

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Whether a communication constitutes an “ex parte communication” for purposes of ORS 215.422(3) is a mixed question of fact and law that turns, in part, on the actual text and context of the communication. Even where an opposing party does not dispute that the communication occurred or the content of the communication, the parties may well dispute the meaning and significance of the text of the communications at issue. If so, that dispute is sufficient to constitute “disputed facts” for purposes of taking evidence outside the record under OAR 661-010-0045(1). *Oregon Shores Conservation Coalition v. Coos County*, LUBA No 2020-002 (May 4, 2021).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. OAR 661-010-0045(2) does not require a movant to demonstrate that it will prevail on the merits of the associated assignments of error. A movant complies with OAR 661-010-0045(2) if the statement attached to the motion includes a coherent and reasonably detailed legal and factual explanation of how LUBA’s consideration of the proffered evidence will affect the review proceeding. If the statement and proffered evidence persuade LUBA that it could resolve the legal and factual disputes in the movant’s favor and ultimately sustain an assignment of error requiring reversal or remand, then there are sufficient grounds to grant the motion to take evidence. *Oregon Shores Conservation Coalition v. Coos County*, LUBA No 2020-002 (May 4, 2021).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take as evidence not in the record a staff report establishing that the decision-maker improperly relied on an alleged misstatement by staff to make a particular finding where the petitioners do not allege that they were prevented from submitting contrary evidence during the proceedings that led to the challenged decision, where the petitioners do not point to any applicable procedure that staff allegedly violated in making the alleged misstatement, and where the petitioners do not allege that the decision-maker committed a procedural error in relying upon staff representations. *Dressel v. City of Tigard*, 81 Or LUBA 1001 (2020).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Although LUBA’s rules do not explicitly recognize evaluating jurisdiction as a purpose for considering evidence outside the record under OAR 661-010-0045, in an appeal of a local government approval of a utility public way use permit authorizing installation of telecommunication-related facilities, where the local government alleges that LUBA does not have jurisdiction because of the location of the facilities, LUBA will consider as evidence outside the record (1) a marked version of a portion of the local government’s adopted zoning map showing the general location of the facilities and (2) a recorded plat including the subject property. In addition, where the petitioners argue that LUBA has jurisdiction because the challenged decision falls within the scope of the local government’s zoning ordinance and telecommunications ordinance, LUBA will consider as evidence outside the record (1) details related to the dimensions and location of the facilities in determining whether a given local land use process is applicable to the facilities and (2) a screenshot related to the definition of small cell facilities in determining whether the facilities installed fall within the class of equipment subject to the zoning ordinance. *Vaccher v. City of Eugene*, 80 Or LUBA 10 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. For purposes of taking evidence not in the record under OAR 661-010-0045, a petitioner cannot establish that a person

who is not a member of the decision-making body engaged in undisclosed *ex parte* contacts in violation of ORS 227.180(3), and there can be no legally significant or reversible bias on the part of such a person. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. For purposes of taking evidence not in the record under OAR 661-010-0045, where a local government denies an application to rezone property, mere allegations that (1) a decision-maker “habitually engaged in *ex parte* contacts” that they did not then disclose in compliance with ORS 227.180(3), (2) the decision-maker previously moved to rezone a neighboring property, (3) the local government rezoned the neighboring property “by using procedures and requirements that paled in comparison” to those used in evaluating the subject application, and (4) the decision-maker voted against the subject application are insufficient to establish that the decision-maker may have engaged in *ex parte* contacts or been motivated by improper bias. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. For purposes of taking evidence not in the record under OAR 661-010-0045, allegations that a decision-maker is related to (1) individuals who own property close to the subject property and who oppose the application and (2) the city recorder are insufficient to establish that the decision-maker may have engaged in *ex parte* contacts or that the decision-maker’s vote denying the application may have been motivated by improper bias. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Pursuant to ORS 197.835(2), LUBA may make its own factual findings as to whether an appeal was timely filed, which is a jurisdictional question. Accordingly, LUBA may consider evidence outside the record for the limited purpose of resolving disputes regarding whether an appeal was timely filed, even in the absence of a motion to take evidence outside the record under OAR 661-010-0045. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will consider an affidavit from a party’s attorney regarding dates and certain actions that occurred related to notice of the local government’s decision at issue in the appeal for the limited purpose of resolving disputes regarding LUBA’s jurisdiction. *PGE v. City of West Linn*, 79 Or LUBA 213 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was an opportunity to lodge an objection. Accordingly, where a dispute may exist regarding whether petitioners objected to the county’s process during the proceedings below, LUBA will allow a motion to take evidence outside the record to consider a document for the limited purpose of allowing petitioners to cite to that document to establish, if the point is disputed in a response brief, that petitioners attempted to lodge objections to the county’s process. *Eng v. Wallowa County*, 79 Or LUBA 1024 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Nothing in LUBA’s rules requires that returned mail envelopes be included in the record. Returned mail documentation does not fall within the description of “[n]otices of * * * adoption of a final decision * * * mailed

