BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL FRYMARK, CHARLEEN FRYMARK, THOMAS STUMPF, HOWARD PINKSTAFF, VIRGINIA PINKSTAFF, RUSSELL SIMONIS, IRENE SIMONIS, N. JIM MARTIN and J. KENNEDY,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent,

and

NETARTS BAY RV PARK AND MARINA, LLC,
Intervenor-Respondent.

LUBA No. 2003-012

ORDER

MOTION TO INTERVENE

Netarts Bay RV Park and Marina, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO TAKE EVIDENCE

A. Introduction

We take the following relevant facts from the record and the parties' pleadings. The challenged decision is a building permit that was issued on July 24, 2002, by the county's building official, after "sign off" by various city officials, including a senior planner. Record 37-38. The challenged building permit was issued without providing notice or opportunity for a hearing. The permit authorizes construction of a large free-standing sign on tax lot 3402, advertising intervenor's RV park and marina, which is located across the street from tax lot 3402. Tax lot 3402 is otherwise vacant, and intervenor leases it to provide overflow

parking when the RV park is full. The relevant zoning governing the subject property prohibits an "off-site" sign, but allows an "on-site" sign that advertises services or facilities on the site.

The sign was constructed in August 2002. A number of neighbors, including a neighbor named Jeannette Brinker (Brinker), inquired with the county as to the sign's lawfulness. The county ultimately agreed to seek the legal advice of its county counsel as to whether the county had erred in approving the requested sign. On November 27, 2002, county counsel sent a letter to the planning department in which he concluded that the sign was a lawful "on-site" sign, and thus that the county had correctly issued the challenged building permit. Brinker received a copy of the county counsel's letter on November 30, 2002. On December 19, 2002, Brinker appealed the July 24, 2002 building permit decision to LUBA. Brinker later withdrew the appeal. *Brinker v. Tillamook County*, ___ Or LUBA ___ (LUBA No. 2002-172, February 18, 2003).

Between January 12 and January 17, 2003, each of the petitioners in the present appeal received telephone calls from Brinker. On January 21, 2003, petitioners filed a notice of intent to appeal the July 24, 2002 decision. On April 24, 2003, petitioners filed the petition for review. To establish that the appeal was timely filed and that petitioners have standing to appeal, the petition for review states that the appeal is filed pursuant to ORS 197.830(3)(a). That statute allows persons who are adversely affected by a decision made without a hearing to appeal a decision within 21 days of receiving "actual notice where notice is required."[1] Petitioners assert that the city was required under applicable land use

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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), 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:

regulations to provide notice of the decision to owners of property within 250 feet of the subject property, and that the city failed to do so. Petitioners allege that each petitioner owns property within 250 feet of the subject property, that each petitioner can either see the sign or its illumination from their property, or when taking a walk in the neighborhood, and therefore each petitioner is "adversely affected" by the decision, for purposes of ORS 197.830(3).

Attached to the petition for review are affidavits from each petitioner. As relevant, those affidavits state with respect to each petitioner that (1) the petitioner received "actual notice" that the county had made a land use decision approving the disputed sign when Brinker informed the petitioner of that fact in a telephone conversation on specified dates in January 2003; (2) the petitioner owns property within 250 feet and within sight of the sign or its illumination; and (3) the visual impact of the sign adversely affects the petitioner's use and enjoyment of his or her property. Also attached to the petition for review is an affidavit from Brinker describing her involvement with the sign issue between August 9, 2002 and December 19, 2002.

B. Disputed Allegations

Intervenor does not dispute, at least for purposes of the present motion, that the challenged decision is a land use decision and that ORS 197.830(3)(a) provides the applicable timeline and standing requirements for petitioners' appeal of the decision to LUBA. However, intervenor disputes the allegations in the petition for review that (1) each petitioner is "adversely affected" within the meaning of ORS 197.830(3), and (2) each petitioner received "actual notice" less than 21 days prior to the filing of the notice of intent to appeal. Intervenor seeks to depose each petitioner and other named persons, pursuant to OAR 661-010-0045, in order to establish that (1) petitioners are not adversely affected and

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"(a) Within 21 days of actual notice where notice is required; or

"(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

(2) each petitioner received "actual notice" more than 21 days prior to the filing of the notice of intent to appeal.[2] We address each basis for a deposition under OAR 661-010-0045 separately.

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[2] 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 * * * standing * * *.
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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:
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> > > "(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.
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> > "(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).
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> > "(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 responsible for service of the subpoena and tendering the witness and mileage fees to the witness.
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> "* * * * *
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> "(4) If the Board grants the motion to take evidence, the Board shall so notify the parties, and indicate whether it will decide the motion on the submitted materials, whether it will allow depositions or discovery of evidence under section (2), or whether it will schedule an evidentiary hearing on the motion."

