

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                                   BARBARA RENKEN, RAY RENKEN  
5                                   and GREGORY PATRICK STONE,  
6                                   *Petitioners,*

7  
8                                   vs.

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10                                  LISA NOVAK and ROBERT La SALLE,  
11                                  *Intervenors-Petitioners,*

12  
13                                  vs.

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15                                  CITY OF OREGON CITY,  
16                                  *Respondent,*

17  
18                                  and

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20                                  HIDDEN FALLS DEVELOPMENT, LLC,  
21                                  *Intervenor-Respondent.*

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23                                  LUBA No. 2018-092

24  
25                                  ORDER

26   **MOTIONS TO INTERVENE**

27                   Hidden Falls Development, LLC, moves to intervene on the side of  
28 respondent. Lisa Novak and Robert La Salle move to intervene on the side of  
29 petitioners. There is no opposition to the motions, and they are granted.

1 **MOTION TO TAKE EVIDENCE**

2 Petitioners move to take evidence not in the record, pursuant to ORS  
3 197.835(2)(b) and OAR 661-010-0045(1).<sup>1</sup> The statute and rule authorize  
4 LUBA to grant a motion to consider evidence outside the record to resolve  
5 “disputed allegations” of “unconstitutionality of the decision.” The decision on  
6 appeal approves an application to annex property into the city without a vote of  
7 the citizenry, as required by Senate Bill (SB) 1573 (2016). Petitioners argue  
8 that in their petition for review they intend to argue that portions of SB 1573  
9 violate the Oregon Constitution by infringing on the city’s authority under its  
10 charter, and therefore the city erred in relying on SB 1573 to authorize  
11 approving an annexation without a vote, as would otherwise be required by the  
12 city’s charter.

13 Petitioners argue that their constitutional challenge will be similar to that  
14 addressed in a recent circuit court opinion that is currently on appeal to the  
15 Court of Appeals. *City of Corvallis et al. v. State of Oregon, et al.*, Benton

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<sup>1</sup> OAR 661-010-0045(1) provides, in relevant part:

“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. \* \* \*”

1 County Circuit Court Case No. 16CV17878, *appeal pending* (A164595)  
2 (*Corvallis* order). In determining whether or not SB 1573 conflicted with the  
3 city charter at issue, and hence required further constitutional analysis, the  
4 circuit court noted that it would consider the intent of the city voters in adopting  
5 the charter language at issue. Because no party supplied any evidence of the  
6 intent of city voters in adopting the charter, the circuit court went on to resolve  
7 the meaning of the city charter language based only on the text and context of  
8 the charter language. The circuit court ultimately determined that SB 1573 did  
9 not conflict with the city charter language at issue, because the charter language  
10 contemplated that state law may mandate annexations without voter approval.  
11 The court ultimately rejected all constitutional challenges to SB 1573 and  
12 granted summary judgment for the state.

13 In the present case, petitioners argue that they intend to present the same  
14 constitutional challenges addressed in the *Corvallis* order, and accordingly they  
15 intend to demonstrate that SB 1573 conflicts with the city charter language  
16 adopted by city voters in 1999, which also includes language contemplating that  
17 state law may mandate annexations without voter approval. However,  
18 petitioners wish to demonstrate that the voters in adopting that charter language  
19 intended to limit the circumstances in which state law can mandate annexations  
20 without voter approval. To that end, petitioners request that LUBA take into its  
21 record and consider three documents, attached to petitioners' motion. The first  
22 document is the minutes of the March 3, 1999 city commission meeting, at

1 which the city commission voted to refer a proposed charter amendment to the  
2 voters that would require voter amendment for annexations. The second  
3 document is a January 29, 1999 memorandum from the deputy city attorney to  
4 the city commission, proposing the charter amendment to require voter approval  
5 of annexations. The third document is a list of Oregon cities that require voter-  
6 approved annexation. We understand that petitioners wish to cite to these  
7 documents in arguing that the voters intend that state law could abrogate city  
8 charter requirements for a vote only in limited circumstances involving  
9 annexations for, *e.g.*, health and safety reasons. Finally, petitioners request that  
10 LUBA allow petitioners to subpoena unnamed city staff from the list of cities  
11 with charters that require voter-approved annexation, in order to obtain  
12 evidence regarding the intent of each city's respective voters in adopting the  
13 charter language requiring voter-approved annexations.

