BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOWARD GRABHORN, GRABHORN INC.,
*Petitioners*,

vs.

WASHINGTON COUNTY,
*Respondent*,

and

ART KAMP, JOHN FREDERICK,
DAVID VAN RIPER, ROBERT BURCHFIELD
and RICHARD PONZI,
*Intervenors-Respondent*

LUBA No. 2004-065

ART KAMP, JOHN FREDERICK,
DAVID VAN RIPER, ROBERT BURCHFIELD
and RICHARD PONZI,
*Petitioners*,

vs.

WASHINGTON COUNTY,
*Respondent*,

and

HOWARD GRABHORN, GRABHORN INC.,
*Intervenors-Respondent.*

LUBA No. 2004-125

ORDER

Before the Board are several motions to intervene, a motion for voluntary remand, motions to take evidence, and a number of record objections.

**MOTIONS TO INTERVENE**

Howard Grabhorn and Grabhorn Inc. (Grabhorn), the applicants below, move to intervene on the side of respondent in LUBA No. 2004-125. Art Kamp, John Frederick, David Van Riper, Robert Burchfield, and Richard Ponzi move to intervene on the side of respondent in LUBA No. 2004-065. There is no opposition to these motions, and they are allowed.

**MOTION FOR VOLUNTARY REMAND**

The challenged decision is a July 14, 2004 hearings officer's decision approving, with conditions, Grabhorn's application to verify the nonconforming use status of an existing landfill. The July 14, 2004 decision incorporated an earlier hearings officer's decision dated March 30, 2004. However, the county inadvertently attached to the notice of the July 14, 2004 decision a draft version of the March 30, 2004 decision, dated March 29, 2004, rather than the incorporated March 30, 2004 decision.

The county requests voluntary remand of the July 14, 2004 decision to allow the county to issue a corrected notice with the March 30, 2004 decision attached. The county anticipates that petitioner Grabhorn will assign error to the incorrect notice, and argues that voluntary remand will make it unnecessary for the Board to review that anticipated assignment of error.

Grabhorn objects to voluntary remand, arguing in relevant part that the Board generally allows voluntary remand only when the respondent demonstrates that the proceedings on remand are capable of providing petitioner the relief it would be entitled to from LUBA's review, including addressing all of the errors alleged in the petition for review. *Angel v. City of Portland*, 20 Or LUBA 541, 543, 44 (1991) (LUBA will deny a motion for voluntary remand where the local government commits to addressing only some of the assignments of error). Because the petition for review has not yet been filed in LUBA No. 2004-065, Grabhorn argues, it is premature at best for the county to seek voluntary remand. In any case, Grabhorn argues, the county is seeking remand to correct only one identified error. According to Grabhorn, it is clear from the existing briefing in

this appeal that the issues in this appeal will not be limited to the one error the county identifies in its motion for voluntary remand.

We agree with Grabhorn that voluntary remand is not warranted. Once the petition for review is filed, the county and we will be in a better position to determine whether voluntary remand is appropriate. The motion for voluntary remand is denied.

**MOTIONS TO TAKE EVIDENCE**

Grabhorn moves to take evidence outside the record, in the form of interrogatories, subpoenaed documents, and depositions, with respect to alleged *ex parte* contacts, bias, unconstitutionality of the decision, and procedural irregularities not shown in the record, pursuant to OAR 661-010-0045.[1] After filing the foregoing motion, Grabhorn filed a second motion to take

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[1] OAR 661-010-0045 provides, in relevant part:

> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record 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 and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record * * *.
>
> "(2) Motions to Take Evidence:
>
> > "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.
> >
> > "(b) A motion to take evidence shall be accompanied by:
> >
> > > "(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or
> > >
> > > "(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.
> >
> > "(c) Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. Depositions under this rule shall be

evidence with respect to the content of the record. We first set out a chronology of the facts pertinent to both motions.

