BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SCOTT DAHLEN,
Petitioner,

vs.

CITY OF BEND,
Respondent,

and

BROKEN TOP COMMUNITY ASSOCIATION,
Intervenor-Respondent.

LUBA No. 2007-251

ORDER

Before the Board is petitioner's motion to take evidence, and petitioner's motion to strike.

MOTION TO TAKE EVIDENCE

Petitioner moves to take evidence outside the record pursuant to OAR 661-010-0045, in the form of depositions and subpoenaed documents.[1] Generally, LUBA's review is

[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. * * *
>
> "(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:

limited to the local evidentiary record. ORS 197.835(2)(a). However, in certain circumstances, ORS 197.835(2)(b) and OAR 661-010-0045 authorize LUBA to consider extra-record evidence. The rules allow LUBA to consider extra-record evidence "in the case of disputed factual allegations in the parties' briefs" concerning, in relevant part, "unconstitutionality of the decision" and "ex parte contacts."

A. Factual Background

We believe the following facts to be undisputed. In 2003, petitioner purchased Tax Lot (TL) 100, a vacant 1.92-acre lot along the east side of Mt. Washington Drive in the City of Bend. TL 100 was created as part of the Broken Top Planned Unit Development (PUD), and is zoned Urban Standard Density Residential (RS).

After petitioner attempted to remove trees on TL 100, the city issued a cease and desist letter, under the apparent belief that TL 100 is (1) not a legal lot, and (2) a dedicated open space buffer and therefore not a buildable lot. In response, petitioner initiated a legal

---

> "(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 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."

lot determination process, and the city hearings officer ultimately determined that TL 100 is a legal lot of record.

The city subsequently initiated its own declaratory ruling process on the question of "whether and to what extent the subject property may be developed with uses other than a landscaped open space buffer[.]" Record 30. The city took the position that the 1991 or 1992 PUD approvals that created the Broken Top PUD reserved TL 100 as a dedicated open space or buffer. After conducting two evidentiary hearings in which petitioner participated, the city hearings officer agreed with the city that TL 100 had been reserved as a landscaped open space buffer, and therefore is not a buildable lot. Specifically, the hearings officer found that the 1991 PUD decision approved a county transportation plan amendment to relocate Mt. Washington Drive, and that the county hearings officer who approved that amendment and relocation relied upon the applicant's representations that TL 100 and other properties along the relocated drive would be reserved as landscaped open space buffer areas, notwithstanding that neither the 1991 nor 1992 PUD approvals imposed a condition of approval or an explicit requirement to that effect.

Petitioner appealed the declaratory ruling decision to the city council, which declined to hear the appeal. This appeal followed.[2]

B. Constitutional Claims

Petitioner states that the petition for review will include assignments of error alleging that the hearings officer's declaratory ruling is unconstitutional based on (1) the federal Takings Clause, (2) the federal Equal Protection Clause, and (3) the federal Due Process Clause. For each constitutional claim, petitioner identifies evidence not in the local record that petitioner seeks to introduce into LUBA's record.

---

[2] The parties advise us that petitioner also filed a lawsuit in federal district court, which is pending. *Dahlen v. City of Bend*, Federal District Court for the District of Oregon, Case No. 061122 TC.

The city and intervenor-respondent (intervenor) offer both general and specific responses. We first address their general responses.

1. The Motion to Take Evidence is Premature.

Intervenor first argues generally that the motion to take evidence is premature, because no briefs on the merits have yet been filed in this appeal and it is not clear that there are "disputed factual allegations" between the parties. OAR 661-010-0045(1); *see* n 1. According to intervenor, LUBA's practice and preference is to address motions under OAR 661-010-0045 after the parties have submitted briefs on the merits, when the parties' legal contentions are more developed and disputed allegations of fact are more clearly identified. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

Intervenor is correct that our preference is to resolve motions to take evidence only after the parties' briefs have been filed. However, in the present case we perceive no particular advantage to waiting to resolve the motion until after the briefs on the merits are filed. The existing briefing appears adequate to resolve the motion, the legal issues are reasonably developed, and, as discussed below, there are at least some "disputed factual allegations" between the parties. Accordingly, we deem it appropriate to resolve the motion in the present posture of this appeal.

2. The Constitutional Claims were Waived.

Both the city and intervenor (together, respondents) argue that the motion to take evidence should be denied because petitioner failed to raise below any of the three constitutional issues that petitioner asserts will be raised in the petition for review. According to respondents, there is no point in addressing a motion to take evidence with respect to a particular issue when that issue was not raised below, is waived under ORS 197.763(1),[3] and thus does not fall within LUBA's scope of review. ORS 197.835(2).[4]

---

[3] ORS 197.763(1) provides:

We generally agree with respondents that a motion to take evidence should be denied where it is clear that the motion seeks to introduce evidence relating solely to an issue that is beyond our scope of review because, for example, that issue was not raised below and is therefore waived under ORS 197.763(1). In the present case, petitioner replies that he asserted below on appeal to the city council that the hearings officer's decision "deprives the owner of TL 100, Mr. Dahlen, of all economically viable use of his property without just compensation and without due process of law." Record 21. Petitioner contends that the foregoing is sufficient to raise issues under the Fifth Amendment to the United States Constitution and Article I, Section 8 of the Oregon Constitution that the city's declaratory ruling effects an unconstitutional taking of his property. We agree with petitioner.