C. Adversely Affected

Intervenor seeks to depose each petitioner to determine "how the sign affects him or her" and the "number of times" petitioners were within sight and sound of the disputed sign. Motion to Take Evidence Not in the Record 4. However, intervenor provides no reason to question the statements by seven of the nine petitioners that they reside within sight of the disputed sign and the visual impact of the sign impinges on the use and enjoyment of their property. We have repeatedly held that persons within sight or sound of the subject property are presumptively adversely affected. *Goddard v. Jackson County*, 34 Or LUBA 402, 409 (1998); *Walz v. Polk County*, 31 Or LUBA 363, 369 (1996). The number of times petitioners may have actually viewed the sign is irrelevant under that test. Therefore, intervenor has not demonstrated that depositions are warranted to inquire into whether seven of the nine petitioners are "adversely affected" by the sign.

Two of the nine petitioners allege that, while they cannot see the sign itself from their property, they can see its illumination, which interferes with their enjoyment of dark skies from their property. These petitioners also allege that they see the sign when walking around the neighborhood or on the beach. Intervenor does not specifically dispute these allegations. While these allegations may be insufficient to establish a presumption that these petitioners are adversely affected, intervenor's failure to specifically controvert them or even advance arguments that those allegations are legally insufficient gives us scant reason to order the deposition of these petitioners. In any case, we see no reason to order the depositions to inquire into whether some petitioners were adversely affected, once it is clear that other petitioners are adversely affected. *See Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 214, 843 P2d 992 (1992) (declining to decide whether one petitioner had standing to appeal to LUBA, once it was established that other petitioners had standing).

Intervenor's motion to depose petitioners with regard to how each petitioner is "adversely affected" is denied.

D. Actual Notice

1. Intervenor's Arguments

According to intervenor, the relevant inquiry in determining whether petitioners had "actual notice" of the decision under ORS 197.830(3)(a) is whether the circumstances were "sufficient to inform the petitioner of both the existence and substance of the decision." *Willhoft v. Gold Beach*, 38 Or LUBA 375, 391 (2000). In *Willhoft*, we discussed the differences between the "actual notice" standard of ORS 197.830(3)(a) and the "knew or should have known" standard of ORS 197.830(3)(b).[3] We concluded that a petitioner may be deemed to have received "actual notice" for purposes of ORS 197.830(3)(a) only if the

[3] We quote portions of that discussion:

> "The relevant inquiry under ORS 197.830(3)(b) (1997) is not limited to determining when a petitioner actually receives a copy of a land use decision or written notice of that land use decision. It is clear that in adopting ORS 197.830(3)(b) (1997) the legislature did not intend that the deadline for filing a notice of intent to appeal be suspended in all cases until the petitioner actually received a copy of or written notice of the appealed decision. If ORS 197.830(3)(b) (1997) invariably required actual receipt of the decision or written notice of the decision before the 21-day appeal period would begin to run, the words 'or should have known' would be surplusage. The 'or should have known' language in ORS 197.830(3)(b) (1997) explicitly imposes an objective 'discovery rule,' and may have the effect of starting the 21-day appeal period *before* a petitioner receives written notice of or a copy of a decision.
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> "* * * * *
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> "With the above understanding of the events that may trigger the 21-day deadline for filing an appeal with LUBA under ORS 197.830(3)(b) (1997), we conclude that ORS 197.830(3)(a) (1997) *does not* impose a discovery obligation on petitioners. To conclude that it does impose a discovery obligation on petitioners would require that we ignore the different language in ORS 197.830(3)(a) and (b) (1997). If the legislature intended to impose the same discovery obligation on petitioners under ORS 197.830(3)(a) (1997) that it imposed under ORS 197.830(3)(b) (1997), it would not have required that the petitioner receive 'actual notice' of the decision. We conclude that under ORS 197.830(3)(a) (1997), a petitioner receives 'actual notice' of the decision when the petitioner is provided (1) a copy of the decision or (2) written notice of the decision. *Bowlin* [*v. Grant County*, 35 Or LUBA 776, 785 (1998)]. In addition to these two circumstances, we believe it is also possible that a petitioner can be deemed to have received 'actual notice' of a decision without being provided a copy of the decision or written notice of the decision. However, the circumstances that would lead us to conclude that a petitioner has received actual notice, without having been provided a copy of the decision or written notice of the decision, must go beyond those that would suffice to obligate a petitioner to make inquires under ORS 197.830(3)(b) (1997) to discover the decision. The circumstances themselves must be sufficient to constitute the equivalent of receiving a copy of the decision or written notice of the decision. In other words, the circumstances must be sufficient to inform the petitioner of both the existence and substance of the decision." *Id.* 389-391 (emphasis original).

petitioner is provided (1) a copy of the decision, or (2) written notice of the decision. In addition, we opined, in *dicta*, that receipt of information other than a copy of the decision or written notice of the decision may also constitute "actual notice, " if it suffices to inform the petitioner of both the existence and substance of the decision.

