



1           **B.       The Current Appeal**

2           Following our decision in *Bagdade*, the city apparently issued or is in the process of issuing  
3 a mechanical permit, an electrical permit, a plumbing permit, a public works permit and a building  
4 permit. The “PROJECT DESCRIPTION” for each of those permits is “Convert existing retail  
5 building to three auto dealerships: Phase 1 – Bid Package B; approved 2/11/04.” Respondent’s  
6 Motion to Dismiss Petitioners’ Appeal, Exhibits A through E.

7           On March 8, 2004, petitioners filed a notice of intent to appeal. That notice of intent to  
8 appeal identifies the appealed decision as follows:

9           “[T]hat land use decision of Respondent, the City of Eugene, entitled ‘Convert  
10 Existing Retail Building To Three Auto Dealerships: Phase 1 – Bid Package.’ This  
11 land use decision was made by the City of Eugene on February 11, 2004, without  
12 any written decision, and without providing notice to any parties other than the  
13 applicant. \* \* \*” Notice of Intent to Appeal 1.

14           **C.       The City’s Motion to Dismiss and Motion to Extend Deadline for Filing the**  
15           **Record**

16           On March 23, 2004, the city filed two motions. In the first motion, it moved to dismiss this  
17 appeal. In support of that motion, the city argued that petitioners had not adequately identified the  
18 challenged decision or decisions.<sup>2</sup> The city argued that the notice of intent to appeal appeared to  
19 appeal what the city described in its motion to dismiss as “five technical permits.” Respondent’s  
20 Motion to Dismiss Petitioners’ Appeal 3. The city argued that if petitioners were appealing one of  
21 those technical permits, they must specify which one they were appealing. The city also argued that  
22 LUBA’s jurisdiction is limited to land use decisions and limited land use decisions under ORS

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<sup>2</sup> As relevant, OAR 661-010-0015(3)(c) provides that a notice of intent to appeal must include:

- “(c)     The full title of the decision to be reviewed as it appears on the final decision;
- “(d)     The date the decision to be reviewed became final;
- “(e)     A concise description of the decision to be reviewed, or a copy of either the notice of  
          decision or the decision to be reviewed;

“\* \* \* \* \*”

1 197.825(1) and that all five of those permits are excluded from the statutory definition of “land use  
2 decision” by ORS 197.015(10)(b)(B), which excludes “building permit[s] issued under clear and  
3 objective land use standards.”

4 The city’s second motion requested that it be allowed to defer filing the record of the local  
5 proceedings in this matter until LUBA ruled on the city’s motion to dismiss.<sup>3</sup>

6 **D. Petitioners’ April 2, 2004 Response**

7 On April 2, 2004, petitioners objected to LUBA’s order allowing respondent’s request to  
8 defer filing the record until after LUBA ruled on the motion to dismiss. Petitioners argued that “the  
9 local government’s record is needed in order to fully respond to Respondent’s Motion to Dismiss \*  
10 \* \*.” Petitioners’ April 2, 2004 Response 2. Petitioners also argued that the city “feigns confusion”  
11 about the decision that is the subject of this appeal. *Id.* at 3. Petitioners describe the subject of this  
12 appeal as “several ORS 227.160(2) discretionary development permits pertaining to the conversion  
13 of a former retail outlet into an auto dealership \* \* \*.” *Id.* at 2. Petitioners go on to argue that the  
14 city’s failures either to (1) issue a written decision in conjunction with these permits or (2) provide  
15 notice of those permit decisions excuses any failure on petitioners’ part to attach copies of the  
16 appealed decisions.

17 **E. LUBA’s April 6, 2004 Order**

18 On April 6, 2004, LUBA issued an order in which we stated that we could not be certain  
19 which decision or decisions were the subject of this appeal. We noted that it appeared that  
20 petitioners sought review of multiple permit decisions and we noted that if that were the case  
21 “petitioners must explain why separate appeals to challenge those [multiple] decisions are  
22 unnecessary. OAR 661-010-0015(1)(c).”<sup>4</sup>

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<sup>3</sup> We granted this motion on March 24, 2004, without giving petitioners an opportunity to object.

<sup>4</sup> We suggested in our April 6, 2004 order that it appeared the appeal may be directed at as many as “16 building, electrical, mechanical, plumbing and public works permits[.]” We remain uncertain about how many permits the city has issued in this matter, but it now appears that the city may have only issued five permits.

