

1 BEFORE THE LAND USE BOARD OF APPEALS

2
3 OF THE STATE OF OREGON

4
5 GENE R. OSTER,

6 *Petitioner,*

7
8 vs.

9
10 CITY OF SILVERTON,

11 *Respondent,*

12
13 and

14
15 MARY ROSE BRANDT,

16 *Intervenor-Respondent.*

17
18 LUBA No. 2018-103

19
20 ORDER

21 **BACKGROUND**

22 Petitioner sought tentative plat subdivision approval to divide a property
23 into 40 lots. The planning commission denied the application based on failure to
24 satisfy standards for off-site traffic impacts. Petitioner appealed the planning
25 commission decision to the city council, which after an on-the-record hearing,
26 issued a decision adopting and affirming the planning commission's denial.

27 The city determined that Silverton Municipal Code, Title 18, Development
28 Code and Zoning Map (SDC) incorporated by reference traffic standards in the
29 City of Silverton Transportation System Plan (TSP). Specifically, the city applied
30 a minimum level of service (LOS) D standard, derived from the TSP. The city

1 denied the application because petitioner's traffic study showed that the proposed
2 development would send additional peak hour traffic through two intersections,
3 N 1st Street and Hobart Road and N 1st Street and Jefferson Street, and those
4 intersections do not and will not meet the minimum LOS D standard. Record 26.
5 Petitioner argues, among other things, that the city erred in applying the LOS D
6 standard and that, instead, the city should have applied an Oregon Department of
7 Transportation (ODOT) functional standard, which, according to petitioner,
8 would obviate the need for petitioner to complete off-site traffic improvements.

9 On December 18, 2018, the Board received the petition for review. On
10 January 9, 2019, the Board received two separate response briefs, one filed by
11 the city and one filed by intervenor-respondent Mary Rose Brandt (intervenor).
12 The city's response brief includes requests to take official notice and intervenor's
13 response brief includes requests to take official notice. We treat those requests as
14 motions to take official notice. On January 8, 2019, intervenor filed a separate
15 motion to take evidence. On January 22, 2019, petitioner filed a response to
16 intervenor's motions. On January 29, 2019, intervenor filed a reply in support of
17 her motions.¹

¹ In her reply, intervenor objects to petitioner's response to her motions for official notice included in intervenor's response brief and asks that LUBA disregard those portions of petitioner's response. Petitioner is entitled to respond to intervenor's motion to take evidence and the parties' motions to take official notice. *See* OAR 661-010-0065(2) ("An opposing party may, within 14 days from the date of service of a motion, file a response."). We will not disregard

1 On January 14, 2019, we issued an order explaining that the motion to take
2 evidence suspended the time limits for all other events in this appeal, including
3 oral argument. OAR 661-010-0045(9). We now resolve the outstanding motion
4 to take evidence and motions to take official notice.

5 **MOTION TO TAKE EVIDENCE**

6 The Board may take evidence not in the record in “the case of disputed
7 factual allegations in the parties’ briefs concerning unconstitutionality of the
8 decision, standing, ex parte contacts, actions for the purpose of avoiding the
9 requirements of ORS 215.427 or 227.178, or other procedural irregularities not
10 shown in the record and which, if proved, would warrant reversal or remand of
11 the decision.” OAR 661-010-0045(1). A motion to take evidence must include a
12 statement “explaining with particularity what facts the moving party seeks to
13 establish, how those facts pertain to the grounds to take evidence specified in
14 [OAR 661-010-0045(1)], and how those facts will affect the outcome of the
15 review proceeding.” OAR 661-010-0045(2). It is the movant’s burden to
16 demonstrate a sufficient basis for LUBA to take evidence outside the record.

17 **A. 2017 TIA**

18 In his second assignment of error, petitioner argues that the city erred in
19 applying the LOS D performance standard for off-site traffic impacts because

petitioner’s responses to intervenor’s motions to take official notice simply
because intervenor decided to include those motions in the body of intervenor’s
response brief instead of filing a separate motion.

