BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TUALATIN RIVERKEEPERS, *et al*.,
Petitioners,

vs.

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent, et al.

LUBA Nos. 2004-050, 051, 054, and 057

ORDER

On September 27, 2007, petitioners filed (1) a motion to take evidence not in the record, and (2) a motion to take official notice.

MOTION TO TAKE EVIDENCE

The challenged decisions in these appeals are four municipal separate storm sewer (MS4) permits that respondent renewed in July 2004. In the petition for review, petitioners assert three facts in support of several assignments of error. In anticipation that respondents may object that the asserted facts are not supported by the record, petitioners filed a motion to take evidence not in the record to establish the three asserted facts.

Specifically, petitioners seek to establish that the following:

(1) In renewing the four MS4 permits, DEQ did not submit to the Department of Land Conservation and Development (DLCD) notices allegedly required under OAR 660-030-0075(2);

(2) DEQ did not obtain land use compatibility statements from the municipal governments that are the permittees when it issued the original MS4 permits in 1995; and

(3) DEQ did not make direct findings regarding the statewide planning goals, or require that the permittees make direct goal findings, when it issued the original MS4 permits in 1995.

Petitioners contend that LUBA may take evidence regarding the foregoing and consider those facts in resolving the assignments of error, pursuant to OAR 661-010-0045(1),

which authorizes LUBA to take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning "procedural irregularities not shown in the record" that, if proved, would warrant reversal or remand of the decision.

DEQ responds that the "evidence" or facts petitioners seek to have the Board consider do not relate in any way to "procedural irregularities" in making the challenged decisions. In any case, DEQ argues that no parties dispute the three facts that petitioners wish to establish. Indeed, DEQ offers to stipulate that:

> 1. DEQ did not submit a notice under OAR 660-030-0075(2) to DLCD with respect to the four MS4 permits that are the subject of this appeal;
>
> 2. DEQ has no records indicating that it obtained land use compatibility statements from the municipal permittees when it issued the original MS4 permits in 1995;
>
> 3. DEQ has no records indicating that it made direct goal findings or required permittees to make direct goal findings when it issued the original MS4 permits in 1995.[1]

We agree with DEQ that petitioners have not established a basis to consider evidence outside the record under OAR 661-010-0045(1). It is highly unusual, at least, to use OAR 661-010-0045 to establish that certain documents do not exist. The more straightforward course is to simply point out that no such documents are in the record, argue that the decision must be supported by such documents in the record, and assign error accordingly. If that argument is meritorious, then LUBA will reverse or remand the decision. ORS 197.835(9)(a)(C).

As we understand it, the petition for review includes several assignments of error that are based in part on assertions that the above documents do not exist. No party disputes those assertions. In fact, DEQ concedes that the documents do not exist. Thus, one of the

[1] DEQ disputes that it is required to send notice under OAR 660-030-0075(2), or that the existence of land use compatibility statements or goal findings regarding the 1995 permits has any bearing on the merits in this appeal.

essential elements of a meritorious motion to take evidence outside the record is missing—"disputed factual allegations in the parties briefs[.]" Even assuming that the nonexistence of the above documents would constitute a "procedural irregularity," a point DEQ disputes and that we need not decide, because there are no "disputed factual allegations" regarding the existence of those documents, there is no basis for a motion to take evidence concerning them. Accordingly, petitioners' motion is denied.

MOTION TO TAKE OFFICIAL NOTICE

Petitioners move for the Board to take official notice under OEC 202 of a number of documents that are attached to the petition for review as appendices.[2] In addition, petitioners request that the Board take notice of a number of general laws and case reporters, such as the "United States Code" and "Oregon Reports."

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[2] Oregon Evidence Code 202, ORS 40.090, provides in relevant part:

> "Law judicially noticed is defined as:
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> "(1) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.
>
> "(2) Public and private official acts of the legislative, executive and official departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.
>
> "* * * * *
>
> "(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States.
>
> "(5) Rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.
>
> "* * * * *
>
> "(7) 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."

A. Undisputed Documents

Intervenors-respondent (intervenors), the municipal governments and agencies subject to the challenged permits, state that they do not object to taking official notice of most of the documents attached to the petition for review, with exceptions discussed below. Intervenors make two general observations, however, with which we agree. First, intervenors note that the Board may take official notice of documents that (1) have some relevance to the issues on appeal and (2) constitute officially cognizable law under OEC 202. However, LUBA's review is generally limited to the record. ORS 197.835(2)(a). Therefore, LUBA has no authority to take official notice of adjudicative facts under OEC 201. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

Second, intervenors argue that petitioners make no effort to explain why many of the requested documents and laws are relevant to any issue in this appeal. It may be that there are such explanations in the petition for review but, if so, petitioners do not bother to cite them.

We agree with intervenors that it is not clear what relevance many of the requested documents may have to the issues in this appeal. We also agree that LUBA may not take official notice of facts within documents that are subject to notice under OEC 202, if notice of those facts is requested for an adjudicative purpose (*i.e.*, to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion that is at issue in the challenged decision). *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103-104 (2005). With those caveats, and with the exceptions noted below, the Board will take notice of the documents attached to the petition for review, where the petition explains the relevance of the document to an issue in this appeal.

B. Disputed Documents

Intervenors object to taking official notice of the following documents: (1) three MS4 permits, (2) a Department of Justice order dated September 14, 2005, denying

petitioners' public records request, and (3) a Department of Environmental Quality internal management directive. We address each in turn.

