

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

3
4 ALLEN PYNN and JOHN MILLER,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF WEST LINN,
10 *Respondent.*

11
12 LUBA No. 2002-003

13
14 ORDER

15 **REQUEST TO FILE REPLY MEMORANDUM**

16 As discussed below, petitioners filed a motion to take evidence not in the record,
17 pursuant to OAR 661-010-0045(1). On March 7, 2002, the city filed a response to that
18 motion. The city's response is expressly authorized by our rules. OAR 661-010-0065(2).
19 On March 18, 2002, petitioners filed a request to file a reply memorandum. The reply
20 memorandum addresses the city's arguments that the motion to take evidence is premature
21 and untimely, and that petitioners have waived any right to seek to admit the identified
22 evidence under OAR 661-010-0045. The city objects to petitioners' request to file a reply
23 memorandum, arguing that a reply memorandum is not authorized by our rules.

24 The city is correct that our rules do not expressly authorize a reply memorandum to
25 the city's response memorandum. However, our practice is to allow such reply memoranda,
26 where they are limited to new issues raised in a response memorandum. *Frevach Land*
27 *Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000); *Fechtig v. City of Albany*, 31
28 Or LUBA 441, 442 (1996). The proposed reply memorandum appears to address new issues
29 raised in the city's response, and the city does not argue otherwise. Petitioners' request is
30 allowed.

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

2 Petitioners move to take evidence not in the record, pursuant to OAR 661-010-
3 0045(1).¹ Specifically, petitioners seek to submit (1) the affidavits of petitioners attached to
4 the motion, and (2) transcripts of certain meetings. Based on the submitted affidavits and
5 argument in the motion, petitioners also seek permission to depose eight individuals pursuant
6 to OAR 661-010-0045(2)(c). Further, petitioners seek discovery of unspecified documents,
7 pursuant to OAR 661-010-0045(2)(d).²

8 The bases for the motion are allegations, supported by the submitted affidavits, that
9 (1) the city took “action for the purpose of avoiding ORS 227.178,” (2) the city’s decision is
10 unconstitutional, and (3) the city engaged in procedural irregularities not shown in the record.

¹OAR 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 215.428 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *”

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

- “(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.
- “(c) Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. * * *
- “(d) Subpoenas: the Board shall issue subpoenas to any party upon a showing that the witness or documents to be subpoenaed will provide evidence relevant and material to the grounds for the motion. * * *”

1 The pertinent allegations are not easily summarized, but their gist is that city staff, prompted
2 by the city council president and mayor, improperly compelled petitioners to grant waivers of
3 the 120-day limit for rendering a decision on a permit application at ORS 227.178, and that
4 the city council president and mayor improperly exerted pressure on the decision-making
5 process to delay and deny petitioners' application. Petitioners' motion seeks to take into the
6 record or discover evidence to establish the underlying facts for those allegations.

7 The city offers a number of responses, but we need only address one. The city argues
8 that a motion to take evidence under OAR 661-010-0045(1) is warranted only "in the case of
9 disputed factual allegations in the parties' briefs[.]" Because neither party has filed a brief,
10 the city argues, there are no "disputed factual allegations in the parties' briefs" and therefore
11 the motion to take evidence should be denied as premature.

12 The parties dispute a number of factual allegations. Although it is not essential that
13 the disputed factual allegations be disclosed in the petition for review and response brief, we
14 have held that in the absence of the parties' briefs, the Board will often lack the context and
15 developed positions necessary to evaluate whether an evidentiary proceeding under OAR
16 661-010-0045, and the resulting delay in LUBA's review of the challenged decision, are
17 warranted. *Newton Creek Citizens Comm. v. City of Roseburg*, 32 Or LUBA 496, 500
18 (1997); *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550, 555-56 (1991). Both
19 *Newton Creek Citizens Comm.* and *Citizens Concerned* involved motions to take evidence to
20 substantiate a challenge to the petitioner's standing. As we explained in *Citizens Concerned*:

