

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Where a petitioner argues that the local government erred under ORS 197.307(4) in applying ambiguous standards to an application to develop housing, and where an intervenor offers a traffic impact assessment (TIA) from a prior land use application that is not included in the local record to establish that the petitioner knew the local government would require compliance with the ambiguous standard, LUBA will deny a motion to take the TIA as evidence not in the record where the intervenor fails to explain how the evidence relates to any basis for LUBA to take additional evidence under OAR 661-010-0045(1) and since the facts that the TIA is offered to prove are not critical to the resolution of the appeal, as required under OAR 661-010-0045(2)(a). *Oster v. City of Silverton*, 79 Or LUBA 1058 (2019).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Even if a motion to take evidence outside the record under OAR 661-010-0045(1) were otherwise proper, LUBA will deny such motion where petitioners have failed to demonstrate that the issue the proffered evidence goes to was raised with the specificity required by ORS 197.763(1), and even if LUBA viewed petitioners’ arguments as one particular “argument” toward the general issue, that issue does not appear to have raised even in a most general way. Because the proffered evidence goes to an issue that is not within the Board’s scope of review, petitioners have not established a basis under OAR 661-010-0045(1) to grant the motion to consider the evidence for any purpose, and such motion will be denied. *Renken v. City of Oregon City*, 78 Or LUBA 1070 (2018).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** LUBA will reject a motion to take evidence under OAR 661-010-0045 requesting that LUBA consider e-mails between a petitioner and city staff to establish that planned unit developments (PUD) are subject to a post-approval city engineer permit process, where the petitioner identifies no basis under OAR 661-010-0045(1) for LUBA to consider the emails for that purpose and, in any case, whether PUDs are subject to a post-approval city engineer permit process is a question of law, not a disputed fact. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Absent a motion to take evidence outside the record pursuant to OAR 660-010-0045, LUBA has no basis for considering diagrams that illustrate an entire series of property line adjustments that are the subject matter of the challenged decision, but that nevertheless contain hand-drawn lines, text, and other information which indicate at least some of the notations post-date the decision, and therefore the diagrams could not have been “placed before” the planner who approved the property line adjustments. *Sarett v. Lane County*, 76 Or LUBA 470 (2017).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Where petitioner offers some additional deeds and diagrams from a 2017 legal lot verification proceeding, in a challenge

to a 2016 application for multiple property line adjustments, LUBA may not consider the additional post-decision deeds and diagrams where the parties agree that the 2016 application approved more than a single property line adjustment, and thus the deeds and diagrams do not offer anything material as to a “disputed factual allegation in the parties’ briefs” pursuant to OAR 661-010-0045(1). *Sarett v. Lane County*, 76 Or LUBA 485 (2017).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** While an unsigned or improperly signed declaration of a petitioner asserting facts that go to standing and whether the petitioner is adversely affected may be less persuasive in the face of conflicting evidence than a properly signed declaration, nothing in LUBA’s rules requires that such declarations be signed in any particular manner, in order to be considered for the proffered purpose. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Items rejected from the local record are properly excluded from the record transmitted to LUBA. Where a local government rejects portions of a document, and includes only a redacted version of the document in the record, the petitioner may attach to the petition for review the unredacted document, in support of any of an assignment of error alleging that the local government erred in rejecting the redacted portions. If no party objects, LUBA will consider the attached document for the limited purpose of resolving that procedural assignment of error. If a party objects, the petitioner may file a motion to take evidence to allow LUBA to consider the unredacted document for that same limited purpose. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** A motion to reconsider a LUBA order is treated as a renewed motion for the same relief sought in the original motion. Because a motion to take evidence outside of the record suspends all other time limits in an appeal,

