

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

3
4 ROY CARROLL,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF MALIN,
10 *Respondent.*

11
12 LUBA No. 2018-131

13 ORDER

14 **BACKGROUND**

15 The challenged decision denies petitioner’s application for a zone change
16 after quasi-judicial city proceedings. On May 21, 2019, petitioner filed the
17 petition for review. On June 3, 2019, the Board received from petitioner a motion
18 to take evidence (Motion). On June 4, 2019, the Board issued an order confirming
19 that the filing of the motion to take evidence suspended all deadlines in the
20 appeal, and providing respondent the time allowed by our rules to respond to
21 petitioner’s motion. Respondent then filed a response to petitioner’s motion to
22 take evidence (Response). Petitioner then filed a reply to the Response entitled
23 “Motion to Take Evidence: Response to Respondent’s Objection to Petitioner’s
24 Motion to Take Evidence by Subpoena(s) and/or Depositions” (Reply).¹ We now

¹ Although our rules do not provide for a reply to a response to a motion to take evidence not in the record, there is no objection to it, and we therefore

1 resolve petitioner’s motion to take evidence.

2 **MOTION TO TAKE EVIDENCE**

3 OAR 661-010-0045 governs motions to take evidence not in the record,
4 and provides in part:

5 “(1) Grounds for Motion to Take Evidence Not in the Record: The
6 Board may, upon written motion, take evidence not in the
7 record in the case of disputed factual allegations in the parties’
8 briefs concerning unconstitutionality of the decision,
9 standing, *ex parte* contacts, * * * or other procedural
10 irregularities not shown in the record and which, if proved,
11 would warrant reversal or remand of the decision.

12 “(2) Motions to Take Evidence:

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

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

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

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

consider it. OAR 661-010-0045. *McCaffree v. City of North Bend*, __ Or LUBA
__ (LUBA No 2019-005, Order, June 7, 2019) (slip op at 4).

1 “(c) Depositions: the Board may order the testimony of any
2 witness to be taken by deposition where a party
3 establishes the relevancy and materiality of the
4 anticipated testimony to the grounds for the motion,
5 and the necessity of a deposition to obtain the
6 testimony. Depositions under this rule shall be
7 conducted in the same manner prescribed law for
8 depositions in civil actions (ORCP 38-40).

9 “(d) Subpoenas: the Board shall issue subpoenas to any
10 party upon a showing that the witness or documents to
11 be subpoenas will provide evidence relevant and
12 material to the grounds for the motion. Subpoenas may
13 also be issued under the signature of the attorney of
14 record of a party. Witnesses appearing pursuant to
15 subpoena, other than parties or employees of the Board,
16 shall be tendered fees and mileage as prescribed by
17 ORS 44.415(2) for witnesses in civil actions. The party
18 requesting the subpoena shall be responsible for
19 service of the subpoena and tendering the witness and
20 mileage fees to the witness.”

21 It is the movant’s burden to demonstrate a sufficient basis for LUBA to take
22 evidence outside the record. *Heiller v. Josephine County*, 23 Or LUBA 551
23 (1992). “A petitioner moving to present evidence of *ex parte* contacts or bias
24 must offer some substantial reason to believe that the evidence of such *ex parte*
25 contacts or bias can be established and that such *ex parte* contacts or bias would
26 lead to reversal or remand.” *Tri-River Investment Co. v. Clatsop County*, 36 Or
27 LUBA 743, 746 (1999).

28 In his petition for review, we understand petitioner to argue that the city
29 committed a procedural error that prejudiced his substantial rights because five
30 persons — two city councilors, two members of the planning commission and

1 one person who is a relative of those other persons listed — failed to disclose *ex*
2 *parte* contacts, and failed to make an unbiased decision. Petition for Review 19–
3 31. ORS 197.835(9)(a)(B).² Accordingly, we understand petitioner to seek to
4 have the Board consider evidence not in the record concerning petitioner’s
5 allegations of procedural error in the form of bias and *ex parte* contacts on the
6 part of one or more of the persons described in the motion.

