BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES, JEFF GILMORE,
JEANNIE GILMORE and ELIZABETH COKER,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

DONALD E. ROWLETT and JEAN ROWLETT,
Intervenors-Respondents.

LUBA No. 2015-097

FINAL OPINION
AND ORDER

Appeal on remand from the Court of Appeals.

William H. Sherlock, Eugene, represented petitioners.

Joel C. Benton, County Counsel, Medford, represented respondent.

H. M. Zamudio, Medford, represented intervenors-respondents.

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

RYAN, Board Member, dissenting.

DISMISSED 02/23/2017

You are entitled to judicial review of this Order. Judicial review is

governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appealed a county decision that stipulates to alterations to a guest ranch that is a nonconforming use.

JURISDICTION

The present appeal is on remand from the Court of Appeals. *Rogue Advocates v. Jackson County*, 282 Or App 381, 385 P3d 1262 (2016). LUBA's decision remanded the challenged county stipulation. *Rogue Advocates v. Jackson County*, __Or LUBA __ (LUBA No. 2015-097/2016-009, July 14, 2016). The court reversed and remanded our decision. We refer to the county's decision as the Second Stipulation. In our decision, we concluded that petitioners' appeal of the Second Stipulation was timely filed, because the appeal had been filed within 21 days of the date that petitioners knew or should have known of the decision, pursuant to ORS 197.830(3)(b).[1]

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[1] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10) * * *, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

That conclusion was based on a declaration submitted by petitioners' attorney, stating that petitioners hired their attorney on November 10, 2015, to investigate proposed hotel development at the guest ranch, which petitioners had apparently seen advertised on a website. Petitioners' attorney inquired with the county to determine whether the county had issued any approvals for development at the guest ranch. On November 16, 2015, the county informed the attorney that the proposed development was authorized by the Second Stipulation. On the same date, petitioners' attorney obtained a copy of the Second Stipulation and shared it with petitioners. Twenty-one days later, on December 7, 2015, petitioners appealed the Second Stipulation to LUBA.

On appeal to LUBA, the parties eventually appeared to agree that the deadline and standing to appeal the Second Stipulation was governed by ORS 197.830(3)(b), which provides that an adversely affected party may appeal a decision made without a hearing within 21 days of the date the petitioner knew or should or known of the decision. *See* n 1. Petitioners argued that the appeal was timely because it was filed within 21 days of November 16, 2015, the date that petitioners obtained a copy of the Second Stipulation that authorized the development that petitioners had earlier seen advertised on the website. Intervenors-respondents (intervenors) argued that petitioners failed to provide any evidence regarding the earliest date that petitioners (1) had actual knowledge of the Second Stipulation, or (2) were placed on "inquiry notice" of the decision.

The parties' pleadings on this point were shaped by the framework we articulated in *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002). In *Rogers*, we stated:

> "[I]t is clear under ORS 197.830(3)(b) that where a petitioner does not have knowledge of the decision, but observes activity or otherwise obtains information reasonably suggesting that the local government has rendered a land use decision, the petitioner is placed on inquiry notice. If the petitioner makes timely inquiries and discovers the decision, the 21-day appeal period begins on the date the decision is discovered. Otherwise, the 21-day appeal period begins to run on the date the petitioner is placed on inquiry notice."

In our decision, we concluded based on inferences drawn from the pleadings and the declaration of petitioners' attorney that (1) petitioners were placed on "inquiry notice" no earlier than November 10, 2015, the date they hired their attorney to investigate the development seen advertised on the website, and (2) petitioners first obtained actual knowledge that the Second Stipulation had authorized the proposed development no earlier than November 16, 2015, the date they obtained a copy of the Second Stipulation. Based on those inferences, we concluded that the appeal of the Second Stipulation was timely filed under the *Rogers* framework, because the appeal was filed within 21 days of the date petitioners knew or should have known of the Second Stipulation.

