

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

3
4 DEAN W. DEVLIN and LAWNNA K. DEVLIN,
5 *Petitioners,*

6
7 vs.

8
9 LINN COUNTY,
10 *Respondent,*

11
12 and

13
14 WILLIAM L. BANKS
15 and RECYCLING DEPOT, INC.,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2016-093

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Linn County.

24
25 William H. Sherlock, Eugene, filed the petition for review and argued on
26 behalf of petitioners. With him on the brief was Hutchinson Cox.

27
28 No appearance by Linn County.

29
30 Edward F. Schultz, Albany, filed the response brief and argued on behalf
31 of intervenor-respondent. With him on the brief was Weatherford Thompson.

32
33 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
34 Member, participated in the decision.

35
36 DISMISSED 02/21/2017

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

1 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a decision by the board of county commissioners related to intervenors’ application for an Oregon Department of Motor Vehicles (DMV) business certificate to operate as a motor vehicle dismantler.

FACTS

Intervenors own and operate an existing wrecking yard on their property. They apparently did so for some time without the benefit of the required DMV business certificate. The DMV business certificate at issue in this appeal authorizes intervenors to dismantle motor vehicles at that wrecking yard. Petitioners own property that adjoins the wrecking yard property to the south. Intervenors and petitioners have had a long-running dispute about whether the wrecking yard encroaches onto petitioners’ adjoining property.

Intervenors filed an application with the county for the business certificate on March 4, 2014. Record 22. In a March 12, 2014 memorandum to the board of county commissioners, planning staff stated that a recent site visit disclosed that a shipping container and a new building or a building addition had been sited on the property without building permits. The planning department recommended that the board of commissioners require intervenors to secure building permits before the business certificate was approved. Record 21. In a March 18, 2014 letter, the board of county commissioners advised intervenors of the planning department’s adverse recommendation and

1 asked that intervenors take one of three courses of action. Record 20. When
2 the intervenors did not take any of those courses of action, the board of
3 commissioners returned intervenors' application, and in a July 9, 2014 letter,
4 the board of commissioners advised intervenors that after they resolved the
5 issues raised by the planning department they could resubmit their application.
6 Record 19. Approximately one year later, in a July 20, 2015 letter to the Board
7 of County Commissioners, the Linn County Surveyor described the property
8 line dispute between petitioners and intervenors. Record 17-18.

9 On August 24, 2015 intervenors resubmitted their application for a DMV
10 business certificate. Record 15. The planning director apparently took the
11 position that it was up to the board of county commissioners to decide whether
12 to approve the application, and that the county "could deal with any
13 outstanding land use issues next time they come up for renewal." Record 15.
14 Two days later, on August 26, 2015, the board of commissioners decided to
15 separate the property line dispute from the DMV wrecking business certificate,
16 and voted to approve the application. Petitioners filed this appeal a little more
17 than one year later, on August 30, 2016.

18 **REPLY BRIEF**

19 Petitioners move to file a reply brief to respond to intervenors' standing,
20 jurisdictional, and waiver challenges, as well as their argument that because the
21 board of commissioners' decision was unanimous, it does not matter if one of

1 the county commissioners might be biased, as petitioners allege in their first
2 assignment of error.

3 Under OAR 661-010-0039 a reply brief must be “confined solely to new
4 matters raised in the respondent’s brief * * *.” We consider each of the matters
5 identified by petitioners to constitute new matters. The reply brief is allowed.

6 **MOTIONS TO CONSIDER EXTRA-RECORD EVIDENCE**

7 LUBA review of a land use decision on the merits is generally limited to
8 the record that is transmitted to the Board by the county. ORS 197.835(2)(a).
9 However, ORS 197.835(2)(b) authorizes LUBA to consider extra-record
10 evidence in certain specified circumstances.¹ Petitioners and intervenors have
11 filed motions asking that we consider extra-record evidence. In addition, we
12 have held on a number of occasions that we may consider extra-record
13 evidence to resolve whether we have jurisdiction to proceed with an appeal to
14 consider the merits of the appeal, without a motion to consider extra-record
15 evidence under ORS 197.835(2)(b). *Jensen v. City of Eugene*, 69 Or LUBA
16 234, 242 (2014); *Hardesty v. Jackson County*, 58 Or LUBA 162, 164 (2009);
17 *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988).

