

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

3
4 REBECCA B. RAWSON,
5 *Petitioner,*

6
7 vs.

8
9 HOOD RIVER COUNTY,
10 *Respondent,*

11
12 and

13
14 VERIZON WIRELESS,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2017-107

18
19 ORDER

20 The petition for review in this appeal was filed on January 12, 2018. On
21 January 12, 2018, petitioner also filed a motion to take evidence not in the
22 record (motion to take evidence), pursuant to OAR 661-010-0045. Responses
23 to the motion to take evidence were filed by the county and intervenor-
24 respondent (intervenor) on January 25, 2018 and January 26, 2018,
25 respectively. On January 29, 2018, petitioner filed a motion to allow a reply to
26 those responses and a proposed reply. On January 30, 2018, intervenor filed an
27 objection to the proposed reply.

28 **A. Petitioner's Motion to Allow a Reply**

29 Intervenor argues the reply goes beyond responding to new issues in
30 respondent's and intervenor's responses to the motion to take evidence and for

1 that reason should be denied. In the alternative, intervenor requests an
2 opportunity to respond to new issues raised in petitioner's reply.

3 Although intervenor is correct that the reply goes beyond responding to
4 new issues in the county's and intervenor's response to the motion to take
5 evidence, we elect to consider all the pleadings filed concerning the motion to
6 take evidence. Given the sometimes obscure and complicated nature of the
7 legal issues, as framed by the parties, LUBA concludes it would benefit by
8 considering all the pleadings.

9 Intervenor's motion to reject petitioner's reply is denied. Petitioner's
10 reply has played no significant role in our resolution of petitioner's motion to
11 take evidence, and intervenor's motion that it be allowed to file a response to
12 the reply is also denied.

13 **B. Petitioner's Motion to Consider Extra-Record Evidence**

14 **1. The Decision on Appeal**

15 The decision that is at issue in this appeal is the Hood River Board of
16 County Commissioners' decision following our remand of an earlier board of
17 county commissioners' decision granting intervenor an industrial land use
18 permit for a wireless communication tower in a M-2 Light Industrial zone.
19 *Rawson v. Hood River County*, 75 Or LUBA 200 (2017) (*Rawson I*). In
20 rendering the decision on remand, the board of county commissioners allowed
21 legal argument from the parties but did not reopen the evidentiary record. The
22 board of commissioners elected to limit the remand proceedings to the

1 evidentiary record that the county compiled in *Rawson I*. Several attachments
2 to petitioner’s legal arguments on remand were rejected by the board of county
3 commissioners, because it found the attachments included new evidence that
4 went beyond the record compiled in *Rawson I*.

5 **2. LUBA’s Rule Concerning Motions to Consider Evidence**
6 **Outside the Record**

7 The grounds for allowing a motion to take evidence are set out at OAR
8 661-010-0045(1):

9 “Grounds for Motion to Take Evidence Not in the Record: The
10 Board may, upon written motion, take evidence not in the record
11 in the case of disputed factual allegations in the parties’ briefs
12 concerning unconstitutionality of the decision, standing, ex parte
13 contacts, actions for the purpose of avoiding the requirements of
14 ORS 215.427 or 227.178, or *other procedural irregularities not*
15 *shown in the record and which, if proved, would warrant reversal*
16 *or remand of the decision*. The Board may also upon motion or at
17 its discretion take evidence to resolve disputes regarding the
18 content of the record, requests for stays, attorney fees, or actual
19 damages under ORS 197.845.” (Emphasis added.)

20 Under OAR 661-010-0045(2)(a):

21 “A motion to take evidence shall contain a statement explaining
22 with particularity what facts the moving party seeks to establish,
23 how those facts pertain to the grounds to take evidence specified
24 in section (1) of this rule, and how those facts will affect the
25 outcome of the review proceeding.”

26 Respondent and intervenor object that petitioner’s motion to take
27 evidence does not comply with OAR 661-010-0045(2)(a) and does not
28 establish that granting the motion is warranted under OAR 661-010-0045(1).

