

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON

3  
4 SUSAN CLAUS, ROBERT JAMES CLAUS,  
5 and SANFORD M. ROME,  
6 *Petitioners,*

7  
8 vs.

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10 CITY OF SHERWOOD,  
11 *Respondent,*

12  
13 and

14  
15 CAPSTONE PARTNERS, LLC,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2010-017

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20 SUSAN CLAUS, ROBERT JAMES CLAUS,  
21 and SANFORD M. ROME,  
22 *Petitioners,*

23  
24 vs.

25  
26 CITY OF SHERWOOD,  
27 *Respondent.*

28  
29 LUBA No. 2010-023

30 ORDER

31 **MOTION TO FILE REPLY BRIEF**

32 On July 7, 2010, petitioner Susan Claus filed an eight-page reply brief. The brief was  
33 not accompanied by a motion, and there is no request to file a reply brief that exceeds the  
34 five-page limit imposed by OAR 661-010-0039, nor explanation for the additional length.<sup>1</sup>

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<sup>1</sup> OAR 661-010-039 provides, in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new

1 The nominal subject of the reply brief is the city’s argument in the response brief that the city  
2 councilors’ non-disclosure of alleged ex parte contacts is mere “harmless error.” Reply Brief  
3 2. However, petitioner does not cite to where that argument is found in the response brief,  
4 and we do not see it. Even if the response brief includes that argument, the first five pages of  
5 the proposed reply brief do not respond to a “harmless error” argument, but instead repeat  
6 and embellish various arguments made in the petition for review. The last three pages of the  
7 reply brief engage in personal attacks on the city’s attorneys. The reply brief is denied.

8 **MOTION TO TAKE EVIDENCE**

9 The challenged city council decision approves an application for planned unit  
10 development (PUD), subdivision, and related zoning map and comprehensive plan  
11 amendments to facilitate a mixed-use development known as Cannery Square. In the petition  
12 for review, petitioners advance five assignments of error alleging that the city council was  
13 biased, failed to disclose ex parte contacts, and committed other procedural errors. Those  
14 allegations are based in part on a number of extra-record documents that are attached to the  
15 petition for review. The city and intervenor-respondent (respondents) moved to strike some  
16 of the attached documents, and petitioner Susan Claus thereafter moved for LUBA to  
17 consider those documents, as evidence outside the record, pursuant to OAR 661-010-0045.

18 Specifically, petitioner requests that the Board (1) consider the documents not in the  
19 record that are attached to the petition for review, (2) consider several additional documents  
20 not in the record that are attached to the motion to take evidence, and (3) order the  
21 depositions of the mayor, the city manager, and the city economic development manager.  
22 We now resolve the motion to take evidence.

23 OAR 661-010-0045(1) specifies the permissible grounds for a motion to take  
24 evidence not in the record:

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matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of  
appendices, unless permission for a longer reply brief is given by the Board. \* \* \*

1 “The Board may, upon written motion, take evidence not in the record in the  
2 case of disputed factual allegations in the parties’ briefs concerning  
3 unconstitutionality of the decision, standing, ex parte contacts, actions for the  
4 purpose of avoiding the requirements of ORS 215.427 or 227.178, or other  
5 procedural irregularities not shown in the record and which, if proved, would  
6 warrant reversal or remand of the decision. \* \* \*”

7 Further, OAR 661-010-0045(2) requires:

8 “(a) A motion to take evidence shall contain a statement explaining with  
9 particularity what facts the moving party seeks to establish, how those  
10 facts pertain to the grounds to take evidence specified in section (1) of  
11 this rule, and how those facts will affect the outcome of the review  
12 proceeding.

13 “(b) A motion to take evidence shall be accompanied by:

14 “(A) An affidavit or documentation that sets forth the facts the  
15 moving party seeks to establish; or

16 “(B) An affidavit establishing the need to take evidence not  
17 available to the moving party, in the form of depositions or  
18 documents as provided in subsection (2)(c) or (d) of this rule.

19 “(c) Depositions: the Board may order the testimony of any witness to be  
20 taken by deposition where a party establishes the relevancy and  
21 materiality of the anticipated testimony to the grounds for the motion,  
22 and the necessity of a deposition to obtain the testimony. \* \* \*”

23 **A. Minutes of Sherwood Urban Renewal Agency Meeting**

24 Exhibit 6 to the petition for review consists of the minutes of the Sherwood Urban  
25 Renewal Agency (SURA) Board of Directors meeting dated November 3, 2009. The SURA  
26 Board of Directors consists of the seven city council members.<sup>2</sup> Petitioner argues that these  
27 minutes show that the SURA Board approved amendments to an existing purchase and sale  
28 agreement and the site development agreement between SURA and intervenor-respondent  
29 Capstone Partners, LLC, on property owned by SURA. We understand petitioner to argue

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<sup>2</sup> It is common for a city governing body to also comprise the board of directors for the city’s urban renewal agency. Nonetheless, the two entities are legally distinct. See ORS 457.045(3) (An “act of the governing body acting as the urban renewal agency shall be, and shall be considered, the act of the urban renewal agency only and not of the governing body”).