21 "* * * In a typical appeal, petitioners allege facts in their petition for review
22 and provide legal argument explaining why those facts establish their
23 standing. Respondents, in their response brief or in a motion to dismiss, then
24 allege facts, identify disputed allegations of fact and supply legal argument
25 explaining why under their version of the facts, petitioners lack standing.
26 Petitioners then may request permission to file a reply brief to respond to
27 respondents' legal allegations concerning standing (OAR 661-010-0039),
28 move for an evidentiary hearing to present facts establishing standing (OAR
29 661-010-0045), or do both. When disputes concerning standing proceed in
30 this manner, the Board has the benefit of a reasonably clear view of both the
31 disputed facts and the parties' legal arguments, and may determine whether

1 the disputed allegations of fact will affect the outcome of the appeal and
2 whether an evidentiary hearing is, therefore, warranted.” *Id.* at 555-56.

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1 Consistent with the approach described in *Citizens Concerned*, we stated in *Horizon*
2 *Construction, Inc. v. City of Newberg*, 25 Or LUBA 656, 662 (1993) that:

3 “* * * To minimize the need for lengthy delays to resolve motions for
4 evidentiary hearing, it is the practice at LUBA for a party that wishes the
5 Board to consider a document not in the local record, for one of the purposes
6 described [in ORS 197.835(2)(b)], to attach that document to its brief and
7 explain in its brief why the Board should consider the document. If another
8 party does not object to the Board considering the document, the document
9 becomes part of the Board’s record (although not the local record) and is
10 considered by the Board for the requested purpose. If an objection is entered,
11 the party offering the document may then file a motion for evidentiary hearing
12 under [OAR 661-010-0045]. *Von Lubken v. Hood River County*, 19 Or
13 LUBA 548, 550 (1990).”

14 Petitioners have not persuaded us that the present case warrants departure from the
15 general approach we describe in *Citizens Concerned* and *Horizon Construction, Inc.*
16 Petitioners allege a large and diverse array of facts not found in the record, supported by the
17 five affidavits attached to their motion. The city apparently does not dispute some of the
18 alleged facts, but controverts others, as supported by the nine affidavits attached to its
19 response. Petitioners’ legal arguments based on those alleged facts are not developed to the
20 extent they presumably will be in the petition for review. Such developed legal argument
21 may not always be necessary to prevail in a motion to take evidence under OAR 661-010-
22 0045. However, proceeding to resolve the motion with the benefit of such developed
23 argument, under circumstances that better clarify which of the many alleged facts are
24 disputed, is more consistent with our statutory directive at ORS 197.805 that “time is of the
25 essence in reaching final decisions” in land use matters, than would be proceeding to resolve
26 the motion in its current posture.

27 Consistent with *Citizens Concerned* and *Horizon Construction, Inc.*, petitioners may
28 allege facts in the petition for review, together with legal argument explaining why the
29 alleged facts provide a basis for reversal or remand. In support of those allegations,
30 petitioners may attach to their petition for review some or all of the affidavits already
31 submitted in this case, or any other evidence not in the record, in support of arguments in the

1 petition. If the city does not object to that evidence, then we may consider it for the purpose
2 requested. If the city objects to some or all of that evidence, then petitioners may renew or
3 submit a new motion under OAR 661-010-0045.³ In resolving such a motion, we would
4 have the benefit of petitioners' developed legal theories in the petition for review, and the
5 city's responses to those theories. In addition, to the extent the city does not dispute some of
6 the alleged facts, then we may consider those facts, which may reduce the need for or scope
7 of further proceedings under OAR 661-010-0045(2), assuming such proceedings are
8 warranted. Similarly, where the city specifically disputes alleged facts, we will have a better
9 understanding of the nature and significance of the dispute.

10 For the foregoing reasons, petitioners' motion to take evidence not in the record is
11 denied, as premature. Pursuant to OAR 661-010-0045, the filing of the motion to take
12 evidence suspended the time limits for all other events in this review proceeding.
13 Accordingly, the petition for review is due 21 days, and the response brief is due 42 days,
14 from the date of this order.

15 Dated this 2nd day of April, 2002.
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22 _____
23 Tod A. Bassham
Board Member

³If petitioners continue to believe that depositions or discovery of documents is necessary and warranted under OAR 661-010-0045(2)(c) and (d), in addition to affidavits submitted under OAR 661-010-0045(2)(b), then petitioners' motion could renew their arguments for depositions or discovery.