



1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's issuance of a grading  
4 permit.

5 **MOTION TO INTERVENE**

6 Mark Wattles (intervenor), the applicant below, moves  
7 to intervene on the side of respondent. There is no  
8 opposition to that motion, and it is allowed.

9 **FACTS**

10 On July 31, 1996, the county issued a permit for  
11 grading associated with construction of a home. The siting  
12 of the home was approved in conjunction with a Farm  
13 Management Plan (FMP) in 1994. That approval was not  
14 appealed. A building permit for the home was issued on  
15 April 26, 1996. That permit was also not appealed.<sup>1</sup>  
16 Petitioner appeals the issuance of the grading permit.

17 **MOTION TO RECONSIDER MOTION FOR EVIDENTIARY HEARING**

18 On February 14, 1997, this Board denied petitioner's  
19 motion for evidentiary hearing and record objections.  
20 Petitioner requests that we reconsider her motion for  
21 evidentiary hearing, through which she sought to establish  
22 that the record of the grading permit file included

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<sup>1</sup>Petitioner appealed an October 4, 1996 letter from the county to  
petitioner in which the county refused petitioner's request that it revoke  
the building permit. We determined the letter was not an appealable land  
use decision. \_\_\_ Or LUBA \_\_\_ (LUBA No. 96-206, January 3, 1997).

1 documents that the county did not include in the record of  
2 this appeal. Specifically, petitioner sought to establish  
3 that the actual decision makers for the grading permit were  
4 other than the individual to whom the decision is ascribed,  
5 and that the individuals who really made the decision had  
6 before them the FMP and building permit files. Petitioner  
7 argues this Board mischaracterized the basis of her  
8 evidentiary hearing request, and incorrectly denied the  
9 request based on petitioner's failure to supply the facts  
10 which were "precisely the reason why Petitioner sought an  
11 evidentiary hearing: to establish the facts LUBA cites as  
12 not established." Petition for Review 4.<sup>2</sup>

13 We disagree that we mischaracterized petitioner's  
14 request. Evidentiary hearings may be appropriate "to  
15 consider disputes regarding the content of the record." OAR  
16 661-10-045(1). However, petitioner has not established that  
17 the facts she wishes to present would lead to the conclusion  
18 that the grading permit file included the FMP and building  
19 permit files. It appears that what petitioner seeks to  
20 introduce is evidence that county staff members consulted  
21 and/or referred to the FMP and the building permit prior to  
22 the issuance of the grading permit. Even if that were true,  
23 it does not make those files part of the grading permit file

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<sup>2</sup>Petitioner did not, in her original motion for evidentiary hearing, or in her request for reconsideration, ask as a basis for requesting an evidentiary hearing, that we consider the FMP and building permit files in order to determine our jurisdiction over this appeal.

1 upon which the county based its issuance of the permit. We  
2 adhere to our order denying petitioner's evidentiary hearing  
3 motion.<sup>3</sup>

4 **REQUEST TO TAKE OFFICIAL NOTICE**

5 Petitioner requests that we take official notice of the  
6 FMP, because it

7 "establishes the proposed dwelling's compliance  
8 with applicable provisions of the [Zoning  
9 Development Ordinance] ZDO. It is a property-  
10 specific articulation of the general EFU-20 zone  
11 requirements. Subsequent construction permits,  
12 including the challenged decision, must comply  
13 with the FMP in order to comply with the  
14 requirements of the EFU-20 zone. Thus, it serves  
15 the same legal effect as, and therefore amounts  
16 to, a local government 'enactment' of which LUBA  
17 may take official notice under Oregon Evidence  
18 Code 202(7)." Petition for Review 4.

19 Petitioner acknowledges that this Board has  
20 consistently declined to take official notice of quasi-  
21 judicial decisions, such as the FMP, citing as examples  
22 Rochlin v. City of Portland, 29 Or LUBA 609 (1995);  
23 Broderson v. Jackson County, 28 Or LUBA 645 (1995); Testa v.  
24 Clackamas County, 26 Or LUBA 604 (1994); and Mental Health  
25 Division v. Lake County, 17 Or LUBA 1165 (1989).  
26 Petitioner's attempt to distinguish the FMP from those other  
27 quasi-judicial decisions demonstrates a flaw in petitioner's

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<sup>3</sup>ORAR 661-10-045(1) also authorizes evidentiary hearings to consider "procedural irregularities not shown in the record and which, if proved, would warrant remand or reversal of the decision." Petitioner does not argue that the county's conduct constituted such a procedural irregularity.

1 analysis: petitioner asserts that, unlike the factual  
2 situations in those other decisions, the FMP is essentially  
3 "legislative" and therefore subject to official notice  
4 because it "establishes the proposed dwelling's compliance  
5 with applicable provisions of the ZDO." Petition for Review  
6 4. We do not understand how this distinction makes the FMP  
7 "legislative" for purposes of the county's evaluation of the  
8 proposed dwelling for compliance with the FMP.<sup>4</sup> Moreover,  
9 the proposed dwelling is not at issue here. Even if the FMP  
10 could be subject to official notice in another context,  
11 petitioner has not shown that the FMP contains any  
12 requirements or criteria relevant to approval of the grading  
13 permit. Petitioner's request that we take official notice  
14 of the FMP is denied.