14 Intervenor-respondent Hidden Falls Development, LLC (Hidden Falls)  
15 responds that while SB 1573 was discussed and applied during the city  
16 proceedings below, at no point did any party argue that SB 1573 was  
17 unconstitutional or does not apply to control the question of whether the  
18 annexation requires voter approval. According to Hidden Falls, a motion to  
19 take evidence under OAR 661-010-0045 is not warranted where the issue the  
20 evidence goes to is not one that was preserved as required by ORS 197.763(1).<sup>2</sup>

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<sup>2</sup> ORS 197.763(1) provides:

1 *St. Johns Neighborhood Assn. v. City of Portland*, 33 Or LUBA 836, 383-39  
2 (1997) (denying motion to take evidence supporting claims under the Equal  
3 Protection Clause of the U.S. Constitution that were not raised before the city).  
4 In addition, Hidden Falls argues that, even if the constitutionality of SB 1573  
5 was raised below, the evidence that petitioners wants LUBA to consider consist  
6 of documents from the city’s archives that petitioners could have submitted  
7 during the proceedings below. Finally, Hidden Falls argues that petitioners  
8 provide no basis for issuing a subpoena to other cities to obtain legislative  
9 history regarding those cities’ charter amendments.

10 Petitioners reply that they raised the issue below that the city charter  
11 requires that the annexation be put to a vote of the citizens. Petitioners contend  
12 that the argument they intend to present in this appeal—that SB 1573 is  
13 unconstitutional and therefore not a basis to avoid the vote required by the city  
14 charter—is merely one *argument* in support of the general *issue* they raised  
15 below that the city charter requires a vote. Petitioners contend that their  
16 obligation under ORS 197.763(1) is limited to raising issues, not specific

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“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 arguments related to the issues raised. Petitioners also argue that the tension  
2 between SB 1573 and the city charter was discussed below, as well as the  
3 *Corvallis* order, which should have led a reasonable decision maker to realize  
4 that the constitutionality of SB 1573 is suspect, and the statute therefore may  
5 not be a basis to avoid the city charter requirement for a vote.

6       ORS 197.835(2)(b) and OAR 661-010-0045(1) authorize LUBA to  
7 consider evidence outside the record where the proponent demonstrates that  
8 there are disputed allegations in the parties’ briefs regarding the  
9 “unconstitutionality of the decision.” As we understand it, petitioners do not  
10 intend to argue that the city’s *annexation decision* is unconstitutional, but rather  
11 that the city erred in failing to comply with its city charter requirement for a  
12 vote, based on its reliance on a statute that petitioners believe unconstitutionally  
13 infringes on the city’s charter authority. However, evidence on the  
14 constitutionality of a statute is not one of the bases for taking evidence outside  
15 the record under ORS 197.835(2)(b) and OAR 661-010-0045(1).

16       That problem aside, we agree with Hidden Falls that even if a motion  
17 under OAR 661-010-0045(1) were otherwise proper, petitioners have failed to  
18 demonstrate that the issue the proffered evidence goes to—that the city charter  
19 vote requirement should apply notwithstanding SB 1573, because the statute is  
20 inapplicable or unconstitutional—was raised with the specificity required by  
21 ORS 197.763(1). While it seems clear that many parties, including the city  
22 commission members, *wished* that the city charter voting requirement could be

1 given effect, petitioners do not cite to any place in the record where any party  
2 attempted to make any claim, much less one with the specificity required by  
3 ORS 197.763(1), that the city could lawfully ignore the requirements of SB  
4 1573. Even if we view petitioners’ arguments regarding the constitutionality of  
5 SB 1573 as one particular “argument” toward the general issue of whether or  
6 not SB 1573 prevents the city from applying the charter vote requirement, that  
7 issue does not appear to have raised even in a most general way.

8 Because the proffered evidence goes to an issue that, as far as we can tell,  
9 based on the present pleadings, is not within our scope of review, we agree with  
10 Hidden Falls that petitioners have not established a basis under OAR 661-010-  
11 0045(1) to grant the motion to consider the three documents for any purpose, or  
12 to grant petitioners subpoena power. Accordingly, the motion is denied.

13 **BRIEFING SCHEDULE**

14 The filing of the motion to take evidence automatically suspended further  
15 events in this review proceeding. The next event is the filing of the petitions for  
16 review, which are due 21 days from the date of this order. The response briefs  
17 are due 42 days from the date of this order, and the Board’s final opinion and  
18 order is due 77 days from the date of this order.

19 Dated this 7th day of November, 2018.

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Tod A. Bassham  
Board Member