On appeal, the Court of Appeals reviewed our findings of fact regarding when petitioners knew or should have known of the Second Stipulation for substantial evidence. The court concluded that there was not substantial

evidence in LUBA's record regarding (1) the date when petitioners first learned of the proposed development and were thus placed on inquiry notice under *Rogers*, and (2) the date when petitioners first had actual knowledge that the Second Stipulation authorized the disputed development. Because petitioners failed to meet their burden of proof on both those points, the court concluded, LUBA's factual conclusions regarding when petitioners knew or should have known of the Second Stipulation, and LUBA's ultimate conclusion that the appeal was timely filed, were not supported by substantial evidence.

The court reversed and remanded the decision to LUBA "to dismiss the appeal, unless LUBA exercises its discretion under ORS 197.835(2) and OAR 661-010-0045 to entertain a motion to take additional evidence."[2] 282 Or App

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[2] ORS 197.835(2)(b) provides that

> "In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. * * *"

OAR 661-010-0045 implements ORS 197.835(2)(b). OAR 661-010-0045(1) sets forth the permissible grounds for taking evidence not in the record:

> "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

at 392. The court issued its opinion on November 23, 2016, and its appellate judgment on January 17, 2017. On remand, we now consider whether to exercise our discretion to allow petitioners to submit additional evidence to demonstrate that the appeal was timely under ORS 197.830(3)(b). For the following reasons, we decline to do so.

In the proceedings before LUBA, petitioners had an initial obligation to state in the petition for review "the facts that establish petitioner's standing[.]" OAR 661-010-0030(4)(a). Petitioners filed a petition for review that included no such facts, but simply asserted that "Petitioners timely filed their Notice of Intent to Appeal with LUBA on December 7, 2015 (LUBA No. 2015-097), within 21 days of learning of the existence of the [Second Stipulation]." Petition for Review 2.

In their response brief, intervenors challenged petitioners' standing, arguing that petitioners had failed to allege or establish facts demonstrating that the appeal was timely filed under any statute. Petitioners then filed (1) a motion to take evidence under OAR 661-010-0045(1) that in relevant part requested that LUBA consider the declaration of their attorney, and (2) a reply brief that provided additional argument regarding timely filing. The reply brief

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> shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

asserted, for the first time in this appeal, that petitioners relied upon ORS 197.830(3)(b) to establish the applicable deadline and standards for timely filing. Intervenors filed a response to the motion to take evidence, and petitioners filed a reply to that response. LUBA granted the motion to take evidence to consider the declaration of petitioners' attorney and other information submitted regarding timely filing. As noted, LUBA ultimately concluded that petitioners' had met their burden of demonstrating that the appeal was timely filed under ORS 197.830(3)(b). However, as the Court concluded, the evidence petitioners submitted to LUBA was not sufficient to meet their burden of proof under the *Rogers* framework.

On January 26, 2017, following issuance of the court's appellate judgment, petitioners filed a second motion to take evidence, requesting that LUBA exercise its discretion to consider the declarations of petitioners' attorney, two representatives of petitioner Rogue Advocates, and the two named petitioners Jeff Gilmore and Jeannie Gilmore. The declarations state facts that, if uncontroverted or believed despite countervailing evidence, would probably suffice to establish that one or more of the petitioners did not have actual or inquiry knowledge of the Second Stipulation more than 21 days prior to the date the appeal was filed.

Intervenors oppose the motion, arguing that petitioners had multiple opportunities during the first appeal to meet their burden of proof of establishing that they knew or should have known of the challenged decision

no earlier than 21 days before filing the appeal. Intervenors note that petitioners initially had the burden of demonstrating standing and jurisdiction in filing the petition for review. After intervenors challenged that showing as insufficient, petitioners responded with a motion to take evidence and a reply brief, following by a further pleading. Intervenors argue that during that extended round of pleadings, petitioners had multiple opportunities to provide LUBA with evidence necessary to establish standing and timely appeal, but failed to do so. We understand intervenors to argue that granting petitioners a third or fourth opportunity to present evidence that they could have presented, but failed to present, during the first appeal is not consistent with the legislative policies, articulated at ORS 197.805, that "time is of the essence" in reaching final decisions in land use matters and that decisions be made "consistently with sound principles governing judicial review."[3]

In the event that LUBA grants petitioners' motion and considers the new affidavits, intervenors have filed a contingent motion to seek and obtain evidence in the form of documents and depositions pursuant to OAR 661-010-

[3] ORS 197.805 provides:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

0045(2), regarding the dates petitioners were placed on inquiry notice or otherwise knew or should have known of the decision.[4]

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[4] OAR 661-010-0045(2) provides:

"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: (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).

