

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WAYNE J. HIEBENTHAL
5 and DAVID L. HIEBENTHAL,
6 *Petitioners,*

7
8 vs.

9
10 POLK COUNTY,
11 *Respondent,*

12 and

13
14 MEDURI FARMS, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA Nos. 2001-084 and 2001-085

18
19 ORDER

20 Before the Board is a motion to intervene, a motion to file a reply brief and a motion
21 to take evidence not in the record.

22 **MOTION TO INTERVENE**

23 Meduri Farms, Inc. (intervenor), the applicant below, moves to intervene on the side
24 of the county. There is no opposition to the motion and it is allowed.

25 **MOTION TO FILE REPLY BRIEF**

26 Petitioners move to file a reply brief pursuant to OAR 661-010-0039 to respond to
27 three alleged “new matters” in the response brief.¹ The reply brief responds to contentions in
28 the response brief that (1) LUBA lacks jurisdiction over the challenged decision; (2)
29 petitioners waived an issue presented in the petition for review because the issue was not

¹OAR 661-010-0039 provides, in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. * * *”

1 raised below; and (3) the evidence in the record “clearly supports” a determination of
2 compliance with applicable criteria, notwithstanding inadequate findings challenged in
3 petitioners’ fourth assignment of error, pursuant to ORS 197.835(11)(b).

4 No party objects to the proposed reply brief. We agree with petitioners that the three
5 cited matters raised in the response briefs warrant a reply brief. *Schultz v. City of Forest*
6 *Grove*, 35 Or LUBA 712, 713 (1999) (jurisdiction); *Tenly Properties Corp. v. Washington*
7 *County*, 34 Or LUBA 352, 354 (1998) (waiver); *Kellogg Lake Friends v. Clackamas County*,
8 17 Or LUBA 277, 281 (1988) (allegation that evidence “clearly supports” compliance, under
9 precursor to ORS 197.835(11)(b)). The reply brief is allowed.

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

11 Intervenor moves to take evidence not in the record, pursuant to OAR 661-010-0045.²
12 Some background is necessary to place the motion in context. The decision appealed in
13 LUBA No. 2001-084 is a hearings officer decision approving intervenor’s application for a
14 replacement processing facility on a parcel zoned exclusive farm use. The decision appealed

²OAR 661-010-0045 provides, in relevant part:

- “(1) 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 215.428 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
- “(2) Motions to Take Evidence:
 - “(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.
 - “(b) A motion to take evidence shall be accompanied by:
 - “(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or
 - “(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.”

1 in LUBA No. 2001-085 is a May 23, 2001 letter from county counsel rejecting petitioners’
2 local appeal of that hearings officer’s decision to the board of commissioners. The May 23,
3 2001 letter rejecting the local appeal states:

4 “* * * The Polk County Board of Commissioners is unable to hear any appeal
5 regarding [intervenor’s application]. The reason for this is a conflict of
6 interest and multiple *ex parte* contacts. Recently, Polk County filed a lawsuit
7 and obtained a public health injunction against Meduri Farms.

8 It is the position of Polk County that all remedies/appeals at Polk County have
9 been exhausted. * * *” Record 31.

10 Petitioners’ first assignment of error argues that the county erred in rejecting
11 petitioners’ local appeal to the board of commissioners, and requests that the commissioners’
12 decision be reversed and the hearings officer’s decision remanded so that petitioners can
13 pursue the local appeal to which they feel they are entitled under the county’s code and
14 applicable law. The remaining assignments of error challenge the merits of the hearings
15 officer’s decision.

16 In a joint response brief, intervenor and the county respond in part to the first
17 assignment of error by arguing that the board of commissioners’ decision correctly rejected
18 petitioners’ local appeal due to extensive *ex parte* contacts with intervenor during which the
19 commissioners formed a bias toward intervenor that prevents the commissioners from
20 impartially resolving an appeal involving intervenor.

21 In support of that response, intervenor now moves to take into the record three
22 affidavits from the three commissioners. Each affidavit asserts that, as a part of ongoing
23 enforcement proceedings against intervenor, the commissioner had numerous *ex parte*
24 contacts with intervenor during the period when intervenor’s land use application was before
25 the county hearings officer. Each affidavit also asserts that during the pendency of the
26 application before the hearings officer, the commissioner approved a plan of legal action
27 wherein county staff secured a court order closing intervenor’s facility. Finally, each

1 affidavit states that as a result of the foregoing, the commissioner felt that he was not able to
2 sit as a fair and impartial judge regarding the underlying land use application.³

