BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STOP TIGARD OSWEGO PROJECT, LLC,
NORMAN KING, PETE BEDARD,
MICHAEL MONICAL, CAROL ELSWORTH,
MARK ELSWORTH, SHANNON VROMAN,
JENNE HENDERSON, LAMONT KING,
THOMAS J. SIEBEN, GWEN L. SIEBEN,
SCOTT GERBER, JAN GERBER, JACK NORBY,
THOM HOLDER, GARY HITESMAN,
REBECCA WALTERS and DARRYL WALTERS,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent,

and

CITY OF LAKE OSWEGO AND LAKE OSWEGO -
TIGARD WATER PARTNERSHIP and CITY OF TIGARD,
Intervenors-Respondents.

LUBA Nos. 2013-021 and 2013-022

WILLIAM J. MORE, CARL L. EDWARDS, LINA S. EDWARDS,
CURT SOMMER and ROBERT STOWELL,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent,

and

CITY OF LAKE OSWEGO AND LAKE OSWEGO -
TIGARD WATER PARTNERSHIP and CITY OF TIGARD,
Intervenors-Respondents.

LUBA No. 2013-023

ORDER ON MOTION TO TAKE EVIDENCE

NOT IN THE RECORD

INTRODUCTION

The two challenged decisions approve (1) a conditional use permit and design review approval to expand an existing water treatment facility and (2) a conditional use permit and design review approval for an associated pipeline. In LUBA No. 2013-021, petitioners STOP Tigard et al. challenge the water treatment expansion. In LUBA No. 2013-022, petitioners STOP Tigard et al. challenge the pipeline approval. In LUBA No. 2013-023, petitioners William J. More et al. also challenge the pipeline approval. These three appeals were consolidated for review, and the city submitted a consolidated record.

Subsequently, petitioners STOP Tigard et al. filed a 50-page petition for review in LUBA Nos. 2013-021/022 alleging procedural and substantive errors in the water treatment facility expansion and pipeline decisions. Petitioners William J. More et al. filed a 50-page petition for review in LUBA No. 2013-023 alleging procedural and substantive errors in the pipeline decision. The petition for review in LUBA Nos. 2013-021/022 incorporates by reference the assignments of error in the petition for review filed in LUBA No. 2013-023. Correspondently, the petition for review in LUBA No. 2013-023 incorporates by reference all assignments of error in LUBA No. 2013-021/022, with respect to all issues that pertain to the pipeline. The assignments of error in the two petitions otherwise do not overlap.

The fifth assignment of error in LUBA No. 2013-021/022 alleges that Councilor Jones engaged in undisclosed ex parte communications with the applicant, intervenor Lake Oswego-Tigard Partnership (LOT). The city filed a response brief disputing the conclusion that Councilor Jones engaged in undisclosed ex parte communications.

Subsequently, petitioners in LUBA No. 2013-023 moved to take evidence not in the record, pursuant to OAR 661-010-0045(1). The motion seeks to obtain the depositions of three city councilors, the city mayor and the city manager, in an attempt to support allegations in the fifth assignment of error in the petition for review filed in LUBA Nos. 2013-021/022.

Specifically, petitioners allege that Councilor Jones had undisclosed ex parte communications with the applicant, using city staff as an intermediary. The city opposes the motion. For the following reasons, we deny the motion to take evidence.

PARTIES

In an earlier order, LUBA consolidated these three appeals for review. Consolidation of appeals does not affect the status of parties to each appeal. OAR 661-010-0055. Neither set of petitioners has intervened in the other appeal. Thus, the petitioners in LUBA No. 2013-023 are not parties to LUBA Nos. 2013-021/022, and vice versa. The two sets of petitioners are represented by different attorneys, have challenged different sets of decisions, and raise different challenges. Despite this posture, the petitioners in LUBA No. 2013-023 have filed a motion to take evidence to support the fifth assignment of error in the petition for review filed by petitioners in LUBA No. 2013-021/022, an appeal that the petitioners in LUBA No. 2013-023 are not parties to.

Our rules do not authorize a person who is party in one appeal to file a motion to take evidence in different appeal to which that person is not a party. OAR 661-010-0045 provides that a motion to take evidence is appropriate "in the case of disputed factual allegations in the parties' briefs * * *" OAR 661-010-0010(11) defines "party" as relevant here as the petitioner or intervenor in an appeal. William J. More et al. are neither petitioners nor intervenors in LUBA No. 2012-021/022, and cannot file a motion to take evidence in that appeal.