"(d) Subpoenas: the Board shall issue subpoenas to any party upon a showing that the witness or documents to be subpoenaed will provide evidence relevant and material to the grounds for the motion. Subpoenas may also be issued under the signature of the attorney of record of a party. Witnesses appearing pursuant to subpoena, other than parties or employees of the Board, shall be tendered fees and mileage as prescribed by ORS 44.415(2) for witnesses in civil actions. The party requesting the subpoena shall be

We agree with intervenors that petitioners have not offered a persuasive reason for the Board to exercise our discretion to grant petitioners another opportunity to present evidence to establish standing and timely appeal under ORS 197.830(3)(b). Petitioners do not argue that the information in the new affidavits could not have been asserted in support of the first motion to take evidence. All the asserted facts appear have been within the declarants' possession and control at all relevant times. Petitioners had multiple opportunities during the initial appeal to assert facts necessary to meet their burden of demonstrating standing and timely appeal. For whatever reason, petitioners failed to do so.

We also agree with intervenor that exercise of our discretion to allow petitioners another opportunity to present evidence to establish standing and timely appeal should be guided by the legislative policies articulated at ORS 197.805. Petitioners do not suggest any other sources of guidance or principles cabining our discretion. There is no possible dispute that granting petitioners another opportunity to present evidence to meet their burden of demonstrating standing and timely appeal would significantly extend these already lengthy proceedings. Almost certainly, LUBA would have to grant intervenor's contingent motion for discovery and deposition, which would entail significant delay (and expense) to the parties, far beyond that already incurred. At the end

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responsible for service of the subpoena and tendering the witness and mileage fees to the witness."

of that evidentiary process, the parties would engage in another round of pleadings arguing the significance of the discovered documents and deposed testimony, and LUBA would issue an order resolving the evidentiary conflicts and adopting findings of fact and conclusions of law, and ultimately a final opinion either dismissing the appeal or remanding the decision to the county. Even with the generous assumption that no party would appeal our second final opinion to the Court of Appeals, the potential for significant further delay in reaching finality in this land use proceeding cannot be minimized. Under these circumstances, we do not believe that granting petitioners' motion would be consistent with the legislative policy that time is of the essence in reaching finality in land use matters.

We also do not think it would be particularly consistent with the other policy articulated in ORS 197.805, that LUBA's decisions be made consistent with sound principles of judicial review. Generally, the party with the burden of establishing LUBA's jurisdiction must do so, at the latest, prior to LUBA's issuance of its final opinion, which is the last opportunity for LUBA to ensure that it is properly exercising its review authority over an appeal, before resolving the merits of that appeal. In the present case, petitioners offer no reason why LUBA should depart from the general principle that LUBA's jurisdiction must be established prior to LUBA's exercise of its jurisdiction to resolve an appeal.

Accordingly, petitioners' second motion to take evidence is denied.

For the reasons set out in the court's opinion, petitioners failed to establish standing and timely appeal of this decision. Accordingly, LUBA lacks jurisdiction.

This appeal is dismissed.

Ryan, Board Member, dissenting.

I respectfully disagree with the majority's decision to deny petitioners' second motion to take evidence and consequently, to dismiss the appeal. In the circumstances presented in this appeal, I would allow petitioners' and intervenors' motions to take evidence not in the record.

The actions of the county that led to petitioners' appeal of the challenged decision are described in detail in *Rogue Advocates v. Jackson County*, __ Or LUBA __ (LUBA No. 2015-097/2016-009, July 14, 2016) (*Rogue Advocates I*). The board of county commissioners authorized the county administrator to enter into a private agreement (Second Stipulation) with intervenors to allow intervenors to significantly expand an existing nonconforming use on their agriculturally-zoned property, to allow development of a 200-room hotel. The county's decision to enter into that private agreement between the county and intervenors failed to comply with laws that govern the procedure for expansion of a non-conforming use. *Rogue Advocates I*, slip op 29.