during the course of the land use proceeding” at OAR 661-010-0025(1)(d). *Conte v. City of Eugene*, 78 Or LUBA 1001 (2018).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Petitioner failed to establish a basis for LUBA to take evidence under OAR 661-010-0045 where the city responded to petitioner’s public records request for a copy of draft design guidelines by explaining that the city’s records do not include a copy of the draft guidelines and that the city never adopted the draft guidelines as land use regulations. LUBA will deny petitioner’s motion to take evidence where there is no disputed factual allegation in the parties’ briefs concerning “procedural irregularities not shown in the record” and petitioner’s motion is not directed at evidence of “procedural irregularities,” but, instead, is an attempt to rebut the city’s response and findings regarding the draft guidelines. *Nicita v. City of Oregon City*, 78 Or 1007 (2018).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. In a dispute over attorney fees charged to petitioner, where the city attempts to introduce evidence explaining the accounting for the actual attorney fees charged, asserting that the new evidence relates to disputed facts concerning “other procedural irregularities not shown in the record” OAR 661-010-0045(1), but does not assert that the city’s prior procedures constitute “procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision,” or otherwise explain on what grounds the Board can consider new evidence, LUBA will deny a motion to take evidence not in the record as the evidence the city seeks to introduce does not fall within the grounds to take evidence under OAR 661-010-0045. *Nicita v. City of Oregon City*, 78 Or LUBA 1084 (2018).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The movant for a motion to take evidence under OAR 661-010-0045 fails to demonstrate that the motion is warranted based on “procedural irregularities not shown in the record” where the movant fails to identify any procedure that was violated with respect to the evidence at issue. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. OAR 661-010-0045(1) provides that LUBA may take evidence to resolve disputes regarding the content of the record. Under OAR 661-010-0045(1), LUBA will grant a motion to take evidence to consider evidence regarding the submission of testimony to the decision-maker, where there is an unresolved dispute regarding whether the decision-maker rejected the proffered testimony. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the petitioners file a motion to take evidence for LUBA to consider affidavits and other documents to establish that petitioners filed a timely appeal and are adversely affected, along with a reply brief addressing the same jurisdictional issues, petitioners have sufficiently “explain[ed] with particularity” the facts petitioners seek to establish for purposes of OAR 661-010-0045(2)(a). *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence that seeks to provide citations to the record to support arguments on the

merits set out in the petition for review, because the motion is similar to an addendum to the petition for review for which no permission to file has been sought or granted, where the petitioners do not demonstrate that their motion satisfies OAR 661-010-0045. *Martin v. City of Central Point*, 74 Or LUBA 312 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. While LUBA’s rule allowing a motion to take evidence not in the record can be invoked to allow LUBA to consider documents outside the record in order to resolve disputes over the content of the record, such a motion is not a basis to strike a land sale contract that is indisputably part of the record on the grounds that the contract is incomplete or is not evidence that the decision maker should have relied upon. *Grimstad v. Deschutes County*, 74 Or LUBA 610 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Accepting into the local evidentiary record of a land sale contract that is arguably incomplete or suffers from defects is not a “procedural irregularity not shown in the record” that would warrant a motion to take evidence not in the record under OAR 661-010-0045. *Grimstad v. Deschutes County*, 74 Or LUBA 610 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence under OAR 661-010-0045(1) where there is “no disputed factual allegation not shown in the record” where the local government and all parties agree the movant submitted an email to the planning director, that email was rejected by the planning commission, and that action is shown in the record. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence outside the record, intended to establish that a nonconforming compost facility was operating on the property in 1984 when the property was zoned EFU, where the basis for the motion to take evidence is an argument that the hearings officer committed a “procedural irregularity” not shown in the record in finding that the date the EFU zone was applied is the relevant date for determining whether the nonconforming use was in existence. If the hearings officer erred in determining the relevant date that contrary zoning was applied, that error might provide a basis for remand, but would not constitute a “procedural irregularity” not shown in the record that would allow the movant to submit new evidence to LUBA intended to establish that the use existed in 1984. *Grabhorn v. Washington County*, 72 Or LUBA 443 (2015).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence to consider an affidavit regarding whether building plans were “placed before” the final decision-maker and thus are part of the local record, where there is no factual dispute that the building plans were not placed before the final decisionmaker, and whether the plans belong in the record depends on a legal argument that the plans were included in the record by operation of law. A motion to take evidence is warranted only where there are disputed factual allegations; a dispute over the legal consequences of undisputed facts is not a basis for LUBA to consider extra-record evidence. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An affidavit indicating that one week after issuing the final decision a decision maker knew that the applicant had agreed