1 **3. *Ex Parte* Contacts and Bias (First Part of the Motion to**
2 **Take Evidence)**

3 In the first part of petitioner’s motion to take evidence, she states that she
4 intends to establish facts that will demonstrate *ex parte* contacts and bias.
5 Petitioner’s reason for believing there may have been *ex parte* contacts that
6 may demonstrate bias on the part of the board of commissioners is the fact that
7 intervenor’s counsel prepared drafts and the final version of the final decision
8 that was adopted by the board of commissioners on remand.¹ From that
9 undisputed fact, petitioner speculates there may have been *ex parte* contacts
10 between intervenor’s counsel and (1) planning staff, (2) the county’s counsel,
11 and (3) the board of county commissioners. Petitioner seeks permission to
12 depose county planning staff, county counsel, and intervenor’s attorney to
13 determine how many drafts of the final decision were prepared, what changes
14 were made, what information may have been exchanged and whether there
15 were *ex parte* contacts. OAR 661-010-0045(2)(c).²

¹ Petitioner’s counsel noticed that the footer on the board of commissioners’ final decision was nearly identical to the footer on a document submitted by intervenor’s counsel. When petitioner’s counsel contacted county planning staff, planning staff confirmed that intervenor’s counsel drafted the final decision that the board of commissioners adopted on remand.

² OAR 661-010-0045(2)(c) authorizes LUBA to order depositions in conjunction with motions to take evidence:

“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

1 As an initial matter, any contacts that there may have been between
2 intervenor's counsel and the county's counsel and county planning staff,
3 without more, are not *ex parte* contacts by the decision maker in this matter,
4 which is the board of county commissioners. Second, as respondent and
5 intervenor correctly point out, the practice of (1) closing the evidentiary phase
6 of a quasi-judicial land use proceeding, (2) rendering an oral decision, and (3)
7 then having the prevailing party prepare a written decision and findings is a
8 common practice in Oregon land use:

9 "The Oregon Supreme Court long ago recognized and approved of
10 what has become the common practice of having parties in quasi-
11 judicial land use proceedings prepare draft findings that a local
12 decision maker then considers and adopts or adopts in revised
13 form in support of its decision. *Sunnyside Neighborhood v.*
14 *Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977). This
15 process of submitting and considering draft findings typically
16 occurs after the evidentiary and argument phases of the local
17 quasi-judicial proceedings have concluded. Citing *Sorte v. City of*
18 *Newport*, 26 Or LUBA 236, 244-45 (1993) and *Adler v. City of*
19 *Portland*, 24 Or LUBA 1, 12 (1992), we explained in our earlier
20 order in this matter that we have previously held that parties in a
21 quasi-judicial land use proceeding have no right to rebut proposed
22 findings absent local provisions to the contrary. * * *" *Arlington*
23 *Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 199
24 (2001)."

25 Petitioner replies that *Sunnyside Neighborhood*, *Arlington Heights* and
26 other decisions that have recognized this now common practice of having

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)."

1 prevailing parties prepare the final written decision and findings apparently
2 have never expressly stated that this common practice need not include
3 participatory rights for other parties in the quasi-judicial proceedings. While
4 petitioner is correct about that, our cases have made it quite clear that non-
5 prevailing parties have no right to comment on or rebut the proposed final
6 decision or its supporting findings before the decision maker adopts the
7 proposed final decision and its supporting findings. *Loprinzi's Gym v. City of*
8 *Portland*, 56 Or LUBA 358, 369 (2008); *Sorte v. City of Newport*, 26 Or
9 LUBA at 244-45; *Adler v. City of Portland*, 24 Or LUBA at 12. Just as
10 petitioner has no right to object to or rebut a proposed written final decision
11 and supporting findings that are prepared by the prevailing party in a quasi-
12 judicial land use proceeding, petitioner has no right to participate in that
13 process and no right to notice that the prevailing party is working with
14 planning staff to prepare a proposed final decision and supporting findings.