Under the rubric the legislature has established for appealing a land use decision, the county's decision to enter into that private agreement amounted to a land use "decision made without a hearing," and as a result ORS 197.830(3)

provided the timeline for appealing that decision. ORS 197.830(3) allows a "less expeditious process" for reaching final land use decisions. *Aleali v. City of Sherwood*, 262 Or App 59, 67 n 4, 325 P3d 747 (2014). Petitioners argued that ORS 197.830(3)(b) applied, and provided evidence intended to satisfy their burden to establish that their appeal was timely filed under ORS 197.830(3)(b). LUBA agreed that the evidence established that their appeal was timely filed. The Court of Appeals ultimately disagreed with LUBA's conclusion about that evidence, and pointed out the deficiencies in that evidence. *Rogue Advocates v. Jackson County*, 282 Or App 381, 391, 385 P3d 1262 (2016) (*Rogue Advocates II*). In particular, the court noted the absence of an assertion by petitioners that none of the petitioners were aware of the Second Stipulation prior to November 16, 2015, the date that their attorney received and provided a copy of the Second Stipulation to them. *Id*. at 390.

Petitioners then filed a second motion to take evidence to address the deficiencies the Court of Appeals identified, namely the absence of an assertion by petitioners that none of the petitioners knew about the county's authorization of the hotel development or the Second Stipulation prior to November 16, 2015. That motion was filed within 14 days of the date that the appellate judgment was issued. The majority acknowledges that petitioners' motion to take evidence was timely filed, and that the evidence that petitioners seek to submit would "probably suffice" to establish that one or more of the petitioners have standing, *i.e.* did not have actual or inquiry knowledge of the

decision more than 21 days prior to the date the appeal was filed. *Slip opinion* 8. However, the majority relies on the legislative policy codified at ORS 197.805 that "time is of the essence" in reaching final decisions on matters involving land use, and concludes that granting petitioners' second motion to take evidence would be inconsistent with that legislative policy.

The legislative policy that "time is of the essence in reaching final decisions involving land use matters" has been cited and relied on as a basis for justifying the expedited timelines for review of land use decisions, and in part as a basis for the "law of the case" principle articulated in *Beck v. City of Tillamook*, 313 Or 148, 152, 831 P2d 678 (1992). *See Maguire v. Clackamas County*, 250 Or App 146, 161, 279 P3d 314 (2012) (the legislative policy that "time is of the essence" supports LUBA's adoption of OAR 661-010-0075(11), requiring a petitioner to file a motion to transfer to circuit court within 14 days of jurisdiction being challenged); *Gordon v. City of Beaverton*, 52 Or App 937, 942-43, 630 P2d 366, *aff'd* 292 Or 228 (1981) (relying on "time is of the essence" to conclude that the deadline for filing the petition for review is mandatory and cannot be extended by LUBA without the agreement of the opposing parties). As far as I am aware, the legislative policy that "time is of the essence" has not been invoked as a basis to deny a motion to take evidence not in the record that is timely filed and otherwise satisfies all of the requirements of ORS 197.835(2) and OAR 661-010-0045. I do not believe that

reliance on that legislative policy to deny petitioners' motion is supported in the circumstances of this appeal.

Importantly, a second legislative policy contained in ORS 197.805 is that "final decisions in matters involving land use * * * be made consistently with sound principles governing judicial review."[5] Some judicial guidance on the importance of that legislative policy was provided by the Supreme Court in *Smith v. Douglas County*, 308 Or 191, 777 P2d 1377 (1989).

