

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JOSEPH VACCHER and LAURIE VACCHER,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent,*

11
12 and

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14 NEW CINGULAR WIRELESS PCS, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-039

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Eugene.

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24 Sean T. Malone, Eugene, represented petitioners.

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26 Emily N. Jerome, Deputy City Attorney, City of Eugene represented
27 respondent.

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29 Richard J. Busch, Issaquah, Washington, represented intervenor-
30 respondent.

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32 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
33 Member, participated in the decision.

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35 DISMISSED

07/11/2019

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37 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850

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NATURE OF THE DECISION

Petitioners challenge a city approval of a utility public way use permit authorizing installation of telecommunication related facilities.

MOTION TO INTERVENE

New Cingular Wireless PCS, LLC (intervenor), the applicant below, moves to intervene on the side of the city. No party opposes the motion and it is granted.

BACKGROUND

On September 18, 2018, the city approved intervenor’s application to install telecommunications-related devices (the facilities) on a utility pole. On March 20, 2019, petitioners appealed the city’s decision by filing a Notice of Intent to Appeal (NITA). On April 10, 2019, the city transmitted the record in this appeal. On April 24, 2019, petitioners filed objections to the record. On May 7, 2019, the city filed its response to the record objections.

Also on May 7, 2019, the city filed a motion to dismiss the appeal. The city asserted in its motion that the decision under appeal is not subject to LUBA’s jurisdiction. On May 14, 2019, petitioners filed a reply in support of the record objections.

On May 21, 2019, petitioners filed a response to the motion to dismiss and a motion to take evidence. On June 4, 2019, the city filed a reply to the response to the motion to dismiss and objection to the motion to take evidence. The city’s

1 reply includes a request that we take official notice of certain material. On June
2 10, 2019, petitioners filed a second response (sur-reply) to the city’s motion to
3 dismiss. We have considered all the pleadings.

4 We address the pending motions below.

5 **MOTION TO TAKE OFFICIAL NOTICE**

6 LUBA may take official notice of “[a]n ordinance, comprehensive plan or
7 enactment of any county or incorporated city in this state, or a right derived
8 therefrom.” ORS 40.090(7) (Oregon Evidence Code (OEC) 202). However,
9 LUBA does not have authority to take official notice of local legislative history
10 or adjudicative facts. *Shaff v. City of Medford*, __ Or LUBA __ (LUBA No 2018-
11 146, Apr 23, 2019) (slip op at 8 n 3); *Martin v. City of Central Point*, 73 Or LUBA
12 422, 426 (2016).

13 The city requests that we take official notice of three documents not in the
14 record: (1) portions of the Eugene Code (EC), (2) portions of the City of Eugene’s
15 Department of Public Works Manual titled “Utility and Right-of-Way Permits,
16 Construction Within and Use of the Public Way” (the manual), and (3) a recorded
17 plat including the subject property.¹

18 Material submitted by the city included portions of EC Chapter 7, which
19 addresses construction requirements and permits for use of the public way.
20 Motion to Dismiss, Exhibit C 1. EC 7.290(3) provides that:

¹ Petitioners do not object to these motions.

1 “Work affecting a public way shall be performed in accordance with
2 this code, the standard specifications, drawings and design standards
3 adopted pursuant to section 7.085, administrative rules issued by the
4 city manager pursuant to section 2.019 of this code, sound
5 engineering and design practices and such other reasonable
6 conditions required by the city engineer to protect the public health,
7 safety and welfare, including proof that the contractor performing
8 the work is licensed and bonded for the work being performed.”²

9 The city also provided excerpts of EC Chapter 3 related to licensing and
10 registration of parties engaged in telecommunication activities. EC Chapter 3 is
11 titled “Telecommunications” and EC 3.410 provides that operators may not place
12 any facility “in, upon, beneath, over or across any public right-of-way” to
13 “[c]onstruct a telecommunications facility or provide telecommunications
14 service” “without first applying for and receiving a license from the city.” EC
15 3.410(1)(b). EC 3.430 provides that the city manager shall adopt administrative
16 rules in order to implement the chapter and that the rules may include but are not
17 limited to requiring the applicant for a license to provide the location and design
18 of the proposed facility. EC 3.430(a). Both EC 7.290(3) and 3.430 call for the
19 city manager to adopt administrative rules regulating the installation of
20 telecommunication facilities within the public way. We take official notice of the
21 EC Chapters 3 and 7 excerpts as city ordinances.