Petitioners may presume that because their 50-page petition for review incorporates all of the assignments of error in the 50-page petition for review in LUBA Nos. 2013-021/022 (to the extent those assignments relate to the pipeline decision), their petition for review includes the fifth assignment of error in STOP Tigard et al.'s petition for review, and therefore the motion to take evidence concerns a disputed factual allegation in the petition for review in LUBA No. 2013-023. If so, that theory is inconsistent with LUBA's rules. OAR

661-010-0030(2)(b) limits the petition for review to 50 pages, unless the Board grants permission for a longer petition. No party has requested a longer petition, and the Board has granted none. While incorporation of arguments in another brief in the appeal is a common practice, such incorporation is permissible only if it is otherwise consistent with LUBA's rules. By incorporating an additional 50 pages of briefing, petitioners in LUBA No. 2013-023 have effectively submitted an over-length 100-page brief, without obtaining the Board's permission. *See Herring v. Lane County*, 54 Or LUBA 417, 420 (2007) (allowing a response brief to incorporate arguments in the brief of a party dismissed from the appeal, where the incorporation did not cause the response brief to exceed the 50 page limit).

Nonetheless, we will not reject the motion to take evidence on the foregoing basis. Petitioners' violation of OAR 661-010-0030(2)(b) is arguably a "technical violation" of LUBA's rules within the meaning of OAR 661-010-0005, because absent dismissal or withdrawal of issues in LUBA No. 2013-021/022 we will consider the assignments of error in the petition for review in LUBA Nos. 2013-021/022 regardless of the attempted incorporation. Further, the disconnect between the parties, the appeals, and the motion could be corrected easily by having the attorney for the petitioners in LUBA Nos. 2013-021/022 sign and re-submit the motion to take evidence. Accordingly, we proceed to address the parties' arguments regarding the motion.

MOTION TO TAKE EVIDENCE

As noted, OAR 661-010-0045(1) provides in relevant part that LUBA may consider evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning, among other things, "ex parte contacts."[1] The motion must explain with

[1] ORS 227.180 provides in relevant part:

> "(3) No decision or action of a planning commission or city 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:

particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence, and how those facts will affect the outcome of the review proceeding. OAR 661-010-0045(2)(a).[2] Further, where the movant seeks to establish facts outside the record by means of deposition, the motion must be accompanied by an affidavit establishing the need to take evidence not available to the moving party. OAR 661-010-0045(2)(b)(B). The Board may order depositions 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. OAR 661-010-0045(2)(c).

"(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 city 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."

[2] OAR 661-010-0045(2) provides in relevant part:

"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. * * *"

We understand the parties to agree on the facts in the following two paragraphs, which are taken from the record.

On January 28, 2013, the city council conducted a public hearing on the two applications, closed the record and began its deliberations. The record was re-opened for an additional 7 days to allow the parties to address a belated ex parte contact disclosure involving the Mayor. No votes were taken, although the Mayor and one councilor indicated that they were leaning toward approval, and two councilors, Jones and Tan, indicated that they were leaning against approval. Councilor Jones indicated that he would favor approval if additional conditions of approval could be crafted to address two areas of concern. Councilor Jones directed staff to propose additional conditions of approval to address those concerns.

On February 8, 2013, city staff submitted a memorandum with three draft conditions of approval addressing Jones' concerns. Record 267. On Monday, February 11, 2013, the city council reconvened the hearing. The councilors each stated that no new ex parte contacts had occurred since the last hearing. The public hearing was closed, and the council again entered deliberations. Councilor Jones moved to add to the proposed staff conditions five new conditions, in addition to the three proposed by staff, and Councilor Carson seconded the motion. Record 260. Councilor Jones explained that he woke up early on Saturday, February 9, 2013, and concluded that additional conditions were necessary beyond the three drafted by staff. After brief discussion, the council voted 4-0 to add the new conditions. Councilor Jones then moved to approve the two applications, and Councilor Carson seconded. After discussion, the motion passed 4-0. Record 262. Staff were directed to prepare final written decisions. On February 18, 2013, the council met and voted 4-0 to adopt the final orders approving the two applications.

The following allegations are based on the declaration of petitioner Scott Gerber, and a local newspaper article attached to the motion to take evidence. The Gerber declaration,

dated August 7, 2013, relates a conversation between Gerber and Councilor Jones that occurred on February 19, 2013, one day after the city council issued its final written decisions. The declaration recites as follows:

> "5. * * * Councilor Jones said that after waking up at 2:00 a.m. on Saturday morning (February 9, 2013), he started working on conditions that he would need to make the project palatable.
>
> "6. After working the conditions out, he called 'staff' and presented the conditions to them. Then, staff worked with LOT through the weekend, after which LOT agreed to Councilor Jones' proposed conditions." Declaration of Scott Gerber 2.

