BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID VANSPEYBROECK, CRAIG SWINFORD,
ANNE SWINFORD, RICHARD BUTLER,
SUE BUTLER, ROBERT STEELE, CARLEEN STEELE,
BARBARA RICE, ROBERT (GARY) APPERSON,
CAROL APPERSON, FRED PANZER, GAIL PANZER,
WESS PRICE and DIANE PRICE,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent,

and

CAMDEN INNS, LLC,
Intervenor-Respondent.

LUBA No. 2005-182

CAMDEN INNS, LLC,
Petitioner,

vs.

TILLAMOOK COUNTY,
Respondent,

and

DAVID VANSPEYBROECK, CRAIG SWINFORD,
ANNE SWINFORD, RICHARD BUTLER,
SUE BUTLER, ROBERT STEELE, CARLEEN STEELE,
BARBARA RICE, ROBERT (GARY) APPERSON,
CAROL APPERSON, FRED PANZER, GAIL PANZER,
WESS PRICE and DIANE PRICE,
Intervenors-Respondent.

LUBA No. 2005-185

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Edward J. Sullivan and Carrie A. Richter, Portland, represented petitioners/intervenors-respondent Vanspeybroeck et al.

William Sargent, County Counsel, Tillamook, represented respondent.

Andrew H. Stamp, Lake Oswego, represented intervenor-respondent/petitioner Camden Inns, LLC.

DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

DISMISSED 03/24/2006

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Davies.

NATURE OF THE DECISION

These consolidated appeals involve a decision by the county board of commissioners on a local appeal of a building permit.

INTRODUCTION

On December 21, 2005, petitioners in LUBA No. 2005-182 (opponents) filed a notice of intent to appeal (NITA) the building permit. On December 23, 2005, opponents and the county filed a stipulated motion for indefinite postponement of the appeal. Intervenor-respondent, Camden Inns, LLC (applicant), filed a motion to intervene on December 27, 2005. After that motion was filed, but before that motion was received by the Board, we granted the motion for indefinite postponement. *Vanspeybroeck v. Tillamook County*, ___ Or LUBA ___ (LUBA No. 2005-182, Order, December 28, 2005).[1] On December 28, 2005, the applicant filed its own appeal of the challenged decision. LUBA No. 2005-185. Opponents intervened in LUBA No. 2005-185, and the appeals were consolidated.

MOTION TO STRIKE

Applicant opposes the indefinite postponement, arguing that the challenged decision is a final land use decision subject to this Board's jurisdiction and that indefinite postponement is not allowed.

Because the record has not yet been filed, applicant's memorandum of law in opposition to opponents' motion for indefinite postponement includes assertions of fact and also includes an affidavit asserting certain facts. Petitioners move to strike those facts, arguing that we may only review the challenged decision itself in determining jurisdiction.

Opponents are correct that, in general, our review is limited to the record. ORS

[1] The applicant's motion was received by the Board later that afternoon.

197.835(2)(a).[2] However, we have held that we will consider evidence outside the record for the sole purpose of determining jurisdiction. *Flying J. Inc. v. Marion County*, 47 Or LUBA 637, 639 (2004); *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988).

Opponents' motion to strike is denied.

REQUEST FOR DETERMINATION OF JURISDICTION

In response to the applicant's objection to the indefinite postponement, opponents requested a determination of LUBA's jurisdiction. We set out the relevant facts before turning to the issue of LUBA's jurisdiction.

A. Facts

Sometime in the 1940's, a two-story building was constructed on the subject property. The first floor has historically been used as a restaurant/bar known as the Anchor Tavern. The second floor has been used since at least 1980 as a residence. The local code now requires off-street parking for the existing residence, but because the building was constructed almost to the property line, there is no room for off-street parking.[3]

In the fall of 2004, the applicant applied for a conditional use permit (CUP) for approval of ten motel units, and the addition of a third story. Because the record has not yet been filed in this case, the planning commission decision is not before us. Accordingly, it is unclear exactly what the planning commission approved. However, the applicant asserts that

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[2] ORS 197.835(2)(a) provides: "[r]eview of a decision under ORS 197.830 to 197.845 shall be confined to the record."

[3] Tillamook County Land Use Ordinance (LUO) 4.030(13) provides the following off-street parking requirements:

> "(a) RESIDENTIAL: Two spaces for the first dwelling unit, and one space for each additional dwelling unit.
>
> "* * * * *
>
> "(c) MOTEL, HOTEL OR GROUP COTTAGES: One space for every unit."

an agreement was reached whereby the planning commission waived the requirement for off-street parking in exchange for the applicant's agreement to reduce its request to five motel units.[4] The planning commission approved the CUP application allowing five units, but the decision was apparently unclear on the allowed height of the building or the continuation of the existing residence.