7 The Motion requests that the Board issue subpoenas and allow petitioner
8 to depose six named persons and “any or all persons the Board sees fit and just.”
9 Motion 9; OAR 661-010-0045(2)(c)-(d). The six persons whom petitioner
10 identifies are Rick Woodley, Linda Woodley, Rosalind Larsen, Kay Neumeyer,
11 Agnes Turner-Wise, and John Hughto.³ Petitioner states that because the city has
12 a population of “barely 800 citizens,” the “likelihood of *ex parte* contacts is
13 great.” Motion 3. Petitioner argues that all six persons have either “familial or
14 personal” ties to each other, and that “all have been opposed” to petitioner’s zone
15 change application “since 2005” which, according to petitioner, is the reason he

² ORS 197.835(9)(a)(B) provides:

“[LUBA] shall reverse or remand the land use decision under review if the board finds * * * [t]he local government or special district * * * [f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]”

³ Petitioner does not include any allegation of undisclosed *ex parte* contacts or biased decision making against Linda Woodley in the petition for review. However, in the Motion, petitioner requests a subpoena and her deposition.

1 has been denied approval to rezone his property. *Id.* Petitioner requests the Board
2 issue subpoenas for the depositions so that petitioner may attempt to establish
3 that these individuals either engaged in *ex parte* contact and/or held beliefs or
4 otherwise acted in such a way as to constitute improper bias in violation of
5 petitioner’s substantial rights, which, if proved, would warrant reversal or remand
6 of the decision. Motion 1-4.

7 **A. Persons Not Members of the Decision-Making Body**

8 None of the first four persons named in the Motion are members of the city
9 council, and accordingly none are “a member of the decision-making body” for
10 purposes of ORS 227.180(3), which requires “a member of the decision-making
11 body” to disclose *ex parte* contacts.⁴ *See* n 3. Accordingly, petitioner cannot
12 establish that any of those four persons engaged in undisclosed *ex parte* contacts.

⁴ ORS 227.180(3) provides:

“No decision or action of a planning commission or city governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

“(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and

“(b) Has a public announcement of the content of the communication and of the parties’ right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.”

1 Similarly, there can be no legally significant or reversible bias on the part of a
2 person who is not a member of the decision-making body.⁵

3 Petitioner’s motion as to Woodley, Woodley, Larsen, and Neumeyer is
4 denied.

5 **B. City Councilors**

6 Agnes Turner-Wise and John Hughto are members of the city council and
7 voted to deny petitioner’s application to rezone his property.⁶ We understand
8 petitioner to allege that Turner-Wise is biased and should have abstained from
9 voting because the Woodleys and Rosalind Larsen are her friends, and Kay
10 Neumeyer, Turner-Wise’s daughter, is city recorder. Motion 8. According to
11 petitioner, “[i]t would be absurd to ponder that John Hughto, the Woodleys, Kay
12 Neumeyer, and Rosalind Larsen did not have any influence to perpetuate the
13 personal and unjust rationales by which Respondent denied Petitioner’s 2018

⁵ Petitioner argues that planning commission chair Rick Woodley voted against petitioner’s proposed rezone project due to bias and *ex parte* contacts with other members of the planning commission and citizens of the city, including Woodley’s wife, Linda Woodley. Petitioner argues that both Woodleys are biased because the Woodleys live across the street from petitioner’s property (the subject property) and have “strongly opposed” petitioner’s proposed project for many years. Next, in his petition for review, petitioner argues planning commission member Rosalind Larsen also lives across the street from the subject property. Petition for Review 14. Petitioner alleges Larsen and Kay Neumeyer, city recorder, were responsible for and failed to keep accurate minutes of the planning commission hearings. Motion 6-8.

⁶ The city council voted four to two to deny petitioner’s application to rezone his property.

1 rezoning application.” Motion 8.

2 Petitioner alleges Hughto participated in a previous city decision
3 approving the rezoning of the Woodley property (across the street from the
4 subject property), and yet voted against petitioner’s 2018 rezoning application.
5 According to petitioner, Hughto “habitually engaged in *ex parte* contacts with
6 either members of [the] Planning Commission or the City Council or civilians of
7 [the City of] Malin—regarding Petitioner’s rezoning application but failed to”
8 disclose these contacts in compliance with ORS 227.180(3). Motion 4–5.