With respect to claims under the federal Equal Protection and Due Process clauses, petitioner appears to concede that no explicit assertion was raised below regarding those constitutional claims. Instead, petitioner argues that raising issues under the federal and state Takings Clauses was sufficient to also raise claims under the federal Equal Protection and Due Process clauses. Petitioner argues that explicitly invoking one textual source of constitutional protection, the Takings Clause, is sufficient to subsume "related and ancillary claims of due process and equal protection." Petitioner's Reply 2. Petitioner cites a string of federal circuit and district cases for that proposition. However, none of the cited cases appear to support that proposition. Even if there were some authority for that proposition, petitioner makes no effort to demonstrate that his equal protection and due process claims are

---

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

[4] ORS 197.835(3) provides that for purposes of LUBA's scope of review, "[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

"related and ancillary" to his takings claim. Based on the petitioner's description of the three constitutional claims that petitioner plans to advance in this appeal, we perceive no particular evidentiary or legal relationship between the three claims. Accordingly, we reject without further discussion petitioner's motion to take evidence as it relates to his claims under the federal Equal Protection and Due Process clauses.[5]

3. Evidence Relating to Petitioner's Takings Claim

To support his takings claim, petitioner requests that the Board consider the following documentary and depositional evidence: (1) evidence concerning the Deschutes County Transportation Plan, specifically the transportation plan itself and testimony from transportation engineers and planners employed by the county, apparently intended to controvert the hearings officer's conclusions based on the transportation plan that TL 100 is a dedicated buffer area; (2) documents from the federal lawsuit that petitioner asserts constitute a judicial admission by the city that the transportation plan did not in fact require TL 100 to be a buffer; and (3) evidence that as a buffer there is no economically viable use for TL 100, and that the city lacks any legitimate governmental interest in restricting the use of the subject property.

The respondents argue, and we agree, that the first two categories of evidence do not "concern" the unconstitutionality of the challenged decision, within the meaning of OAR 661-010-0045(1). Instead, the first two categories of evidence appear to relate solely to the merits of the hearings officer's conclusion that TL 100 is a dedicated buffer area and are apparently intended to controvert that conclusion. Generally, OAR 661-010-0045 cannot be

[5] To be clear, we do not hold that issues related to the Equal Protection and Due Process clauses are definitively waived, for purposes of the merits of this appeal, only that we decline to exercise our authority under OAR 661-010-0045(1) and ORS 197.835(2)(b) to address petitioner's motion to take evidence based on those two constitutional provisions, because petitioner has not sufficiently established at this juncture that issues based on those provisions are within our scope of review. Petitioner may, if he chooses, raise such issues in the petition for review and, in anticipation or response to a waiver challenge, seek to demonstrate that such issues were raised below or some other basis to include those issues within our scope of review. If necessary, petitioner may renew the motion to take evidence with respect to those constitutional claims.

used to augment a party's evidentiary presentation on the merits of the proposal, by adding to the record facts that could have been, but were not, submitted during the local evidentiary proceeding. *St. Johns Neighborhood Assn. v. City of Portland*, 33 Or LUBA 836 (1997). Accordingly, petitioner has not established any grounds to take evidence under OAR 661-010-0045(1) with respect to the first two categories of evidence.[6]

The third category of evidence, however, relates directly to petitioner's takings claim rather than the correctness of the hearings officer's conclusion that TL 100 is a dedicated buffer area. We understand respondents to argue that petitioner could have submitted evidence below regarding (1) the alleged lack of economically viable use for TL 100 as a dedicated buffer area and (2) whether the city has a legitimate governmental interest in restricting the use of the subject property to a buffer. However, the purpose of the declaratory ruling process initiated by the city was to test the city's claim that TL 100 is a dedicated open space buffer area and thus not a buildable lot. While petitioner was obligated to raise the takings issue below, we do not believe petitioner was obligated as part of the declaratory ruling proceeding below to plead or prove the factual elements of a takings claim.

Accordingly, we conclude that taking evidence not in the record under OAR 661-010-0045 is *potentially* warranted, with respect to petitioner's claim that as restricted to a dedicated open space buffer area TL 100 has no economically viable use. The difficulty here is that it is not clear that respondents dispute petitioner's claim that there is no permitted use of TL 100 other than an open space buffer area, and his claim that there is no economically viable use of TL 100. While respondents vigorously dispute all other elements of petitioner's takings claim and offer a number of defenses to that claim, the respondents'

[6] We note, however, that the county transportation plan is an official enactment that is subject to judicial notice under Oregon Evidence Code 202(7).

pleadings do not explicitly dispute that TL 100 can only be used as an open space buffer area, or that there is no economically viable use of TL 100.