As noted, intervenor does not dispute for purposes of this motion that petitioners were entitled to "actual notice" and that the county has never provided written notice of the decision to petitioners. However, intervenor cites to evidence suggesting that at least some of the petitioners may have learned about the challenged decision more than 21 days prior to filing the notice of intent to appeal. Intervenor states, supported by affidavits attached to the motion, that the disputed sign immediately became a local *cause celebré* when it was completed August 6, 2002, that several newspaper articles were written about the sign, and that a group of concerned neighbors subsequently held community meetings and exchanged e-mails on the issue. Intervenor speculates that some of the petitioners in this appeal attended some of those meetings. More specifically, intervenor attaches to the motion copies of several e-mails to and from one of the concerned neighbors, Jacky Carpenter (Carpenter), to a number of other persons, including one of the named petitioners in this case, Thomas Stumpf (Stumpf). Intervenor argues that it is clear that Stumpf received these e-mails, because Stumpf replied to one such e-mail. Affidavit of Mark Roan, Exhibit 1, page 18.

Intervenor argues that, given the notoriety of the issue and the extensive community discussion during the fall of 2002, it is possible that the named petitioners in this case either (1) came into possession of a copy of the challenged building permit or (2) were provided information that was the equivalent of receiving a copy of the decision or written notice of the decision, prior to January 2003. Accordingly, intervenor seeks to depose each of the named petitioners to determine (1) "whether he or she had a copy of the decision in advance of January, 2003"; and (2) "the extent to which the circumstances surrounding this dispute

were sufficient to inform him or her of both the existence and the substance of the decision[.]" Motion to Take Evidence Not in the Record 4.

In addition, intervenors seek to depose Brinker in order to determine whether there were other phone conversations, e-mails, letters or other forms of communications between Brinker and the petitioners on the disputed building permit prior to January 2003. Similarly, intervenors seek to depose Carpenter, who intervenor alleges was a key community activist on the issue and who intervenor speculates may have communicated information to petitioners prior to January 2003. Finally, intervenor seeks to subpoena e-mail records from each deponent, arguing that at least petitioner Stumpf appears to have exchanged e-mails prior to January 2003 with community activists on the issue, and it is possible that other petitioners did so as well.

2. Petitioners' Responses

Petitioners oppose the motion to take evidence on a number of grounds. Petitioners argue generally that the parties' disagreements revolve primarily around a legal dispute over the meaning of "actual notice." According to petitioners, the evidence that intervenors seek in the requested depositions and discovery is relevant only under an expansive view of the meaning of that term. Petitioners argue that it is undisputed that the county failed to provide either (1) notice of the decision or (2) a copy of the decision to any petitioner. Therefore, the sole basis for questioning when petitioners received "actual notice" is whether petitioners nonetheless came into possession of a copy of the decision, as intervenor alleges, or otherwise received information that might "constitute the equivalent of receiving a copy of the decision or written notice of the decision," under *Willhoft*. Petitioners contend that there is no evidence that any petitioner somehow obtained a copy of the decision. Further, petitioners argue that the "circumstances" alleged here—possible attendance at neighborhood meetings, casual conversations at a neighborhood potluck, reading an e-mail from a

neighbor—are simply not equivalent to receiving a copy of the decision or written notice of the decision.

