

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Items rejected from the local record are properly excluded from the record transmitted to LUBA. Where a local government rejects portions of a document, and includes only a redacted version of the document in the record, the petitioner may attach to the petition for review the unredacted document, in support of any of an assignment of error alleging that the local government erred in rejecting the redacted portions. If no party objects, LUBA will consider the attached document for the limited purpose of resolving that procedural assignment of error. If a party objects, the petitioner may file a motion to take evidence to allow LUBA to consider the unredacted document for that same limited purpose. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. A motion to reconsider a LUBA order is treated as a renewed motion for the same relief sought in the original motion. Because a motion to take evidence outside of the record suspends all other time limits in an appeal, a motion to reconsider an order denying the motion to take evidence, which is considered a renewed motion to take evidence, also suspends all other time limits. *Stewart v. City of Salem*, 61 Or LUBA 77 (2010).

27.6.3 LUBA Procedures/Rules - Evidentiary Hearings - Motion for. Where the parties' dispute is over the correct interpretation and application of code provisions rather than a factual dispute, there is no basis for a motion requesting LUBA to consider an electronic mail message as extra-record evidence under ORS 197.835(2)(b). A planner's electronic mail message in which the planner expresses opinions about the meaning of those code provisions has no bearing on how that issue of law should be resolved. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will deny as premature a motion to take evidence regarding alleged ex parte contacts that is filed before the record is settled and the briefs filed. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. A party who files a motion for evidentiary hearing seeking evidence to prove that the decision makers, members of the city council, are biased must allege that there is a “reasonable basis” to believe the city council members are biased. Where a moving party alleges that the city as a municipal entity was interested in purchasing the subject property for future development of city buildings, it is relatively clear that any plans the city had were preliminary, and a moving party does not point to any evidence or likelihood of uncovering evidence that the decision makers relied on anything other than the applicable approval criteria in rendering the challenged decision, it fails to demonstrate a “reasonable basis” to believe the decision makers are biased, and a motion for evidentiary hearing will be denied. *Wal-Mart Stores, Inc. v. City of Oregon City*, 49 Or LUBA 729 (2005).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will deny a motion to take evidence not in the record under OAR 661-010-0045 where the

factual allegations asserted in the motion are not in dispute. Under such circumstances it is more appropriate for the party to assert its allegations in its brief and file a motion to take evidence not in the record if another party disputes those allegations. *Rogers v. City of Eagle Point*, 42 Or LUBA 607.

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will deny a motion to take evidence not in the record based on an allegation that the petition for review will allege constitutional error and that LUBA must have the proffered extra-record evidence before it in order to resolve such an assignment of error, where the theory of constitutional error as shown in the motion is conclusory and undeveloped and the facts established by the proffered evidence are not in dispute. *Rogers v. City of Eagle Point*, 42 Or LUBA 607.

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will deny a motion to take evidence not in the record to consider the affidavits of three county commissioners explaining that they are biased against the applicant and cannot impartially hear a local appeal involving the applicant, where the commissioners’ declaration of bias is stated in the challenged decision, the assignment of error directed at the commissioners’ bias presents a legal question not dependent on the facts stated in the affidavits, and the proponent fails to demonstrate to LUBA that the affidavits are necessary to resolve that assignment of error. *Hiebenthal v. Polk County*, 41 Or LUBA 573 (2001).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. The Board will deny a motion to take evidence of alleged *ex parte* contacts where, in the absence of the parties’ briefs, it is not clear that the alleged contacts relate to the local government decision. In most cases, the appropriate posture in which to file a motion for evidentiary hearing is after the briefs have been filed, when the legal arguments and disputed allegations of fact are more clearly identified. *Halvorson Mason Corp. v. City of Depoe Bay*, 38 Or LUBA 949 (2000).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. An evidentiary hearing to establish decision makers’ “personal interest” in a proposal due to their ownership of proximate property is not warranted because, even if true, such a “personal interest” could not provide a basis for reversing or remanding the decision. *ODOT v. City of Mosier*, 34 Or LUBA 797 (1998).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will not order an evidentiary hearing or a deposition from a county planner where petitioner does not explain how such testimony can authoritatively establish whether the county approved the version of a comprehensive plan at issue. *Trademark Construction Inc. v. Marion County*, 33 Or LUBA 842 (1997).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. An evidentiary hearing is not warranted to show a decision maker is a member of an advocacy group that supports transportation projects, where the advocacy group did not take a position on a disputed land use decision that approved a geologic hazard report related to a proposed