9 Respondent responds that petitioner has failed to sustain his burden of
10 establishing the basis for which such motion should be granted, as required by
11 OAR 661-010-0045(2), quoted above. Petitioner’s motion must contain a
12 statement “explaining with particularity” those facts petitioner seeks to establish
13 and how those facts pertain to the limited grounds to take evidence outside the
14 record. OAR 661-010-0045(2)(a). In addition, the motion must be accompanied
15 by an affidavit or documentation that sets forth the facts the moving party seeks
16 to establish or establishes the need to take evidence not available to the moving
17 party. Respondent argues that petitioner’s motion fails because he failed to
18 provide an affidavit or documentation setting forth the facts he seeks to establish,
19 or an affidavit establishing the need to take evidence not available to the
20 petitioner, as set forth in OAR 661-001-0045(2). We agree.

21 Petitioner provided with the Motion an “All-purpose Acknowledgment,”
22 and with his Reply, provided a “Jurat Certificate.” Those documents do not

1 constitute an “affidavit” within the meaning of OAR 661-010-0045(2)(a) and (b),
2 and are insufficient to satisfy the requirement of the rule.⁷ Neither of these
3 documents “sets forth the facts the moving party seeks to establish,” or
4 “establishing the need to take evidence not available to the moving party, which
5 “if proved, would warrant reversal or remand of the decision.” OAR 661-010-
6 0045.⁸

7 Respondent also responds that petitioner’s motion is insufficient to meet
8 petitioner’s burden to “offer some substantial reason to believe that the evidence
9 of such *ex parte* contacts or bias can be established and that such *ex parte* contacts
10 or bias would lead to reversal or remand.” *Tri River*, 36 Or LUBA at 746.
11 Regarding councilor Hughto, respondent argues that petitioner’s allegation that
12 Hughto “habitually engaged in *ex parte* contacts” does not contain specific facts
13 that establish what the content of the contacts were and whether they would result
14 in reversal. Response 5. Respondent argues that petitioner’s statement regarding
15 Hughto amounts only to “vague speculation,” and that the general allegation that
16 the size of the town and the fact that many of the city’s employees and decision

⁷ *Black’s Law Dictionary* defines “affidavit” as “[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public.” *Id.* at 62 (8th ed 2004).

⁸ Both of the documents include the statement “California Only,” and both include a statement that the notary signing the document verified only the identity of the person signing and not the truthfulness, accuracy, or validity of the document.

1 makers are related to each other fails to satisfy petitioner’s burden to identify the
2 evidence he seeks to obtain through subpoenas or depositions, nor the
3 requirement of showing that anticipated evidence would establish a basis for a
4 reversal. *Id.*

5 We agree. Petitioner’s allegation regarding Hughto appears to amount to a
6 statement that Hughto previously “motion[ed] to have [petitioner’s neighbor]
7 Rick Woodley’s property rezoned from commercial to residential,” that Hughto
8 “and [the city] rezoned Rick Woodley’s property by using procedures and
9 requirements that paled in comparison to what petitioner has been subjected to,”
10 and that Hughto “voted against petitioner’s 2018 rezoning application on appeal.”
11 Motion 4. Petitioner fails to establish how these facts, if true, would establish that
12 Hughto engaged in *ex parte* contact or is biased.

13 Respondent also responds that petitioner’s allegations that it would “be
14 absurd to ponder that” councilor Turner-Wise did not engage in undisclosed *ex*
15 *parte* contacts because her daughter and son-in-law the Woodleys live across the
16 street from petitioner and according to petitioner oppose his project, and because
17 Turner-Wise’s daughter Neumeyer is in charge of keeping accurate minutes of
18 city meetings, do not meet the burden set forth in the rule because those
19 allegations are, again, based on mere speculation.

20 Again, we agree. Simply because councilor Turner-Wise is related to
21 individuals who own property close to petitioner’s property, and who according
22 to petitioner oppose his project, that allegation is insufficient to show that Turner-

1 Wise’s vote denying petitioner’s rezone may have been motivated by improper
2 bias. Similarly, that Turner-Wise’s daughter is city record appears to have no
3 relevance to the city’s decision to deny petitioner’s application.

4 Petitioner’s motion to subpoena and/or depose councilors Turner-Wise and
5 Hughto is denied.

6 For the reasons set forth above, the Motion is denied.

7 **BRIEFING SCHEDULE AND ORAL ARGUMENT**

8 The next event in the review proceeding is the filing of the response brief.
9 The response brief is due 21 days after the date of this order. The final opinion
10 and order is due 56 days after the date of this order.

11 Oral argument will be scheduled by separate letter in accordance with the
12 Board’s usual practice.

13 Dated this 26th day of July, 2019.

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Melissa M. Ryan
Board Chair