In February, 2005, the planning director issued a building permit that allowed a three-story building, including the existing restaurant and bar on the first floor, a residence and one motel unit on the second floor, and four motel units on a third floor. Opponents appealed the building permit to the planning commission. As far as we can tell, the planning commission concluded that the previously approved CUP did not approve a residence and that the residence was a nonconforming use to the extent that no off-street parking was provided in conjunction with that residential use.[5] Further land use review regarding the nonconforming residential use would therefore be required before a building permit could be approved.[6] The planning commission therefore concluded that the planning director erred in granting a building permit that included a residence on the second floor.[7]

Both the applicant and opponents appealed the planning commission decision to the county board of commissioners. The board of commissioners affirmed the planning

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[4] We assume the planning commission purported to waive the off-street parking requirement for motel units. *See* n 3.

[5] As relevant, LUO 7.020(1)(a) defines nonconforming use as follows:

> "A use that does not conform to current requirements of this Ordinance but which legally existed at the time the applicable section(s) of the Ordinance took effect and has continued into the present without discontinuance as described in Section 7.020(6)."

[6] The local code does not refer to "verification" of a nonconforming use, but provides:

> "CONTINUATION: A NONCONFORMING USE OR STRUCTURE may be continued at the level of use or dimension of structure existing on the date the applicable zoning went into effect, subject to the requirements of Section 7.020." LUO 7.020(3).

[7] The applicant prevailed on some other issues appealed. However, those issues are not relevant to our disposition of this appeal.

commission's decision that further land use review was required. However, rather than merely granting the opponents' appeal and denying the building permit, the board of commissioners remanded the matter to the planning commission to determine whether a major or minor review process would be required with regard to the nonconforming residential use before granting a building permit. The board also remanded for the planning commission to conduct a hearing "as necessary to decide the merits of such review as it relates to the residence." Notice of Intent to Appeal (LUBA No. 2005-182), Exhibit A, page 6.

This appeal followed.

B. Discussion

Opponents claim to have filed their appeal of the board of commissioners' decision merely as a precautionary measure. It appears that they believe that the challenged decision is not in fact a final land use decision subject to LUBA's jurisdiction. *See* ORS 197.015(10)(a)(A).[8] Accordingly, as noted above, they filed a Request for Determination of Jurisdiction in response to the applicant's objection to the indefinite postponement. Applicant, however, argues that, although the board of commissioners remanded the matter to the planning commission, the decision is, in substance, a final land use decision.[9]

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[8] ORS 197.015(10)(a)(A) defines "land use decision" in relevant part to include:

> "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).

[9] Their position, as noted by opponents, is somewhat equivocal on this issue:

Applicant provides numerous arguments in support of a conclusion that the challenged decision is final. We decline to address all of those arguments, but focus on the one that is pertinent to our disposition of this case.

The challenged decision is subject to our jurisdiction only if it is a *final* decision or determination that concerns the adoption, amendment or application of the goals, a comprehensive plan provision or a land use regulation. ORS 197.015(10)(a)(A). We have consistently held that we do not have jurisdiction to review "interlocutory" decisions that may be rendered in advance of a local government's final decision in a land use matter. *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702, 705 (2000); *Tylka v. Clackamas County*, 20 Or LUBA 296, 301-02 (1990); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752, *aff'd* 93 Or App 73, 761 P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405-06 n 7 (1988). The applicant summarizes the cases involving interlocutory decisions, and argues that this case is distinguishable. We briefly summarize two of those cases.

In *Tylka*, the applicant applied for a permit allowing construction of a gravel driveway and parking area on property adjacent to the Salmon River. The planning staff approved the application, and opponents appealed to the hearings officer. The hearings officer affirmed portions of the planning director's decision, and remanded the decision to the planning director on two issues. The hearings officer determined that the gravel drive and parking area are "potentially subject to the requirement of ZDO § 305.05(A)(12) that filling, grading or clearing of vegetation in a 'stream corridor area,' * * * requires a conditional use permit." 20 Or LUBA at 297. He therefore remanded to the planning

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> "[W]e are not entirely sure that the decision under appeal is a 'final' decision. On balance, we think it is final within the meaning of ORS 197.015(10). In this Memorandum, we attempt to summarize existing law on the topic in an effort to help the Board decide whether, in fact, the decision is final (in which case the LUBA appeal should proceed on the merits) or whether the decision is not final (in which case, the appeals must be dismissed)." Motion to Consolidate & Memorandum of Law in Opposition to Motion for Indefinite Postponement 3.

director to (1) determine whether a conditional use permit was required, and (2) a determination of the depth of a buffer strip that he determined was required under the local code.

