BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRIAN ROGERS and MICHELLE ROGERS,
Petitioners,

vs.

CITY OF EAGLE POINT,
Respondent,

and

WINFALL, LLC,
Intervenor-Respondent.

LUBA No. 2002-030

ORDER

Before the Board are intervenor-respondent's motion to dismiss and motion to take evidence, and petitioner's motion to take evidence.

FACTS

We take the following undisputed facts from the record and the parties' pleadings. The challenged decision is the city's approval of a tentative subdivision master site plan for construction of a 20-lot subdivision known as the Angel View subdivision. The Angel View subdivision adjoins the previously approved Butte Crest subdivision to the south. Petitioners acquired lot 179 in the Butte Crest subdivision on October 11, 2001, and recorded a warranty deed on that date. Lot 179 is south of Ridgeview Drive, a local street within the Butte Crest subdivision that runs roughly east-west and ends just west of lot 179. Across the street from lot 179 is a vacant residential lot, lot 203, the rear lot line of which adjoins the property proposed for the Angel View subdivision. Lot 179 is within 100 feet of lot 203. One of intervenor's principles owns lot 203.

On November 20, 2001, intervenor-respondent (intervenor) filed its application to establish the Angel View subdivision. The site plan proposed that lot 203 in the Butte Crest

1 subdivision be developed as a local street, Laura Street, connecting the Angel View
2 subdivision to Ridgeview Drive within the Butte Crest subdivision. The city provided
3 hearing notice to property owners within 100 feet of the Angel View subdivision. The notice
4 included a copy of the proposed site plan. The city did not provide notice to petitioners.

5 The city conducted hearings on January 15 and 22, 2002, and issued its final decision
6 approving the proposed subdivision on February 12, 2002. The city did not provide notice of
7 the decision to petitioners. On March 11, 2002, petitioners filed a notice of intent to appeal
8 (notice), appealing the city's decision to LUBA.

9 **INTERVENOR'S MOTION TO DISMISS; RELATED MOTIONS TO TAKE**
10 **EVIDENCE**

11 Intervenor moves to dismiss this appeal, on the ground that petitioners' notice was
12 filed more than 21 days after the date the city's decision became final. OAR 661-010-
13 0015(1)(a). According to intervenor, petitioners had actual notice of the city's decision
14 sometime during the first week of February, 2002. To support that assertion, intervenor
15 attaches to its motion the affidavit of Gary T. Whittle. Whittle is president of one of the
16 corporations that developed the Butte Crest subdivision. Whittle's affidavit states in relevant
17 part that sometime during the first week of February 2002, petitioners spoke with him by
18 telephone expressing concerns regarding the application and approval of the Angel View
19 subdivision.[1] Based on this affidavit, intervenor argues that petitioners had actual notice of
20 the city's decision more than 21 days before March 11, 2002, the date they filed their notice
21 with LUBA.

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[1]Whittle's affidavit states, in relevant part:

> "During the first week of February 2002, plaintiffs, Brian and Michelle Rogers, telephoned me regarding the issues in the present litigation. During the telephone conversation, Brian Rogers expressed some concerns regarding the application and approval of the Angel View Subdivision. Mr. Rogers, in addition to discussing other items, indicated that he had a concern regarding the construction of apartments on some of the lots in the Angel View Subdivision. During the course of this conversation it was apparent that Mr. Rogers was fully knowledgeable regarding the Angel View Subdivision." Intervenor's Motion to Dismiss Exhibit A, Page 2.

1 In support of the motion to dismiss, intervenor also moves to take evidence not in the
2 record, specifically to order the deposition of petitioners and a city planner, in order to
3 establish when petitioners had actual or constructive notice of the city's decision.
4 In response to the motion to dismiss, petitioners submit the affidavit of petitioner
5 Brian Rogers, which disputes Whittle's recollection. According to the affidavit, petitioners
6 first learned that the proposed development of the Angel View subdivision included
7 development of lot 203 on February 19, 2002, when they heard a comment to that effect from
8 one of the builders of their house and confirmed it that same day with the city. The affidavit
9 disputes that any phone conversation with Whittle regarding the Angel View subdivision
10 occurred during the first week of February, 2002, but states that such a conversation occurred
11 March 19, 2002. Petitioners attach to the affidavit a telephone record that purports to show a
12 phone call from petitioners to Whittle on that date, and argue that Whittle's recollection of
13 the date of their conversation is simply incorrect. To the extent intervenor continues to rely
14 on the Whittle affidavit to support the motion to dismiss, petitioners move to take Whittle's
15 deposition.
16 As discussed below, no party to this case appears to dispute that (1) petitioners owned
17 lot 179 at all relevant times; (2) lot 179 is within 100 feet of lot 203; and (3) petitioners did
18 not receive notice of the city's hearing, pursuant to ORS 197.763(2)(a) and implementing
19 code provisions.[2] As relevant here, ORS 197.830(9) requires that a notice of intent to appeal
20 a land use decision to LUBA be filed no later than 21 days after the date the decision
21 becomes final. However, ORS 197.830(3) through (5) provide alternative appeal deadlines

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[2]ORS 197.763(2)(a) provides, in relevant part:

> "Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:
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> "(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary[.]"