**A. Factual Background**

We believe the following facts to be undisputed. In 2001, Grabhorn filed an application for a lot line adjustment with respect to property on which Grabhorn operates a landfill. The county required Grabhorn to file a companion application to verify the existence and scope of the landfill as a lawful nonconforming use, and Grabhorn did so. After opposition to the application arose, Grabhorn sought to withdraw the application, but the county refused, citing a county code provision that allows the county to continue processing an application notwithstanding a request to withdraw it, when the county believes there are ongoing code violations. After a number of procedural detours that we need not detail here, in October 2003 the county planning director issued a decision approving the nonconforming use verification, with conditions. Opponents to the application appealed the planning director decision to the county hearings officer, who conducted *de novo* hearings on the appeal on November 30, 2003, December 4, 2003, and January 14, 2004. Meanwhile, in early December 2003, Grabhorn built a new 25-foot high berm along the property line, without obtaining a county permit.[2] During the December 4, 2003 hearing, neighbors testifying in opposition to Grabhorn's application also spoke out against the new berm. The hearings officer made several sympathetic comments with respect to the opponents' concerns over the berm, including a suggestion that the neighbors get a lawyer and sue Grabhorn for nuisance. At the same

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> conducted in the same manner prescribed by law for depositions in civil actions (ORCP 38-40).
>
> "(d) Subpoenas: the Board shall issue subpoenas to any party upon a showing that the witness or documents to be subpoenaed will provide evidence relevant and material to the grounds for the motion. * * *
>
> "(3) Any party may file a response within 14 days of the date of service of the motion to take evidence. The response shall specifically state what facts alleged in the motion are contested, with references to where contrary facts are found in the record or in affidavits or documents appended to the response."

[2] We understand Grabhorn to dispute whether a county permit is required for the berm.

hearing the hearings officer also made several comments prior to Grabhorn's evidentiary presentation that can be read to suggest that the hearings officer had already accepted a staff position adverse to Grabhorn, with respect to the nonconforming use status of the landfill.

At the next hearing on January 14, 2004, Grabhorn moved to recuse the hearings officer for bias. The hearings officer apologized for some of his comments at the December 4, 2003 hearing, and offered an explanation for others. After hearing argument on the motion to recuse, the hearings officer denied the motion, stating that he believes he is not biased and can decide the appeal based on the evidence and the applicable law.

On March 29, 2004, the hearings officer e-mailed a draft decision on the appeal to the planning director and a senior county planner, in order to allow staff to raise "questions or identify errors." December 17, 2004 Affidavit of Larry Epstein 3. The planning director telephoned the hearings officer asking for "clarification" on certain points. *Id*. In response to that phone call the hearings officer amended the draft decision and issued a final decision on March 30, 2004, approving the nonconforming use verification with conditions. The March 30, 2004 decision includes findings explaining why the hearings officer believed he was not biased and can render fair judgment.

Grabhorn appealed the March 30, 2004 hearings officer decision to LUBA. Grabhorn also wrote to the county identifying several ambiguities in the hearings officer's decision and requesting negotiation to resolve those ambiguities. On or about May 12, 2004, the planning director telephoned the hearings officer and stated that the county board of commissioners intended to withdraw the decision for reconsideration, pursuant to OAR 661-010-0021. On May 13, 2004, the county withdrew the decision for reconsideration. On May 14, 2004, the assistant county counsel e-mailed the hearings officer a two-page list of "tentative questions" regarding matters to be addressed on reconsideration that the assistant county counsel planned to share with the board of commissioners and bring back to the hearings officer. Sometime thereafter but prior to June 3, 2004, the planning director again called the hearings officer and discussed possible procedures and

the scope of issues to be considered on reconsideration. On June 3, 2004, the planning director wrote to the hearings officer, officially requesting that the hearings officer limit the scope of review on reconsideration to clarifying condition of approval #2. The county provided a copy of that June 3, 2004 letter to the parties.

On June 10, 2004, Grabhorn filed a motion requesting a hearing in order to address the scope of reconsideration and allow the parties to present additional evidence. The hearings officer felt it would be "prudent" to hold a hearing, and e-mailed a draft order to the planning director, a senior planner and an assistant county counsel proposing to grant the motion and hold a hearing. On June 14, 2004, Grabhorn filed a supplemental motion requesting a hearing to provide argument with respect to condition of approval #2. On June 15, 2004, the planning director and the assistant county counsel telephoned the hearings officer to discuss whether to hold a hearing. No decision was reached. On June 17, 2004, the hearings officer met with the planning director and the county counsel, at the conclusion of which the hearings officer decided not to hold a hearing.