to the proposed conditions is an insufficient showing that an *ex parte* contact might have occurred during the hearing to warrant depositions under OAR 661-010-0045, where there is no indication when or how the decision maker acquired that knowledge. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Even assuming that a staff member conveyed to a decision maker during the proceedings below that the applicant had agreed to proposed conditions, that communication is not the kind of communication that requires the decision maker to disclose and offer other parties the opportunity to rebut. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. To constitute an *ex parte* communication that obligates a local government to provide an opportunity for rebuttal, the content of the communication must include something concerning the land use decision at issue that is capable of rebuttal. Where the only content of the alleged communication is that the applicant has agreed to city-proposed conditions, there is simply nothing to rebut or respond to. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion under OAR 661-010-0045 to depose unnamed officials of a regional transit agency, where the depositions are for the purpose of demonstrating that the challenged land use decision is inconsistent with a previous land use decision adopted by the regional transit agency, and that issue has no bearing on whether the land use standards that the city applied or should have applied are “land use standards that do not require interpretation or the exercise of policy or legal judgment” within the ORS 197.015(10)(b)(A) exception to LUBA’s jurisdiction. *Lazarus v. City of Milwaukie*, 67 Or LUBA 475 (2013).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence of a city’s post-adoption actions to enforce a sign ordinance on appeal, where the petitioner’s challenge to the sign ordinance is necessarily a facial challenge, and the petitioner fails to demonstrate that evidence of the city’s post-adoption enforcement actions would be relevant or determinative of any facial challenge. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence that a city has applied its sign ordinance by its terms to require that temporary signs be constructed in a “colonial post style,” where the petitioner advances a facial challenge to the ordinance itself, and evidence that the city has applied the ordinance by its terms could add nothing to any facial constitutional challenge to the ordinance. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence that a city has applied its sign ordinance in an unequal or discriminatory fashion, where the petitioner fails to demonstrate that the city’s actual post-hoc pattern of enforcement is probative to a facial challenge to the sign ordinance itself. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A motion to consider extra-record evidence under ORS 197.835(2)(b) to establish the bias of a *planning commissioner* in favor of a permit application will be denied where the motion is submitted in an appeal of a *city council* decision regarding a related but different permit application. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A petitioner’s motion for an evidentiary hearing to establish bias on the part of a planning commissioner will be denied where (1) the decision on review is a city council decision that followed a *de novo* review of a planning commission decision, (2) the only claim of impropriety on the part of the planning commission that might have tainted the record on review was a planning commission majority vote to refuse to consider evidence offered by petitioner, and (3) the allegedly biased planning commissioner voted with the planning commission minority to accept the evidence offered by petitioner. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. OAR 661-010-0045(1) limits LUBA’s consideration of extra-record evidence to circumstances where there are “disputed factual allegations” in the parties’ briefs concerning, among other things, standing. Where there is no dispute in the parties’ briefs regarding petitioner’s standing to appeal to LUBA, LUBA will deny a motion to take evidence outside the record to consider evidence of a lease that the petitioner asserts may be necessary to establish injury and hence constitutional standing under federal law. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the local government concedes that *ex parte* contact occurred but there exists a disputed allegation of fact concerning the number of *ex parte* contacts that occurred, when they occurred and the substance of those contacts, LUBA will grant a motion to take evidence not in the record to assist in resolving that disputed factual allegation. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence to consider e-mails between the petitioner and the local government to establish that the local government was aware following the proceedings below that it had failed to provide timely notice of hearing and notice of the decision to DLCD, where there is no factual dispute that the local government did not provide the notice of hearing or that the local government failed to provide timely notice of the decision, only a legal dispute as to whether such notices were required and if so the consequences of failure to provide them. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to consider petitioner’s affidavit regarding how his testimony to the planning commission would have been different if he had not been misinformed regarding the time limits, where the decision before LUBA is the city council decision conducted after an evidentiary hearing, and petitioner does not explain why any error committed by the planning commission was not cured

by the proceedings before the city council. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Bias on the part of the city council, if proven, may warrant reversal or remand, and is a proper subject for a motion to take evidence. However, to demonstrate that the grounds to take evidence not in the record to demonstrate bias are met, it is not enough to allege that a planning commissioner was biased in some way. *Smith v. City of Shady Cove*, 63 Or LUBA 543 (2011).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. In order to succeed in a motion to take evidence, the motion must include substantial allegations that the decision maker was biased or that there is a reasonable basis to believe the decision maker was biased. *Smith v. City of Shady Cove*, 63 Or LUBA 543 (2011).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where a city imposes a permit appeal fee that is equal to the original permit application fee, and under the city code the appeal fee is treated as a deposit and the city thereafter refunds any portion of the appeal fee that exceeds the actual cost of the permit appeal, LUBA will deny a motion to allow depositions of city planning staff to establish the estimated actual cost of the permit appeal. Under ORS 227.180(1), which allows cities to impose an appeal fee that does not exceed the actual cost of the appeal, the dispositive legal issue is whether the local government can deny a local appeal that is not accompanied by the requisite deposit, and the actual cost of the local appeal is legally irrelevant. *Oregon Coast Alliance v. City of Brookings*, 63 Or LUBA 586 (2011).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. While LUBA has held that a motion to take evidence under OAR 661-010-045 is not necessary to consider affidavits or evidence outside the record for the limited purpose of establishing LUBA’s *jurisdiction* over the challenged decision, a motion to take evidence is necessary to consider affidavits offered to establish whether LUBA’s *scope of review* includes a particular issue. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to consider extra-record evidence of the minutes of an urban renewal agency meeting at which the agency’s board of directors, made up of the city council members, considered amendments to a sale agreement between the urban renewal agency and the applicant for a land use application then pending before the city planning commission, where the petitioner fails to demonstrate that the minutes include anything that constitutes evidence of bias or an *ex parte* communication between the applicant and city council members concerning the land use application. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the petitioner requests that LUBA consider extra-record evidence in the form of a sign-up sheet that includes the city’s rules for hearings, to support allegations that the city failed to abide by those rules, LUBA will take official notice of the city rules because they were adopted by resolution. However, LUBA will deny the motion with respect to extra-record copies of the sign-up sheet that were signed by participants in the proceeding below, where the petitioner fails to demonstrate how LUBA’s