1 that standard is contained in the city’s TSP and not codified in the SDC. Petition
2 for Review 46. Petitioner argues that the SDC is unclear about what traffic
3 standards apply to his application and that the city erred by applying ambiguous
4 traffic standards to an application to develop housing. *See* ORS 197.307(4) (“[A]
5 local government may adopt and apply only clear and objective standards,
6 conditions and procedures regulating the development of housing[.]”). In his
7 petition for review, petitioner states that he “had no reason to believe when
8 initially preparing the subdivision application that [he was] required to bring [the
9 two intersections] to LOS D based on the criteria identified by the City.” Petition
10 for Review 49.

11 Intervenor argues that even though it is not included in the record of these
12 proceedings, the board should consider a traffic impact assessment from a prior,
13 2017 land use application (2017 TIA) to establish that petitioner knew that the
14 city would require compliance with a LOS D traffic standard. Intervenor argues
15 that the 2017 TIA rebuts petitioner’s allegation in his second assignment of error
16 that he had no reason to believe that the city would require compliance with the
17 LOS D traffic standard.

18 Intervenor does not explain how the 2017 TIA relates to any basis for us
19 to take additional evidence. Petitioner responds, and we agree, that his knowledge
20 of the LOS D standard in the TSP is not critical to the resolution of the second
21 assignment of error. Even if we agreed with intervenor that the 2017 TIA
22 establishes that the petitioner had reason to believe that the city would apply the

1 LOS D standard, intervenor does not explain how establishing that fact has any
2 bearing on whether the city erred in applying the LOS D standard or will
3 otherwise affect the outcome of the appeal, and we do not understand that it
4 would. OAR 661-010-0045(2)(a) (a motion to take evidence “shall contain a
5 statement” explaining how the facts that the movant seeks to establish will affect
6 the outcome of the appeal). Thus, intervenor has failed to establish any basis for
7 us to consider the 2017 TIA.

8 Intervenor’s motion to take the 2017 TIA as evidence is denied.

9 **B. August 16, 2018 Memorandum**

10 In his third assignment of error, petitioner argues that the city erred in
11 applying the LOS D standard because the intersections are ODOT facilities and,
12 thus, the city should have applied an ODOT functional standard. In the
13 preservation section under the third assignment of error, petitioner quotes
14 arguments from his appeal statement to the city council and states that the parties
15 were afforded “an opportunity to respond to them.” Petition for Review 52.

16 Intervenor disputes that she was afforded an opportunity to respond to
17 arguments contained in petitioner’s appeal statement during the local proceeding.
18 According to intervenor’s motion to take evidence and declaration attached to
19 that motion, her attorney prepared a written memorandum dated August 16, 2018
20 (memorandum). According to the declaration, at the August 20, 2018 city council
21 hearing, intervenor intended to testify to the city council about matters in the
22 memorandum and intended to submit the memorandum into the record. However,

1 the city council limited the scope of intervenor's oral testimony because the city
2 council's review was on the record before the planning commission. Intervenor
3 declares that, "Although I had the memorandum with me, due to the direction
4 from the Mayor and the discussion by the council members and staff limiting the
5 scope of testimony, I did not feel comfortable and thus I did not attempt to submit
6 the memorandum." Declaration of Mary Rose Brandt 2.

7 Intervenor argues that, because the city council considered petitioner's
8 appeal statement but limited her testimony, LUBA should allow her to
9 supplement the record with her memorandum. Intervenor further argues that, to
10 remedy the city's violation of intervenor's right to fully participate in the local
11 proceeding, if LUBA remands the city's decision, "LUBA should require the City
12 to consider her full testimony." Intervenor's Motion to Take Evidence 2.

13 LUBA may take evidence outside the record to allow the parties to
14 *establish facts* relevant to disputed factual allegations in the parties' briefs
15 concerning a limited array of defined issues, including procedural irregularities
16 not shown in the record and which, if proved, would warrant reversal or remand
17 of the decision. LUBA does not receive evidence outside the record to *remedy* an
18 alleged procedural error.