Taking evidence under OAR 661-010-0045 is warranted only for "disputed factual allegations." Because respondents do not appear to dispute that there is no economically viable use for TL 100 under the restrictions described in the hearings officer's decision, we believe the more appropriate course is to deny the motion to take evidence on that issue. Petitioner may assert in the petition for review that there is no economically viable use of TL 100 and if desired attach supporting affidavits or documentation on that point. *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 619 (2002); *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656, 662 (1993). If the respondents dispute that factual assertion or the supporting evidence, then petitioner may renew the motion to take evidence on that point, and if so the Board will resolve that dispute.

With respect to the question of whether the city has a legitimate governmental interest in restricting the use of TL 100 to a buffer area, it is not clear that that is an evidentiary issue at all, for purposes of OAR 661-010-0045. A dispute regarding legal conclusions to be drawn from undisputed facts does not warrant taking extra-record evidence under OAR 661-010-0045. *Meredith v. Lincoln County*, 44 Or LUBA 821, 827 (2003); *Jones v. Lane Cou*nty, 27 Or LUBA 654, 655 (1994). Importantly, petitioner does not identify any specific "evidence" that petitioner seeks to introduce or elicit on the question of the city's legitimate governmental interests, and it is difficult to imagine what form or substance such "evidence" might take, other than bare assertions or arguments. As far as petitioner has established, the question of the substance or scope of the city's legitimate governmental interests is entirely or almost entirely a legal question. Accordingly, we deny this aspect of petitioner's motion.

C. Ex Parte Contacts

Petitioner argues that, given the adversarial position taken by city planning staff in the declaratory ruling process, it is possible that there were undisclosed ex parte communications between planning staff and the hearings officer. According to petitioner, depositions of city staff in the parallel federal lawsuit indicate that such contacts may have occurred. Petitioner seeks to depose city planning staff and the hearings officer to determine whether such communications occurred and the substance of those communications.

Respondents argue that petitioner merely speculates that ex parte communications occurred between staff and the hearings officer, and that such speculation fails to meet the threshold showing that ex parte contacts "actually took place or that there is a reasonable basis to believe that such contacts probably took place." *Pfahl v. City of Depoe Bay*, 16 Or LUBA 1073, 1074-75 (1988). We agree with respondents. Petitioner offers no reason or basis to conclude that impermissible or undisclosed ex parte contacts occurred between staff and the hearings officer, other than an allusion to staff depositions in the federal lawsuit, which petitioner states "indicate that such contacts may have occurred." Motion to Take Evidence 12. Petitioner does not elaborate on that statement, and does not attach the depositions or other evidence to support that statement. Even if such supporting evidence were proffered, the mere possibility that some ex parte contact "may have occurred" is insufficient to warrant authorizing depositions under OAR 661-010-0045. *See Grabhorn v. Washington County*, 48 Or LUBA 657, 667-68 (2005) (ex parte contacts between staff and the hearings officer would warrant reversal or remand and thus would warrant taking depositions under OAR 661-010-0045 only if the proponent demonstrates that the contacts likely involved the discussion or advocacy of the merits of the underlying decision, as opposed to administrative or procedural matters). Petitioner's motion to depose staff and the hearings officer to explore the possibility of ex parte contacts is denied.

D. Conclusion

For the foregoing reasons, petitioner's motion to take evidence is denied.

MOTION TO STRIKE

Petitioner moves to strike a number of documents attached to the city's response to petitioner's motion to take evidence, arguing that those documents are not part of the record and the city offers no basis for the Board to consider them. However, OAR 661-010-0045(3) provides that any party may file a response to a motion to take evidence, and contemplates that the respondent may append supporting affidavits or documents to the response. *See* n 1. Just as the Board may consider affidavits or documents attached to a motion to take evidence, at least for purposes of resolving the motion, the Board may consider affidavits or documents attached to responses to that motion, for the same purpose. Accordingly, the motion to strike is denied.[7]

RECORD

On March 20, 2008, the city filed a supplemental record that appears to resolve petitioner's outstanding record objections. Accordingly, the record is settled as of the date of this order. The petition for review is due 21 days, and the response briefs due 42 days, from the date of this order. The Board's final order and opinion is due 77 days from the date of this order.

Dated this 29th day of July, 2008.

_____

Tod A. Bassham
Board Member

[7] To clarify, while the documents attached to the city's response are part of LUBA's record, they are not part of the local record, and the Board will not consider them for any evidentiary purpose or in resolving the merits asserted on appeal, unless the city or other party files a motion to take evidence or asserts some other basis for the Board to consider those extra-record documents.