consideration of the signed sheets would affect the outcome of the review proceeding. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to consider extra-record evidence in the form of a police report describing an incident between the city economic development manager and one of the petitioners, where petitioners do not explain how the alleged conduct of the city manager, even if true, would provide a basis to reverse or remand the city council decision on appeal. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. OAR 661-010-0045(1) allows LUBA to consider evidence that is not in the record that is submitted by the local government in a LUBA appeal, “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,” if resolving those factual disputes could support reversal or remand of the decision. But OAR 661-010-0045(1) does not provide a way for a party to rebut factual conclusions adopted by the local government. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may consider documents that are not in the record, even without a motion to take evidence under OAR 661-010-0045, if a party offers such documents for the limited purpose of determining whether LUBA has jurisdiction over the challenged decision. *Murray v. Multnomah County*, 56 Or LUBA 370 (2008).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A hearing to consider extra-record evidence under OAR 661-010-0045 is not necessary to resolve the parties’ factual disputes surrounding a city’s decision to adopt its final decision at a noon rather than its evening meeting, where a digital recording in the record establishes that parties were orally advised that final action might occur at the noon rather than the evening meeting on a specified date, and that oral notice was sufficient to establish that the city committed no procedural error in acting at its noon meeting. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. It is unusual and unnecessary to use OAR 661-010-0045 to establish that certain documents do not exist. The more straightforward course is to point out that the documents are not in the record, argue that the decision must be supported by those documents in the record, and assign error accordingly. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence under OAR 661-010-0045 to establish that certain documents do not exist, where the respondent concedes the documents do not exist and thus there no disputed factual allegation between the parties. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A respondent’s motion to consider a transcript of a phone message left by petitioner’s attorney as extra-record evidence under OAR 661-010-0045 will be denied, where petitioner disputes the legal significance of that

message but does not dispute the fact that the message was left or the substance of that message. *Siporen v. City of Medford*, 54 Or LUBA 792 (2007).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A petitioner who seeks to present extra-record evidence to LUBA to show that a permit denial was the product of bias or prejudice, rather than the application of relevant approval standards, must make a substantial showing to establish that there is a reasonable basis to believe that the search for extra-record evidence will lead to evidence of such bias or prejudice. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may consider extra-record evidence where there are disputed allegations regarding whether a city took action for the purpose of avoiding the ORS 227.178 requirement that the city take final action on certain permit applications within 120 days. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An ambiguous statement that could be understood to refer to *ex parte* contacts, but could also be understood to refer to contacts that were not *ex parte* contacts might be sufficient to warrant an evidentiary hearing to clarify the meaning of the reference, but is not sufficient to support a conclusion that there were improper undisclosed *ex parte* contacts. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where relevant local legislative history was not included in the local record of a land use decision, OAR 661-010-0045(1) does not authorize LUBA to allow an evidentiary hearing so that a city may provide that legislative history to LUBA to support of its legal interpretive arguments. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A dispute between the parties over the scope and proper interpretation of the term “image” in a city sign code does not warrant consideration of extra-record evidence, where there are no disputed *factual* allegations, and the fact petitioner wishes to establish—that city staff has interpreted the term differently in the past—has no bearing on the issues on appeal. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may consider evidence that is not included in the local government record that is filed with LUBA in an appeal of a land use decision, where consideration of that evidence is necessary to resolve “procedural irregularities not shown in the record * * * which, if proved, would warrant reversal or remand of the decision.” OAR 661-010-0045(1). However, where the only identifiable potential procedural irregularities can be resolved without the extra-record evidence, a motion to consider that extra-record evidence will be denied. *Bradley v. Washington County*, 46 Or LUBA 805 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Petitioners fail to allege facts that would support LUBA’s consideration of evidence not in the record under OAR 661-010-0045, where petitioners merely allege that the disputed evidence was included in a staff

file that ante-dated the proceedings that led to the challenged decision, was relied upon by petitioners in making presentations to the local decision makers, and petitioners would have requested that the evidence be submitted into the local record if they were aware that it was not already included in the record. *Citizens Protection Neighborhoods v. City of Salem*, 46 Or LUBA 823 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. For purposes of establishing standing to appeal to LUBA under ORS 197.830(3), petitioners who reside within sight of a disputed sign are presumptively adversely affected. Exactly how the sign affects petitioners and how many times petitioners have seen it are irrelevant considerations under that presumption, and depositions to resolve those matters are not warranted. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Depositions of two petitioners to inquire into their allegations that they are adversely affected by the challenged decision for purposes of ORS 197.830(3) are not warranted, where the movant fails (1) to specifically controvert those allegations, and (2) to establish that depositions of two petitioners are likely to affect the outcome of LUBA’s review proceeding. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Mere speculation that some petitioners may have obtained a copy of the challenged decision more than 21 days prior to filing the notice of intent to appeal, and thus the appeal is untimely under ORS 197.830(3), is insufficient to warrant depositions to inquire into that circumstance. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where it is not clear whether the parties dispute whether a county planning director rejected an attempted local appeal or whether the local appellants voluntarily retrieved their appeal document, LUBA will not authorize an evidentiary hearing to consider that question. *Burke v. Crook County*, 45 Or LUBA 739 (2003)

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the record includes no reasonable basis for a local government to assume that two unsigned pages attached to a local appellant’s local appeal were not submitted as part of his local appeal, an evidentiary hearing is not warranted to resolve the parties’ factual dispute concerning whether the local appellant expressly told the county that the attached pages were part of his local appeal. *Burke v. Crook County*, 45 Or LUBA 739 (2003)