The newspaper article is dated April 26, 2013, and states in relevant part:

> "Over the course of the two weeks [between the hearing on January 28, 2013 and the hearing on February 11, 2013], Jones worked with city staff to add more conditions of approval to the projects that would sway his vote to approval. City Manager Chris Jordan said he has been in contact with both Jones and LOT officials in regard to the new conditions, and that other city staff, such as attorneys, dealt with drafting the new conditions." Motion to Take Evidence, Exhibit 1, page 2.

Petitioners argue that these extra-record documents suggest that ex parte communications likely occurred between LOT and Councilor Jones over the weekend of February 9-11, 2013, with city staff acting as the go-between or intermediary. Specifically, petitioners argue that it can be inferred from the above-quoted documents that staff relayed to Council Jones LOT's agreement with the new conditions. According to petitioners, any communications from LOT that city staff conveyed to Councilor Jones constitute ex parte communications, and must be disclosed pursuant to ORS 227.180(3). Petitioners seek depositions of the councilor and city staff in order to establish that staff conveyed ex parte communications to Councilor Jones, in support of STOP's fifth assignment of error.

The city and LOT respond, and we agree, that petitioners have not established a basis to obtain the requested depositions under OAR 661-010-0045. Communication between staff and a member of the governing body is not an ex parte communication. ORS 227.180(4). Communications between staff and parties to a land use proceeding are also not ex parte

communications. *McKenzie v. Multnomah County*, 27 Or LUBA 523, 532 (1994). Thus, any staff discussion with LOT officials regarding the new conditions is not, itself, an ex parte communication.

An ex parte communication is a communication from a party or other person to a decision maker that concerns the land use decision or action before the decision maker. We assume without deciding that petitioner is correct that ORS 227.180(4) does not shield a decision maker from the obligation to disclose an ex parte communication from a party that is conveyed to the decision maker by staff. However, even under that assumption, petitioners have not made a demonstration in the present case that an ex parte communication likely occurred, and therefore has not demonstrated sufficient grounds for the requested depositions.

The inference that petitioners draw from the Gerber declaration and the newspaper article—that sometime prior to the city council hearing on February 11, 2013, city staff informed Councilor Jones that LOT agreed to the five new conditions—is not particularly strong. Assuming the August 7, 2013 Gerber declaration is an accurate recollection of the telephone conversation that occurred on February 19, 2013, the declaration suggests that Councilor Jones knew by February 19, 2013 that LOT had agreed to the new conditions. But the Gerber declaration does not state or suggest how or when Councilor Jones acquired that knowledge. The newspaper article, written several months after the events described, states only that, during the two week period in which city staff had developed the original three conditions requested by Council Jones, City Manager Chris Jordan had been in contact with both Jones and LOT officials in regard to the new conditions. As noted above, communications between city staff and the city councilor, and between city staff and the parties, are not ex parte communications. Thus, that the city manager has been in contact with both the councilor and with LOT officials does not necessarily constitute an ex parte communication. Only if staff conveyed a direct communication from LOT to the councilor does a potential ex parte communication occur. However, the article does not state or even

clearly suggest that the city manager conveyed any communications from LOT to Jones.

Reading the declaration and the article together, one could possibly infer that at some point prior to the hearing on February 11, 2013 the city manager or other staff had informed Councilor Jones that LOT agreed to the new conditions, although that inference is not particularly strong. In our view, that inference does not warrant granting the request to obtain depositions to establish whether, how and when Councilor Jones gained the knowledge that LOT agreed to the new conditions. That is because the alleged subject matter of the communication—that LOT agreed to the new conditions—is in our view not the kind of communication that ORS 227.180(4) required Councilor Jones to disclose and required the council to provide petitioners an opportunity to rebut.

In *Link v. City of Florence*, 58 Or LUBA 348, 353-54 (2009), a city councilor belatedly disclosed contacts with persons who were supportive of the proposed annexation and wanted their property to be annexed also. We held that the belated disclosure did not warrant remand, explaining:

> "[I]n order to provide a basis for remand based on *ex parte* contacts, there must be some indication that the communication had something to do with the factual determinations or legal standards that govern approval or denial of the application. The goal of prohibiting undisclosed *ex parte* contacts is to ensure that land use decisions are based on information or evidence the decision makers receive within the public process, and are not based on legal arguments or evidence received outside the public process. *Carrigg v. City of Enterprise*, 48 Or LUBA 328, 333 (2004). The correlation is that failure to disclose communications that have no bearing on applicable approval criteria or to issues material to approving or denying the application does not necessarily warrant remand. *Crook v. Curry County*, 38 Or LUBA 677, 687 (2000).
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> "Here, [the city councilor] disclosed the substance of the communications, but belatedly, following the close of the record and at a meeting at which no public testimony was taken. The city failed to offer participants an opportunity to rebut the substance of that communication. That failure warrants remand, in our view, only if there is some reason to believe those communications had some bearing on applicable approval criteria or otherwise played a material role in the city council's decision to approve the annexation.

