BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL CONTE and BRYN THOMS,
Petitioners,

and

RACHEL STEDMAN,
Intervenor-petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

OAKLEIGH MEADOW CO-HOUSING,
Intervenor-Respondent.

LUBA No. 2017-063

ORDER

On August 15, 2017, the Board issued an order resolving all objections to the record, and settling the record, based in part on receipt of a supplemental record. On August 16, 2017, and August 18, 2017, lead petitioner Paul Conte (Conte) filed (1) a motion to reconsider our August 15, 2017 order and (2) a motion to take evidence outside the record, pursuant to OAR 661-010-0045.[1]

[1] OAR 661-01-0045(1) provides:

LUBA also received a motion to intervene from Olive Rossman, which prompted another series of motions and responses and replies. We now resolve the outstanding motions.

ROSSMAN MOTION TO INTERVENE

On August 29, 2017, Olive Rossman (Rossman) filed a motion to intervene in this appeal, on the side of petitioners Paul Conte and Bryn Thoms. On September 7, 2017, the city filed an objection to the motion, arguing that Rossman never appeared before the local government at any point in any of the city's proceedings on the application. ORS 197.830(7)(b)(B) (persons who appeared before the local government orally or in writing may intervene in a LUBA appeal). As discussed below, on September 11, 2017, petitioners Conte and Thoms filed a reply in support of Rossman's motion to intervene and a motion to take evidence, which prompted a response from the city and a further reply from Conte.

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

The affidavit attached to Rossman's motion to intervene states that Rossman appeared in the original 2013 proceedings before the hearings official, citing to City Exhibit PT-1 (hereafter, the Report). However, the city argues that the Report is a document prepared by various opponents to the application, designated as "lead authors" and "supporting authors," and that the document does not list Rossman as one of the authors. Objection to Rossman Motion to Intervene, Attachment A, page 2. According to the city, the only reference to Rossman in the Report is her name and address included on a list of names and addresses in the affected neighborhood, and the authors' assertion that these residents "endorse the recommendations of this document." *Id.* The city contends that inclusion of Rossman's name in a list of residents who, it is asserted, endorse the document is not sufficient to constitute an "appearance" for purposes of ORS 197.830(7)(b)(B). The city notes that the list of names and addresses appears to include a complete list of all addresses on Oakleigh Lane in numerical order, because it lists a vacant address ("121 Oakleigh Ln—vacant"). Following the list of Oakleigh Lane addresses, the document states that "100% of the residents on Oakleigh Lane * * * do not support" the project. *Id.* at 3.

A. Rossman Motion to Take Evidence: Exhibit A

On September 13, 2017, Rossman filed a response to the city's objection to her intervention, along with a motion to take evidence to consider her second affidavit. The city opposes the motion to take evidence, arguing that her

second affidavit focuses on her intent and understanding in consenting to include her name in the list of Oakleigh Lane residents who endorse the Report, but that such evidence is irrelevant. According to the city, the relevant question is purely a legal one: does the inclusion of Rossman's name and address in the Report constitute an "appearance" for purposes of ORS 197.830(7)(b)(B)?

We disagree with the city. Whether a person "appeared" during the proceedings below and thus has standing to appeal or intervene before LUBA is a mixed question of law and fact that often requires extra-record evidence to evaluate, including the circumstances surrounding whatever action is the basis for the asserted appearance. Rossman's second affidavit includes factual assertions regarding the circumstances of her alleged appearance, and it is appropriate for LUBA to consider those assertions in resolving the contested motion to intervene. Rossman's motion to take evidence to consider Exhibit A is granted.

B. Rossman Motion to Take Evidence: Exhibit B

Rossman's motion to take evidence also includes Exhibit B, a document consisting of pages 5-17 of a reply to the city's objection to Rossman's intervention, filed by petitioners Conte and Thoms on September 11, 2017, and which also includes a related motion to take evidence to consider the affidavit of petitioner Thoms and a non-party, Tammy Crafton. The reply, motion and affidavit provide support and legal argument for Rossman's contested motion

to intervene. However, we note that Conte, Thoms and Rossman are all unrepresented persons. Under OAR 661-010-0075(6), each individual before LUBA must either appear on his or her own behalf or be represented by an attorney. Our rules do not authorize one unrepresented party to file pleadings, motions and affidavits presenting legal arguments and factual assertions intended to support the standing of another unrepresented party. An unrepresented party cannot lawfully represent another party, *e.g.*, present argument on behalf of another party. Accordingly, we do not consider the September 11, 2017 pleading filed by Conte and Thoms, and their related motion to take evidence is denied.[2] For the same reason, we do not consider the excerpt of that pleading that is attached to Rossman's motion to take evidence as Exhibit B, and Rossman's motion to take evidence to consider Exhibit B is denied.[3]

