new  
22 walk-in freezer on the subject property on October 23, 2008, and issued final mechanical,  
23 electrical and plumbing inspections. Petitioners argue that, combined with exhibits 1-4,  
24 exhibit 5 demonstrates that the county has already issued all necessary permits and approvals  
25 for the deli expansion authorized by the August 28, 2008 LUCS decision. We understand  
26 petitioners to argue that the county committed "procedural error" in failing to take these final

1 inspections into account, before concluding that the August 28, 2008 LUCS had expired for  
2 failure to obtain all required approvals within 180 days of the August 28, 2008 decision.

3           However, we note that the inspection report is only for mechanical, electrical and  
4 plumbing for a walk-in freezer, and does not purport to include septic inspections or to issue  
5 final building approval. The spaces next to “On-Site Septic” and “Building Final” are not  
6 checked. Nothing in the inspection report seems inconsistent with the conclusion in the  
7 February 27, 2009 letter that petitioners had failed to obtain “final signatures from the On-  
8 Site Sanitation Department and Building Department” as required by the August 28, 2008  
9 LUCS decision, with respect to the disputed septic system upgrade. In any case, even if  
10 exhibit 5 purported to establish what petitioners allege, petitioners fail to identify what  
11 required *procedure* the county failed to follow in issuing the February 27, 2009 letter.  
12 Petitioners do not explain how staff’s alleged failure to take the inspection report into  
13 account before issuing the February 27, 2009 letter constitutes *procedural* error.

14           In sum, petitioners have not demonstrated any basis under OAR 661-010-0045(1) for  
15 LUBA to consider the documents in exhibits 1-5. Therefore, petitioners’ second motion to  
16 take evidence is denied.

17 **CONCLUSION**

18           Filing of the motion to take evidence suspended the time limits for all other events in  
19 our review proceeding. OAR 661-010-0045(9). Now that we have denied the motion, the  
20 petition for review shall be due 21 days from the date of this order, and the response brief  
21 shall be due 42 days from the date of this order. The Board’s final opinion and order shall be  
22 due 77 days from the date of this order.

23           DATED this 9<sup>th</sup> day of October, 2009.

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Tod A. Bassham  
Board Chair