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may not consider a written statement that is attached to a petition for review to provide information that is not reflected in the record about what occurred during a local land use proceeding, where petitioner fails to demonstrate that one or more of the grounds for considering extra-record evidence under OAR 661-010-0045(1) applies. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will not order a city to produce extra-record evidence of contacts between the city council and its legal counsel during a rezoning proceeding, pursuant to OAR 661-010-0045, to establish that the attorney’s actions violate a party’s right to due process, where (1) the party’s due process argument is based on an allegation that the attorney acted as both legal advisor to the decision maker and as an advocate for the rezoning application, and (2) the city attorney argues that he never served as an advocate for the rezoning application and petitioner does not directly dispute the attorney’s argument. *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary proceeding before LUBA is not a vehicle to belatedly introduce evidence into the record that could have been included in the proponent’s evidentiary presentation below. *Meredith v. Lincoln County*, 44 Or LUBA 821 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary proceeding before LUBA is not warranted to consider evidence that the petitioner has installed “light emitting diodes” on an existing sign in order to engage in constitutionally protected speech, where the question of whether petitioner’s installation is constitutionally protected speech is a legal conclusion, not an assertion of fact. *Meredith v. Lincoln County*, 44 Or LUBA 821 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may consider extra-record evidence if the evidence may demonstrate that the local government decision warrants reversal or remand because of one or more of the bases listed in OAR 661-010-0045(1), and there is sufficient reason why the evidence was not submitted during the local proceedings. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where evidence relating to an approved application for a Head Start program might lend support to petitioners’ allegation that denial of their subsequent application for a migrant worker Head Start program was based on improper discrimination, LUBA will grant a motion to take evidence not in the record to compare the two applications. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Newspaper articles reflecting community members’ bias against an application for a migrant worker Head Start program are not properly attributable to the decision makers, and LUBA will deny a motion to consider the newspaper articles in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A proposed city comprehensive plan amendment that could have the effect of preventing the establishment of a Head Start program in the proposed amendment area does not demonstrate that the city’s denial of an earlier, unrelated application for a migrant worker Head Start program in that area was based on racial prejudice or discrimination, and LUBA will deny a motion to take evidence related to the comprehensive plan amendment in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The fact that an application for a migrant worker Head Start program was hotly debated at the local level does not demonstrate that the decision makers engaged in undisclosed *ex parte* contacts, and LUBA will deny a motion to take evidence relating to the local debate in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The fact that a city approved billboards 20 years ago under a very different regulatory scheme than the current one has little bearing on whether the city violated petitioner’s state and federal constitutional rights in denying its application for a billboard under current regulations. Absent a showing of similarity between the old and new regulatory schemes, evidence of prior approvals does not demonstrate that a city acted arbitrarily or extended privileges to others that were denied to petitioners, and consideration of extra-record evidence under OAR 661-010-0045 is not warranted. *West Coast Media v. City of Gladstone*, 43 Or LUBA 659 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence not in the record under OAR 661-010-0045 where the factual allegations asserted in the motion are not in dispute. Under such circumstances it is more appropriate for the party to assert its allegations in its brief and file a motion to take evidence not in the record if another party disputes those allegations. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence not in the record based on an allegation that the petition for review will allege constitutional error and that LUBA must have the proffered extra-record evidence before it in order to resolve such an assignment of error, where the theory of constitutional error as shown in the motion is conclusory and undeveloped and the facts established by the proffered evidence are not in dispute. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. It is not necessary for LUBA to grant a motion to consider evidence that is not in the record to recognize a fact that is undisputed and is already reflected in the record. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A motion to consider an affidavit regarding an individual’s subjective understanding of a procedure will be denied, where the affidavit is not included in the record and is unnecessary to resolve the legal question presented. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence not in the record to consider the affidavits of three county commissioners explaining that they are biased against the applicant and cannot impartially hear a local appeal involving the applicant, where the commissioners’ declaration of bias is stated in the challenged decision, the assignment of error directed at the commissioners’ bias presents a legal question not dependent on the facts stated in the affidavits, and the proponent fails to demonstrate to LUBA

that the affidavits are necessary to resolve that assignment of error. *Hiebenthal v. Polk County*, 41 Or LUBA 573 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. In demonstrating that a party was entitled to have the evidentiary phase of a local land use proceeding reopened under *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), one of the things a party must show is that the party would submit specific evidence to respond directly to an unanticipated interpretation in the final written land use decision. However, this burden is met at LUBA by identifying the evidence; a party need not move for an evidentiary hearing at LUBA to actually present that evidence to LUBA. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 560 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Motions to take evidence not in the record regarding prejudice or bias are treated the same as those alleging *ex parte* contacts and must include substantial allegations that the decision maker was biased, or that there is a reasonable basis to believe that the decision maker was biased. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An allegation that a city councilor told a city planning commissioner that he “did not want any new service stations” in the city is not sufficient to establish a reasonable basis to believe that the city councilor was biased, and a motion to take evidence not in the record will be denied. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to consider evidence not in the record where the dispute between the parties concerns the accuracy or validity of a map that is included in the record rather than whether that map is properly included in the record. Challenges to the accuracy or validity of the map must be made during the local proceedings. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The Board will accept evidence not included in the record where that evidence is necessary to support a claim of bias in a “clear and unmistakable manner” so as to warrant reversal or remand of the local government’s decision pursuant to ORS 197.835(9)(a)(B). *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A petitioner moving to present evidence of *ex parte* contacts or bias must offer some substantial reason to believe that evidence of such *ex parte* contacts or bias can be established and that such *ex parte* contacts or bias would lead to reversal or remand. This burden is not carried where petitioner simply speculates that the decision maker’s and a local opponent’s membership in an animal rights organization may have led to improper *ex parte* contacts or bias during local proceedings on petitioner’s dog kennel. *Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743 (1999).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where a local decision maker discloses during a local proceeding that one of the parties is her veterinarian and serves on