That decision was appealed to LUBA, and the county moved to dismiss, arguing that the challenged decision was not "final." Petitioners argued, as the applicant does in this case, that the hearings officer exceeded his authority when he remanded the matter to the planning director because no local regulation or state statute grants the hearings officer authority to remand the matter or any portion of it. The applicable code and statutory provisions authorize the hearings officer only to approve, deny or approve with conditions. In *Tylka*, we relied on our analysis in a similar previous case, *CBH Company v. City of Tualatin*, *supra*. We summarized that case in *Tylka* as follows:

> "In *CBH Company*, *supra*, we considered whether a city council decision remanding a decision of the city architectural review board (ARB) concerning the design of the applicant's proposed apartment complex was a final decision. In *CBH Company*, the planning director had originally approved the design and the planning director's approval was appealed to the ARB by a neighborhood association. The ARB rejected the design, and the applicant appealed to the city council, arguing that the ARB lacked jurisdiction because the neighborhood association lacked standing to appeal and, therefore, the planning director's approval was final. The city council determined the planning director had not given the required notice of his original decision and remanded the matter to the planning director to reissue his decision with the required notice.
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> "We decided that because the city council had remanded the matter for further proceedings, the city's proceedings were not yet complete and, therefore, the city council's decision was not a *final* decision. We stated that the petitioner in that case might yet receive on remand the design approval it sought and, if not, when the city's proceedings were complete, the petitioner could appeal the city's *final* decision to this Board and obtain review of the issue of whether the planning director's original approval became final." *Tylka*, 20 Or LUBA at 300-301 (emphasis in original; footnotes and internal citations omitted).

In *Tylka*, we rejected the petitioners' arguments for the same reasons we rejected similar arguments in *CBH Company*:

> "[P]etitioners in this case may yet receive from the county, when its proceedings are complete, the disposition of the application which they seek. Also as in *CBH Company*, if petitioners are not satisfied by the decision reached by the county at the conclusion of its proceedings, they may appeal that decision to us and may raise in that appeal the issue of whether the hearings officer exceeded his jurisdiction by remanding certain matters to the planning director." *Id*. at 301.

We dismissed the appeal in *Tylka* because the challenged decision was not a final decision.

The applicant in this case makes similar arguments to those made in *Tylka* and *CBH Company*, and argues that the board of commissioners' decision was *ultra vires* because the board did not have authority under the local code to remand the matter. Applicant also argues that the board exceeded its authority because the issue or matter that the board remanded to the planning commission was beyond the scope of the application. The decision on appeal was the approval of a building permit, it asserts, and the board did not have authority to require that an additional land use review process be initiated without the applicant's consent. According to the applicant, the board clearly denied the building permit, which was the decision that was on appeal, and it did not have authority to remand to the planning commission for a determination of whether approval of the residence would require major or minor land use review. The applicant argues that this case is unlike *Tylka* and *CBH Company* because, here, the board's decision precludes the result sought by applicant, *i.e*., "final occupancy for the residence without undertaking additional land use review." Motion to Consolidate & Memorandum of Law in Opposition to Motion for Indefinite Postponement 19.

We do not agree with the applicant that the challenged decision precludes the result sought by the applicant if that intended result is correctly identified as the approval of a building permit for development it seeks, even if it requires additional land use review. In this respect, this case is no different than *Tylka*. In *Tylka*, the hearings officer remanded the appealed permit, in part, for a determination of whether a conditional use permit was required. We did not determine whether the hearings officer erred in doing so, but dismissed

the appeal because the decision on appeal was not final. Similarly, even if the board's decision in this case to remand the building permit decision to the planning commission for the reason it provided was *ultra vires*, as the applicant asserts, that would not render the challenged decision a "final" land use decision. Again, as we stated in *Tylka*,

> "if petitioners are not satisfied by the decision reached by the county at the conclusion of its proceedings, they may appeal that decision to us and may raise in that appeal the issue of whether the hearings officer exceeded his jurisdiction by remanding certain matters to the planning director." *Tylka*, 20 Or LUBA at 301.

We do not have jurisdiction to determine at this point whether the board was correct in remanding the decision to the planning commission. The fact is that it did remand the matter. If the board erred in doing so, the applicant may make that argument in an appeal of the county's final decision.[10] The decision will become final "[o]nly when all county proceedings on the subject application are complete."[11] *Id.* at 302.[12] Accordingly, we lack jurisdiction to review the challenged decision.

These consolidated appeals are dismissed.

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[10] We also noted in *CBH Company* and in *Tylka* that ORS 197.825(2)(a) imposes a separate requirement, independent of the finality requirement, that a decision be "the final outcome of the proceedings below in order to be subject to LUBA review." *CBH Company*, 16 Or LUBA at 405-06 n 7.

[11] In determining that the challenged decision is not a "final" land use decision, we do not mean to suggest that the applicant necessarily must proceed through the land use review process for which the board of commissioners has remanded the matter. If the applicant chooses not to apply for such review or otherwise participate in proceedings before the planning commission, and any available local appeal of the planning commission's subsequent denial of the building permit is exhausted, the city's decision will be final and subject to appeal to LUBA. The applicant may also choose to participate in the proceedings before the planning commission under protest, thus preserving its right to challenge the board's decision to remand the matter to the planning commission for further land use review. *See also Recovery House VI v. City of Eugene*, 150 Or App 382, 386, 946 P2d 342 (1997) (where applicant chooses to proceed with application for a conditional use permit under protest, it preserves the right to challenge, at LUBA, the local government's decision that a conditional use permit was required).

[12] The applicant's objection to indefinite postponement is moot.