15 Petitioner's speculation that there may have been *ex parte* contact
16 between intervenor's attorney and the board of county commissioners which
17 may have resulted in bias, as far as we can tell, is entirely speculation and
18 based solely on the undisputed fact that intervenor's attorney prepared drafts of
19 the decision and findings as well as the final decision and findings that the
20 board of commissioners adopted following our remand in *Rawson I*. That
21 speculation falls considerably short of establishing a substantial reason to
22 believe that intervenor's attorney had *ex parte* contacts with the board of

1 county commissioners or one or more of its members. *Tri-River Investment*
2 *Co. v. Clatsop County*, 36 Or LUBA 743, 746 (1999) (“A petitioner moving to
3 present evidence of *ex parte* contacts or bias must offer some substantial reason
4 to believe that evidence of such *ex parte* contacts or bias can be established and
5 that such *ex parte* contacts or bias would lead to reversal or remand,” citing
6 *Pfahl v. City of Depoe Bay*, 16 Or LUBA 1073, 1074-75 (1988) and *Lane*
7 *County School Dist. 71 v. Lane County*, 15 Or LUBA 608, 609-10 (1987).).

8 The first part of petitioner’s motion to take evidence is denied.

9 **4. Material Specifically Rejected by the County and Not**
10 **Included in the Record (Second Part of Motion to Take**
11 **Evidence)**

12 Following LUBA’s remand in *Rawson I*, intervenor’s attorney requested
13 in an August 4, 2017 letter that the county proceed to consider LUBA’s
14 remand. Remand Record 143. The planning department issued a notice of
15 hearing to be held by the board of commissioners on September 18, 2017.
16 Remand Record 140-42. That notice stated that the hearing would be for
17 argument only, and that “no new written or oral evidence [would] be accepted
18 * * * unless specifically authorized by the Board [of Commissioners] in
19 advance of the hearing.” Remand Record 140.

20 Petitioner submitted an undated document to address issues on remand,
21 which was received by the county on September 7, 2017. Remand Record 126-
22 39 (Petitioner’s September 7, 2017 Comments). The record includes a
23 planning department staff report, dated September 8, 2017. Remand Record

1 124-25 (September 8, 2017 Staff Report). Petitioner submitted an undated
2 document responding to the September 8, 2017 Staff Report, which was
3 received by the county on September 18, 2017. Remand Record 116-121
4 (Petitioner's September 18, 2017 Response to September 8, 2017 Staff Report).
5 Intervenor submitted what it referred to as final written rebuttal argument on
6 September 25, 2017, and that document was received by the county on the
7 same date. Remand Record 102-15 (Intervenor's September 25, 2017 Final
8 Rebuttal). And finally, Petitioner submitted a response to intervenor's final
9 rebuttal on September 26, 2017. Remand Record 30-101 (Petitioner's
10 September 26, 2017 Response to Intervenor's Final Rebuttal).

11 The county rejected part of a paragraph in Petitioner's September 7,
12 2017 Comments that referred to a 140-foot cell tower. Remand Record 132.
13 The county also rejected three tabs (Tabs C, D and E) and footnote 3 of
14 Petitioner's September 18, 2017 Response to September 8, 2017 Staff Report.
15 Remand Record 118-20. And finally, the county rejected a tab (Tab G) of
16 Petitioner's September 26, 2017 Response to Intervenor's Final Rebuttal.
17 Remand Record 34. All the rejected material was rejected by the county based
18 on findings that it constituted "new evidence." Remand Record 7-8.