a motion to reconsider an order denying the motion to take evidence, which is considered a renewed motion to take evidence, also suspends all other time limits. *Stewart v. City of Salem*, 61 Or LUBA 77 (2010).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Where the parties’ dispute is over the correct interpretation and application of code provisions rather than a factual dispute, there is no basis for a motion requesting LUBA to consider an electronic mail message as extra-record evidence under ORS 197.835(2)(b). A planner’s electronic mail message in which the planner expresses opinions about the meaning of those code provisions has no bearing on how that issue of law should be resolved. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** LUBA will deny as premature a motion to take evidence regarding alleged *ex parte* contacts that is filed before the record is settled and the briefs filed. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** A party who files a motion for evidentiary hearing seeking evidence to prove that the decision makers, members of the city council, are biased must allege that there is a “reasonable basis” to believe the city council members are biased. Where a moving party alleges that the city as a municipal entity was interested in purchasing the subject property for future development of city buildings, it is relatively clear that any plans the city had were preliminary, and a moving party does not point to any evidence or likelihood of uncovering evidence that the decision makers relied on anything other than the applicable approval criteria in rendering the challenged decision, it fails to demonstrate a “reasonable basis” to believe the decision makers are biased, and a motion for evidentiary hearing will be denied. *Wal-Mart Stores, Inc. v. City of Oregon City*, 49 Or LUBA 729 (2005).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** The Board will deny a motion to take evidence of alleged *ex parte* contacts where, in the absence of the parties’ briefs, it is not clear that the alleged contacts relate to the local government decision. In most cases, the appropriate posture in which to file a motion for evidentiary hearing is after the briefs have been filed, when the legal arguments and disputed allegations of fact are more clearly identified. *Halvorson Mason Corp. v. City of Depoe Bay*, 38 Or LUBA 949 (2000).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** An evidentiary hearing to establish decision makers’ “personal interest” in a proposal due to their ownership of proximate property is not warranted because, even if true, such a “personal interest” could not provide a basis for reversing or remanding the decision. *ODOT v. City of Mosier*, 34 Or LUBA 797 (1998).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** LUBA will not order an evidentiary hearing or a deposition from a county planner where petitioner does not explain how such testimony can authoritatively establish whether the county approved the version of a comprehensive plan at issue. *Trademark Construction Inc. v. Marion County*, 33 Or LUBA 842 (1997).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** An evidentiary hearing is not warranted to show a decision maker is a member of an advocacy group that supports transportation projects, where the advocacy group did not take a position on a disputed land use decision that approved a geologic hazard report related to a proposed highway improvement. Such membership would not demonstrate the decision maker’s views concerning transportation in general or the particular project, or show that he was biased or prejudged the matter. *Terdina v. Clatsop County*, 33 Or LUBA 830 (1997).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** A motion for evidentiary hearing requesting that a local government and intervenor be ordered to produce all demographic data kept by either party with regard to intervenor’s other developments fails to state with particularity what facts will be presented at the hearing and how those facts will affect the outcome of the review proceeding as required by OAR 661-10-045. *St. Johns Neighborhood Assn. v. City of Portland*, 33 Or LUBA 827 (1997).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Where a local code prohibits *ex parte* contacts between a decision maker and a “person interested in the outcome of the proceeding,” a party moving for an evidentiary hearing to prove such *ex parte* contacts occurred must provide specific reasoning why that person qualifies as such an “interested” party. Merely describing the person as a professional land developer or community leader is not specific enough. *Opp v. City of Portland*, 33 Or LUBA 820 (1997).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Petitioners cannot raise a new basis for reversing or remanding a challenged decision for the first time in a post oral argument motion for evidentiary hearing unless they demonstrate that they seek to present facts unknown to them at the time the petition for review was filed. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** OAR 661-10-065(4) simply provides that with the exception of objections to the record and motions for evidentiary hearing, the filing of a motion does not have the legal effect of automatically suspending the deadlines for future events in a LUBA appeal until the motion is resolved. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 746 (1994).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Occasional references in a motion for evidentiary hearing to extra-record materials do not satisfy the requirement of OAR 661-10-045(2) that petitioner explain “with particularity the facts the moving party will present at the [evidentiary] hearing” and do not explain how that evidence shows an evidentiary hearing is warranted under OAR 661-10-045(2) and ORS 197.830(13)(b). *Jones v. Lane County*, 27 Or LUBA 654 (1994).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Under OAR 661-10-045(2), the movant for evidentiary hearing must establish how the facts to be presented at the proposed evidentiary hearing will affect the outcome of the appeal. *Breivogel v. Washington County*, 22 Or LUBA 847 (1992).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** A movant for an evidentiary hearing must explain, with particularity, what facts it will present at the evidentiary hearing. In addition, the movant must establish how those facts “will affect the outcome of the review proceeding.” OAR 661-10-045(2). *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Until the local record is filed with LUBA, a motion for evidentiary hearing is premature. *Berg v. Linn County*, 21 Or LUBA 622 (1991).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion 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).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** After the petition for review is filed, respondents may, in their response brief or in a motion to dismiss, identify disputed allegations of fact, and explain why under their version of the facts petitioners lack standing. Petitioners may then request permission to file a reply brief to respond to respondent’s legal arguments, move for an evidentiary hearing to present facts establishing standing or do both. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Where a party moves for an evidentiary hearing but fails to clearly identify what facts it wishes to establish through the evidentiary hearing and fails to explain why those facts will affect the outcome of the appeal, the motion for evidentiary hearing will be denied. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

**27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for.** Where the petitioner objects that the record should include a letter he sent to the city, and an intervenor unsuccessfully opposes the record objection *solely* on the grounds that the letter was sent after the public hearing was closed, LUBA will not grant intervenor’s subsequent requests for an evidentiary hearing and for depositions to consider whether the letter was sent and received as petitioner claimed in his record objection. *Cecil v. City of Jacksonville*, 19 Or LUBA 532 (1990).