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[2] On September 27, 2017, lead petitioner Conte filed "Petitioners' Reply to Respondent's Response to Petitioners' Motion to Reply to Respondent's Objection to Olive Rossman's Motion to Intervene," combined with "Petitioners' Reply to Respondent's Response to Petitioners' Motion to Take Evidence." For the reasons stated in the text, we also do not consider these pleadings. Lead petitioner Conte cannot present legal arguments on behalf of unrepresented "Petitioners," just as the unrepresented "Petitioners" cannot present legal argument on behalf of Rossman.

[3] We assume, without deciding, that Rossman's motion to intervene, affidavits, motion to take evidence and responses to the city's objection were in fact drafted by Rossman, although there are stylistic and other textual and contextual reasons to believe that may not be the case.

Returning to Rossman's second affidavit, the second affidavit states, in relevant part:

> "My intent and understanding in having my name and address listed among the names and addresses of other residents of McLure and Oakleigh Lanes who endorsed the report recommendations were that I was a party to submitting testimony opposing the PUD, as proposed, based on concerns identified in the report." Rossman Motion to Take Evidence, Exhibit A, 2.

We agree with the city that Rossman has failed to demonstrate that she "appeared" before the city for purposes of ORS 197.830(7)(b)(B). The appearance requirement of ORS 197.830(7)(b)(B) is identical to the appearance requirement of ORS 197.830(2)(b), a pre-requisite to petitioning the Board for review. To demonstrate an appearance, a person need not assert a position on the merits of the proposed land use action. A bare, neutral appearance, such as a letter requesting that the local government accept the letter as an appearance and provide notice of the decision, is sufficient. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572, 586, *aff'd* 207 Or App 8, 139 P3d 990 (2006). Nonetheless, the person must, at a minimum, submit a document or oral testimony that the local government would reasonably recognize as an appearance by that person, *i.e.*, a request to join the land use proceeding as a party, and henceforth be provided notices of the hearing and decision.

That the Report included Rossman's name and address, and a statement from the authors of the Report that Rossman among others "endorsed" the authors' recommendations, was not sufficient to put the city on reasonable

notice that Rossman wished to appear as a party in the proceeding and, accordingly, become entitled to notice of the decision. If it were otherwise, attaching a list of names to one's testimony, and stating that everyone on the list endorses one's testimony, would be sufficient to constitute an "appearance" by every person listed. To make an appearance, the putative party must provide statements that a reasonable person would recognize as a request to join the proceedings as a party. A reasonable person would not recognize, from the mere inclusion of Rossman's name in a list of persons whom the Report's authors claim endorse the Report, that Rossman and others on that list were seeking to appear in the proceeding as a party.

Rossman does not argue that the authors of the Report or anyone else represented her during the proceedings below. Rossman was not one of the listed authors of the Report, and did not submit it or any other document or testimony to the city. We conclude that Rossman has failed to demonstrate that she "appeared" before the local government, orally or in writing, for purposes of ORS 197.830(7)(b)(B). Rossman's motion to intervene is denied.

C. Rossman's Request to Suspend Resolution of the Motion to Intervene

Finally, Rossman requests that, in the alternative to denying her motion to intervene at this juncture, LUBA instead suspend resolution of the motion, allow Rossman to file a petition for review seeking remand for procedural error prejudicial to her, and resolve the contested motion to intervene in LUBA's Final Order and Opinion. Rossman argues that denying the motion to intervene

at this juncture "would leave Intervenor no means to seek relief other than an appeal to the Court of Appeals." Rossman Motion to Take Evidence 5. We reject the request. Where LUBA issues an interlocutory order approving or denying a motion to intervene, an appeal of LUBA's Final Opinion and Order to the Court of Appeals would allow challenge to that interlocutory order. In the present case, the contested motion to intervene is briefed and ripe for resolution. Delaying its resolution would unnecessarily prejudice the other parties, and complicate final resolution of this appeal by allowing a person we have determined lacks standing to intervene to file a petition for review.