22 The city advises that the manual was adopted by Eugene Administrative
23 Order 58-03-19-F. Motion to Dismiss 4. Adoption of the manual was authorized

² EC 2.019(1) delegates to the city manager authority to adopt rules to implement the city’s code.

1 by EC 2.019(1), 7.290(3) and 3.430. Enactments of the city council authorized
2 development of regulations to implement the code governing telecommunication
3 facilities in the public way. ORS 40.090(7) authorizes notice of “[a]n ordinance,
4 comprehensive plan or enactment of any county or incorporated city in this state,
5 or a right derived therefrom.” We take official notice of the manual as an
6 administrative enactment of the city authorized by ordinance and as a reflection
7 of rights derived from the city’s code authorizing intervenor to seek a permit to
8 place the facilities in the right of way.

9 We will not take official notice of the recorded plat, which the city relies
10 upon to establish where the facilities are located, because we may not take official
11 notice of adjudicative facts. *Shaff*, ___ Or LUBA at ___ (LUBA No 2018-146,
12 Apr 23, 2019) (slip op at 8 n 3).

13 **MOTION TO TAKE EVIDENCE**

14 Petitioners ask that we take evidence outside the record in the form of their
15 declarations. Motion to Take Evidence 1, Declarations of Joseph Vaccher and
16 Lauri Vaccher (Declarations). Petitioners argue that the facts they wish to
17 establish through their declarations are that (1) petitioners own and live on
18 property adjacent to the facilities, the pole supporting the facilities, and a pole
19 that no longer exists and petitioners should have received notice of related land
20 use decisions, and (2) LUBA has jurisdiction because the challenged decision
21 falls within the scope of the zoning ordinance and telecommunications ordinance,

1 or the city’s decision required the interpretation or exercise of policy or legal
2 judgment. Motion to Take Evidence 3.

3 The Board may take evidence not in the record in “the case of disputed
4 factual allegations in the parties’ briefs concerning unconstitutionality of the
5 decision, standing, ex parte contacts, actions for the purpose of avoiding the
6 requirements of ORS 215.427 or 227.178, or other procedural irregularities not
7 shown in the record and which, if proved, would warrant reversal or remand of
8 the decision.” OAR 661-010-0045(1). A motion to take evidence must include a
9 statement “explaining with particularity what facts the moving party seeks to
10 establish, how those facts pertain to the grounds to take evidence specified in
11 [OAR 661-010-0045(1)], and how those facts will affect the outcome of the
12 review proceeding.” OAR 661-010-0045(2). It is the movant’s burden to
13 demonstrate a sufficient basis for LUBA to take evidence outside the record.

14 We have considered evidence outside the record in evaluating jurisdiction,
15 despite the fact that is a purpose not explicitly recognized in our rules. *Hemstreet*
16 *v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33, *aff’d*, 93 Or App 73,
17 761 P2d 533 (1988). The city alleges that we do not have jurisdiction in this
18 matter because of the location of the facilities. Petitioners seek consideration of
19 a map allegedly showing the general location of the petitioners’ property and the
20 facilities. Joseph Vacher Declaration Ex C. The map appears to be a marked
21 version of a portion of the city’s adopted zoning map, a copy of which, absent
22 the marking of petitioners’ property, is embedded in the city’s reply. Reply 5. As

1 explained below, both parties rely upon the map in their discussion of the
2 jurisdiction issue and we will grant the motion to take evidence as to the map for
3 that purpose.