an animal rights organization with her, petitioner's failure to explore concerns about *ex parte* contacts with that party or possible bias precludes an evidentiary hearing at LUBA to explore such concerns. *Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743 (1999).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A motion for evidentiary hearing to present evidence of a development's violation of a master sewer plan will be denied where such evidence has no bearing on any of the assignments of error. *Claus v. City of Sherwood*, 35 Or LUBA 810 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An alleged lack of candor by the city and a developer concerning negotiations to sell a proposed park property for a school provides no basis for an evidentiary hearing under OAR 661-010-0025 where, even if the alleged lack of candor were true, it would have no bearing on the legal issues raised in the petition for review. *Claus v. City of Sherwood*, 35 Or LUBA 810 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is not warranted to establish that the county orally advised petitioner that the county had approved the challenged application more than 21 days before petitioner filed the notice of intent to appeal, when the relevant issue under ORS 197.830(3)(a) is when the petitioner received actual written notice of the decision. *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Generally, only a local government can commit procedural error within the meaning of OAR 661-010-0045(1). Petitioner's failure to raise an issue below is not a "procedural error" warranting an evidentiary hearing. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 759 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary proceeding under OAR 661-010-0045 is not a vehicle for respondents to provide *post hoc* support for land use decisions or address legal challenges to those decisions on appeal. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 759 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is not warranted where the letter to be considered would only "substantiate information" that is already in the record. *Abadi v. Washington County*, 35 Or LUBA 729 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The "procedural irregularities" not shown in the local record that may warrant an evidentiary hearing at LUBA can only be committed by the local government that has procedural responsibilities for the land use proceedings. An individual participant cannot commit such "procedural irregularities." *ODOT v. Coos County*, 34 Or LUBA 805 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is not warranted where adding more recollections concerning the terms of a city council's motion would not add to the conflicting recollections already included in the record and such additional recollections would not be more persuasive evidence of the terms of the motion than the actual

conduct of the city council after the vote on the motion. *ODOT v. City of Mosier*, 34 Or LUBA 797 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioner submits testimony that minutes of the local proceedings in the record have been altered, the requirements of OAR 661-010-0045 have been met for LUBA to grant an evidentiary hearing. *ODOT v. City of Mosier*, 34 Or LUBA 770 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing to resolve “disputes regarding attorney fees” pursuant to OAR 661-010-0045(1) is not warranted where the motion for an evidentiary hearing is filed before LUBA has entered its final opinion. *Ackerley Outdoor Advertising v. City of Portland*, 34 Or LUBA 736 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The predicate to LUBA’s authority to conduct an evidentiary hearing under ORS 197.835(2)(b) and OAR 661-010-0045(1) is allegations of certain conduct *not shown* in the record. LUBA has no authority to conduct an evidentiary hearing to determine which of two competing versions of facts *in the record* is accurate. *Ackerley Outdoor Advertising v. City of Portland*, 34 Or LUBA 736 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Communication between a local governing body or its staff and its insurance carrier are not *ex parte* contacts requiring disclosure under ORS 227.180(3). *Marshall v. City of Yachats*, 34 Or LUBA 724 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Allegations that the applicant committed fraud and forgery do not provide a basis for an evidentiary hearing under OAR 661-010-0045(1) as a “procedural irregularity” not shown in the record. Only the local government can commit a procedural irregularity within the meaning of OAR 661-010-0045(1). *Marshall v. City of Yachats*, 34 Or LUBA 724 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will consider supplemental affidavits, submitted after oral argument in support of petitioners’ standing, where the parties’ arguments did not focus on the theory of standing supported by the affidavits and the facts asserted in the affidavits are not disputed. In that circumstance, an evidentiary hearing is not required for LUBA to consider the affidavits. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Presenting evidence that petitioner knew a final hearing was scheduled for a certain date would not establish that a petitioner knew that a final decision was actually adopted on that date. *Casey Jones v. City of Lowell*, 33 Or LUBA 845 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Evidentiary hearings provided for by ORS 197.835(2) do not provide a mechanism to add to the local record facts that could have been, but were not, submitted during the course of the local proceeding. *St. Johns Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. ORS 197.763(1) requires the proponent of an evidentiary hearing to demonstrate that the reason facts are missing from the record is not due to the proponent’s failure to submit information sufficient to afford the local governing body the opportunity to respond. *St. Johns Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioner requests an evidentiary hearing but does not attempt to show that it is adversely affected or aggrieved by the operation of the proposed facility approved by the challenged decision, LUBA can conclude that the facts to be presented would not affect the outcome of the appeal and therefore do not merit an evidentiary hearing. *Wilbur Residents v. Douglas County*, 33 Or LUBA 412 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Even if county staff consulted certain files prior to issuance of a contested grading permit, that would not make those files part of the local record. Therefore, petitioner’s allegations concerning such consultation provide no basis for an evidentiary hearing to establish that those files are part of the grading permit record on appeal. *Ceniga v. Clackamas County*, 33 Or LUBA 261 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. It is premature, before the record is settled and the petition for review is filed, to take depositions or to hold an evidentiary hearing in order to obtain information that can be used to challenge petitioners’ standing. *Newton Creek Citizens Comm. v. City of Roseburg*, 32 Or LUBA 496 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Because OAR 661-10-045(1) limits “disputes regarding the content of the record” to whether certain items were properly included in or excluded from the record, an evidentiary hearing is not the proper means to establish the possible significance of the items, which depends on the arguments made in the parties’ briefs. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 491 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing may be requested pursuant to OAR 661-10-045 when evidence outside the record must be considered to determine what should be included in the record, but an evidentiary hearing cannot be used to add evidence to the record regarding the substantive merits of a case. *Laurance v. Douglas County*, 32 Or LUBA 489 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The deliberate use by a local government of false affidavits of service, if not shown in the record, would be a “procedural irregularity,” as that term is used in ORS 197.835(2)(b) and OAR 661-10-045(1), and therefore evidence outside the record showing such deliberate use could justify an evidentiary hearing. However, one wrongly addressed envelope does not cast sufficient doubt on the accuracy of the county’s affidavit of service to warrant reversal or remand. *Palmer v. Lane County*, 32 Or LUBA 484 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Unless petitioners allege facts which are disputed by some other party and which, if true, would warrant reversal or remand by demonstrating that the challenged decision is unconstitutional or that the proceedings