CONTE'S MOTION TO TAKE EVIDENCE

On August 18, 2017, lead petitioner Conte filed a motion to take into consideration copies of returned mail envelopes of two types of notice sent to various persons entitled to notice, attached as Exhibits A and B to the motion. Conte offers two bases for taking evidence outside the record under OAR 661-010-0045(1): (1) to resolve disputes regarding the content of the record, and (2) as evidence of procedural irregularities not shown in the record which, if proved, would warrant reversal or remand of the decision. *See* n 1.

The city responds that the motion to take evidence is premature, noting LUBA's preference that motions to take evidence outside the record be filed only after the parties have filed the briefs on the merits. *Pynn v. City of West Linn*, 42 Or LUBA 581 at 583-84 (2002) ("[a]lthough it is not essential that the disputed factual allegations be disclosed in the petition for review and response

brief, we have held that in the absence of the parties' briefs, the Board will often lack the context and developed positions necessary to evaluate whether an evidentiary proceeding under OAR 661-010-0045, and the resulting delay in LUBA's review of the challenged decision, are warranted."). Consistent with the preferred approach we described in *Pynn*, the city argues in the present case that Conte should attach the documents in Exhibits A and B to his petition for review, and request that LUBA consider them for an appropriate purpose in aid of an assignment of error. If no party objects, then LUBA may consider the proffered documents for that purpose. If a party objects, the city argues, then Conte can file a motion to take evidence, and the Board will have at that juncture a fully briefed dispute to resolve the motion. The city states that it does not anticipate that it will object to the Board's consideration of the returned mail envelopes.

The preferred approach described in *Pynn* and our other cases does not work very well when one of the bases for the motion is to resolve disputes over the content of the record. Such disputes arise and ripen before briefing on the merits. To that extent, we disagree with the city that the motion to take evidence is premature. We grant the motion to the extent necessary to resolve the parties' disputes concerning the content of the record, which we discuss below.

With respect to the second basis for the motion, "procedural irregularities not shown in the record and which, if proved, would warrant

reversal or remand of the decision," it is not clear that the parties have or will have any disputed *factual* allegations regarding the returned mail envelopes. The dispute, if any, will be over the legal question of whether the city's apparently unsuccessful attempts to mail notices to various persons represented a procedural error prejudicial to a party, or other remandable error. Nonetheless, resolution of any such legal dispute may require or benefit from consideration of the returned mail envelopes. Accordingly, Conte or other parties may attach to their briefs on the merits relevant copies of the returned mail envelopes, and the Board will consider them to the extent necessary to resolve one or more assignments of error in this appeal.

Conte's August 18, 2017 motion to take evidence is granted.

MOTION FOR DEPOSITIONS

On September 2, 2017, petitioner Conte and Thoms, along with intervenor-petitioner Rachel Stedman (collectively, petitioners), filed a 41-page motion seeking depositions of two city employees, pursuant to OAR 661-010-0045(2).[4] As part of the same motion, petitioners also move to take evidence

[4] 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.

outside the record in the form of (1) a memorandum produced by Dahl, the city deputy fire marshal (one of the two city employees for which petitioners seek deposition), which comments on a different land use application for the Capital Hill planned unit development (PUD), and (2) excerpts from a document entitled "2015 Standards of Coverage Eugene Springfield Fire." The city and intervenor-respondent (intervenor) oppose both the motion for depositions and the motion to take evidence.

The basis for both motions under OAR 661-010-0045(1) is "unconstitutionality of the decision" and "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." *See* n 1. Petitioners argue that the two city employees treated the application for the Oakleigh Meadows PUD differently from an application for

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> "(b) A motion to take evidence shall be accompanied by:
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> "(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or
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> "(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.
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> "(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)."

a different PUD development, the Capitol Hill PUD, which the city is currently processing. Petitioner argues that the proffered evidence and the testimony to be elicited in the requested depositions would demonstrate that the city has engaged in the "unequal" application of the applicable standards in processing the two PUD applications, and thereby violated petitioners' rights under Article I, Section 20, the Privileges and Immunities Clause, of the Oregon Constitution, and the Equal Protection Clause of the 14th Amendment to the United States Constitution.

Specifically, petitioners argue that Dahl, the deputy fire marshal, submitted a memorandum for the Capital Hill PUD that thoroughly evaluated the safety of a narrow access road to that PUD, using standards and guidance from the city's fire code, ultimately recommending additional measures to make that access road safer. In contrast, petitioners argue that during the most recent remand proceedings on the Oakleigh Meadows PUD Dahl contributed only a brief and conclusory analysis regarding the safety of Oakleigh Lane to provide access to the PUD, ultimately concluding that no additional measures are recommended to make Oakleigh Lane safer. Petitioners also argue that associate planner Berg-Johansen solicited testimony from city public works staff, and Dahl, in a manner that demonstrates that Berg-Johnsen is biased against petitioners.