highway improvement. Such membership would not demonstrate the decision maker's views concerning transportation in general or the particular project, or show that he was biased or prejudged the matter. *Terdina v. Clatsop County*, 33 Or LUBA 830 (1997).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. A motion for evidentiary hearing requesting that a local government and intervenor be ordered to produce all demographic data kept by either party with regard to intervenor's other developments fails to state with particularity what facts will be presented at the hearing and how those facts will affect the outcome of the review proceeding as required by OAR 661-10-045. *St. Johns Neighborhood Assn. v. City of Portland*, 33 Or LUBA 827 (1997).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where a local code prohibits *ex parte* contacts between a decision maker and a "person interested in the outcome of the proceeding," a party moving for an evidentiary hearing to prove such *ex parte* contacts occurred must provide specific reasoning why that person qualifies as such an "interested" party. Merely describing the person as a professional land developer or community leader is not specific enough. *Opp v. City of Portland*, 33 Or LUBA 820 (1997).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where petitioner's motion for evidentiary hearing does not explain how the alleged facts concerning a procedural irregularity below not shown in the record would warrant reversal or remand of the challenged decision, petitioner fails to demonstrate that an evidentiary hearing is warranted. *Pendair Citizens' Committee v. City of Pendleton*, 28 Or LUBA 796 (1995).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Petitioners cannot raise a new basis for reversing or remanding a challenged decision for the first time in a post oral argument motion for evidentiary hearing unless they demonstrate that they seek to present facts unknown to them at the time the petition for review was filed. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. OAR 661-10-065(4) simply provides that with the exception of objections to the record and motions for evidentiary hearing, the filing of a motion does not have the legal effect of automatically suspending the deadlines for future events in a LUBA appeal until the motion is resolved. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 746 (1994).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Occasional references in a motion for evidentiary hearing to extra-record materials do not satisfy the requirement of OAR 661-10-045(2) that petitioner explain "with particularity the facts the moving party will present at the [evidentiary] hearing" and do not explain how that evidence shows an evidentiary hearing is warranted under OAR 661-10-045(2) and ORS 197.830(13)(b). *Jones v. Lane County*, 27 Or LUBA 654 (1994).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where petitioner withdraws its motion for evidentiary hearing, but respondents wish to have an evidentiary hearing, respondents must file their own motion for evidentiary hearing in accordance with OAR 661-10-045. *Louisiana Pacific v. Umatilla County*, 25 Or LUBA 818 (1993).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Under OAR 661-10-045(2), the movant for evidentiary hearing must establish how the facts to be presented at the proposed evidentiary hearing will affect the outcome of the appeal. *Breivogel v. Washington County*, 22 Or LUBA 847 (1992).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. A movant for an evidentiary hearing must explain, with particularity, what facts it will present at the evidentiary hearing. In addition, the movant must establish how those facts “will affect the outcome of the review proceeding.” OAR 661-10-045(2). *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Until the local record is filed with LUBA, a motion for evidentiary hearing is premature. *Berg v. Linn County*, 21 Or LUBA 622 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA requires that a party moving for an evidentiary hearing explain with particularity what facts it expects to present in an evidentiary hearing and why those facts will affect the outcome of the appeal. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. After the petition for review is filed, respondents may, in their response brief or in a motion to dismiss, identify disputed allegations of fact, and explain why under their version of the facts petitioners lack standing. Petitioners may then request permission to file a reply brief to respond to respondent’s legal arguments, move for an evidentiary hearing to present facts establishing standing or do both. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where a party moves for an evidentiary hearing but fails to clearly identify what facts it wishes to establish through the evidentiary hearing and fails to explain why those facts will affect the outcome of the appeal, the motion for evidentiary hearing will be denied. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where the petitioner objects that the record should include a letter he sent to the city, and an intervenor unsuccessfully opposes the record objection *solely* on the grounds that the letter was sent after the public hearing was closed, LUBA will not grant intervenor’s subsequent requests for an evidentiary hearing and for depositions to consider whether

the letter was sent and received as petitioner claimed in his record objection. *Cecil v. City of Jacksonville*, 19 Or LUBA 532 (1990).