4 We denied the city's request that we take official notice of a plat map for
5 adjudicative purposes. We have, however, taken official notice of the zoning map
6 to assist us in resolving the jurisdictional dispute which, as we describe above,
7 relates to the physical location of the facilities. Given that we have, in the past,
8 taken evidence outside the record to assist in resolving a jurisdictional dispute,
9 despite the fact that this is not expressly allowed by our rules, we will also
10 consider as evidence the recorded plat provided by the city to assist us in
11 determining the location of the facilities. Reply 4.

12 Petitioners argue that details related to the dimensions and location of the
13 facilities relate to determining whether a given local land use process is
14 applicable to the facilities. Motion to Take Evidence 2-3. Petitioners also argue
15 that a screenshot related to the definition of small cell facilities is relevant to
16 determining whether the facilities installed fall within the class of equipment
17 subject to the zoning ordinance. *Id.* We will consider this information if needed
18 for purposes of determining whether we have jurisdiction because a land use
19 regulation may be implicated.

20 As noted, our rules provide that we may take evidence outside the record
21 in cases of disputed factual allegations related to standing. OAR 661-010-
22 0045(1). Petitioners have not established that their standing is disputed and we

1 do not see another potential basis for accepting the evidence petitioners submit
2 concerning the location of their residence. The motion is denied as to this
3 material.

4 **MOTION TO DISMISS**

5 Local government land use and limited land use decisions fall within our
6 jurisdiction. ORS 197.825(1). A “land use decision” is “[a] final decision or
7 determination made by a local government or special district that concerns the
8 adoption, amendment, or application of * * * (i) [t]he goals; (ii) [a]
9 comprehensive plan provision; (iii) [a] land use regulation; or (iv) [a] new land
10 use regulation.” ORS 197.015(10)(a)(A). A limited land use decision is:

11 “[a] final decision or determination made by a local government
12 pertaining to a site within an urban growth boundary that concerns:

13 “(A) The approval or denial of a tentative subdivision or
14 partition plan, as described in ORS 92.040(1).

15 “(B) The approval or denial of an application based on
16 discretionary standards designed to regulate the
17 physical characteristics of a use permitted outright,
18 including but not limited to site review and design
19 review.” ORS 197.015(12).

20 The city argues that its approval of the facilities placement did not involve the
21 application of any land use provisions. ORS 197.015(10). The city also asserts
22 that the facilities installation did not involve a land division and was not subject
23 to “discretionary standards designed to regulate the physical characteristics of a

1 use permitted outright.” ORS 197.015(12). For the reasons set forth below, we
2 agree.

3 The city’s land use provisions regulate telecommunication facilities.
4 Petitioners’ Response City’s Motion to Dismiss 2. EC Chapter 9 contains its land
5 use regulations. EC 9.5750 is entitled “Telecommunication Devices--Siting
6 Requirements and Procedures” and identifies “Outright Permitted Uses,” “Site
7 Review,” and Conditional Use Permit” processes applicable to covered devices.
8 EC 9.5750(2)(a)-(c). The city code provides, however, that “[a]reas of public
9 ways and railroad right-of-way, other than those designated on the zoning map,
10 shall be deemed to be unzoned.” EC 9.1070(3). “Land in Eugene is zoned to
11 provide areas suitable for certain types of development. Each zone provides a set
12 of regulations governing the uses, lot size, building setbacks, height, and other
13 development regulations.” EC 9.1000. The city argues that the public or right-of-
14 way containing the facilities is unzoned and because it is unzoned, it is not subject
15 to the city’s land use regulations.