1 that the Cannery Square PUD is the subject of that purchase and sale agreement and the site  
2 development agreement. On November 3, 2009, the Cannery Square PUD application had  
3 been filed and was pending before the city planning commission. According to petitioner,  
4 when the city council later conducted its first hearing on the Cannery Square PUD  
5 application in February 2010, the city councilors should have, but did not, disclose *ex parte*  
6 communications they received at the November 3, 2009 SURA meeting. Petitioner also  
7 argues that SURA minutes reflect the city council's bias in favor of the Cannery Square  
8 PUD.

9 The city responds in relevant part that petitioner does not identify anything in the  
10 minutes of the November 3, 2009 SURA meeting that constitutes an *ex parte* communication  
11 or evidence of bias. We agree with the city that petitioner has not demonstrated that LUBA's  
12 consideration of the SURA minutes is warranted under OAR 661-010-0045(1). The mere  
13 fact that the seven city council members also comprise the SURA Board of Directors does  
14 not necessarily mean that communications received during SURA meetings are *ex parte*  
15 communications with respect to land use applications that involve property owned by SURA.  
16 Although petitioner does not cite it, ORS 227.180(3), the statute that requires the city council  
17 members to disclose *ex parte* communications, requires in relevant part that members of the  
18 decision-making body disclose "the substance of any written or oral *ex parte*  
19 communications *concerning the decision or action.*" ORS 227.180(3)(a). The "decision or  
20 action" is the land use application before the decision-making body. It is not clear, and  
21 petitioner makes no effort to demonstrate, that the SURA Board's consideration of  
22 amendments to the purchase and sale agreement and the site development agreement  
23 between SURA and Capstone Partners, LLC, should be viewed as a communication  
24 "concerning" the Cannery Square PUD application that was then pending before the planning  
25 commission. For all petitioner has demonstrated, those amendments had nothing to do with

1 the PUD application. Further, petitioner does not identify *any* communication in the minutes  
2 that could be viewed as an *ex parte* communication for purposes of ORS 227.180(3).<sup>3</sup>

3 Similarly, with respect to bias, petitioner does not identify anything in the SURA  
4 minutes suggesting that any city council member was biased with respect to the PUD  
5 application. Petitioner has not demonstrated that LUBA's consideration of the SURA  
6 minutes is warranted under OAR 661-010-0045. LUBA will not consider Exhibit 6 to the  
7 petition for review.

8 **B. City Council Hearing Audiotapes**

9 Petitioner requests that the Board consider audiotapes of three city council hearings  
10 on the Cannery Square application. Respondents note, correctly, that all three tapes are in  
11 the record, and retained by the city until oral argument, pursuant to OAR 661-010-0025(2).  
12 This request is moot.

13 **C. E-Mail dated February 4, 2010.**

14 Exhibit 11 to the petition for review is an e-mail from petitioner Susan Claus to the  
15 city council dated February 4, 2010, with attachments. The e-mail objects to the mayor's  
16 refusal to re-open the evidentiary record to allow additional written testimony. Petitioner  
17 argues that the e-mail is evidence of bias and "procedural irregularity" on the part of the  
18 mayor.

19 The city responds that it does not dispute that petitioner objected to the mayor's  
20 refusal to re-open the evidentiary record, and there are thus no "disputed factual allegations"  
21 on that point. We agree that petitioner has not demonstrated that consideration of the  
22 February 4, 2010 e-mail is warranted under OAR 661-010-0045. Further, while the e-mail  
23 includes petitioner's assertions of procedural irregularities and bias on the part of the mayor,

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<sup>3</sup> ORS 227.180(4) provides that "[a] communication between city staff and the planning commission or governing body shall not be considered an *ex parte* contact \* \* \*." If the minutes reflect non-staff communication with the SURA Board on any subject, much less the Cannery Square PUD, petitioner has not bothered to identify it.

1 those assertions are not *evidence* of either procedural irregularity or bias. The Board will not  
2 consider Exhibit 11 to the petition for review.