In addition, petitioners submit supplemental affidavits from four petitioners responding to some of intervenor's speculations regarding those petitioners' knowledge of the county's decision. The affidavits attached to petitioners' response are from four petitioners, Paul Frymark, Charleen Frymark, Howard Pinkstaff and Virginia Pinkstaff. In relevant part, each avers that at no time prior to January 2003 did the affiant (1) receive or view a notice of the decision, a copy of the decision, or the county counsel's November 27, 2002 memorandum; (2) communicate personally or by telephone, e-mail or otherwise with Brinker, Carpenter, or Thomas Stumpf regarding the disputed sign; or (3) attend any of the community meetings, potlucks or bingos held prior to January 2003 at which the sign was allegedly discussed. Petitioners argue, based on these supplemental affidavits, that it is clear that at least some petitioners did not have "actual notice" of the decision prior to January 2003 under even the most expansive view of that term. If any one of the petitioners filed a timely appeal under ORS 197.830(3)(a), petitioners argue, then LUBA has jurisdiction over the appeal and dismissal of other petitioners would have no effect on the outcome of this review proceeding. Petitioners argue that the motion to take evidence in the form of the requested depositions and subpoenas is only warranted in this case if intervenor advances sufficient reason to believe that *all* of the named petitioners had "actual notice" prior to January 2003. Petitioners argue that at best intervenor has advanced reasons that *some* petitioners may have had some knowledge of the challenged decision prior to January 2003. Even assuming intervenor's expansive view of "actual notice" is correct, petitioners contend, intervenor has failed to establish any reason to believe that all petitioners had such notice prior to January 2003, particularly in light of the supplemental affidavits. Petitioners submit that the interests of judicial efficiency should prohibit allowing depositions and other discovery into the knowledge of *any* petitioners, where at best the information obtained

might result in the dismissal of *some* petitioners, but would not otherwise affect LUBA's jurisdiction or the outcome of this review proceeding.

Intervenor argues in reply to petitioners' response that the supplemental affidavits simply confirm that the original affidavits attached to the petition for review are incomplete in reciting the circumstances surrounding each of the petitioners' receipt of "actual notice." We understand intervenor to argue that reliance on supplemental affidavits for some petitioners is a concession that the original affidavits for all nine petitioners did not suffice to establish when petitioners received "actual notice." With respect to petitioners' contention that dismissal of some but not all petitioners would not affect this review proceeding, and thus the motion to take evidence is not warranted, intervenor argues that "[t]he petitioners (rather than their lawyer) decide how the case will be briefed and argued, on what terms it should settle, and whether it should be appealed. Thus, the identity of those petitioners is of the utmost importance in this case." Reply to Petitioners' Response 3-4. We understand intervenor to argue that the motion to take evidence should be granted, even if the only potential impact on this review proceeding is the possibility that some but not all petitioners might be dismissed.

3. Analysis

We agree with petitioners that the legal significance of the facts that intervenor seeks to gather by means of deposition and subpoena depends on what circumstances constitute "actual notice." We also agree that the parties appear to view that legal question differently. As we understand intervenor's position, subjective knowledge in any form from any source (*e.g.*, a conversation with a neighbor at a party) can constitute "actual notice" of the decision under *Willhoft*, if the circumstances are sufficient to inform petitioners of the "existence" and "substance" of the decision. Conversely, petitioners emphasize that notice short of being provided written notice or a copy of the decision itself "must be sufficient to constitute the *equivalent* of receiving a copy of the decision or written notice of the decision." *Willhoft*, 38

Or LUBA at 391 (emphasis added). According to petitioners, casual conversations with neighbors can never constitute the "equivalent" of written notice or a copy of the decision.

We are persuaded by the arguments of the parties in this case that our *dicta* in *Willhoft* was incorrect. Although our cases applying ORS 197.830(3) have not been entirely uniform, we have consistently attempted to draw a clear distinction between the "actual notice" standard in ORS 197.830(3)(a) and the "knew or should have known" standard in ORS 197.830(3)(b). The statute describes three types or states of knowledge: (1) "actual notice" of the decision; (2) subjective knowledge of the decision; and (3) imputed knowledge of the decision. The legislature has carefully placed "actual notice" in one category, and subjective knowledge and imputed knowledge in a different category. Contrary to that legislative distinction, our *dicta* in *Willhoft* suggests that there is partial overlap between "actual notice" and subjective knowledge. In other words, if a petitioner "knew" of the decision, *i.e.*, had subjective knowledge of the decision, then that also may constitute "actual notice" of the decision. While that view has some commonsense justification, we now believe that it is inconsistent with the statute.

The most common circumstance where ORS 197.830(3)(a) applies is where the local government has rendered a "permit" decision, as ORS 215.402(4) and 227.160(2) define that term, without recognizing that its decision was a permit decision and without providing contemporary notice of that decision, as required by ORS 215.416(11)(a) and 227.175(10)(a).[4] *See, e.g., Warf v. Coos County*, 42 Or LUBA 84, 100 (2002) (discussing that circumstance). In other words, ORS 197.830(3)(a) applies where the local government has committed a procedural error by failing to provide timely notice of its permit decision. By contrast, where ORS 197.830(3)(b) applies, the local government has not committed a

[4] Other common circumstances where ORS 197.830(3)(a) might apply are (1) where the petitioner obtains required notice after the opportunity for a local appeal has expired, and (2) where the local government holds a hearing on the permit application, but fails to provide notice of that hearing to a person who is entitled to notice of hearing. *Bowlin v. Grant County*, 35 Or LUBA 776, 783 (1998); *Leonard v. Union County*, 24 Or LUBA 362, 374-75 (1992).

procedural error with regard to notice of its decision, because no notice of the decision was required. Presumably, the distinction between ORS 197.830(3)(a) and (b) reflects the legislature's view that different standards should govern appeals to LUBA under ORS 197.830(3) where the local government has failed to provide required notice of its decision and where it has not failed to provide required notice of its decision.