16 The challenged decision does not contain express findings, set forth in a
17 traditional land use decision style document, that the facilities will be located in
18 the city right of way. Rather, the approval is shown on a city “Utility Public Way
19 Use Permit” application form with “Approved By * * * at 11:40 am, Sep 18,
20 2018” stamped on the “Permit Approved by” line in the section of the application
21 form designated “For Office Use Only.” NITA, Exhibit A. In their initial
22 response, petitioners state that “it is clear to Petitioners that the private property

1 is zoned R-1 and the street is unzoned” but claim that “*there is the potential for*
2 *uncertainty and ambiguity in determining whether what appears to be the*
3 *property line is actually demarcating the boundary of the right-of-way.*”
4 Petitioners’ Response to City’s Motion to Dismiss 7 (emphasis added).
5 Petitioners assert that this is a land use decision and we have jurisdiction because
6 judgment must be exercised in resolving the ambiguity of whether the residential
7 zone starts at the property boundary or whether the right-of-way within private
8 property is identified on the zoning map. *Id.*

9 Petitioners’ theory that there may be right-of-way within private property
10 (and zoned residential) is not supported by evidence. Aerial photographs, with
11 property lines and pole locations marked, show the utility poles to be located
12 within the public right-of-way.³ Record 17-18. The plat map shows that the right-
13 of-way was dedicated to the public and is 50 feet wide. City’s Reply in Support
14 of Motion to Dismiss and Objection to Petitioners’ Motion to Take Evidence Not
15 in Record (Reply), Ex A. Comparing the plat and aerial photographs, the utility
16 pole appears to be approximately 10 feet from the centerline of the street (and 15

³ None of petitioners’ objections to the record challenge the inclusion of any documents therein and we rely upon them. Petitioners’ objections to the record included a request that certain documents be added to the record. Because petitioners do not cite those documents in their response to the motion to dismiss, we conclude that none of the documents petitioners seeks to have added to the record are relevant to our resolution of the motion to dismiss.

1 feet from petitioners' property line). The zoning map shows that the zoning does
2 not extend into the public right-of-way. Reply 5.

3 In their sur-reply, petitioners argue instead that to them, "it is clear from
4 the zoning map that the entire property, including any right of way is zoned R-
5 1." Sur-reply 1. They explain that:

6 This is consistent with EC 9.1070(3) (Response, Appendix at 2),
7 which provides that '[a]reas of public ways and railroad right-of-
8 way, *other than those designated on the zoning map, shall be*
9 *deemed to be unzoned * * *.*' *Id.* (emphasis added). Because the
10 zoning map shows everything but the road as being zoned R-1, any
11 right of way is one of 'those designated on the zoning map,' under
12 EC 9.1070(3)." Sur-reply 2.

13 We disagree with petitioners. The zoning map assigns specific colors to
14 zoned areas. Reply 5. The road adjacent to petitioners' property does not have an
15 assigned zoning color. The road is not designated as zoned on the zoning map.

16 Both declarations state that the facilities are located on a new pole several
17 feet away from the location of a previously existing pole. Declarations 2. Neither
18 declaration states that the new pole is farther from the centerline of the public
19 right-of-way than the prior pole. To the extent the aerial photographs in the record
20 may identify the location of a different pole than the pole currently hosting the
21 facilities, petitioners have not provided any evidence indicating that the facilities
22 are in fact outside the unzoned public right-of-way. Thus, we conclude that the
23 facilities are located within unzoned public right-of-way, and not subject to city
24 land use regulations.

1 The city's decision was not a limited land use decision approving an
2 application based on discretionary standards regulating the physical
3 characteristics of a use permitted outright. ORS 197.015. The city does not
4 designate permitted uses for unzoned areas.

5 It is also possible for LUBA to have jurisdiction under the significant
6 impacts test. *City of Pendleton v. Kerns*, 294 Or 126, 133-134, 653 P2d 992
7 (1982). We agree with the city, however, that the facilities permit does not impact
8 the land use status quo in the area and we do not have jurisdiction under the
9 significant impacts doctrine. We conclude that we do not have jurisdiction.⁴

10 The city's motion to dismiss is granted.

11 The appeal is dismissed.

⁴ Given our resolution of the motion to dismiss, we will not resolve the outstanding record objections.