19 We understand intervenor to argue in her motion to take evidence that the
20 city committed procedural error by limiting her testimony. However, in her
21 response brief intervenor asks LUBA to affirm the city's decision. Intervenor did
22 not file a cross petition for review cross-assigning error to the city's decision to

1 limit her testimony during the August 20, 2018 city council hearing. *See* OAR
2 661-010-0030(7) (“A respondent or intervenor-respondent who seeks reversal or
3 remand of an aspect of the decision on appeal only if the decision on appeal is
4 reversed or remanded under the petition for review may file a cross petition for
5 review that includes contingent cross-assignments of error, clearly labeled as
6 such.”). Accordingly, due to intervenor’s chosen strategy in litigating this appeal,
7 including her briefing and requested relief, any fact that could be established by
8 the intervenor’s memorandum would not “warrant reversal or remand” of the
9 challenged decision because she does not seek reversal or remand. Intervenor has
10 not established any basis for us to accept the memorandum.

11 Intervenor’s motion to take her memorandum as evidence is denied.

12 **C. Ordinance 08-06; DLCD Notice of Adoption (Nov 2008)**

13 Intervenor argues that petitioner “implies” in his petition for review that
14 the city failed to follow the post-acknowledgment plan amendment process in
15 2008 when it adopted amendments to the SDC sections that the city council in
16 this proceeding concluded incorporated the LOS D standard from the TSP.²
17 Intervenor contends that the city did follow the correct process in 2008, as
18 evidenced by City of Silverton Ordinance 08-06 (Oct 6, 2008) and the
19 Department of Land Conservation and Development (DLCD) notice of adoption

² At this stage in the appeal, we do not express any opinion about whether the city properly applied the LOS D standard to petitioner’s proposed development.

1 (Nov 2008). Petitioner responds that his petition for review does not attack the
2 city's legislative adoption of amendments to the SDC, but that his argument
3 instead challenges the city's quasi-judicial application of the SDC and LOS D
4 standard.

5 It is the movant's burden to demonstrate a basis for us to take evidence not
6 in the record. Intervenor has not established any basis under OAR 661-010-0045
7 for us to consider Ordinance 08-06 and the DLCD notice of adoption (Nov 2008).
8 Accordingly, we deny the motion to take evidence with respect to Ordinance 08-
9 06 and the DLCD notice of adoption (Nov 2008). However, as explained below,
10 we will take official notice of those documents.

11 Intervenor's motion to take Ordinance 08-06 and DLCD notice of adoption
12 (Nov 2008) as evidence is denied.

13 Intervenor's motion to take evidence is denied.

14 **MOTIONS TO TAKE OFFICIAL NOTICE**

15 LUBA may take official notice of "[a]n ordinance, comprehensive plan or
16 enactment of any county or incorporated city in this state, or a right derived
17 therefrom," and "[p]ublic and private official acts of the legislative, executive
18 and judicial departments of this state[.]" ORS 40.090(7), (2) (Oregon Evidence
19 Code (OEC) 202). However, LUBA does not have authority to take official notice
20 of local legislative history or adjudicative facts. *Martin v. City of Central Point*,
21 73 Or LUBA 422, 426 (2016), *aff'd*, 283 Or App 648 (2017); *see also* ORS

1 40.060 (OEC 201 (ORS 40.060 to 40.085) governs official notice of adjudicative
2 facts).

3 The city moves LUBA to take official notice of three documents: (1)
4 Ordinance 08-01 (March 3, 2008), adopting the TSP by a comprehensive plan
5 text amendment, (2) DLCD notice of adoption (March 2008), and (3) Chapter 2
6 of the TSP. The city appended those documents to the city's response brief. No
7 party opposes those motions, and they are granted.

8 Intervenor moves LUBA to take official notice of five documents: (1)
9 various sections of the SDC, (2) 2017 TIA, (3) Ordinance 08-06, updating the
10 SDC and implementing the TSP, (4) DLCD notice of adoption (Nov 2008), and
11 (5) Ordinance 16-16 (Oct 3, 2016), annexing the subject property and zoning it
12 single family residential.

13 No party objects to the Board taking official notice of sections of the SDC.
14 LUBA routinely takes official notice of local government comprehensive plans
15 and land use regulations. *McNamara v. Union County*, 28 Or LUBA 722 (1994).
16 Intervenor's motion to take official notice of the sections of the SDC that are
17 attached to intervenor's response brief is granted.

