BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NANCY GAIL MICHAELS, MERLE L. YOUNG,
RAYMOND A. DEQUINE, JOHN STOUWIE,
MARIE STOUWIE and THELMA J. O'NEAL,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

MIKE JEFFRIES,
Intervenor-Respondent.

LUBA No. 2005-138

ORDER ON MOTION TO TAKE EVIDENCE

The petition for review has already been filed in this appeal. One day before the response briefs were due to be filed, intervenor-respondent Mike Jeffries (intervenor) filed a motion to take evidence not in the record, pursuant to OAR 661-010-0045.[1] LUBA's review

[1] OAR 661-010-0045 provides, in relevant part:

> "(1) 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 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 direction take evidence to resolve disputes regarding the content of the record * * *.
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> "(2) Motions to Take Evidence:
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> "(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.
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> "(b) A motion to take evidence shall be accompanied by:

is generally limited to the record that was compiled by the local government whose decision is on appeal at LUBA. ORS 197.835(2)(a).[2] However, in specified circumstances, ORS 197.835(2)(b) and OAR 661-010-0045 authorize LUBA to consider extra-record evidence.[3] The statute and the rule allow LUBA to consider extra-record evidence "in the case of disputed factual allegations in the parties' briefs" concerning, among other things, standing and "other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." LUBA may also consider extra-record evidence "to resolve disputes regarding the content of the record."

FACTS

The following facts are not in dispute. On May 13, 1997, the county issued a conditional use permit (CUP) for aggregate removal on the subject property, then owned by E.W. and D.P. Mignot. The CUP was issued subject to a condition that the applicant obtain a permit from the Department of Geology and Mineral Industries (DOGAMI). The CUP also provided that the approval would "become invalid without special action if the permit is not exercised within two (2) years from the date of approval" unless an extension was granted. Extensions were granted on May 17, 1999 and on June 1, 2000. On April 17, 2001, a one-year extension was granted to May 15, 2002. Intervenor's predecessor applied for an

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> "(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or
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> "(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."

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

[3] ORS 197.835(2)(b) provides, in relevant 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. * * *"

extension on June 11, 2002, almost one month after the previous extension had expired.[4] The extension was granted on July 10, 2002. It is that July 10, 2002 extension that is the subject of this appeal. Intervenor purchased the property on March 27, 2003 and immediately took steps to obtain the necessary permits to conduct mining operations.[5]

MOTION TO TAKE EVIDENCE

Intervenor moves to take evidence not in the record in an attempt to challenge petitioners' standing. He also claims to base his motion on other procedural irregularities and factual disputes regarding the content of the record, pursuant to OAR 661-010-0045. Intervenor makes no attempt to explain what those other procedural irregularities might be, however, or identify any factual disputes regarding the content of the record. We therefore limit our discussion of intervenor's motion to disputed allegations of standing.

In their petition for review, petitioners allege that they had actual notice of the challenged extension on September 2, 2005 at the earliest. Attached to the petition for review is an affidavit of petitioner Michaels, alleging that her lawyer notified her of the decision on September 2, 2005. Based on that affidavit, petitioners assert that petitioner Michaels "did not know of the decision, nor could she have known of the decision before September 2, 2005." Petition for Review 3. Petitioners allege that the remaining petitioners did not learn of the decision until September 18, 2005 at the earliest.[6]

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[4] Intervenor's predecessor apparently had not received the county's notice regarding expiration of the previous extension, which had been mailed to his predecessor, E.W. Mignot, who was suffering from Alzheimer's. Intervenor does not explain the relevance of this fact, although we assume it has something to do with providing an excuse for failing to request the extension until after the previous extension had expired.

[5] Subsequent extensions that are not relevant to our resolution of intervenor's motion to take evidence were granted after July 10, 2002.

[6] Although the petition for review indicates that the other petitioners did not learn of the decision until September 13, 2005, those other petitioners attest in their affidavits attached to the petition for review that they learned of the extension on September 18, 2005, when petitioner Michaels informed them of the extension. It is immaterial, for purposes of resolving this motion, whether that date is September 18, 2005 or September 13, 2005.

Generally, a petitioner must file a notice of intent to appeal (NITA) a land use decision to LUBA within 21 days of the date the challenged decision becomes final. ORS 197.830(9). Under ORS 197.830(3), a petitioner may appeal a land use decision to LUBA more than 21 days after the decision becomes final where the local government makes a land use decision without a hearing.[7] There is no dispute that, in this case, the county did not provide a hearing before issuing the challenged extension. Petitioners argue that the challenged decision is a "permit" decision and that notice of the decision was therefore required. *See Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 384 (2000) (a decision to extend the term of an expired conditional use permit is a discretionary approval of a proposed development of land and constitutes a "permit" as that term is defined in ORS 227.160(2)). They argue that, pursuant to ORS 197.830(3)(a), petitioners were required to file their NITA within 21 days of the date they had *actual* notice of the challenged decision.[8] According to petitioners, petitioner Michaels was the first of the petitioners to learn of the decision when she spoke with her attorney on September 2, 2005. The NITA was filed less than 21 days later, on September 21, 2005.