¹ ORS 197.835(2)(b) provides, in part:

“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.”

1 We resolve the parties’ motions before turning to intervenors’ jurisdictional
2 challenge and petitioners’ assignments of error.

3 **A. Petitioners’ December 20, 2016 Motion to Consider Extra-**
4 **Record Evidence**

5 In this motion, petitioners ask us to consider evidence that they believe
6 demonstrates that one of the county commissioners is biased against petitioners
7 in this matter and should have recused himself. That evidence is presented in
8 support of petitioner’s first assignment of error.

9 For the reason explained below, we ultimately conclude we lack
10 jurisdiction to review the challenged business certificate decision. We therefore
11 deny petitioners’ December 20, 2016 motion.

12 **B. Petitioners’ January 23, 2016 Motion to Consider Extra-**
13 **Record Evidence**

14 Along with their reply brief, petitioners included declarations by both
15 petitioners to establish that the notice of intent to appeal in this case was filed
16 within the 21-day deadline established by ORS 197.830(3)(a), which is
17 measured from the date petitioners received actual notice of the board of
18 commissioners’ decision, and that LUBA thus has jurisdiction to proceed with
19 this appeal. Intervenors oppose the motion on a number of grounds.

20 The reply brief and declarations were submitted to respond to
21 intervenors’ jurisdictional and standing challenges. ORS 197.835(2)(b)
22 authorizes LUBA to consider extra-record evidence “[i]n the case of disputed
23 allegations of standing[.]” In addition, as explained above, LUBA may

1 consider extra-record evidence to resolve a jurisdictional challenge without a
2 motion to consider extra-record evidence under ORS 197.835(2)(b).
3 Petitioners' January 23, 2016 motion is granted.

4 **C. Intervenors' January 26, 2016 Motion to Consider Extra-**
5 **Record Evidence**

6 Intervenors filed a motion asking that LUBA consider pages from the
7 Linn County Comprehensive Plan and Rural Development Zone Code. As far
8 as we can tell, all of those pages are proper subjects for official notice under
9 Oregon Evidence Code Rule 202; ORS 40.090(7).² Because we take official
10 notice of those documents, a ruling on intervenors' motion to consider extra-
11 record evidence is unnecessary.

12 **JURISDICTION**

13 Intervenors challenge petitioners' standing and argue this appeal should
14 be dismissed because it was not timely filed. We ultimately conclude that the
15 challenged decision qualifies for the exception to the statutory definition of
16 "land use decision" set out at ORS 197.015(10)(b)(A), which requires that we
17 dismiss this appeal. For that reason we need not and do not resolve the parties'

² ORS 40.090(7) authorizes judicial notice of:

"An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015."

1 dispute concerning petitioners’ standing and whether this appeal was timely
2 filed under ORS 197.830.

3 LUBA has exclusive jurisdiction to review land use decisions. ORS
4 197.825(1). ORS 197.015(10) defines the term “[l]and use decision” to include
5 “[a] final decision” “by a local government” “that concerns the * * *
6 application of” “[a] land use regulation[.]” The challenged decision was
7 required to apply the county’s land use regulations, because the county was
8 required to determine whether the property is zoned industrial or some other
9 zone that allows vehicle dismantling. The challenged decision therefore is a
10 land use decision, subject to LUBA review, unless one of the exceptions to the
11 statutory definition of land use decision set out at ORS 197.015(10)(b) applies.
12 Intervenors earlier moved to dismiss this appeal, arguing that in signing the
13 form the board of county commissioners did not apply any county land use
14 regulations. In a November 29, 2016 Order we denied that motion, concluding
15 that since the county was required by statute to determine how the property is
16 zoned, it either applied or should have applied its land use regulations to certify
17 the property’s zoning.