below were flawed by some procedural irregularity, LUBA is not permitted to conduct an evidentiary hearing, even if doing so might improve our understanding of the case. *Palmer v. Lane County*, 32 Or LUBA 484 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Petitioners may not use an evidentiary hearing as a vehicle to expand their presentation of evidence and testimony below. *Palmer v. Lane County*, 32 Or LUBA 484 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A county commissioner’s unexplained reference to a “gap,” which might refer to an alleged gap in ownership that could invalidate an access easement to the subject property, is insufficient to create an inference of procedural irregularity sufficient to justify an evidentiary hearing. *Palmer v. Lane County*, 32 Or LUBA 484 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Although documents specifically rejected by a local government during its proceedings are not part of the local government record, the erroneous rejection of documents may provide a basis for reversal or remand. A party that wishes to challenge in its brief the propriety of the decision to exclude particular documents may request an evidentiary hearing before filing its brief. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 475 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. To establish *ex parte* contacts not shown by the record, a party must request an evidentiary hearing. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A single, unexplained reference to an earlier use in a nonconforming use determination hearing is not a reasonable basis for a belief that an undisclosed *ex parte* contact took place and would not justify granting a motion for an evidentiary hearing. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A motion for evidentiary hearing will be denied where petitioners do not make the requisite threshold showing that there is a reasonable basis to believe that *ex parte* contacts probably took place, and offer no supporting legal authority indicating that such contacts would warrant reversal or remand of the county’s decision. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Because communication between a county commissioner and an attorney representing the county regarding a pending conditional use application is not an *ex parte* contact required to be disclosed under ORS 215.422(4), an evidentiary hearing is not warranted to determine if such communication occurred. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is not the proper forum for resolving issues relating to bias where the moving party does not allege any facts which are actually in dispute. *Dominey v. City of Astoria*, 31 Or LUBA 523 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The purpose of an evidentiary hearing is to determine the underlying facts supporting allegations regarding improper *ex parte* contacts. There is no need for an evidentiary hearing where the facts alleged by the moving party are not in dispute. *Dominey v. City of Astoria*, 31 Or LUBA 523 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Under OAR 661-10-045, LUBA has authority to order an evidentiary hearing in order to consider disputed facts, not in the record, which would establish a petitioner’s standing to appeal. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Under ORS 197.830(13)(b), LUBA may allow an evidentiary hearing if there are disputed allegations of procedural irregularities not shown in the record which, if proved, would warrant reversal or remand. *Huntzicker v. Washington County*, 29 Or LUBA 587 (1995).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioner’s motion for evidentiary hearing does not explain how the alleged facts concerning a procedural irregularity below not shown in the record would warrant reversal or remand of the challenged decision, petitioner fails to demonstrate that an evidentiary hearing is warranted. *Pendair Citizens’ Committee v. City of Pendleton*, 28 Or LUBA 796 (1995).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The “disputed allegations” that may justify an evidentiary hearing under ORS 197.830(13)(b) are disputed allegations of *fact*. Where the dispute between parties concerns only the legal conclusions or consequences to be drawn from facts in the record, an evidentiary hearing is not warranted. *Jones v. Lane County*, 27 Or LUBA 654 (1994).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The “disputed allegations” that may justify an evidentiary hearing under ORS 197.830(13)(b) must concern the matters referenced in ORS 197.830(13)(b) or OAR 661-10-045(1). *Jones v. Lane County*, 27 Or LUBA 654 (1994).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will not grant a motion for evidentiary hearing unless the moving party establishes that it would introduce evidence at such a hearing that could result in reversal or remand of the challenged decision. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioners request an evidentiary hearing for the purpose of submitting evidence of an unrelated local land use decision made during the pendency of the subject LUBA appeal, and petitioners fail to explain how such evidence would affect the outcome of the subject appeal, the motion for evidentiary hearing will be denied. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A local government staff memorandum concerning notice provided during a legislative proceeding is not properly included in the record of that proceeding, where the memorandum was created two months after