> "[T]he gist of the communications with [the city councilor] is that other persons besides the [applicant] are interested in being annexed into the city. That subject has no obvious bearing on any approval criteria applicable to the proposed Driftwood Shores annexation, and it is difficult to see how such communications could play a material role in the city council's decision. It is true that the persons who communicated with [the city councilor] also expressed support for the proposed annexation of the Driftwood Shores property, but that expression of support appears to be prompted by the communicants' desire to have their own property similarly annexed, and not to any assertion that the Driftwood Shores annexation should be approved because it is consistent with applicable approval criteria or any other consideration that is material to the city council's decision making on the Driftwood Shores annexation.
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> In our view, such general expressions of support for the proposed annexation (or general expressions in opposition, for that matter) are not '*ex parte* contacts' within the meaning of ORS 227.180(3), or to the extent they can be construed as *ex parte* contacts, the failure to timely disclose such contacts and provide an opportunity for rebuttal does not warrant remand. As the city points out, there are no factual or legal assertions in such general expressions of support or opposition that petitioner or any other participant could possibly rebut. Petitioner does not explain what purpose would be served by remanding the decision to provide rebuttal, or describe what petitioner could possibly say in rebuttal. Under these circumstances, the city's error, if any, in failing to offer petitioner the opportunity to rebut the communications with [the city councilor] does not provide a basis for reversal or remand."

In the present case, assuming that city staff informed Councilor Jones that LOT agreed to the new conditions, that information is not a factual or legal assertion that concerns any applicable approval criteria, or otherwise constitute a material consideration for the city council. The city can impose conditions of approval whether or not the applicant agrees to them or not, and the applicant's agreement or disagreement has no factual or legal bearing on any approval criterion or any other material consideration. Petitioners argue that adding the five new conditions persuaded two council members to change their minds about approval. That may be true, but there is nothing in the record or elsewhere cited to us that suggests that any council member's knowledge that the applicant agreed to the new conditions played any role in the city council's decision.

In addition, in our view, to constitute an ex parte communication the content of the

communication must be something that is capable of rebuttal, *i.e.* information that other parties could meaningfully respond to or attempt to controvert in some way. Here, petitioners do not argue that the information allegedly conveyed—that the applicant agreed to conditions drafted by city staff—is information that is capable of rebuttal, and we do not see that it is. There is simply nothing to respond to. Therefore, even if petitioners established that prior to the February 11, 2013 hearing staff informed Councilor Jones that LOT accepted the new conditions, we do not believe that such a communication would constitute an ex parte communication within the meaning of ORS 227.180(3).

Further, even if such a communication would technically qualify as an ex parte communication, petitioners have not demonstrated that an evidentiary proceeding under OAR 661-010-0045 is warranted. OAR 661-010-0045(2)(a) requires the movant to explain how the facts to be established "will affect the outcome of the review proceeding." In the present circumstances, petitioners must demonstrate that the fact to be established via deposition — that staff informed Councilor Jones that LOT agreed to the new conditions—might affect the resolution of the fifth assignment of error, *i.e.* could result in remand for violation of ORS 227.180(3). However, as in *Link*, petitioners have not explained what purpose would be served in remanding the decision to provide petitioners with an opportunity to rebut the information that LOT had agreed to the new conditions. Accordingly, as in *Link*, we would almost certainly conclude that the city's error, if any, in failing to offer petitioners the opportunity for rebuttal does not provide a basis for reversal or remand.

Petitioners also argue that depositions are warranted because the deposition of Councilor Jones and city staff might reveal other communications that staff conveyed from LOT officials to the councilor, besides LOT's agreement to the new conditions. However, petitioners offer nothing to substantiate that speculation.

Finally, petitioners argue that depositions are warranted to establish that Councilor Jones was biased in favor of LOT's application. However, no assignment of error in either

petition for review alleges bias. The city responds, and we agree, that petitioners cannot obtain depositions under OAR 661-010-0045 to support new allegations of error that are not present in the petitions for review.

For the foregoing reasons, the motion to take evidence is denied. The next event in this review proceeding is oral argument, which is hereby scheduled for October 3, 2013, at 11:00 a.m.

Dated this 25th day of September, 2013.

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Tod A. Bassham
Board Member