On July 7, 2004, the hearings officer e-mailed a draft order on reconsideration to the planning director and a senior planner seeking comments. The planning director again telephoned the hearings officer and identified some perceived errors. In response, the hearings officer amended the order and issued a final order on reconsideration on July 14, 2004. The final order incorporates the earlier March 30, 2004 decision, and modifies condition of approval #2 as requested by the planning director's June 3, 2004 letter. As noted above, the county inadvertently attached the March 29, 2004 draft decision to the notice of the July 14, 2004 decision on reconsideration, rather than the March 30, 2004 final decision. The July 14, 2004 order includes findings explaining why the hearings officer denied Grabhorn's motion for a new hearing on reconsideration, and findings describing some of the contacts between the hearings officer, county staff and the assistant county counsel. This appeal followed.

**B. Petitioner's First Motion to Take Evidence**

Grabhorn argues, based on inferences drawn from the foregoing facts, that (1) the hearings officer was hostile to the applicant, biased, and unable to render fair judgment based on the record and applicable law; (2) the hearings officer engaged in a number of undisclosed *ex parte* communications with county staff, county counsel and the board of commissioners regarding the substance of the decisions; (3) the hearings officer improperly allowed county staff, which Grabhorn argues opposed Grabhorn's application, to "vet" and influence the March 30, 2004 and July 14, 2004 decisions; and (4) the hearings officer was improperly subject to the "command influence" of county staff, county counsel and the board of commissioners, due to the financial relationship between the hearings officer and the county. Grabhorn seeks to depose the hearings officer, planning director, planning staff, assistant county counsel, and the board of commissioners. Grabhorn also seeks authority to serve interrogatories and requests for production of documents, as well as subpoenas for particular documents, as necessary. As described in Grabhorn's affidavit, the purpose of the requested discovery is to (1) take evidence of "procedural irregularities, unconstitutionality of the decision, *ex parte* contacts not shown in the record," (2) establish the "scope, nature, timing, extent, content and speaker/writer of *ex parte* contacts in this case that fail to comply with ORS 215.422" and similar authorities, and (3) establish that the challenged decision was the "result in whole or in part of impermissible *ex parte* contacts, bias, and prejudgment and that the cumulative effect of the bias, prejudgment and *ex parte* communications so taints the decision as to render it invalid." January 5, 2005 Affidavit of Wendie Kellington 2.

The county responds in relevant part that (1) the motion is untimely as the record is not yet settled and the parties have not submitted briefs on the merits; (2) the motion is unnecessary with respect to *ex parte* contacts, because the county has provided affidavits from the hearings officer describing the contacts between the hearings officer and county staff; (3) there is no reason to believe that any contacts occurred other than described in the affidavits; and (4) the contacts described in the affidavits do not warrant reversal or remand of the challenged decision. Attached

to the county's pleadings are two affidavits from the hearings officer, describing in some detail the contacts between the hearings officer, county planning staff, and the assistant county counsel. The county further argues that if the Board orders depositions under OAR 661-010-0045 the evidentiary proceedings should be limited to the hearings officer. The county states that it would "readily consent" to a hearing limited to the hearings officer, although the county believes it to be unnecessary and unwarranted. Response to Motion for Evidentiary Hearing 11.

As the parties recognize, the Board's practice and preference in most cases is to address motions under OAR 661-010-0045 after the parties have submitted briefs on the merits. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656, 662 (1993); *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550, 555-56 (1991). In that posture, the parties' legal contentions are generally presented in better detail, disputed allegations of fact are more clearly identified, and the Board is in a better position to resolve a motion under OAR 661-010-0045 consistently with the statutory mandate for timely resolution of land use disputes. In the present case, however, our usual approach does not seem appropriate. The parties have filed hundreds of pages of pleadings exhaustively detailing the legal contentions, the factual disputes between the parties are relatively clear, and we do not see that further briefing will put the Board in a better position to resolve those disputes.

For the reasons that follow, we agree with Grabhorn that a limited evidentiary proceeding under OAR 661-010-0045 is warranted, limited to a deposition of the hearings officer. The hearings officer is the final decision maker in this appeal, and Grabhorn has not established that any alleged bias or similar impropriety on the part of other persons such as county planning staff, the assistant county counsel or the board of commissioners could result in reversal or remand of the hearings officer's decision. Nor has Grabhorn established that depositions of county planning staff, the assistant county counsel or the board of commissioners are necessary to elicit information regarding any alleged bias, errors or improprieties on the part of the hearings officer. While Grabhorn contends that the board of commissioners and/or planning staff were the *de facto*

decision-makers with respect to the July 14, 2004 decision on reconsideration, there is little but speculation to support that contention. Even if the planning staff, assistant county counsel or the board of commissioners improperly influenced the hearings officer, as Grabhorn also alleges, the reversible error if any would lie with the hearings officer in allowing that influence, and the most direct and probative evidence on that point can come only from the hearings officer. We therefore deny Grabhorn's request to depose the planning director, planning staff, assistant county counsel and the board of commissioners. We allow only the request to depose the hearings officer, limited to the issues set out below.[3]

