

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. *In camera* review of a document under Oregon Evidence Code 612 is appropriate only where the witness reads the document to refresh memory and production of the document is necessary in the interests of justice. LUBA will deny a motion for *in camera* review of the redacted portions of a document allegedly used to refresh memory in a deposition, where the movant fails to establish that the deponent in fact read the redacted portions of the document, for purposes of refreshing memory. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. *In camera* review or production of a document under Oregon Evidence Code 612 is not warranted “in the interests of justice,” where the deposition authorized under OAR 661-010-0045 was limited to alleged *ex parte* contacts and bias on the part of the hearings officer, the disputed document was an e-mail to the hearings officer dated a year after the events that were the subject of the deposition, and the movant failed to establish that review or production of the document would yield anything probative about the alleged *ex parte* contacts or bias issues. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. A deposition of the decision maker to determine the content of *ex parte* contacts is warranted under OAR 661-010-0045, where the record and affidavits submitted by the parties demonstrate that such contacts occurred and may have involved discussion of the merits of the decision, but the record and affidavits do not include information necessary for LUBA to resolve anticipated assignments of error seeking to reverse the decision based on those *ex parte* contacts. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Where a petitioner’s deposition discloses she learned the city may have approved certain permits, and thereafter petitioner promptly pursues the matter with the city planning department and obtains copies of the permits, the date she obtained the copies of the permits from the planning department is the date of actual notice of the permits for purposes of computing the deadline for filing a notice of intent to appeal at LUBA. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Where petitioners' notice of intent to appeal to LUBA is timely if filed within 21 days after petitioners received actual notice of the appealed decision, but the facts in the record before LUBA are unclear as to when petitioners obtained notice of the decision, LUBA will grant a petition to depose petitioners. *Torgeson v. City of Canby*, 19 Or LUBA 623 (1990).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. 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).