18 Intervenors now argue that the exception set out at ORS
19 197.015(10)(b)(A) for decisions that are “made under land use standards that

1 do not require interpretation or the exercise of policy or legal judgment”
2 applies here.³

3 Before turning to the parties’ arguments concerning ORS
4 197.015(10)(b)(A), we note that no party argues that ORS 197.015(10)(b)(H)
5 applies here to exempt the county’s decision from the statutory definition of
6 “land use decision.” That statute exempts from the statutory definition of land
7 use decision some decisions that are commonly referred to as land use
8 compatibility statements or LUCS, in certain circumstances.⁴ The statute sets

³ ORS 197.015(10)(b)(A) provides that a land use decision, as defined by ORS 197.015(10)(a) does not include a local government decision:

“That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]”

⁴ ORS 197.015(10)(b)(H) provides the statutory definition of “[l]and use decision” does not include a local government decision:

“That a proposed state agency action subject to ORS 197.180 (1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if:

“(i) The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action;

“(ii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or

“(iii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged

1 out the circumstances in which a LUCS, which might otherwise qualify as a
2 land use decision, is not a land use decision reviewable by LUBA. *See* n 4.

3 DMV business licenses do not appear to be a “state agency action subject
4 to ORS 197.180(1).” If that is the case, the exemption from the statutory
5 definition of land use decision set out at ORS 197.015(10)(b)(H) does not
6 apply. Because we dismiss this appeal on other grounds, and no party argues
7 that this exemption to the statutory definition of land use decision applies, we
8 do not consider the question further.

9 As we have already noted, the challenged decision is an application for a
10 DMV business certificate as a dismantler of motor vehicles. Such business
11 certificates are governed by statute. ORS 822.140(1) and (2) make local
12 governments co-grantors of such certificates, along with DMV.⁵ ORS

comprehensive plan and land use regulations implementing
the plan[.]”

⁵ ORS 822.140 provides, in part:

“(1) To meet the requirement for local government approval of a dismantler certificate under ORS 822.110 or a supplemental certificate under ORS 822.125, an applicant must comply with any regulations established by a city or county under this section and must obtain the approval of the governing body * * *”

“(2) A city or county governing body shall grant approval of a dismantler certificate or renewal when requested under this section if the governing body:

1 822.140(2)(d) and 822.140(3) authorize local governments to adopt local
2 regulations for vehicle dismantlers. Linn County has not adopted such motor
3 vehicle dismantler regulations, only procedures for approving applications for
4 business certificates for such operations. Linn County Code (LCC) Title 10.

5 Line 8 of the DMV business certificate application form that is the
6 subject of this appeal form is set out below:

7 “LOCAL GOVERNMENT APPROVAL (CITY/COUNTY)

8 “By signing this application you are authorizing a dismantler
9 business to be conducted at the location listed on Line 3 of this
10 application. If a dismantler business cannot be conducted at that
11 location, or if any of the conditions below are not met, do not sign
12 the approval.

13 “I CERTIFY THAT THE GOVERNING BODY OF THE
14 CITY/COUNTY OF _____ HAS:

15 “A) APPROVED THE APPLICANT AS BEING SUITABLE
16 TO ESTABLISH, MAINTAIN OR OPERATE A MOTOR

“(a) Approves the applicant as being suitable to establish,
maintain or operate a motor vehicle dismantling
business;

“(b) Determines that the location or proposed location
meets the requirements for location under ORS
822.110;

“(c) Determines that the location does not violate any
prohibition under ORS 822.135; and

“(d) Approves the location and determines that the
location complies with any regulations adopted by a
city or county under this section.”

1 VEHICLE DISMANTLING BUSINESS (ORIGINAL
2 APPLICATIONS ONLY).

3 “B) DETERMINED THAT THE LOCATION OR PROPOSED
4 LOCATION MEETS THE REQUIREMENTS FOR THAT
5 LOCATION UNDER ORS 822.110.

6 “C) DETERMINED THAT THE LOCATION DOES NOT
7 VIOLATE ANY APPLICABLE PROVISION OF ORS
8 822.135.

9 “D) APPROVED THE LOCATION AND DETERMINED
10 THAT THE LOCATION COMPLIES WITH ANY
11 REGULATIONS ADOPTED BY THE JURISDICTION
12 UNDER ORS 822.140.