**1. *Ex Parte* Contacts**

It is often necessary in resolving a motion to take evidence under OAR 661-010-0045 to discuss the underlying legal merits, because the rule requires the proponent to demonstrate that alleged *ex parte* contacts and similar procedural irregularities, if proved, would warrant reversal or remand of the decision. OAR 661-010-0045(1). Further, the proponent must show how our consideration of the facts to be elicited "will affect the outcome of the review proceeding." OAR 661-010-0045(2)(a). We therefore set out, at least tentatively, our view of the applicable law, as necessary to resolve Grabhorn's motion and provide guidance for the deposition authorized by this order.

It is undisputed that the hearings officer engaged in a number of informal contacts with county staff and the assistant county counsel outside the presence of the other parties. How to characterize those contacts and what law applies to them is not entirely clear to us. ORS 215.422(3), cited by Grabhorn, provides that a decision by a planning commission or

[3] Grabhorn has not established that there is a need to subpoena or request production of documents. That request is denied. With respect to interrogatories, our rules do not expressly provide for interrogatories. *But see* ORCP 40, cited in OAR 661-010-0045(2)(c) (providing for deposition upon written questions). In any case, deposition of the hearings officer would seem to be a faster and more direct method of exploring the narrow range of issues authorized in this order than interrogatories. However, if the parties prefer to proceed by means of interrogatories rather than deposition, they may do so or, if they cannot agree on that point, one or more of the parties may petition the Board for that authority.

governing body is not invalid due to an *ex parte* contact or bias resulting from an *ex parte* contact if the member of the decision making body receiving the contact places the substance of the contact on the record and provides a rebuttal opportunity for parties.[4] ORS 215.422(4) states that contacts between county staff and the planning commission or governing body is not an *ex parte* contact for purposes of ORS 215.422(3). Significantly, ORS 215.422(5) states that ORS 215.422(3) does not apply to hearings officers. It is not clear how or whether ORS 215.422 applies to hearings officers, or what other authorities might govern contacts between county staff and a hearings officer, if any. We assume for purposes of this order that the hearings officer potentially committed error in engaging in these undisclosed contacts with county staff and the assistant county counsel. However, it seems to us that whether such undisclosed contacts are likely to result in reversal or remand depends on the purpose of those contacts and the substance of communications. For example, we tend to agree with the county that having county staff proofread a draft of the decision to identify typographic or grammatical problems, while perhaps inadvisable, is probably not reversible error, if it is error at all. Similarly, we do not think that *ex parte* discussion between the hearings officer, county staff and the assistant county counsel regarding the scope or

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[4] ORS 215.422 provides, in relevant part:

> "(3) No decision or action of a planning commission or county governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> > "(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and
> >
> > "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.
>
> "(4) A communication between county staff and the planning commission or governing body shall not be considered an *ex parte* contact for the purposes of subsection (3) of this section.
>
> "(5) Subsection (3) of this section does not apply to *ex parte* contact with a hearings officer approved under ORS 215.406 (1)."

conduct of proceedings on remand is necessarily reversible error, if it is error at all. In our view, such *ex parte* communications might constitute reversible error only if the communication also involves a discussion of or advocacy with respect to the merits of the underlying decision. It is one thing to ask county staff to proofread for typographic errors. It is another thing to seek *ex parte* staff input on the substance of the decision. Similarly, it is one thing to inform the hearings officer that the county wishes to confine the scope of reconsideration to clarifying a condition of approval. It is quite another thing to discuss how that condition should be modified or to advocate a particular position with respect to the condition.