3 **D. Sign-Up Sheet**

4 Exhibit 9 is a copy of a document entitled “Rules for Meetings in the City of  
5 Sherwood” that includes a signature line stating that the participant has read and understood  
6 the rules. The city’s practice, apparently, is to require that each participant at city council  
7 meetings read and sign the rules and give them to the city recorder, prior to addressing the  
8 city council. The mayor then uses the sign-up sheets to organize public testimony. In an  
9 order dated May 12, 2010, LUBA ruled that the sign-up sheets submitted by parties to the  
10 city during the hearings below are not part of the local evidentiary record for the PUD  
11 application.

12 Petitioner argues that the blank sign up sheet in Exhibit 9 is evidence of procedural  
13 irregularity, in that the city allegedly failed to abide by the rules described on that sheet. In  
14 addition, petitioner argues that LUBA should order the city to provide the signed sheets  
15 submitted by other participants at the various hearings.

16 The city responds that “Rules for Meetings in the City of Sherwood” were adopted by  
17 resolution, and LUBA can take official notice of the blank document in Exhibit 9, but that  
18 petitioner has not demonstrated that consideration of the signed sheets submitted by  
19 participants at the hearings is warranted under OAR 661-010-0045. We agree with the city.  
20 Petitioner identifies nothing in the signed sheets that would have a bearing on any issue in  
21 this appeal. If petitioner wishes to argue that the city acted inconsistently with the rules  
22 stated on the sign-up sheets and direct LUBA to specific rules, petitioner can cite to the blank  
23 sign up sheet in Exhibit 9.

24 **E. Affidavits**

25 Exhibit 10 includes two affidavits signed by persons who are not parties to this  
26 appeal, stating in relevant part that they submitted sign up sheets and believed that the sheets

1 would be part of the local record. However, petitioner does not explain how those beliefs  
2 have any bearing on any issue in this appeal, or constitute evidence of any procedural  
3 irregularity.

4 The two affidavits also state that the affiants believed that the oral testimony before  
5 the planning commission would be submitted to the city council. The petition for review  
6 alleges that the city erred in not placing the audiotapes of planning commission hearings into  
7 the city council record. The city does not dispute that the planning commission audiotapes  
8 were not provided to the city council, although it disputes that failure to do so was error.  
9 Because petitioner has identified no disputed factual allegation with respect to those  
10 audiotapes, petitioner has not demonstrated any basis to consider the affidavits in Exhibit 10.

11 Exhibit 8 is an affidavit from two persons that are not parties to this appeal, alleging  
12 that the affiants were entitled to notice of the city council hearing, but that the city failed to  
13 provide notice to the affiants. While that affidavit alleges a procedural error, petitioner has  
14 not demonstrated that the alleged procedural error is one that, “if proved, would warrant  
15 reversal or remand of the decision.” OAR 661-010-0045(1). LUBA may reverse or remand  
16 based on procedural error only if the error “prejudiced the substantial rights of the  
17 *petitioner*[.]” ORS 197.835(9)(a)(B) (emphasis added). Petitioners may not raise alleged  
18 prejudice to other people’s substantial rights as a basis for reversal or remand. *Cape v. City*  
19 *of Beaverton*, 41 Or LUBA 515, 523 (2002); *Bauer v. City of Portland*, 38 Or LUBA 432,  
20 439 (2000). The request to consider the affidavits in Exhibits 8 and 10 are denied.

#### 21 **F. Police Report**

22 Exhibit 7 is a police report investigating allegations that petitioner Sanford Rome  
23 threatened the city economic development manager, acting as city staff, during a recess at a  
24 planning commission hearing on the Cannery Square application. The manager later  
25 contacted police, who spoke with petitioner Rome at his home, advised him to avoid  
26 behavior that could be construed as threatening, but concluded that no crime had been

1 committed. Petitioner requests that LUBA consider Exhibit 7 as “evidence of the ongoing  
2 threat and use of police in the Cannery (and other Sherwood) public hearing that prejudices a  
3 public hearing and intimidates citizens from coming forward to participate in an impartial  
4 and fair tribunal.” Motion to Take Evidence 9.

5 Petitioner apparently wishes to establish based on the police report that the city  
6 manager has used police to intimidate citizens from testifying at Cannery Square hearings.  
7 However, the police report simply does not support that allegation.<sup>4</sup> Even if it did, there is  
8 no assignment of error or allegation in the petition for review based on the police report or  
9 any alleged misconduct by the city economic development manager, and petitioner does not  
10 explain in the motion to take evidence how the “fact” that petitioner wishes to establish  
11 pertains to any of the grounds to take evidence specified in OAR 661-010-0045(1). It is also  
12 unexplained how any alleged misconduct of the economic development manager following a  
13 planning commission hearing could provide a basis to reverse or remand the city council  
14 decision before us in this appeal. The request to consider Exhibit 7 is denied.