13 “I ALSO CERTIFY THAT I AM AUTHORIZED TO SIGN THIS
14 APPLICATION AND AS EVIDENCE OF SUCH AUTHORITY
15 DO AFFIX HEREON THE SEAL OR STAMP OF THE CITY OR
16 COUNTY.” Record 1.

17 Although the stamp or seal required by the form was not applied by the
18 county in this case, the chair of the board of county commissioners signed
19 below the above-quoted certificate. The board of county commissioners
20 adopted no findings, but that certification certifies that the requirements set out
21 in paragraphs A through D above are met. Those paragraphs set out the same
22 approvals and determinations set out in ORS 822.140(2)(a) through (d). *See n*
23 *5.* We address each of those paragraphs to determine if any of those paragraphs
24 required the board of commissioners to apply “land use standards that * * *
25 require[d] interpretation or the exercise of policy or legal judgment[.]” *See n 3.*
26 If not, the exception provided by ORS 197.015(10)(b)(A) applies and the
27 challenged board of county commissioners decision regarding the DMV

1 business certificate is not a land use decision subject to LUBA review, even
2 though it may otherwise fall with the ORS 197.015(10)(a) definition of “[l]and
3 use decision.”

4 **A. Paragraph A**

5 Paragraph A and ORS 822.140(2)(a) require the county to “approve[] the
6 applicant as being suitable to establish, maintain, or operate a motor vehicle
7 dismantling business[.]” Whether to grant such an approval may well require
8 the exercise of policy or legal judgment, but ORS 822.140(2)(a) is not a “land
9 use standard,” which is an integral part of the inquiry under ORS
10 197.015(10)(b)(A). *See* n 3. Since ORS 822.140(2)(a) is not a land use
11 standard, for purposes of determining whether the ORS 197.015(10)(b)(A)
12 exception applies, it does not matter if applying ORS 822.140(2)(a) required
13 the exercise of policy or legal judgment.

14 **B. Paragraph B**

15 Paragraph B and ORS 822.140(2)(b) require the county to determine
16 “that the location or proposed location meets the requirements for location
17 under ORS 822.110[.]” The only requirement under ORS 822.110 for which
18 the county must apply land use standards is set out at ORS 822.110(1)(a),
19 which provides in part:

20 “(1) Except as provided in subsection (2) of this section, the
21 Department of Transportation shall issue a dismantler
22 certificate to any person if the person meets all of the
23 following requirements:

1 “(a) The person establishes that the area in which the
2 business is located and the place of business to be
3 approved under the dismantler certificate for use in
4 the motor vehicle dismantling business are *zoned for*
5 *industrial use* or subject to another zoning
6 classification that permits the type of business
7 conducted by the dismantler.” (Emphasis added.)

8 Because the board of commissions simply signed at the bottom of the
9 DMV form, we do not know whether the board of commissioners determined
10 that intervenors’ property is “zoned for industrial use,” or whether it
11 determined intervenors’ property “is subject to another zoning classification
12 that permits the type of business conducted by the dismantler.” The documents
13 submitted by intervenors establish that it is the former.

14 Intervenors devote all of their arguments toward the statewide planning
15 goal exception to Goal 3 (Agricultural Lands) that the county adopted to allow
16 the property to be planned and zoned for something other than exclusive farm
17 use. However, the fact that the county has adopted such a statewide planning
18 goal exception to allow intervenors’ property to be planned for industrial use
19 does not answer the question posed by ORS 822.110(1)(a). Just because the
20 comprehensive plan includes an exception to *allow* the property to be planned
21 and zoned for industrial use does not mean that it *has been planned and zoned*
22 *for such use*. Intervenors’ citation of *Baker v. City of Milwaukie*, 271 Or 500,
23 514, 533 P2d 772 (1975), for the contrary proposition is simply inapposite.
24 Under *Baker* the comprehensive plan might control if the comprehensive plan
25 map designated the subject property for industrial use and the county’s zoning

1 map designated the property for something else. But as the Court of Appeals
2 explained in *Marracci v. City of Scappose*, 26 Or App 131, 133, 552 P2d 552,
3 *rev den*, 276 Or 133 (1976), the kind of conflict that under *Baker* results in the
4 zoning map designation having to give way to the comprehensive plan map
5 designation is where the zoning map designation would allow a more intensive
6 use than the comprehensive plan map designation would allow.

