

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. ORS 197.835(2)(b) and OAR 661-01-0045(1) authorize LUBA to consider evidence outside the record where the proponent demonstrates that there are disputed allegations in the parties’ briefs regarding the “unconstitutionality of the decision.” However, where petitioners do not intend to argue that a city’s decision is unconstitutional, but rather that the city erred in failing to comply with its city charter requirement for a vote, based on the city’s reliance on a statute that petitioners believe unconstitutionally infringes on the city’s charter authority, LUBA will deny petitioners’ motion to take evidence because evidence on the constitutionality of a statute is not one of the bases for taking evidence outside the record under ORS 197.835(2)(b) and OAR 661-010-0045(1). *Renken v. City of Oregon City*, 78 Or LUBA 1070 (2018).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. In a motion to take evidence outside the record pursuant to OAR 661-010-0045(1), and (2)(a) and (c), petitioners’ argument—that two city employees violated petitioners’ rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution because the employees engaged in the “unequal” application of the applicable standards in processing two similarly situated planned unit development (PUD) projects—fails to demonstrate that the proffered evidence would concern “procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision” because petitioners do not allege that the final decision maker violated petitioners’ constitutional rights. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. To succeed in a motion to take evidence outside the record and pursuant to OAR 661-010-0045(1), and (2)(a) and (c), regarding an alleged violation of petitioners’ rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution, the movant must develop a legal theory and a set of factual assertions sufficient to allow LUBA to determine how consideration of the proffered evidence would “affect the outcome of the review proceeding.” *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. It would be inconsistent with sound principles of judicial review, ORS 197.805, for LUBA to resolve a constitutional challenge to the procedure a city uses to approve an annexation, in a direct appeal of the city decision approving the annexation, when the same issue is pending before a circuit court in a writ of mandamus proceeding between the same parties, seeking to compel the city to approve the annexation under a different procedure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. A petitioner’s constitutional challenge to a city’s denial of a business license fee exemption, in its appeal of a land use permit decision, is premature for two reasons. First, the challenged decision only requires business licenses, without specifying whether exemptions to the business license fee might apply. Second, because the city took the position at LUBA that it intended to deny the business license exemption, and the decision failed to include finding on that issue, the decision must be remanded for response findings. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. *Fasano v. Washington County*, 264 Or 574, 507 P2d 23 (1973), does not give a party an independent constitutional right to notice of a hearing in addition to a statutory or local code right to notice of a hearing. *Plaid Pantries, Inc. v. City of Tigard*, 60 Or LUBA 441 (2010).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Code procedures that distinguish between “Type II” permit decisions that can be made without an initial hearing, with an opportunity for affected persons to appeal to a *de novo* hearing, and “Type III” permit decisions that require an initial hearing, do not violate the privileges and immunities clause by granting “privileges” to participants of Type III proceedings that are denied Type II participants. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. A challenge to a city decision denying building permits under the city’s sign ordinance is necessarily viewed as an “as-applied” challenge rather than a facial challenge, because the challenged decision is not the enactment of an ordinance by lawmakers, but rather the enforcement of the ordinance by executive officials. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Even in the context of an “as-applied” constitutional challenge, LUBA’s scope of review is not limited to the code provisions directly applied to the petitioner. Depending on the type of constitutional challenge, petitioner may cite to portions of legislation not directly applied to petitioner and argue that the government’s action is unconstitutional, because the legislative scheme under which the government acted includes impermissible distinctions. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Incremental impacts on a transportation facility attributable to a proposed development may support an exaction. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. LUBA will uphold an exaction requiring the dedication of right-of-way where the city’s findings demonstrate that the exaction is roughly proportional to the impacts caused by the development, including any benefits the development receives by virtue of the exaction. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Where a city fails to establish a relationship between vehicular and nonvehicular impacts of a proposed development and a required dedication for sidewalks, the exaction is not supportable under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. A waiver of remonstrance to the formation of a local improvement district is not subject to the analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), because it, by

itself, does not result in the loss of property. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. A city does not violate an applicant’s right to due process by denying its request to cross-examine witnesses, where the local code provides no right of cross-examination and the applicant fails to explain why an alternative process offered by the city in place of cross-examination would be insufficient to protect the applicant’s right to due process. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Where a city allows one party more time to present oral testimony during a land use hearing than is allowed another party, the unequal allocation of time will not constitute error so long as the city’s decision explains the reason for the differentiation, there is an unlimited opportunity to submit written testimony, and the unequal allocation of time does not cause substantial prejudice. *Kane v. City of Beaverton*, 38 Or LUBA 183 (2000).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. An enumeration of alleged procedural irregularities, without analysis, does not amount to a reviewable claim of a constitutional violation. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Where petitioner makes no distinction in his brief between state and federal constitutional issues, LUBA cannot consider his constitutional arguments. *Fence v. Jackson County*, 30 Or LUBA 265 (1995).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Under Article IV, section 20, of the Oregon Constitution, a legislative act is limited to one subject, and that subject must be expressed in the act’s title. *O’Mara v. Douglas County*, 25 Or LUBA 25 (1993).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. There is nothing unconstitutional about providing only published notice of legislative rezoning. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. It is reasonable for a county to adopt special procedures for application of new criteria to amended permit applications already reviewed by a county decision maker, in order to avoid undue delay in processing the amended applications while providing notice and a *de novo* hearing on the new criteria. Because such procedures have a rational basis, they do not violate Article I, section 20, of the Oregon Constitution (Equal Privileges and Immunities). *Eckis v. Linn County*, 19 Or LUBA 15 (1990).