18 We deny intervenor's motion to take official notice of the 2017 TIA
19 because the 2017 TIA is evidence submitted in a prior land use application and
20 not judicially noticeable law under OEC 202.

21 Petitioner does not respond or object to the motion to take official notice
22 of Ordinance 16-16. Petitioner appears to concede that Ordinance 08-06 and the

1 DLCD notice of adoption (Nov 2008) are public law that LUBA may officially
2 notice, and we conclude that those documents are subject to official notice.

3 Petitioner argues that Ordinance 08-06 is not relevant to LUBA's
4 disposition and that DLCD notice of adoption (Nov 2008) has no probative value.
5 The general standards for admissibility of evidence do not apply to a LUBA
6 proceeding. *See* ORS 40.015 (OEC 101) (2) ("The Oregon Evidence Code
7 applies generally to civil actions, suits and proceedings, criminal actions and
8 proceedings and to contempt proceedings except those in which the court may
9 act summarily."). LUBA's review is limited to the record of the proceeding
10 below, except in instances where LUBA takes evidence not in the record, takes
11 official notice of law, and where facts outside the record are essential to
12 determining whether LUBA has jurisdiction or whether an appeal is moot. ORS
13 197.830(13)(a); *Blatt v. City of Portland*, 21 Or LUBA 337, *aff'd*, 109 Or App
14 259, 819 P2d 309 (1991), *rev den*, 314 Or 727 (1992). In taking official notice of
15 law, LUBA is not confined by evidentiary thresholds for relevance and probative
16 value. *Foland v. Jackson County*, 70 Or LUBA 247 (2014) (land use proceedings
17 are not governed by rules of evidence).

18 We take official notice of Ordinance 16-16, attached to intervenor's
19 response brief, and Ordinance 08-06 and DLCD notice of adoption (Nov 2008),
20 attached to intervenor's motion to take evidence, as noticeable law. We note that
21 those documents that we officially notice do not become part of the local record
22 or provide evidentiary support for the parties' arguments or for the challenged

1 decision itself. *See Martin*, 73 Or LUBA at 426; *Friends of Deschutes County v.*
2 *Deschutes County*, 49 Or LUBA 100 (2005) (LUBA may take official notice of
3 city annexation resolutions as law, but LUBA does not have authority to take
4 notice of the facts contained in those resolutions).

5 The city's motion to take official notice is granted. Intervenor's motion to
6 take official notice is denied, in part, and granted, in part.

7 **MOTION TO STRIKE**

8 Petitioner moves to strike the 2017 TIA and DLCD notice of adoption
9 (Nov 2008) and the portions of intervenor's response brief that refer to those
10 documents. Because we have determined that the 2017 TIA is not evidence that
11 we can consider in this appeal, we will disregard the 2017 TIA and the portions
12 of intervenor's arguments in the response brief that rely on the 2017 TIA.

13 Differently, we take official notice of the DLCD notice of adoption (Nov
14 2008) and will consider arguments in intervenor's response brief that refer to that
15 notice, while being mindful of the limitation that documents that we officially
16 notice do not provide evidentiary support for the parties' arguments.

17 Petitioner's motion to strike is granted, in part, and denied, in part.

18 **REPLY BRIEF**

19 On January 14, 2019, the Board issued an order clarifying that the filing of
20 the motion to take evidence suspended further deadlines, including the deadline
21 for filing a reply brief. On January 15, 2019, petitioner filed a motion to file a

1 reply brief and proposed reply brief. On January 29, 2019, the city filed an
2 objection to petitioner's motion to file a reply brief.

3 The Board denies the motion to take evidence in this order; thus, the time
4 for all other events begins to run on the date of this order, including the time for
5 filing any response to the motion to file a reply brief. The Board will issue a
6 separate order in due course on petitioner's motion to file a reply brief.

7 **ORAL ARGUMENT**

8 Oral argument in this appeal was previously scheduled for January 29,
9 2019 and cancelled on January 14, 2019. The Board will reschedule oral
10 argument by separate letter.

11 Dated this 5th day of April, 2019.

12

13

14

15

H. M. Zamudio
Board Member