

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will decline to dismiss an appeal as moot based on extra-record evidence that the factual predicate for four of the assignments of error has been eliminated, where even if the evidence were properly before LUBA, the movant has not established that the changed factual predicate fully resolves the four assignments of error, or otherwise would render LUBA’s review of no practical effect. *McNichols v. City of Canby*, 78 Or LUBA 1090 (2018).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will decline to exercise its discretion to grant petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal a land use decision to LUBA under ORS 197.830(3), where petitioners had multiple opportunities in the initial appeal to offer the additional evidence, which was at all times within petitioners’ possession, but failed to do so. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Exercise of LUBA’s discretion to allow petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal to LUBA would be inconsistent with the legislative policy at ORS 197.805 that time is of the essence in reaching finality in land use matters, because granting the motion would entail a lengthy round of pleadings, discovery, depositions, and resolution of conflicting evidence that would significantly delay reaching finality in the appeal. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Exercise of LUBA’s discretion to allow petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal to LUBA would be inconsistent with the legislative policy at ORS 197.805 that LUBA’s decisions be made consistent with sound principles of judicial review, because it would depart from the general principle that LUBA’s jurisdiction over the appeal must be established prior to LUBA’s issuance of its final opinion resolving the merits of an appeal. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA may consider documents outside the record, including copies of earlier land use decisions regarding the subject property, that are useful in resolving a jurisdictional challenge to the appeal of a land use compatibility statement (LUCS), even in the absence of a motion to take evidence under OAR 661-010-0045. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a disputed reply brief, a motion to strike and a motion to take evidence all revolve around an issue that is beyond LUBA’s scope of review and has no bearing on a basis for reversal or remand of the challenged decision, LUBA will summarily deny the reply brief and motions. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will deny as unnecessary a motion to take evidence to accept a supplemental record that includes a copy of the notice of adoption sent to DLCD, which is required to be included in the record pursuant to OAR 660-010-0025(1)(d). LUBA will accept the untimely filed supplemental record over the petitioner’s objection, where the untimely submission does not prejudice any party’s substantial rights. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA is not bound to accept as true factual assertions in petitioner’s affidavit in the record. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a motion to take evidence is filed regarding an outstanding record objection and the content of the local record, the motion will be denied as moot where the motion and pleadings provide sufficient information to determine the content of the record. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will not consider an argument that an annexation is barred by a statute that was adopted and took effect after the annexation was approved, where LUBA would be required to consider extra-record evidence to do so, the local government objects to LUBA’s consideration of that extra-record evidence and petitioner does not file a motion requesting an evidentiary hearing at LUBA. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a city permit decision does not include findings addressing applicable criteria that may lead to a requirement for a geological study, remand is appropriate for the city to adopt the required findings. However, LUBA will not grant a motion that requests LUBA to go further and consider extra-record evidence concerning whether the geological study is necessary; that determination is for the city to make in the first instance. *Jebousek v. City of Newport*, 51 Or LUBA 93 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a party seeks an evidentiary hearing to challenge whether an individual who submitted a letter on behalf of an organization in a local land use permit proceeding was in fact authorized to submit that letter on the organization’s behalf, the moving party must provide more than speculation that the individual

was not authorized to appear on behalf of the organization. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where an individual who submits a letter in a local land use permit proceeding in which he represents that the letter is submitted “on behalf of” an organization, but the letter does not expressly state that the individual is “authorized” to make the written appearance for the organization, that failure and a party’s speculation that such authorization is “implausible” are not sufficient reasons to authorize an evidentiary hearing to consider extra-record evidence regarding whether the individual was actually authorized to appear on behalf of the organization. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. A petitioner who seeks to present extra-record evidence to LUBA to show that a permit denial was the product of bias or prejudgment, 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 prejudgment. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Although LUBA’s preference and practice is to address motions under OAR 661-010-0045 after the parties have submitted briefs on the merits, where the parties have adequately briefed the legal issues, the factual disputes between the parties are relatively clear, and further briefing will not put the Board in a better position to resolve the motion, LUBA may resolve the motion without requiring the parties to file the petition for review and response brief. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. When a party submits an affidavit in response to a jurisdictional challenge and the assertions in that affidavit are unchallenged, absent some other reason to question those assertions LUBA will accept them as true for purposes of resolving a jurisdictional issue. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Although it is not essential that disputed factual allegations be disclosed in the parties’ briefs in order to grant a motion to take evidence under OAR 661-010-0045, in the absence of the parties’ briefs the Board will often lack the context and developed argument necessary to evaluate whether an evidentiary proceeding under OAR 661-010-0045 is warranted. *Pynn v. City of West Linn*, 42 Or LUBA 581 (2002).