

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 DAVID SARETT,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 D & H BESSETT, LLC
15 *Intervenor-Respondent.*

16
17 LUBA No. 2017-055

18
19 ORDER ON MOTION TO TAKE EVIDENCE

20 In this appeal, petitioner challenges a decision approving seven property
21 line adjustments affecting the boundaries of six properties owned by
22 intervenor-respondent (intervenor).

23 On August 25, 2017, petitioner filed the petition for review,
24 accompanied by a motion to take evidence outside the record, pursuant to OAR
25 661-010-0045(1).¹ The proffered evidence consists of (1) Exhibit A,

¹ OAR 661-010-0045(1) provides:

“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

1 petitioner's declaration, offered to demonstrate standing, and (2) Exhibits B-D.
2 Petitioner apparently obtained Exhibits B-D from a proceeding on intervenor's
3 application in 2017 for legal lot verification of the six parcels at issue in the
4 present appeal. Exhibit B consists of diagrams, apparently prepared by
5 intervenor's agents, illustrating some of the property line adjustments at issue
6 in the present appeal. Exhibit C consists of deeds that implement the
7 adjustments illustrated in the diagrams in Exhibit B. Exhibit D consists of
8 documents from the 2017 legal lot verification proceeding involving the same
9 parcels at issue in this appeal. Petitioner states that the documents in Exhibit D
10 are offered to demonstrate how petitioner obtained the documents in Exhibits B
11 and C.

12 On September 8, 2017, intervenor filed a response to the motion,
13 opposing LUBA's consideration of Exhibits B-D, and moving to strike all
14 references to Exhibits B-D in the petition for review. The county has not
15 responded to petitioner's motion.

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 discretion take evidence to resolve disputes regarding the
content of the record, requests for stays, attorney fees, or actual
damages under ORS 197.845.”

1 **EXHIBIT A**

2 Intervenor does not oppose the motion to take evidence to consider
3 Exhibit A, the declaration of petitioner offered to demonstrate standing. The
4 motion is allowed.

5 **EXHIBITS B-D**

6 Petitioner argues that LUBA can consider the extra-record documents in
7 Exhibits B-D, to resolve factual disputes in the parties’ briefs regarding
8 “procedural irregularities not shown in the record and which, if proved, would
9 warrant reversal or remand of the decision.” *See* n 1. Petitioner’s first
10 assignment of error in the petition for review argues that the county erred in
11 processing the application for the seven property line adjustments at issue in
12 this appeal under the ministerial review provisions at Lane County Code (LC)
13 13.450(4), rather than the Director Review provisions of LC 13.450(5). *See*
14 *Bowerman v. Lane County*, 287 Or App 383, __ P3d __ (August 23, 2017)
15 (construing LC 13.450(4) and (5) to require planning director review for an
16 application for property line adjustments that proposes more than a single
17 adjustment). Petitioner argues that the documents in Exhibits B and C confirm
18 that the challenged decision indeed authorized a series of seven property line
19 adjustments, and therefore that the county erred in processing the application
20 under the ministerial review provisions at LC 13.450(4), rather than the
21 Director Review provisions of LC 13.450(5), which would offer notice and
22 other procedural protections to petitioner.

1 Intervenor opposes consideration of the documents in Exhibits B-D,
2 arguing that the diagrams and deeds therein post-date the challenged decision
3 and belong to an entirely different proceeding, an application filed by
4 intervenor in 2017 for legal lot verification. Intervenor also argues that
5 considering only some of the documents from the 2017 legal lot verification
6 would be prejudicial to intervenor, and that full documentation from that
7 proceeding would show that petitioner had an opportunity in that proceeding to
8 object to the legal lot status of the adjusted lots.

9 Notably, intervenor does not dispute the fact that petitioner alleges, *i.e.*,
10 that the challenged decision approves more than a single property line
11 adjustment. Thus, there are no “disputed factual allegations in the parties’
12 briefs” on that point. Whether those undisputed facts establish a procedural
13 error is a legal, not a factual, issue. In addition, as noted in our previous order,
14 the record includes diagrams and deeds reflecting three of the seven property
15 line adjustments apparently authorized by the challenged decision. The
16 documents in Exhibits B-D offer additional confirmation of that undisputed
17 fact, but do not appear to offer anything materially new on that point.
18 Accordingly, we agree with intervenor that petitioner has not demonstrated a
19 basis under OAR 661-010-0045(1) to grant a motion to take evidence to
20 consider the documents in Exhibits B-D. The motion is denied. Intervenor’s
21 motion to strike is granted, and LUBA will not consider Exhibits B-D, or any

1 references to Exhibits B-D in reviewing the arguments in the petition for
2 review.

3 The next event in this review proceeding is the filing of the response
4 brief. Accordingly, the response brief is due 21 days from the date of this
5 order. The Board's final opinion and order is due 56 days from the date of this
6 order. The Board will schedule oral argument by separate letter.

7 Dated this 20th day of September, 2017.

8

9

10

11

12 _____
Tod A. Bassham

13 Board Member