Notably, petitioners do not allege that the final decision maker in this appeal, the planning commission, violated Article I, Section 20, or the Equal

Protection Clause. However, petitioners argue that the planning commission unwittingly aided Dahl's and Berg-Johnsen's unconstitutional conduct by accepting their recommendations and relying on their biased input in concluding that Oakleigh Lane complied with the applicable PUD criteria, and rejecting the opponents' arguments to the contrary.

The city and intervenor respond that the motion should be denied as premature, or denied because petitioners fail to state a cognizable claim of unconstitutionality that might warrant granting the motion to conduct depositions and consider extra-record evidence. In addition, respondents argue that under OAR 661-010-0045(1) the relevant basis for granting a motion to take evidence is the "unconstitutionality of the *decision*," not the alleged unconstitutional conduct of two city employees who were not the decision-makers and did not make the city's decision. We agree with respondents that petitioners have not established a basis under OAR 661-010-0045(1) and (2) to consider the extra-record documents or to obtain depositions.

To succeed in a motion to take evidence regarding the alleged "unconstitutionality of the decision," the movant must develop a legal theory and a set of factual assertions sufficient to allow LUBA to determine how consideration of the proffered evidence or elicitation of testimony would "affect the outcome of the review proceeding." OAR 661-010-0045(2)(a). As respondents argue, petitioners' legal theory for why the challenged planned commission decision is unconstitutional is flawed by the fact that the alleged

unconstitutionality stems from the actions or bias of two city employees who are not the final decision makers. In relevant part, LUBA has limited statutory authority to review only land use decisions, and can reverse or remand a land use decision only if LUBA concludes that the local government "[m]ade an unconstitutional decision[.]" ORS 197.835(9)(a)(E). LUBA does not have authority to review general claims that city employees engaged in unconstitutional or biased conduct; we may review only challenges to the final decision adopted by the final decision makers. Petitioners do not allege that the final decision or any actions of the final decision makers are unconstitutional, only that the planning commission received input from two city employees who petitioners allege acted in unconstitutional or biased ways. That allegation, even if we assume it to be accurate and adequately demonstrated, would not provide a basis for LUBA to conclude that the city's *decision* was unconstitutional or that the city's final decision makers were biased.

For similar reasons, we agree with respondents that petitioners fail to demonstrate that the proffered evidence or testimony to be elicited would concern "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." Petitioners identify no state or local *procedure* that the city violated or failed to follow, or any procedural irregularity that is not shown in the record.

In sum, petitioners have not demonstrated any basis under OAR 661-010-0045(1) and (2) to grant the motion to take evidence and the requested depositions.[5] Petitioners' September 2, 2017 motion to take evidence is denied.

CONTE'S MOTION TO RECONSIDER RECORD OBJECTIONS

A. Notices, Mailing Lists and Returned Mail Envelopes

In his original July 26, 2017 objections, Conte objected that the mailing list in the record included an incorrect address for a person named Marshall Wilde. The city agreed to mail Mr. Wilde a new notice and provide a corrected mailing list. Conte also argued that the local record should include copies of returned mail envelopes sent to persons entitled to notices. In our August 15, 2017 order (*Conte v. City of Eugene*, __ Or LUBA __ (LUBA No. 2017-063, Order), slip op 2), we rejected the latter argument and ultimately settled the record.[6]

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[5] On September 27, 2017, lead petitioner Conte filed "Petitioners' Combined Reply to Respondent's & Intervenor-Respondent's Responses to Petitioners' Motions to Take Evidence Not in the Record and to Depose Witnesses." As explained above, unrepresented parties are not entitled to present arguments on behalf of unrepresented parties. The September 27, 2017 pleading is signed only by Conte, but purports to present legal argument on behalf of "Petitioners." Accordingly, we do not consider the pleading.

[6] We stated that we agreed with the city that "nothing in our rules requires that returned mail envelopes be included in the record" (citing *Trautman v. City of Eugene*, __ Or LUBA __ (LUBA No. 2015-076/077, Order, December 30, 2015), slip op 4). In *Trautman*, an earlier iteration of this same controversy, we concluded that returned mail envelopes do not fall within the description of

In his subsequent August 16, 2017 reply, Conte identified four other persons the city mailed notice to, apparently using incorrect addresses. As discussed above, Conte attaches to his August 18, 2017 motions the returned mail envelopes for those four persons, and others, which Conte obtained via a public records request. We understand Conte to argue that the city is obligated to send these four persons new notices at the correct addresses, and the record should be amended to include the new notices, along with a new corrected mailing list, as the city agreed to do with respect to Mr. Wilde.[7] Conte also repeats his arguments that the record should include the returned mail envelopes.