19 We understand petitioner to request that LUBA consider the rejected tabs
20 and text. Petitioner's entire argument in support of this part of the motion to
21 take evidence is set out below:

22 "These facts go directly to the allowance under [OAR] 661-010-
23 0045(1) for the taking of evidence to establish procedural

1 irregularities. The briefing of the issues has made it clear that the
2 error in striking materials tendered by Petitioner is potentially
3 determinative on appeal. This material will be important to
4 LUBA's consideration of the assignments of error No. 2 and No.
5 4, including the failure to allow Petitioner her fundamental
6 statutory rights under ORS 197.763(7). These facts could justify
7 remand at the least, or even reversal." Petitioner's Verified
8 Motion to Take Evidence Not in Record 6.

9 We are not sure we understand the above argument. The reference to
10 rights petitioner might have under ORS 197.763(7) is particularly perplexing.³
11 That statute provides that a party in a quasi-judicial land use proceeding may
12 raise new issues *in a subsequent appeal to LUBA* if the local government
13 reopens the evidentiary record after it has closed. *Sorte*, 26 Or LUBA at 244.
14 At this point, no question has been raised about the scope of the issues
15 petitioner may raise at LUBA. Moreover, petitioner offers no explanation for
16 how the county's decision to *reject* her proffered text and tabs could possibly
17 constitute a *reopening* of the evidentiary record, which is required to implicate
18 ORS 197.763(7). *See* n 3.

19 Petitioner's second assignment of error challenges the board of
20 commissioners' findings, on the merits, that the disputed cellular

³ ORS 197.763(7) provides:

"When a local governing body, planning commission, hearings
body or hearings officer reopens a record to admit new evidence,
arguments or testimony, any person may raise new issues which
relate to the new evidence, arguments, testimony or criteria for
decision-making which apply to the matter at issue."

1 communication tower qualifies as a “[d]istribution plant[]” or “substation[.]”
2 Petition for Review 14. The board of county commissioners did not consider
3 the disputed tabs and text in adopting those findings and neither will LUBA be
4 considering them in deciding whether the board of commissioners erred in
5 reaching its conclusions on the merits. Petitioner makes a number of other
6 arguments under the second assignment of error. It is not obvious to us how the
7 disputed tabs and text could have any bearing on our resolution of any
8 arguments that are presented and developed sufficiently for review, and
9 petitioner offers no explanation for why that might be the case.

10 Turning to the fourth assignment of error, most of the arguments
11 advanced under that assignment of error, to the extent they are adequately
12 stated and developed for review, similarly seem resolvable without any need to
13 refer to the rejected tabs and text. However, petitioner does advance the
14 following argument under the fourth assignment of error:

15 “It is fundamentally unfair to allow Verizon to use new sources,
16 and for the BOC to use new sources to determine the construction
17 of a phrase, but then to strike all similar materials Petitioner has
18 tendered.” Petition for Review 27.

19 The precise scope and nature of the above argument and the legal
20 standard of review that petitioner believes is implicated by the alleged
21 unfairness is not clear to us, and we do not yet have the benefit of the
22 respondents’ briefs or oral argument. We express no final judgment here on
23 the scope and nature of the above argument or whether any legal standard that
24 might justify remand is implicated or whether we will consider the disputed

1 tabs and text. However, we cannot at this point rule out the possibility our
2 consideration of the rejected tabs and text might lead us to conclude the board
3 of commissioners committed a procedural error in rejecting the disputed tabs
4 and text that warrants remand, assuming without deciding that the petition for
5 review alleges and adequately develops an argument that the board of
6 commissioners committed a procedural irregularity that warrants remand.

7 The motion is granted as to the rejected tabs. Within 14 days of the date
8 of this order, petitioner shall transmit to LUBA Tabs C, D and E of Petitioner's
9 September 7, 2017 Comments and Tab G of Petitioner's September 26, 2017
10 Response to Intervenor's Final Rebuttal. The other text, while lined out, is
11 visible in the record transmitted by the county. Upon receipt of the Tabs,
12 LUBA will issue an order establishing the deadline for response briefs and the
13 Board's final opinion in this matter.

14 Dated this 12th day of February, 2018.
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21 _____
22 Michael A. Holstun
Board Member