15 **G. Sherwood Urban Renewal Committee Meeting Minutes**

16 Exhibit 5 is a copy of the August 19, 2009 minutes of a meeting of the Policy  
17 Advisory Committee for the Sherwood Urban Renewal agency, known as SURPAC.  
18 Petitioner alleges that during the SURPAC meeting the city economic development manager,  
19 apparently acting as committee staff, threatened to call the police when petitioner Susan  
20 Claus attempted to speak at the meeting, which was not open to public testimony. Petitioner  
21 notes that the SURPAC minutes do not reflect that alleged exchange between petitioner and  
22 the city manager. According to petitioner, the alleged exchange is “another example of a  
23 pattern of threats and intimidation[.]” Motion to Take Evidence 9.

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<sup>4</sup> If anything, the police report suggests that the intent to intimidate runs the other way.

1 If the SURPAC minutes do not reflect the alleged exchange, it is difficult to  
2 understand how the minutes could possibly supply evidence of the alleged misconduct that  
3 petitioner apparently wishes to establish. In addition, the request to consider the August 19,  
4 2009 minutes suffers from all of the deficiencies identified above, with respect to the police  
5 report. There is no assignment of error based on the above allegation, no explanation how  
6 the allegations pertain to any of the grounds for considering extra-record evidence, and no  
7 explanation how the allegations, even if proved, could provide a basis to reverse or remand  
8 the *city council* decision that is before us. The request to consider Exhibit 5 is denied.

#### 9 **H. Depositions**

10 Petitioner requests permission to depose the mayor, the city economic development  
11 manager, and his supervisor, the city manager. With respect to the economic development  
12 manager, petitioner argues that his deposition will provide testimony about his alleged threat  
13 to have petitioner Susan Claus removed from the SURPAC meeting. However, that request  
14 fails for all the reasons specified above. With respect to the city manager, petitioner merely  
15 assert that his deposition will “provide evidence that procedural irregularities occurred  
16 during the Cannery hearings,” without explaining what those procedural irregularities might  
17 be. Motion to Take Evidence 10.

18 Finally, with respect to the mayor, petitioner states that his deposition will provide  
19 evidence of “ex-parte [contacts] and bias that occurred during the Cannery PUD hearings but  
20 were not disclosed.” Motion to Take Evidence 11. However, petitioner offers no concrete  
21 basis to believe that *ex parte* contacts with the mayor in fact occurred or that the mayor was  
22 biased with respect to the PUD application. To obtain a deposition under OAR 661-010-  
23 0045(2)(c), the movant must establish “the relevancy and materiality of the anticipated  
24 testimony to the grounds for the motion, and the necessity of a deposition to obtain the  
25 testimony.” A deposition is not a fishing expedition that can be granted based on mere  
26 allegations. Petitioner has fallen far short of providing the kind of foundation necessary to

1 support a request for a deposition under OAR 661-010-0045(2)(c). The request for  
2 depositions is denied.

3 **I. Other Documents**

4 Petitioner requests that LUBA consider (1) a newspaper article about petitioner Jim  
5 Claus, found in Exhibit 3 to the petition for review, (2) a magazine article about Jim Claus,  
6 attached to the motion, and (3) a screen shot of the city’s web site, which indicates that the  
7 SURA governing board consists of the city council members, also attached to the motion.  
8 We agree with the city that petitioner offers no basis under OAR 661-010-0045(1) for LUBA  
9 to consider the newspaper and magazine articles. With respect to the screen shot of the city’s  
10 website, the city responds that it does not dispute that the SURA governing board consists of  
11 the city council members, and there is no “disputed factual allegation” on that point. We  
12 agree with the city, and do not consider the documents attached to the motion.

13 **J. Conclusion**

14 For the above reasons, petitioner’s motion to take evidence outside the record is  
15 denied. LUBA will not consider Exhibits 3, 5-8, and 10-11 attached to the petition for  
16 review, nor the magazine article and screen shot attached to the motion. LUBA will take  
17 official notice of the document in Exhibit 9.

18 **MOTION TO STRIKE**

19 For the above reasons, the city’s motion to strike Exhibits 3, 5-8, and 10-11 is  
20 granted. The city also moved to strike Exhibit 2, but subsequently withdrew the motion.

21 **SCHEDULE**

22 The next event in this review proceeding is oral argument. OAR 661-010-0045(9).  
23 Oral argument is hereby scheduled for August 19, 2010, at 11:00 a.m., at LUBA’s offices in  
24 Salem.

25 Dated this 14<sup>th</sup> day of July, 2010.  
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Tod A. Bassham  
Board Member