The present record does not include evidence necessary to resolve these legal questions, because it does not include sufficient evidence of the nature and substance of the contacts between the hearings officer, planning staff and the assistant county counsel. The most direct evidence available to us at the moment is the affidavits prepared by the hearings officer, which are not in the record. Those affidavits, however, do not resolve what seem to us to be the critical questions. For example, one affidavit states that the hearings officer submitted the March 29, draft decision to the planning director and planning staff "to allow staff to identify any spelling, syntax or labeling errors *or to raise any substantive concerns*." January 11, 2005 Affidavit of Larry Epstein 4 (emphasis added). The emphasized language suggests that the hearings officer was inviting substantive comments on the merits of the decision. The parties dispute whether the hearings officer in fact received substantive comments, and the record is unclear on that point.

Similarly, the hearings officer's affidavits do not resolve whether the communications between the hearings officer and the county following the withdrawal for reconsideration was confined to discussing the scope and procedures for reconsideration. It is reasonably clear from the record that county planning staff felt there was a problem with condition of approval #2 and had advocated successfully that the decision be withdrawn to clarify that condition. It also seems clear that condition #2 was (and apparently still is) a highly disputed issue, with the applicant and opponents arguing for strongly contrasting interpretations. One can infer from the record and the

hearings officer's affidavit that planning staff had a position on what condition #2 should require and expressed that position to the hearings officer at one or more of the *ex parte* conversations that occurred following withdrawal of the decision for reconsideration.

In sum, we agree with Grabhorn that deposition of the hearings officer to elicit additional evidence with respect to the nature and content of the *ex parte* communications is warranted under OAR 661-010-0045.

**2. Bias**

Grabhorn also seeks to depose the hearings officer to elicit evidence that the hearings officer was biased or hostile to Grabhorn, had prejudged the merits of the appeal, or was otherwise unable to judge the merits of the appeal based on the evidence and arguments presented during the evidentiary proceedings. Most of Grabhorn's arguments with respect to bias and prejudgment focus on the comments the hearings officer made during the December 4, 2003 hearing, but some also relate to Grabhorn's persistent theme that the hearings officer was improperly influenced by county staff or the assistant county counsel. The latter contention is intertwined with the *ex parte* issue discussed above. As noted, the hearings officer explained his comments at the December 4, 2003 hearing and adopted findings concluding that he was not biased and could render fair judgment. The comments, the explanation and the findings are already in the record. It seems unlikely that a deposition of the hearings officer would yield anything further or different regarding the bias question. Nonetheless, because the general issue of bias and prejudgment is intertwined to some extent with the *ex parte* contact issue, and a deposition of the hearings officer is necessary to resolve that issue, the parties may include questions regarding bias and prejudgment within the scope of that deposition.

**3. Other Matters**

As noted, Grabhorn also seeks depositions to explore a number of other issues, such as the alleged hostility of county staff, the financial relationship between the county and the hearings officer, and the alleged role of the board of commissioners in determining the scope, procedures, and

substance of the decision on reconsideration. Grabhorn has not established that these issues warrant evidentiary proceedings under OAR 661-010-0045.

**C. Petitioner's Second Motion to Take Evidence**

Grabhorn also moves to take evidence to resolve a dispute regarding the content of the record, pursuant to the last sentence of OAR 661-010-0045(1). *See* n 1. According to Grabhorn, the board of commissioners was one of the final decision-makers on reconsideration, if not *the* final decision-maker, and thus the record should include all materials placed before the board of commissioners in this matter, under OAR 661-010-0025(1).[5] Grabhorn contends that the board of commissioners determined the scope of reconsideration in an executive session, confining it to clarifying identified ambiguities in condition of approval #2. Further, Grabhorn speculates, the board of commissioners may have gone further and dictated to the hearings officer, via the assistant county counsel and planning director, how the hearings officer should resolve those ambiguities. Because the board of commissioners was the final decision maker, or a final decision maker, Grabhorn argues, the record should include material placed before the board of commissioners.

The county responds that the "final decision maker" for purposes of OAR 661-010-0025(1) was the hearings officer, because the county's code provides that the hearings officer and not the board of commissioners is the final decision maker for this type of decision.[6] In addition, the

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[5] OAR 661-010-0025(1) provides, in relevant part:

> "Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:
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> "(a) The final decision including any findings of fact and conclusions of law;
>
> "(b) All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.
>
> "(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. * * *"

[6] Community Development Code (CDC) 209-2.2 provides with respect to Type III development actions:

county argues that the board of commissioners' meeting was conducted in executive session, and therefore the minutes or other documents involved in that executive session are privileged and not subject to disclosure. *Dimone v. City of Hillsboro*, 44 Or LUBA 805, 809-10 (2003) (LUBA has no authority to order the city to prepare transcripts or minutes of executive sessions).