the challenged decision was adopted. However, submission of the memorandum may be allowed in the event of an evidentiary hearing, pursuant to ORS 197.830(13)(b) and OAR 661-10-045, to demonstrate that required notices were given. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is unwarranted where the dispute between the parties concerns only the correct legal conclusion to be drawn from undisputed facts. *Davenport v. City of Tigard*, 24 Or LUBA 594 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing at LUBA will not be allowed to show that many, but not all, conditionally permitted uses listed in the applicable zoning district are economically infeasible, where petitioners do not argue that it would have been futile to apply for approval of the other conditionally permitted uses. Under these circumstances, the evidence petitioners seek to introduce would not establish an unconstitutional “taking.” *Larson v. Multnomah County*, 24 Or LUBA 591 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioners seek an evidentiary hearing concerning alleged procedural errors not shown in the local record, but there are no disputed allegations of fact concerning the alleged errors, there is no basis for an evidentiary hearing. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 708 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the facts petitioners seek to introduce into the record through an evidentiary hearing do not provide a basis for reversal or remand of the challenged decision, an evidentiary hearing is not warranted. ORS 197.830(13)(b). *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 708 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. ORS 197.830(13)(b) limits LUBA’s authority to conduct evidentiary hearings to consider evidence that is not included in the local record. ORS 197.830(13)(b) does not permit LUBA to conduct an evidentiary hearing to obtain a more complete picture of the local government hearings or the characteristics of the subject property and the area surrounding the property at issue in a LUBA appeal. *Reed v. Benton County*, 23 Or LUBA 681 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where one of a petitioner organization’s members did not receive actual notice of a land use decision more than 21 days prior to the time the notice of intent to appeal was filed, an evidentiary hearing to establish that *other* individual members of the organization or the organization’s board of directors had actual notice of the challenged decision more than 21 days before the challenged decision was made, is not warranted. Even if other members received such actual notice, petitioner’s notice of intent to appeal in its *representational* capacity would be timely. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where an organizational petitioner timely files a notice of intent to determine in its representational capacity, it is only necessary to determine whether petitioner also filed the notice of intent to appeal within 21 days of the date it, as an *organization*, is deemed to have actual notice of the challenged

decision, if there were a dispute concerning the member's standing upon whom petitioner's representational capacity to bring the appeals and its representational standing depend. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Under ORS 197.830(13)(b) and OAR 661-10-045(1), allegations of unconstitutionality and procedural irregularities only provide grounds for an evidentiary hearing if the facts the movant desires to present are not in the local record. *Berg v. Linn County*, 21 Or LUBA 622 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where it is alleged a decision maker made statements concerning a previously issued decision, and those statements indicate that the decision maker was biased against the applicant or had undisclosed *ex parte* contacts, an evidentiary hearing at LUBA may be justified to accept evidence concerning the allegations. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where erroneous plan and code interpretations are not included in a land use decision maker's written decision, they do not constitute a procedural error or irregularity warranting reversal or remand under ORS 197.835(7)(a)(B) or an evidentiary hearing under ORS 197.830(13)(b). *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioners are required to file a notice of intent to appeal within 21 days of receiving actual notice of the challenged decisions and a party gives specific reasons to question petitioners' allegations that they received actual notice of the challenged decisions less than 21 days before the notices of intent to appeal were filed, an evidentiary hearing is warranted and LUBA will allow depositions to explore when petitioners received actual notice of the challenged decisions. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA requires that a party moving for an evidentiary hearing explain with particularity what facts it expects to present in an evidentiary hearing and why those facts will affect the outcome of the appeal. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will not order an evidentiary hearing, or depositions to inquire whether a local appeal was timely filed, where the party requesting the evidentiary hearing or depositions fails to supply any basis for concluding that the local appeal notice was untimely filed. *Tarbell v. Jefferson County*, 20 Or LUBA 517 (1990).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. If a petitioner's standing to appeal to LUBA on any basis can be established without the necessity of an evidentiary hearing, LUBA will not conduct an evidentiary hearing to enable the petitioner to establish standing to appeal on a different basis. *Lowrie v. Polk County*, 19 Or LUBA 564 (1990).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where there is no dispute concerning the authenticity or identity of a document a party believes was improperly excluded from the record by the local government, the parties may stipulate that the document be included in the LUBA record for the limited purpose of reviewing the correctness of the local government’s decision to exclude the document from the local government record. Alternatively, the document may be attached to a party’s brief, and if any party objects to LUBA’s consideration of the document, the party offering the document may move for an evidentiary hearing. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Petitioners’ motion for evidentiary hearing to submit affidavits recounting events outside the proceedings below, which allegedly demonstrate bias against petitioners on the part of the city attorney, will be denied because the city attorney was not the local government decision maker and, therefore, the attorney’s motivation is not relevant to determining whether petitioners’ rights to a fair hearing were prejudiced. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).