Our *dicta* in *Willhoft* essentially suggests that if the circumstances that would justify a conclusion that a party has subjective or imputed notice of a land use decision are strong enough, those facts may also justify a conclusion that a party received "actual notice" of the decision, even though the local government did not provide "actual notice," assuming the words "actual notice" were intended to require the written notice of decision that is legally required. We now conclude that that is precisely what those words mean. The species of notice that we described in *Willhoft* is "quasi-actual notice," and the circumstances that may give rise to such notice are as ill-defined as the term suggests. We now conclude that the "actual notice" referred to in ORS 197.830(3)(a) is provided only when the local government provides the written notice of decision that is required by law. When the local government fails to "actual[ly]" provide the legally required written notice of decision, the 21-day deadline specified in ORS 197.830(3)(a) does not begin to run until the local government provides to that person (1) the legally required written notice of decision or (2) a copy of the decision itself.[5] Any other set of circumstances that would lead a reasonable person to know that the local government adopted a decision, or would be sufficient to impute such knowledge, will trigger the 21-day appeal period set out in ORS 197.830(3)(b) for persons who are not entitled to notice. But such circumstances will not trigger the 21-day deadline set out in ORS 197.830(3)(a) for persons who are entitled to actual notice of the decision.

The bright line that we interpret ORS 197.830(3)(a) to draw means that the kind of notice that is required by ORS 197.830(3)(a) is clearly defined. The subjective and imputed

[5] In our view, the decision itself is also written notice of the decision.

notice that is anticipated by ORS 197.830(3)(b) remains ill-defined, and will depend largely on the facts in any particular case. Given that ORS 197.830(3)(b) applies only where the local government is not required to provide notice of its decision to a potential LUBA petitioner, the uncertainty of the circumstances that may trigger the 21-day deadline under ORS 197.830(3)(b) is probably unavoidable. However, our decision in *Willhoft* imports a similar kind of uncertainty to ORS 197.830(3)(a), when the language of ORS 197.830(3)(a) does not explicitly envision any kind of notice other than the written notice of decision that is legally required. If the legislature had intended the 21-day deadline that is provided by ORS 197.830(3)(a) to commence when something short of actual written notice of the decision is provided, it would have employed language like it used in ORS 197.830(3)(b) to express that intent. Having failed to do so, we now conclude that we erred in *Willhoft* in suggesting that something short of actual written notice of the decision from the local government, or a copy of the decision itself, will suffice to commence the 21-day deadline for filing an appeal that is provided by ORS 197.830(3)(a).

Turning to the case before us, intervenor's motion to take evidence outside the record depends almost entirely on the *Willhoft dicta*. Almost all of the alleged facts that intervenor seeks to discover and present for our consideration are relevant only under that disavowed *dicta*. The exception is intervenor's allegation that some of the petitioners in this case might have obtained a copy of the disputed building permit. As noted, four petitioners have submitted supplemental affidavits that aver the contrary. It is not clear to us whether intervenor continues to dispute that the four petitioners who submitted the supplemental affidavits might have obtained copies of the building permit. Assuming that intervenor does not continue that dispute with regard to those four petitioners, we see no reason to order depositions with respect to the remaining five, when it is clear that at least four petitioners did not obtain copies of the decision prior to January 2003 and thus filed timely appeals. Even if intervenor maintains that dispute with respect to those four petitioners, we agree with

petitioners that intervenor has failed to demonstrate that depositions or other discovery under OAR 661-010-0045 are warranted to resolve that dispute. Intervenor offers no basis, other than speculation, to suspect that any of the petitioners in this case obtained a copy of the challenged building permit prior to January 2003.

Intervenor's motion to take evidence not in the record is denied.

BRIEFING SCHEDULE

The response brief is due 21 days from the date of this order. Oral argument is hereby scheduled for September 11, 2003, at 11:00 a.m. at the Board's Offices in Salem.

Dated this 7th day of August, 2003.

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Tod A. Bassham
Board Chair