1 With regard to petitioners' argument that the city should be required to file the record  
2 before petitioners are required to respond to the city's motion to dismiss, we noted that the city's  
3 record in this matter would be necessary for LUBA to conduct a review of the challenged decision  
4 or decisions on the merits. But we also noted:

5 "However, where a local government questions our jurisdiction over the appealed  
6 decision, as a threshold matter, the record is frequently unnecessary to determine  
7 whether we have jurisdiction to review the decision. Although petitioners claim that  
8 the record is essential for their response to the motion to dismiss and for LUBA to  
9 resolve the jurisdictional questions presented in the city's motion to dismiss, they do  
10 not make any attempt to explain why either is the case. Given the city's arguments  
11 in support of its motion to dismiss, it is not at all clear to us why the record is  
12 necessary to resolve the motion. Unless petitioners can demonstrate that the local  
13 record is necessary to determine whether we have jurisdiction over the appealed  
14 decision or decisions, we will not order the city to file the record." *Wetzel v. City*  
15 *of Eugene*, \_\_ Or LUBA \_\_ (LUBA No. 2004-046, Order, April 6, 2004), slip  
16 op 3-4.

17 We allowed petitioners time "to file a supplemental memorandum to identify precisely what  
18 decision or decisions are the subject of this appeal and to explain more fully why the city should be  
19 required to file the record in this matter before LUBA rules on the city's motion to dismiss." *Id.* at  
20 2.

#### 21 **F. Petitioners' April 16, 2004 Supplemental Memorandum**

22 In their April 16, 2004 Supplemental Memorandum petitioners explain:

23 "In their Notice of Appeal to LUBA initiating this action, Petitioners were unable to  
24 simpl[y] reference to a building permit decision in this matter because the City of  
25 Eugene did not ever issue or provide a proper written building permit decision, or  
26 provide the written basis for this decision, or ever provide the public with any of the  
27 procedural requirements expressly mandated by ORS 227.173 and ORS 227.175.  
28 \* \* \*

29 "Consequently, in the absence of a proper written decision for this building permit,  
30 or any notice of such land use action to the public as required by law, Petitioners  
31 were required to make reference to the challenged land use decision in their Notice  
32 of Appeal by reference to the limited information that was available on the City of  
33 Eugene' web site at this time. However, the Respondent City of Eugene fully  
34 understands that Petitioners herein challenge the City's issuance of a building permit  
35 for the Kendall Auto Group's conversion of this site, and their allowance of various

1 technical development permits in furtherance of this permit, without ever providing a  
2 written decision or public participation required by Oregon's land use statute for  
3 discretionary building permits. \* \* \*” Petitioners’ Supplemental Memorandum 3  
4 (citation omitted).

5 Because our only other alternative would be to dismiss this appeal, based on petitioners’  
6 failure to identify the appealed decision with sufficient precision to give the city and LUBA notice of  
7 the decision petitioners seek to appeal, we will assume at this point that the subject of this appeal is  
8 one of the five technical permits identified by the city in its motion to dismiss. Specifically, we  
9 assume that the challenged decision is the building permit decision that is described in Exhibit E to  
10 the city’s motion to dismiss. As we explained in our April 6, 2004 order, if petitioners seek review  
11 of additional technical permits they must file separate appeals to challenge those separate decisions  
12 or explain why separate appeals should not be required. Petitioners have pursued neither course of  
13 action.

14 Petitioners are almost certainly correct that the city’s record in this matter will be required to  
15 determine whether the city improperly failed to follow the procedures that petitioners believe the city  
16 should have followed in issuing the building permit and related technical permits, assuming we have  
17 jurisdiction to consider that question. But petitioners continue to fail to recognize that the local  
18 government record may not be necessary to determine whether LUBA has jurisdiction over the  
19 appealed building permit. That question is primarily or exclusively a question of law. Petitioners  
20 make no attempt to explain why whatever record the city may have compiled in this matter is  
21 necessary to determine whether the challenged decision qualifies as a “land use decision,” within the  
22 meaning of ORS 197.015(10)(a) or a “limited land use decision” within the meaning of ORS  
23 197.015(12). Given that failure on petitioners’ part, we deny their motion to reconsider our earlier  
24 order allowing the city’s motion to extend the deadline for filing the record until LUBA determines  
25 whether it has jurisdiction in this appeal.

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**G. Conclusion**

In our April 6, 2004 order, we suspended the deadline for petitioners to respond to the city's March 23, 2004 motion to dismiss until we resolved petitioners' request that the city first be required to file the record in this matter. We have now concluded that petitioners have not demonstrated that the city should be required to file the record before we consider the motion to dismiss. Petitioners shall have 14 days from the date of this order to file their response to the motion to dismiss.<sup>5</sup>

Dated this 22<sup>nd</sup> day of June, 2004.

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Michael A. Holstun  
Board Chair

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<sup>5</sup> We recognize that petitioners provided some argument in support of their position that the challenged building permit decision qualifies as a land use decision. Petitioners' April 16, 2004 Supplemental Memorandum 4-5. Our intent is to allow petitioners 14 days to provide any additional arguments they wish to provide in response to the city's motion to dismiss before we decide whether we have jurisdiction.