3 Petitioners offer several responses to the motion, but we need address only one.
4 Petitioners argue in relevant part that the motion to take evidence should be denied because
5 the statements in the affidavits, even if accepted as true, would not affect resolution of the
6 first assignment of error. To the extent petitioners argue that intervenor has not established
7 that granting the motion to take evidence is warranted under OAR 661-010-0045, we agree.
8 A motion to take evidence must contain a statement explaining with particularity how the
9 facts the moving party seeks to establish pertain to the grounds specified in OAR 661-010-
10 0045(1), and how those facts will affect the outcome of LUBA’s review proceeding.
11 OAR 661-010-0045(2). Intervenor’s effort to satisfy that requirement is the following:

³We quote, as representative, the substance of the affidavit of commissioner Tom Ritchey:

- “1. I am an elected County Commissioner for Polk County, Oregon.
- “2. I am familiar with the operations of Meduri Farms (Intervenor herein).
- “3. At a point in time shortly before the underlying land use application was considered by the Hearings Officer, I had numerous *ex parte* contacts with Meduri Farms. These included at least one occasion when I was present at Meduri Farms due to ongoing enforcement issues involving Polk County (*i.e.* public health, use of county roads, nuisance).
- “4. Again, at a point in time when the underlying land use application was being considered by the Hearings Officer, I approved a plan of legal action against Meduri Farms wherein county staff secured a court order effectively closing all of the operations of Meduri Farms. I was perplexed that Meduri Farms was not wise enough to voluntarily cooperate with our staff. I knew we had worked with them to address the ongoing problems. Legal action would not have been necessary if Meduri Farms had simply cooperated with staff. Because Meduri Farms did not cooperate, Polk County was forced to spend time and money to compel them.
- “5. Because of these contacts and enforcement matters (and especially due to the fact that Meduri Farms’ lack of cooperation forced Polk County to spend additional money), I felt that I was not able to sit as a fair and impartial judge regarding the underlying land use application.
- “6. I can state that on advice of counsel, if LUBA attempts to order the Board of Commissioners to hear this matter, we will petition the Circuit Court for an order disallowing such a hearing.” Intervenor’s Motion to Take Evidence Not in the Record, Affidavit of Tom Ritchey 1-2.

1 “The facts pertain to the grounds to take evidence specified in OAR 661-010-
2 0045(1) as they concern *ex parte* contacts which, if shown to demonstrate
3 bias, would clarify the record as to why the Board of Commissioners could
4 not and cannot hear Petitioners’ appeal.

5 “The facts demonstrated by these affidavits will establish that the Polk County
6 Board of Commissioners acted properly under *Fasano v. Washington County*
7 *Commission*, 264 Or 574, 507 P2d 23 (1973), in not hearing Petitioners’
8 appeal.” Motion to Take Evidence Not in the Record 1-2.

9 The decision challenged in LUBA No. 2001-085, the May 23, 2001 letter, announces
10 that the board of commissioners rejects the appeal because the commissioners have a
11 “conflict of interest and multiple *ex parte* contacts” involving intervenor, and provides one
12 basis for the alleged “conflict of interest.” Record 31. The parties appear to agree that the
13 May 23, 2001 letter is fairly read to declare that the commissioners cannot impartially
14 resolve an appeal involving intervenor’s application. The affidavits that intervenor now
15 proffers for our consideration in resolving the first assignment of error merely elaborate on
16 and provide specific details about the basis for the impartiality expressly declared in the
17 challenged decision. What is missing is an explanation for why that elaboration and detail is
18 necessary to resolve the first assignment of error. As far as we can tell, the issues raised in
19 the first assignment of error, and in the responses to that assignment of error, are issues of
20 law that arise from the face of the challenged decision, and do not depend upon the actual
21 details of the commissioners’ contacts with intervenor, or the actual bases for the
22 commissioners’ declared lack of impartiality toward intervenor. In other words, it appears to
23 us that we can fully resolve the first assignment of error without considering the proffered
24 affidavits, based on the declaration of partiality in the challenged decision. Absent a focused
25 explanation why the facts stated in the affidavits “will affect the outcome of the review
26 proceeding,” we see no need or basis in OAR 661-010-0045 to grant the motion to take
27 evidence outside the record.

28 Intervenor’s motion to take evidence is denied.

1 Oral argument in this case was cancelled, and the review proceeding suspended
2 pending resolution of intervenor's motion to take evidence, pursuant to OAR 661-010-
3 0045(9). As reflected in a letter to the parties this same date, oral argument is rescheduled to
4 December 6, 2001.

5 Dated this 27th day of November, 2001.

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Tod A. Bassham
Board Member