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will deny as premature a motion to take evidence under OAR 661-010-0045 filed before the parties have submitted the petition for review and response brief, where the moving party fails to demonstrate the necessity of resolving the motion in the absence of the parties’ briefs. *Pynn v. City of West Linn*, 42 Or LUBA 581 (2002).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. When undisputed evidence in the record establishes that petitioner appeared below, and therefore establishes petitioner’s standing before LUBA, the Board will not take evidence outside of the record for purposes of establishing standing before the Court of Appeals, because such evidence will not “affect the outcome” of LUBA’s proceedings, within the meaning of OAR 661-010-0045(2). *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. 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).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will deny a motion to consider evidence that is not included in the record, where the moving party fails to demonstrate that any of the criteria for granting such a motion under OAR 661-010-0045(1) are met and the evidence the moving party seeks to have included does not render the appeal moot. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where the county’s tape recording equipment failed during the receipt of relevant oral testimony, and where no one disputes the content of that testimony or that it was in fact given, LUBA will deny a motion to take evidence not in the record. In that circumstance LUBA will assume that all parties agree that uncontested testimony was given, and would have been disclosed by the tapes, if they were not defective. *Hal’s Construction, Inc. v. Clackamas County*, 37 Or LUBA 1037 (2000).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a party moves for an evidentiary hearing, LUBA concludes that the requirements for an evidentiary hearing at OAR 661-010-0045(2) are met and no party objects, LUBA will accept documents attached to the motion for evidentiary hearing in lieu of a hearing. *Dorman v. Yamhill County*, 34 Or LUBA 747 (1998).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. When the local government decision maker reviews allegations of procedural irregularities and finds, based on substantial evidence, that no such irregularities exist, LUBA is bound by the finding. *Huntzicker v. Washington County*, 29 Or LUBA 587 (1995).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Unless an evidentiary hearing is granted, LUBA’s review is limited to the local record. Therefore, if a motion for evidentiary hearing is not filed, LUBA will not consider discussion in a party’s brief or oral argument concerning matters not in the local record. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. In resolving objections to the record, LUBA determines only whether the items in question are properly part of the local government record. Parties who wish to submit evidence outside the local government record to LUBA under ORS 197.830(13)(b) must file a motion for evidentiary hearing pursuant to OAR 661-10-045(2). *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where petitioner had an opportunity during the local proceedings to object to the completeness of a hearings officer’s disclosure of *ex parte* contacts, but failed to do so, petitioner’s motion for an evidentiary hearing at LUBA to present evidence concerning those *ex parte* contacts will be denied. *Jones v. Lane County*, 27 Or LUBA 654 (1994).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a party’s argument is based solely on a document not in the local record, another party objects to LUBA’s consideration of that document, and the party making the argument does not move for an evidentiary hearing pursuant to ORS 197.830(13)(b) or offer any other basis on which LUBA might consider the document, LUBA will reject the argument. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where petitioner withdraws its motion for evidentiary hearing, but respondents wish to have an evidentiary hearing, respondents must file their own motion for evidentiary hearing in accordance with OAR 661-10-045. *Louisiana Pacific v. Umatilla County*, 25 Or LUBA 818 (1993).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. It is the practice at LUBA for a party that wishes LUBA to consider a document not in the local record, for one of the purposes listed in ORS 197.830(13)(b) or OAR 661-10-045(1), to attach that document to its brief and explain in its brief why LUBA should consider the document. If another party does not object to LUBA considering the document, the document becomes part of LUBA’s record and is considered for the requested purpose. If an objection is made, the party offering the document may file a motion for evidentiary hearing under OAR 661-10-045. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where allegations of fact made in petitioner’s briefs are critical to establishing LUBA’s jurisdiction, respondents dispute those allegations, and petitioner neither provides citations to the record, affidavits or other evidence supporting the allegations nor files a motion for evidentiary hearing seeking to introduce evidence to support the allegations, LUBA will dismiss the appeal. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where petitioner seeks to establish through an evidentiary hearing that all nonresidential uses allowed outright or conditionally under the existing zone are not economically feasible on the subject property, but has not sought approval of a plan and zone map amendment which would allow residential development of the subject property, petitioner’s state constitution taking claim is not ripe for adjudication and petitioner’s motion for evidentiary hearing will be denied. *Dority v. Clackamas County*, 23 Or LUBA 384 (1992).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. To enable LUBA to grant a request for an evidentiary hearing, petitioners must establish, by affidavit or otherwise, that the facts to be presented at the evidentiary hearing will affect the outcome of the appeal. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where petitioners assign as error in their petition for review unconstitutionality and procedural irregularities not shown in the record and attach to their motion for evidentiary hearing a document they seek to introduce into the LUBA record in support of their assignment of error, and the other parties do not dispute the identity of this document, LUBA may grant the motion for evidentiary hearing for the limited purpose of including in its record the document attached to petitioners’ motion. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).