In *Smith v. Douglas County*, the planning commission approved Smith's conditional use permit application, and neighbors appealed to the board of county commissioners, alleging seven errors. The board of county commissioners addressed one of the seven alleged errors and decided it in Smith's favor. But the board of commissioners reversed the planning commission's decision that another criterion had been met, even though the

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[5] In *Valley & Siletz Railroad v. Laudahl*, 296 Or 779, 681 P2d 109 (1984), the Supreme Court explained that the intent of the statutes creating LUBA was to simplify appeal of land use decisions:

> "A legislative sponsor of the establishment of LUBA, Senator Ragsdale, stated that formation of LUBA would 'cut down the potential for forum shopping in land use appeals. The concern was also to cut down the opportunity to divide the question and go into multiple forums.' Minutes, House Committee on Judiciary 4, June 18, 1979. Similarly, Lee Johnson testified that the essence of LUBA was to consolidate the then-expiring procedural complexities into a single administrative proceeding." *Id*. at 786, n 5.

planning commission's decision on that criterion was not included as one of the seven alleged errors.

Smith appealed to LUBA, and LUBA agreed with Smith that the board of commissioners did not have the authority under the county's land development ordinance to consider an issue that was not one of the seven alleged errors. LUBA remanded the decision for the board of commissioners to consider the remaining six appeal issues.

Smith appealed LUBA's decision to the Court of Appeals, which affirmed, and to the Supreme Court. Before the Supreme Court, Smith argued that LUBA's remand of the decision for the board of commissioners to consider the remaining six appeal issues "contravenes the legislative policy of expedited conclusion of land use proceedings." 308 Or at 194. Smith argued that legislative policy of speedy resolution required LUBA to treat the board of county commissioners' denial of the permit on a single ground as approval of all other applicable criteria, or in other words, as a rejection of the other appeal issues that were raised. *Id*.

In affirming the decision that remand to address the remaining six errors was appropriate, the Supreme Court considered and rejected Smith's argument that LUBA's remand of the decision for the board of commissioners to address the six remaining alleged errors contravened the legislative policy that "time is of the essence[:]"

> "And speedy resolution is not supposed to sacrifice correct decision, as it may do if issues are 'deemed waived' in procedural

> tangles so that no tribunal considers their merits. This always is a risk of leaving the public administration of policies important to the whole community to adjudication between private parties. Land use decisions, even when contested by interested parties, are more than the resolution of private disputes. They are the administration of public policies whose correct or incorrect application often will shape the community long after the immediate contesting parties have left the scene. An applicant unquestionably is entitled to an expeditious correct decision, but the statutes do not compel LUBA to affirm an arguably wrong decision simply because the county board stopped considering the remaining issues after rejecting the application on a basis that, in this case, had not been properly raised. LUBA did not exceed its authority in remanding those issues to the board." *Id*. at 196.

Admittedly the factual situation in this appeal differs from the factual situation in *Smith*. However, in *Smith*, the Supreme Court concluded that the legislative policy in ORS 197.805 that "time is of the essence" in reaching final decisions on matters involving land use did not outweigh the importance of reaching a correct decision. In the circumstances presented here, the balance weighs in favor of granting petitioners' motion to take evidence in order for LUBA to reach a correct decision on standing.

LUBA previously determined in its final opinion in *Rogue Advocates I* that the evidence petitioners presented was sufficient to establish standing. The necessity of presenting the additional evidence that petitioners now seek to present only became apparent to petitioners (and LUBA) when the Court of Appeals held in *Rogue Advocates II* that the evidence presented to LUBA was insufficient to establish standing, and in its opinion identified deficiencies in that evidence. Accordingly, the majority's faulting of petitioners for failing to

present, during the LUBA proceeding that led to our decision in *Rogue Advocates I*, the evidence they now seek to present to LUBA after remand from the Court of Appeals seems counter-intuitive, to say the least. Petitioners now seek to address the deficiencies identified by the Court of Appeals in the only forum in which they may be addressed, before LUBA.

Where, as here, the county circumvented the land use process and authorized the proposed hotel development/expansion of a nonconforming use through a private agreement between the county and intervenors without any public notice or participation that is required by law, I believe that the legislative policy that decisions be made "consistently with sound principles governing judicial review," *i.e.*, that LUBA reach a correct decision on standing, more strongly supports allowing petitioners to present the evidence to LUBA that the Court of Appeals determined was lacking. I believe that the policy that "time is of the essence" in reaching final decisions on matters involving land use provides little support for denying the motion in these circumstances. I would also grant intervenors' motion that seeks to obtain and present evidence to refute petitioners' evidence.

For the above reasons, I respectfully dissent.