15 **MOTION TO STRIKE**

16 Intervenor requests that we strike the appendices to  
17 the petition for review, on the basis that they are neither  
18 in the record, nor subject to official notice.<sup>5</sup> Intervenor  
19 acknowledges that we have in the past referred to documents  
20 outside the record in order to determine our jurisdiction.  
21 See Leonard v. Union County, 24 Or LUBA 362, 377 (1992);

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<sup>4</sup>We make no ruling in this case on petitioner's assumption that all legislative enactments are necessarily subject to official notice.

<sup>5</sup>We note that the document at Appendix 1 is the challenged decision, which is in the record, and properly appended. We do not understand intervenor to challenge that appendix.

1 Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 630, 631-  
2 33 (1988). In this case, we will consider the the  
3 challenged appended documents to the extent they aid in our  
4 assessment of whether the challenged grading permit is a  
5 land use decision subject to our jurisdiction.

6 **JURISDICTION**

7 The county challenges our jurisdiction over this appeal  
8 on the basis that the grading permit is not a land use  
9 decision. Intervenor also argues in response to the second  
10 assignment of error that the grading permit is not a land  
11 use decision.<sup>6</sup> Under ORS 197.015(10)(b), a "land use  
12 decision" does not include a local decision:

13 "(A) Which is made under land use standards which  
14 do not require interpretation or the exercise  
15 of policy or legal judgment;

16 "(B) Which approves or denies a building permit  
17 issued under clear and objective land use  
18 standards[.]

19 "\* \* \* \* \*"

20 Petitioner acknowledges that ordinarily a grading

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<sup>6</sup>Under her second assignment of error, petitioner asserts that the county "failed to make adequate findings and made a decision not supported by substantial evidence when it approved the challenged decision for a building site which is substantially larger than the one authorized by the underlying FMP." Petition for Review 7-8. Under her first assignment of error, petitioner asserts the county "failed to make adequate findings and made a decision not supported by substantial evidence when it approved the challenged decision after the underlying farm use dwelling authorization had expired." Petition for Review 6. Intervenor argues this assignment is a collateral attack on the issuance of the building permit and urges dismissal as an untimely appeal of that permit. Because we conclude the grading permit is not a land use decision, we need not reach that issue.

1 permit such as the one challenged here would not be a land  
2 use decision. Petitioner argues, however, that this  
3 particular grading permit is a land use decision because it  
4 involves "the computation of time limits." Petition for  
5 Review 6. Petitioner contends,

6 "The ZDO, Oregon Administrative Rules, and the FMP  
7 itself contain land use standards governing  
8 expiration of the underlying dwelling approval and  
9 siting of the dwelling on the subject property,  
10 and are therefore applicable to the challenged  
11 decision." Petition for Review 5.

12 Petitioner also relies on a condition of the FMP, which  
13 states:

14 "9. This approval is valid for two years after  
15 the date of final approval. If a building  
16 permit for a single family dwelling is not  
17 obtained within the two year period, this  
18 approval will automatically become void."  
19 Petition for Review 6. (Emphasis added.)

20 As the county and intervenor explain, the flaw in  
21 petitioner's argument is that the time limits and the "land  
22 use standards governing expiration of the underlying  
23 dwelling approval" to which petitioner refers do not relate  
24 to the challenged grading permit. Petitioner does not  
25 identify any land use standard that would impose a time  
26 limitation on the issuance of a grading permit. Nor does  
27 petitioner establish that issuance of a grading permit is  
28 dependent or conditioned upon the existence of a valid  
29 building permit.

30 Petitioner does not argue that the county's grading

1 permit requirements themselves do not contain clear and  
2 objective standards. At oral argument, petitioner's  
3 attorney acknowledged that if we were to find jurisdiction  
4 over this matter and remand it to the county for findings,  
5 the findings petitioner seeks would not relate to the  
6 grading permit requirements. Rather, petitioner seeks  
7 findings from the county as to whether the building permit  
8 was timely issued, and whether the proposed amount of  
9 grading violates the FMP. This acknowledgment underlies the  
10 jurisdictional problem with this appeal: petitioner does  
11 not challenge the grading permit itself or contend that the  
12 grading permit requirements are discretionary.

13 Petitioner's dispute is with the issuance of the  
14 building permit or with the FMP itself. However,  
15 petitioner's belief that the issuance of the building permit  
16 violates a condition of the FMP does not make the grading  
17 permit a land use decision. Even if the amount of grading  
18 proposed would substantively violate the FMP, that FMP  
19 violation would not convert the clear and objective  
20 standards under which the grading permit was issued into  
21 discretionary standards.

22 The challenged grading permit is not a land use  
23 decision.

24 This appeal is dismissed.