The city responds that Conte's arguments regarding the notices for these four persons represent untimely new or additional objections to the record that may not be advanced in a reply to the response to the original objections, or in

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"[n]otices of * * * adoption of a final decision * * * mailed during the course of the land use proceeding" for purposes of OAR 661-010-0025(1)(d), and further that the envelopes were never "placed before" the final decision maker, for purposes of OAR 661-010-0025(1)(b). *Trautman*, slip op at 4, 7. The same conclusions apply here.

[7] We note that, on August 23, 2017, Conte served an amended notice of intent to appeal on the four persons identified in his August 16, 2017 reply, along with the notice of opportunity to provide testimony and notice of the decision. Even assuming we agree with Conte's premise that the city is obligated, at this juncture, to provide a new notice of the decision to these four persons, and to provide Conte with a corrected mailing list, so that Conte can then belatedly serve those persons with the notice of intent to appeal, it appears that the four persons at issue have now been served with the notice of intent to appeal.

a motion to reconsider settled record objections. We agree with the city. Under OAR 661-010-0026(2), Conte had 14 days from the date the city transmitted the record to file objections to the original record. Conte did so on July 26, 2017, advancing in relevant part an objection regarding notice to Mr. Wilde. Three weeks later, after the city responded and LUBA issued an order settling the record based on Conte's original objections, Conte sought to expand his original objections to include four other instances of allegedly defective notice. Nothing in our rules authorizes a party to file a series of new or expanded objections to the record after the 14-day period for filing record objections closes. That the city filed a supplemental record on August 9, 2017, does not open the door for Conte to file new or expanded objections to the original record. *Smith v. City of Salem,* 60 Or LUBA, 478, 483 (2010). This objection is denied.

Conte offers no basis for us to reconsider our order rejecting his argument that the returned mail envelopes are not part of the local record. Although we have granted Conte's motion to take evidence regarding the mail envelopes, and the envelopes are therefore part of LUBA's record for limited purposes, we conclude again that the envelopes are not part of the *local* record, for any purpose. This renewed objection is denied.

B. Retained Incorporated Records

In its August 15, 2017 order, the Board approved the city's proposal to include in the record as retained items pursuant to OAR 661-010-0025(2)(a)

copies of records and supplemental records in two prior LUBA appeals, LUBA No. 2014-001 and LUBA Nos. 2015-076/077. In his subsequent reply and motions, Conte complains that the revised table of contents fails to *expressly* reflect the inclusion of the *supplemental* records from those appeals. That complaint is accurate; however, the defect is immaterial, given the city's expressed commitment to provide the records, including supplemental records, and LUBA's express approval of the same. We see no reason to delay this appeal further to amend the table of contents to expressly state what the city has already agreed to, and LUBA has approved. This objection is denied.

C. Motion to Strike

In our August 15, 2017 order, we concluded that the planning commission had rejected a May 8, 2017 motion to strike that Conte submitted, and hence the motion was not part of the local record transmitted to LUBA. We denied Conte's objection arguing that the planning commission erred in rejecting the motion, and thus the motion should be included in the local record. We agreed with the city that if Conte believes the city erred in rejecting his motion, Conte can assign error in his petition for review, but such error has no relevance to whether the rejected motion is included in the local record. In his reply and motions, Conte repeats and elaborates on his argument that the planning commission erred in rejecting his motion to strike. Conte contends that because the planning commission erred in rejecting the motion to strike,

the purported rejection was ineffective, and therefore the motion to strike remains in the record.

However, Conte's argument confuses a dispute over the content of the record with the merits of a potential assignment of error. It is axiomatic that a document rejected from the local record is not part of the local record, for purposes of settling the content of the record, even if we later conclude after briefing on the merits that the document was erroneously rejected from the local record. This objection is denied.

BRIEFING SCHEDULE

The record is re-settled as of the date of this order.

Based on the parties' stipulation, the petition for review is due October 30, 2017. The response briefs are due 21 days after that date, and the Board's final opinion and order is due 56 days after that date.

Dated this 3rd day of October, 2017.

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Tod A. Bassham
Board Member