

1 the city's files regarding actions the city has taken to enforce ZCDC 16.102 since it was
2 adopted on August 7, 2012, and (2) the depositions of the city code enforcement officer, the
3 city planning director, and the city senior planner. As grounds for the motion, we understand
4 petitioner to argue that this extra-record evidence will demonstrate the "unconstitutionality of
5 the decision." OAR 661-010-0045(1).² According to petitioner, ZCDC 16.102 includes
6 unconstitutional content-based restrictions on speech, and is incapable of being enforced in a
7 constitutional manner. Petitioner attaches to his motion (1) his affidavit, (2) a September 27,
8 2012 enforcement letter to a property owner, (3) photographs of the sign at issue in that
9 enforcement letter, (4), an e-mail exchange between the property owner and a city senior
10 planner, and (5) a pamphlet issued by the city explaining the new sign code. According to
11 petitioner, these attachments are examples of the kind of evidence he wishes to elicit from the
12 city enforcement files and through deposition of city staff.

13 The city objects to the motion to take evidence on several grounds, including that (1)
14 the motion is premature because it was filed before the parties filed their briefs, (2) the
15 motion fails to state grounds to take evidence outside the record under OAR 661-010-
16 0045(1), (3) the motion does not allege any disputed facts, only disputed legal conclusions,

“(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).”

² We understand petitioner to argue that grounds for the motion also includes “other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision.” OAR 661-010-0045(1). However, petitioner provides no argument or any basis to conclude that the city committed procedural error in adopting Ordinance 2012-009 and ZCDC 16.102. We therefore focus on his arguments that the motion is warranted because the extra-record evidence he seeks to place before LUBA concerns the alleged “unconstitutionality” of Ordinance 2012-009 and ZCDC 16.102.

1 and (4) the motion does not describe with particularity the facts to be admitted, as required
2 by OAR 661-010-0045(2).

3 We agree with the city that petitioner has not demonstrated that the motion to take
4 evidence should be granted. Initially, we note that petitioner's appeal of Ordinance 2012-009
5 is necessarily a facial challenge of Ordinance 2012-009, not an as-applied challenge of
6 decisions that have applied Ordinance 2012-009. The city's post-adoption enforcement
7 actions could possibly be challenged on an as-applied basis, but those enforcement decisions
8 or actions are not before us in this appeal of Ordinance 2012-009. It is conceivable that,
9 depending on the nature of a facial constitutional challenge, specific examples of how a law
10 has actually been applied might have some bearing on a determination of the law's facial
11 constitutionality. However, petitioner has not demonstrated that evidence of the city's
12 enforcement actions or the depositions of city staff would be relevant to, much less
13 determinative of, a facial constitutional challenge to Ordinance 2012-009.

14 In the motion and affidavit, petitioner presents two main arguments regarding the
15 alleged unconstitutionality of ZCDC 16.102, and the need to take evidence outside the
16 record. First, petitioner argues that ZCDC 16.102 violates the free speech and due process
17 clauses of the state and federal constitutions, because it includes provisions that allow the
18 city to regulate the "content" of speech. As one specific example, petitioner notes that
19 ZCDC 16.102 requires that temporary signs in a residential zone must be constructed in a
20 "colonial post style." ZCDC 16.102.030(A)(1). In one of the exhibits attached to the
21 motion, petitioner notes that the city appears to have enforced against a sign in part because it
22 was not constructed in a "colonial post style." However, we do not see that such evidence of
23 specific enforcement actions under ZCDC 16.102 could have any bearing on a facial
24 challenge to the constitutionality of ZCDC 16.102. A facial challenge presumes that the
25 challenged law will be applied by its terms; evidence that the city has in fact applied ZCDC
26 16.102 by its terms will add nothing to any facial constitutional challenge to ZCDC 16.102

1 that we can imagine.

2 Petitioner's second main theme is that the enforcement files will show that the city
3 has applied ZCDC 16.102 in an unequal and discriminatory fashion, by enforcing against
4 some temporary signs but not others. Again, we fail to see how the actual pattern of
5 enforcement of ZCDC 16.102 is probative to a facial challenge to the sign ordinance. Even if
6 the city is enforcing the ZCDC 16.102 inconsistently, that has nothing to do with whether
7 ZCDC 16.102 is unconstitutional on its face. The city could easily apply a facially
8 constitutional ordinance in an inconsistent or unequal fashion. In that circumstance, in an
9 appeal of the ordinance we would be required to affirm the ordinance, even though
10 inconsistent or unequal enforcement decisions might be successfully challenged in
11 appropriate forums.

12 In sum, petitioner has failed to demonstrate how those facts he seeks to establish
13 pertain to any ground to take evidence specified in OAR 661-010-0045(1), and how those
14 facts will affect the outcome of the review proceeding. OAR 661-010-0045(2). The motion
15 to take evidence is denied.

16 The next event in this review proceeding is the filing of the petition for review. The
17 petition for review is due 21 days, and the response brief due 42 days, from the date of this
18 order. The Board's final opinion and order is due 77 days from the date of this order.

19 Dated this 21st day of November, 2012.
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27 Tod A. Bassham
Board Chair