

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

3
4 JAMES NICITA,
5 *Petitioner,*

6
7 vs.

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9 CITY OF OREGON CITY,
10 *Respondent,*

11
12 and

13
14 HACKETT HOSPITALITY, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-038

18
19 ORDER
20

21 **MOTION TO TAKE EVIDENCE NOT IN THE RECORD**

22 On July 18, 2018, petitioner filed the petition for review. On August 7,
23 2018, petitioner filed a motion to take evidence not in the record, for an
24 evidentiary hearing, and for oral argument via telephonic conference. On
25 August 8, 2018, intervenor-respondent (intervenor) filed a response to the
26 motion and a response brief. That same day, petitioner filed a reply to
27 intervenor's response to the motion.

28 OAR 661-010-0045 governs petitioner's motion to take evidence and
29 provides, in part:
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1 “(1) Grounds for Motion to Take Evidence Not in the Record:
2 The Board may, upon written motion, take evidence not in
3 the record in the case of disputed factual allegations in the
4 parties’ briefs concerning unconstitutionality of the
5 decision, standing, ex parte contacts, actions for the purpose
6 of avoiding the requirements of ORS 215.427 or 227.178, or
7 other procedural irregularities not shown in the record and
8 which, if proved, would warrant reversal or remand of the
9 decision. The Board may also upon motion or at its
10 discretion take evidence to resolve disputes regarding the
11 content of the record, requests for stays, attorney fees, or
12 actual damages under ORS 197.845.

13 “(2) Motions to Take Evidence:

14 “(a) A motion to take evidence shall contain a statement
15 explaining with particularity what facts the moving
16 party seeks to establish, how those facts pertain to the
17 grounds to take evidence specified in section (1) of
18 this rule, and how those facts will affect the outcome
19 of the review proceeding.

20 “(b) A motion to take evidence shall be accompanied by:

21 “(A) An affidavit or documentation that sets forth
22 the facts the moving party seeks to establish; or

23 “(B) An affidavit establishing the need to take
24 evidence not available to the moving party, in
25 the form of depositions or documents as
26 provided in subsection (2)(c) or (d) of this
27 rule.”

28 Petitioner’s motion to take evidence relates to his second assignment of
29 error, in which petitioner argues that the city erred in approving intervenor’s
30 hotel proposal because the proposal fails to comply with the 1990 End of the
31 Oregon National Historic Trail Master Plan (OTMP) and the 1991 End of the

1 National Historic Oregon Trail District Design Guidelines (Guidelines).
2 Petitioner argues that the proposed hotel design violates a 2.5-story height
3 limitation and wood exterior requirement in the Guidelines.

4 During the local proceeding, petitioner requested a copy of the
5 Guidelines from respondent via a public records request. Respondent
6 responded to that public records request by stating that it was unable to locate
7 the Guidelines. Record 4849. Petitioner states that he ultimately obtained a
8 copy of the Guidelines from a private party and submitted that copy into the
9 record. Record 5844–5932. That copy is stamped “DRAFT.” *Id.*

10 In the local proceeding, petitioner asserted that the Guidelines contain
11 mandatory approval criteria. Oregon City Municipal Code (OCMC) 17.65
12 governs master plans and is undisputed applicable criteria. OCMC
13 17.65.050(C)(6) requires a general development plan be “consistent with the
14 Oregon City Comprehensive Plan and its ancillary documents.” Petitioner
15 argues that the Guidelines are an “ancillary document” to the comprehensive
16 plan. The City Commission disagreed and expressly found that the city had
17 never adopted the Guidelines as approval criteria. Record 44–45. The City
18 Commission specifically adopted the Planning Commission decision, which
19 stated, among other things, that the City Recorder did not locate any record
20 indicating that the City Commission had adopted the Guidelines. The City
21 Commission also relied on a senior planner’s statement that, after a review of

1 the historic land use planning files from 1988 to 1995, “there is no indication
2 that these Guidelines were ever adopted by the City Commission.” Record 46.

3 In its response brief, intervenor argues that the City Commission
4 reasonably found based on substantial evidence that the Guidelines were never
5 adopted, either expressly or by incorporation. Response Brief 34–35.

6 Through his motion to take evidence, petitioner seeks to depose city
7 planning staff regarding the details of respondent’s search for the Guidelines in
8 response to petitioner’s public records request. Specifically, petitioner requests
9 the Board authorize subpoenas and depositions to allow petitioner to obtain
10 testimony of city planner Pete Walter and City Recorder Kattie Riggs to
11 ascertain the extent of their search for the Guidelines and to review the
12 planning files regarding creation of the Guidelines. If those depositions do not
13 satisfy petitioner’s inquiry, he requests the Board authorize subpoenas and
14 depositions to allow him to obtain testimony of individuals who he believes
15 were involved with the development of city plans related to the Guidelines.
16 Motion to Take Evidence 15–16.

17 Petitioner contends that his request falls under OAR 661-010-0045(1),
18 which allows the Board to grant motions to take evidence in the case of
19 “disputed factual allegations in the parties’ briefs concerning * * * procedural
20 irregularities not shown in the record and which, if proved, would warrant
21 reversal or remand of the decision” and “to resolve disputes regarding the
22 content of the record.”

1 Intervenor responds that the motion fails to meet the requirements of
2 OAR 661-010-0045. First, intervenor asserts that there are no disputed factual
3 allegations in the parties' briefs regarding the Guidelines because the petition
4 for review does not allege that there exists an undiscovered (or concealed) final
5 adopted version of the Guidelines (as opposed to the "DRAFT" version in the
6 record). Intervenor's Response to Motion to Take Evidence 2. Second,
7 intervenor responds that petitioner's motion is not directed at evidence of
8 "procedural irregularities not shown in the record," but, instead, the motion is
9 petitioner's attempt to rebut the City Commissioner's finding and dispute that
10 city staff searched for but was unable to find an adopted copy of the
11 Guidelines. Intervenor's Response to Motion to Take Evidence 3.

12 We agree with intervenor that petitioner has failed to identify a basis
13 under OAR 661-010-0045(1) to take evidence not in the record. There is no
14 disputed factual allegation in the parties' briefs concerning procedural
15 irregularities not shown in the record. The record reveals that upon receiving
16 petitioner's request, city staff searched for and did not find an adopted version
17 of the Guidelines. Petitioner's motion seeks to determine whether the city's
18 search was sufficient to satisfy petitioner. The issue petitioner raises is also
19 foreclosed by the City Commission's express finding that the Guidelines were
20 not adopted, to which petitioner does not assign error in the petition for review.

21 Petitioner's motion also does not raise any dispute regarding the content
22 of the record. It is undisputed that the version of the Guidelines in the record is

1 the draft version. We understand that petitioner sought to obtain from
2 respondent a final version of the Guidelines, if one exists. Petitioner asserts in
3 his motion: “Had Petitioner obtained such a copy from Respondent, that copy is
4 the one that he would have ‘placed before the decision maker’ during the
5 proceedings below.” Motion to Take Evidence 5. We accept that assertion as
6 true. However, the fact that petitioner would have submitted a document into
7 the record had he first obtained it does not create any dispute regarding the
8 content of the record.

9 Petitioner has not established a basis for us to take evidence not in the
10 record under OAR 661-010-0045. Petitioner’s motion to take evidence, motion
11 for evidentiary hearing, and request for telephonic oral argument are denied.
12 Petitioner shall comply with the Board’s order dated August 6, 2018 and oral
13 argument shall proceed as scheduled for August 30, 2018 at 1:30 p.m.

14 Dated this 13th day of August, 2018.
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21 H. M. Zamudio
 Board Member