7 Nevertheless, the documents submitted by intervenors also establish that
8 the subject property is zoned Light Industrial (LI). Intervenors-Respondents
9 Brief Appendix A, page 3. The LI zone allows wrecking yards as a conditional
10 use. Linn County – Rural Development Zone Code 929.330(B)(1);
11 Intervenors’ January 27, 2017 Motion, Appendix VI, page 5. While it is true
12 that we do not know whether intervenors have received conditional use
13 approval for their wrecking yard, or may be operating as a nonconforming use
14 if they do not have conditional use approval, ORS 822.110(1)(a) does not
15 require the county to determine whether the wrecking yard has any required
16 conditional use approval or has been verified as a nonconforming use. All
17 ORS 822.110(1)(a) and ORS 822.140(2)(b) require is that the county determine
18 the property is *zoned for* industrial use. It is clear from the documents
19 submitted by intervenors that it is zoned for industrial use. And for purposes of
20 ORS 197.015(10)(b)(A), determining that the property is zoned industrial did
21 not require “interpretation or the exercise of policy or legal judgment.” The
22 map supplied by intervenors and cited above does not require “interpretation or

1 the exercise of policy or legal judgment” to make that determination. The
2 property is plainly designated LI.

3 **C. Paragraph C**

4 Paragraph C and ORS 822.140(2)(c) require the county to determine
5 “that the location does not violate any prohibition under ORS 822.135[.]” ORS
6 822.135 sets out a number of statutory prohibitions against certain conduct at
7 motor vehicle dismantling businesses. As was the case with Paragraph A,
8 those statutory requirements are not land use standards. So for purposes of
9 ORS 197.015(10)(b)(A), even if making determinations about any ORS
10 822.135 violations might require “interpretation or the exercise of policy or
11 legal judgment[.]” that would not render the ORS 197.015(10)(b)(A)
12 exemption inapplicable.

13 **D. Paragraph D**

14 Paragraph D and ORS 822.140(2)(d) require the county to determine
15 “that the location complies with any regulations adopted by a city or county
16 under this section.” As we noted before, no party argues that the county has
17 adopted any such regulations, under ORS 822.140.

18 **E. Conclusion**

19 The only land use standard that we have been able to identify that the
20 county was required to apply in approving the DMV business certificate is the
21 county’s LI zone. As explained above, applying that standard did not “require
22 interpretation or the exercise of policy or legal judgment.” Petitioners’

1 arguments largely turn on their contentions that intervenors’ wrecking yard has
2 trespassed across their shared property line with intervenors. Even if that is the
3 case, petitioners have identified no land use standard that requires a county
4 determination on that point before approving a DMV business certificate, and
5 the requested certificate does not authorize petitioners to operate a vehicle
6 dismantling operation on petitioners’ property. The requested business
7 certificate is to operate a motor vehicle dismantling operation on intervenors’
8 property.

9 If there is some county land use law that intervenors are violating or if
10 intervenors’ vehicle dismantling operation is trespassing on petitioners’
11 property, we see no reason why the parties’ pending circuit court litigation
12 cannot resolve those issues. For purposes of this appeal, the only land use law
13 the county was required to apply to approve the disputed DMV motor vehicle
14 dismantler business certificate required the county to apply a single land use
15 standard, which did “not require interpretation or the exercise of policy or legal
16 judgment[.]” It follows that the decision qualifies for the exception set out at
17 ORS 197.015(10)(b)(A), *see* n 3, and LUBA does not have jurisdiction to
18 review the decision.

19 Petitioners did not file a contingent motion to transfer this appeal to
20 circuit court if we conclude that we lack jurisdiction, as authorized by OAR
21 661-010-0075(11). Therefore, this appeal is dismissed. *Maguire v. Clackamas*
22 *County*, 250 Or App 146, 160-61, 279 P3d 314 (2012).