1. Municipal Separate Storm Sewer Permits

Petitioners request that LUBA consider the following three documents: (1) a MS4 permit dated July 26, 1995, issued by DEQ to the United Sewerage Agency (Appendix 177-185), (2) a MS4 permit dated December 15, 1995 issued by DEQ to Clackamas County (Appendix 186-195), and (3) a MS4 permit dated April 28, 2006 issued by DEQ to Blue Heron Paper Company (Appendix 196-226). Petitioners contend that each MS4 permit is an "official act" of DEQ and therefore subject to official notice under OEC 202(2).

Intervenors do not dispute that these MS4 permits may be "official acts" of DEQ in some sense, but they question whether the permits provide any generally applicable principles of "law" subject to official notice under OEC 202(2). According to intervenor, in order to constitute "law" under OEC 202(2), the official act must enact generally or widely applicable rules or regulations of some kind. Intervenors contend that a permit issued by DEQ to a municipal government or a private entity does not enact any generally applicable rule or regulation.

The legislative conference committee commentary to OEC 202(2) lists a number of examples of "official acts" subject to official notice. Most of those examples indeed involve rules or regulations of some kind, consistent with intervenors' view. However, the commentary also cites to a similar State of California provision, under which "California courts have taken official notice of a wide variety of administrative and executive acts, including proceedings and reports of Congressional committees, records of the California State Board of Education, and the records of a county planning commission." OEC 202 Commentary (West 2007). The conference committee evidently intended OEC 202(2) to have a similar broad scope. None of the last three examples would constitute "law" under intervenors' view.

An additional indication that the scope of "official acts" under OEC 202(2) is not confined to generally applicable rules or regulations is the fact that such rules and regulations are separately described in OEC 202(4), which lists "[r]egulations, ordinances and similar legislative enactments" issued by or under the authority of state or federal entities as being subject to official notice.

While the outer limit of what constitutes an "official act" under OEC 202(2) is not clear to us, we agree with petitioners that the disputed MS4 permits can be viewed as "official acts" of an executive department, and thus potentially subject to official notice under OEC 202(2). That said, however, we note that petitioners make no effort in their motion to explain why the permits are relevant to any issue in this appeal, or for what purpose LUBA may consider them. As explained above, LUBA will not take official notice of facts within documents that are subject to notice under OEC 202, if notice of those facts is requested for an adjudicative purpose. With that caveat, if the petition for review explains why the MS4 permits are relevant to an issue in this appeal and cites the permits for a permissible purpose, LUBA will consider them.

2. Public Records Request

Petitioners argue that the Department of Justice order denying their public records request is an "official act" that may be noticed for the purpose of establishing that the documents at issue in petitioners' motion to take evidence do not exist. Petitioners apparently view this request as an alternative to their motion to take evidence.

Intervenors argue that petitioners appear to request official notice of the order in order to establish an adjudicative fact. We agree that the only purpose cited for our consideration of the Department of Justice order is to establish as a fact that certain documents do not exist. While the significance of that fact is not explained, it appears that petitioners wish to establish the non-existence of those documents as a factual basis to undermine the legal or evidentiary support for the permits challenged in this appeal. In short,

petitioners appear to cite the order only to establish an adjudicative fact. The Board could only consider the order for that purpose pursuant to a motion to take evidence under OAR 661-010-0045, which we denied above. Accordingly, the request to take official notice of the Department of Justice order is denied.

3. Internal Management Directive

Appendix pages 351-394 of the petition for review is a document from DEQ entitled "Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications," dated March 2001. Petitioners argue that this internal directive is an "official act" of DEQ, that it is in the nature of an internal "order," and therefore that it is subject to official notice.

Intervenors object, noting statements from the document's executive summary indicating that it is intended to "guide" DEQ in its internal procedures and that the document "does not create rights or obligations on the part of the public or regulated entities." Appendix 352. Because the directive is non-binding, intervenors argue that it is not "law" of any kind subject to official notice under OEC 202(2).

As explained above, the legislature apparently intended the scope of "official acts" under OEC 202(2) to include more than generally applicable rules and regulations. For similar reasons, we believe the legislature did not intend to exclude "official acts" that promulgate official but non-binding guidelines for issuing permits. Again, it is not clear why the internal directive is relevant or for what purpose petitioners wish to cite it, but we agree with petitioners that it is a document that is potentially subject to official notice under OEC 202(2).

C. Other Unspecified Laws

Petitioners request that LUBA take official notice of a general list of state and federal laws, regulations, and case reporters, including "Code of Federal Regulations" and "Oregon

Land Use Board of Appeals Reports, Opinions and Orders." However, petitioners do not specify any particular federal or state law, regulation or case.

No party objects to petitioners' general request. There is no possible dispute that relevant state and federal laws, regulations and decisions are generally subject to official notice. However, it is unnecessary and unhelpful to request that LUBA take notice of general sources of law. As a practical matter, the Board generally takes notice only of *specific* federal or state laws, regulations or cases that are cited in the pleadings. Even then, it is usually unnecessary to formally request that the Board take notice of such obvious sources of laws as the Oregon Revised Statutes and the Board's own cases. In any case, petitioners' nonspecific request to take official notice of the listed state and federal laws, regulations and case reporters is denied.

BRIEFING SCHEDULE

Pursuant to a previous order of this Board, the response brief is due November 5, 2007. However, filing of the motion to take evidence suspends further events in this appeal, until the Board issues a new briefing schedule. OAR 661-010-0045(9). Accordingly, the response brief is due 21 days from the date of this order.

Dated this 26th day of October, 2007.

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Tod A. Bassham
Board Member