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[7] 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), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, 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."

[8] ORS 197.830(3)(b) applies where notice is not required, in which case a NITA must be filed within 21 days of the date a person knew or should have known of the challenged decision. *See* n 7.

Intervenor assumes, for purposes of the motion to take evidence, that the challenged decision is a permit and that notice of the decision was therefore required.[9] He argues that whether ORS 197.830(3)(a) or (b) applies, all petitioners had actual *and* constructive notice of the challenged extension more than 21 days before they filed their NITA. He seeks to introduce evidence for purposes of ORS 197.830(3)(a) establishing that petitioners had actual notice of the decision before September 2, 2005. With respect to ORS 197.830(3)(b), intervenor also seeks to introduce evidence that petitioners knew or should have known that intervenor had commenced mining operations pursuant to the extended CUP starting in 2003.

Intervenor's motion to take evidence includes an affidavit of intervenor's attorney. Attached to the affidavit are numerous exhibits. Of particular note, Exhibit 1 is an e-mail message dated August 31, 2005, from petitioner Michaels' previous attorney to county counsel. The e-mail indicates that the attorney was aware of the existence of the challenged extension, and the attorney specifically comments in the e-mail message that the applicant "did not request an extension until after the one-year extension granted in 2001 had expired." Affidavit of John M. Junkin, Exhibit 1.[10] Also attached to intervenor's motion is the affidavit of intervenor. In his affidavit, intervenor explains the process he followed in obtaining his permits and commencing mining activities on the subject property. Intervenor

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[9] Intervenor specifically reserves his right to argue that the challenged decision is not a permit in his response brief on the merits.

[10] Exhibits 2 through 7 are documents that were initially included in the record submitted by the county and were removed from the record as a result of record objections filed by petitioners. Those exhibits are offered now by intervenors to resolve disputed allegations of standing, under OAR 661-010-0045.

Exhibit 2 is a copy of a fax cover sheet dated October 11, 2004 to Lisa Hawley, who is a county planner, from DOGAMI staff, with a copy of an operating permit attached. Exhibit 3 is a copy of a letter dated September 18, 2003, from Lisa Hawley to Dennis Ingram regarding a minor amendment to the previously issued conditional use permit (CUP) authorizing joint use of an access road for the subject mining operation. Exhibit 4 is a copy of a letter to Mike Jeffries from Lisa Hawley dated June 18, 2003 regarding a request for an extension of time to complete conditions of approval for the CUP. Exhibit 5 is a copy of a receipt for $20.00, issued by Douglas County Planning Department to Mike Jeffries and dated April 23, 2003, titled "Extension of Land Use Action." Exhibit 6 is a copy of a letter dated April 11, 2003 from Mike Jeffries to Lisa Hawley requesting an extension of time to satisfy conditions of the CUP. Exhibit 7 is a letter dated April 11, 2003 titled "Administrative Decision Extension Request."

also alleges facts regarding petitioner Michaels' knowledge of the procedural steps he took, including her knowledge of extensions that were granted after the 2002 extension. Attached to the affidavit are numerous documents verifying the facts set forth in the affidavit.[11]

Petitioners oppose the motion to take evidence, arguing that the motion is premature; *i.e.,* that LUBA should not consider the motion until after the response brief is filed. Opposition to Motion to Take Evidence Not in the Record 2-3, citing *Pynn v. City of West Linn*, 42 Or LUBA 581, 583-84 (2002) (in the absence of the parties' briefs, the Board will often lack the context and developed arguments necessary to determine whether a motion to take evidence is warranted). While petitioners are correct that we often deny motions to take evidence that are filed before briefing is completed as premature, that is not always the case. *See Grabhorn v. Washington County*, 48 Or LUBA 657, 665 (2005) (where disputes between the parties are relatively clear and further briefing will not put the Board in any better position to resolve the motion, a motion to take evidence filed before completion of briefing will not be considered premature). In this case, the issues and parties' positions are fully briefed in the petition for review, intervenor's motion to take evidence and petitioners' opposition to the motion. As far as we can tell, the only issues presented by the motion to take evidence are disputed factual allegations regarding standing of petitioners and, specifically, when petitioners received actual or constructive knowledge of the challenged decision. We do not see what further briefing would be forthcoming in the response brief that intervenor has not already had an opportunity to address in his motion.[12] Accordingly, we disagree with petitioners that intervenor's motion is premature.

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[11] Exhibit 3 of intervenor's affidavit, for instance, is the same letter attached as Exhibit 3 to the affidavit of John M. Junkin. *See* n 10. The affidavit points out that the letter is copied to petitioner Michaels among others.

[12] Intervenor had adequate opportunity to explain the basis for the motion to take evidence in the motion itself. His failure to adequately brief his arguments might provide a basis to deny the motion on the merits, but it is not a reason to decline to address the motion on the basis that it is premature.