We agree with the county that Grabhorn has not established a basis to "take evidence to resolve disputes regarding the content of the record," under OAR 661-010-0045(1). The challenged decision is the hearings officer's decision on reconsideration. Whatever *ex parte* contacts or other irregularities may or may not have occurred, as a matter of law the hearings officer is the "final decision maker" for purposes OAR 661-010-0025(1). An evidentiary proceeding under OAR 661-010-0045(1) is not warranted to resolve disputes about the content of the record before a body that was not the "final decision maker." In addition, even if it were undisputed that the board of commissioners was the final decision maker, LUBA cannot compel the county to place into the record transcripts, minutes or privileged documents that were placed before the board of commissioners during an executive session. *Dimone*, 44 Or LUBA at 810.

**D. Conclusion**

Grabhorn's first motion to take evidence is allowed, in part. Grabhorn may depose the hearings officer to elicit testimony with respect to (1) the content of alleged *ex parte* communications between the hearings officer, county staff, and the assistant county counsel, and (2) the hearings officer's alleged bias or prejudgment. In all other respects, Grabhorn's first motion to take evidence is denied. Grabhorn's second motion to take evidence is denied.

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"A. The Board of County Commissioners shall hear appeals of decisions of the Hearings Officer and Planning Commission for Type III quasi-judicial plan amendments and Type III development actions in transit oriented districts. The Board shall be the final decision-maker for the County on appeals of these actions.

"B. For all other Type III development actions, the Hearings Officer or the Planning Commission shall be the final decision-maker for the County."

As provided in OAR 661-010-0045(2)(d), the deposition shall be conducted in the manner prescribed by law for depositions in civil actions under ORCP 38-40, unless the parties agree otherwise. The parties shall proceed as expeditiously as possible in scheduling and conducting the deposition. Grabhorn shall serve a copy of the deposition transcript to the Board and all parties as soon as possible following completion of the deposition. On receipt, the Board anticipates that it will issue an order resolving any remaining matters and establishing a briefing schedule.

**RECORD OBJECTIONS**

The county filed the original record on September 23, 2004. That record consists of 21 volumes. Grabhorn filed a number of objections to the original record. The parties were able to resolve some of the record objections and, on October 21, 2004, the county filed a two-volume supplemental record. The county also filed a response that disputes some of Grabhorn's record objections. On November 3, 2004, Grabhorn filed objections to the supplemental record, at the same time renewing some of the original record objections. In response, on December 2, 2004, the county filed a two-volume combined supplemental record (CSR), which includes and apparently replaces the supplemental record, along with additional material responding to the objections to the supplemental record. On December 6, 2004, Grabhorn filed objections to the CSR. The county responded, agreeing to one objection and disputing others.

It is not entirely clear to us which record objections remain in dispute. As far as we can tell, only three objections remain unresolved.[7] We now address these objections.

**A. Materials Placed Before the Board of Commissioners**

This objection is a variant of Grabhorn's second motion to take evidence, addressed above. As explained, the board of commissioners was not the final decision maker in this matter and, in any

[7] If we misunderstand the state of the briefing on the record objections, the parties may so advise us and we will resolve any unresolved record objections prior to or at the same time we establish a briefing schedule under OAR 661-010-0045(9), following conclusion of the evidentiary proceedings.

case, LUBA lacks authority to compel the county to include in the record testimony or other matters presented during an executive session. This objection is denied.

**B. Document Found in Materials Forwarded to the Hearings Officer**

Grabhorn argues that the county failed to include in the record a document that Grabhorn's counsel found in a box of documents that the county had forwarded to the hearings officer. A copy of the document is attached to Grabhorn's objections to the CSR. The county responds that it does not object to including the document in the record. This objection is sustained.

**C. Objection 14**

Grabhorn objects that the original record, supplemental record and CSR are missing letters dated May 15, 1991, April 29, 1992, and January 8, 2000, with attachments. The county responds that the cited documents are found in the CSR, and identifies their location. As far as we can tell, the county is correct. This objection is denied.

The document attached to Grabhorn's Objections to the Combined Supplemental Record is included in the record. As discussed above, the Board will settle the record and establish a briefing schedule following the conclusion of the proceedings under OAR 661-010-0045.

Dated this 16th day of February, 2005.

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Tod A. Bassham
Board Member