In his motion to take evidence, intervenor does not clearly identify whether he believes ORS 197.830(3)(b) or ORS 197.830(3)(a) applies. He seeks to introduce evidence related to both actual notice for purposes of ORS 197.830(3)(a) and constructive notice under ORS 197.830(3)(b). For purposes of resolving this motion, however, we must determine which provision applies. If the NITA was required to be filed within 21 days of actual notice of the challenged decision, then evidence related to the date of constructive notice of the challenged decision would not be relevant to our determination of petitioners' standing and would not be allowed.

Every petitioner except petitioner Stouwie is an adjacent landowner and thus was entitled to notice of the challenged decision.[13] Accordingly, ORS 197.830(3)(a) is the applicable provision, and at least with regard to all petitioners but petitioner Stouwie, the NITA was required to be filed within 21 days of the date they obtained actual notice of the challenged decision.[14] Accordingly, intervenor's motion to take evidence is denied insofar as it seeks to introduce evidence relating to constructive notice.[15]

With regard to the August 31, 2005 e-mail, petitioners surmise that intervenor intends to argue that petitioner Michaels' lawyer found the challenged extension in the county's planning file as early as August 31, 2005, and that his knowledge is imputed to his client. They contend, however, that intervenor does not present this legal theory in his motion to take evidence, and that the motion to introduce that evidence should therefore be denied. The main problem with intervenor's motion, however, is that it does not explain how our

[13] We agree with petitioners that the challenged extension is a "permit."

[14] The parties do not indicate what distance from the subject property petitioner Stouwie's property lies. However, petitioner alleges that all petitioners were entitled to notice, and intervenor does not directly challenge that allegation with regard to petitioner Stouwie.

[15] Although intervenor does not identify which documents relate to constructive notice, it appears that all except the August 31, 2005 e-mail message would demonstrate petitioner's constructive as opposed to actual notice of the challenged decision.

consideration of the August 31, 2005 e-mail would affect petitioner Michaels' standing or our jurisdiction. The NITA in this appeal was filed 21 days after the date of the e-mail message. Accordingly, it appears that the NITA would not be untimely even if August 31, 2005 was considered the date petitioner Michaels had actual notice of the challenged decision.

Further, intervenor does not explain why the knowledge allegedly imputed to petitioner Michaels would affect the other petitioners' standing under ORS 197.830(3)(a). Petitioners allege in their petition for review that the other petitioners did not become aware of the challenged decision until September 18, 2005 at the earliest. Petition for Review, Affidavits of Petitioners Merle L. Young, Marie Stouwie and Thelma J. O'Neal. Accordingly, even if petitioner Michaels had actual notice of the decision more than 21 days before the NITA was filed, the remaining petitioners who did not learn of the extension decision until September 18, 2005 would still have standing to appeal. Accordingly, we agree with petitioners that intervenor fails to demonstrate how our consideration of the August 31, 2005 e-mail message would affect our determination of petitioners' standing. Intervenor's request that we consider that August 31, 2005 e-mail message for purposes of determining petitioners' standing is denied.[16]

Finally, intervenor seeks to take depositions of each and every petitioner regarding whether they "had actual knowledge of on-going and substantial mining operations at the quarry" and whether they "had actual or constructive knowledge of the challenged 'land use decision' more than 21 days prior to filing the Notice of Intent to Appeal." Affidavit of John M. Junkin 3. First, as explained above, the critical inquiry in this case for purposes of

[16] Many of the other documents intervenor seeks to introduce concern events leading up to intervenor's commencement of actual mining operations on the subject property. It is our understanding that intervenor seeks to introduce those documents in an attempt to demonstrate when petitioners obtained constructive knowledge of the challenged decision. For the reasons discussed above, we decline to consider extra-record evidence relating to constructive notice.

determining petitioners' standing is when they obtained actual notice of the challenged decision. Evidence related to when petitioners obtained constructive knowledge of the challenged extension is irrelevant. Second, OAR 661-010-0045 does not authorize a moving party to engage in a fishing expedition for information. As a threshold matter, in this case, the moving party must provide a reasonable basis to believe that the NITA was not filed in a timely manner. *Tarbell v. Jefferson* County, 20 Or LUBA 517, 520 (1990). Mere speculation that some of the petitioners learned of the decision more than 21 days before the NITA was filed is inadequate to justify granting intervenor's request to depose petitioners on that issue. *See Frymark v. Tillamook County*, 45 Or LUBA 685, 698-99 (2003) (mere speculation that any of the petitioners in the case obtained a copy of the challenged decision more than 21 days before the NITA was filed does not provide a sufficient basis to warrant the taking of depositions).

Intervenor's motion to take evidence is denied.

BRIEFING SCHEDULE

The petition for review has already been filed in this appeal. Response briefs shall be due 14 days from the date of this order.

Dated this 6th day of June, 2006.

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Anne C. Davies
Board Member