1 that apply in specified circumstances.[3] Petitioners contend that ORS 197.830(3) provides the
2 applicable appeal deadline in the present case, not ORS 197.830(9), because they were
3 entitled to notice of the hearing, the city failed to provide notice and thus failed to "provid[e]
4 a hearing" as to petitioners, petitioners are adversely affected by the decision, and petitioners
5 filed their appeal to LUBA within the deadlines specified in ORS 197.830(3)(a) or (b). *See*
6 *Shrader v. Deschutes County*, 39 Or LUBA 782, 784 (2001) (a local government fails to
7 "provid[e] a hearing" within the meaning of ORS 197.830(3) where, *inter alia*, the local
8 government fails to give a person the individual notice of hearing he or she is entitled to
9 receive under state law); *Leonard v. Union County*, 24 Or LUBA 362, 374-75 (1992)
10 (same).[4]

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[3]ORS 197.830 provides in relevant part:

> "(3) If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.
>
> "* * * * *
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> "(5) If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

[4]We note that it is possible to characterize the challenged decision as a limited land use decision, as defined at ORS 197.015(12), rather than a land use decision, although it does not appear that the city processed the application according to the procedures specified for limited land use decisions at ORS 197.195. If the city's decision is accurately characterized as a limited land use decision, it is arguable that petitioners should invoke ORS 197.830(5) and not ORS 197.830(3). *But see Gensman v. City of Tigard*, 29 Or LUBA 505, 512 (1995) (if

1 We do not understand intervenor to dispute that petitioners are "adversely affected"
2 by the city's decision, within the meaning of ORS 197.830(3), or that ORS 197.830(3) may
3 provide the pertinent appeal deadline to LUBA where a local government fails to provide a
4 notice of hearing to a person entitled to that notice. Intervenor's motion to dismiss argues
5 that petitioners had either actual or constructive notice of the city's decision more than 21
6 days prior to filing an appeal with LUBA and, therefore, petitioners may not appeal to LUBA
7 under either ORS 197.830(3)(a) or (b). As noted above, the only evidence supporting that
8 contention is the Whittle affidavit.
9 Neither party takes a discernible position as to which subsection of ORS 197.830(3)
10 applies. *See Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 389-91 (2000) (discussing the
11 differences between ORS 197.830(3)(a) and (b)). As we explained in *Willhoft*, whether
12 subsection (a) or (b) applies turns on whether the petitioner is entitled to notice of the
13 *decision*. *Id.* at 386-87; *see also Leonard*, 24 Or LUBA at 375-76 (same). Although
14 petitioners argue that they were entitled to notice of the hearing, petitioners do not argue that
15 they were entitled to notice of the decision. Accordingly, for purposes of this order we
16 assume that ORS 197.830(3)(b) applies, and the appropriate question in resolving
17 intervenor's motion to dismiss is when petitioners "knew or should have known of the
18 decision."
19 We first conclude that the city's motion to seek depositions to establish when and
20 what petitioners knew about the city's decision is unwarranted. The parties have submitted
21 affidavits that contain conflicting recollections regarding the date of a conversation between
22 petitioners and Whittle. From intervenor's perspective, Whittle's affidavit establishes that
23 petitioners had knowledge of the city's decision to approve the subdivision sometime during

the city fails to follow the procedures for a limited land use decision at ORS 197.195 and instead applies some of the procedures for land use hearings specified at ORS 197.763, the city must provide all of the procedural safeguards required by ORS 197.763). We need not characterize the decision or address the differences between ORS 197.830(3) and (5) here, because the only disputed issue is when petitioners had "actual notice" or "knew or should have known" of the decision. In that respect, ORS 197.830(3) and (5) are identical.

the first week of February 2002. Petitioners' affidavit avers that that conversation took place on March 19, 2002. It seems unlikely that deposing petitioners would help us resolve that conflict. In any case, even assuming that the conflict was resolved in intervenor's favor, and we affirmed that the conversation took place in early February 2002 rather than March, in our view the conversation as alleged in the Whittle affidavit is insufficient to establish that petitioners "knew or should have known of the decision" prior to February 19, 2002.

As we discussed in *Willhoft*, the ORS 197.830(3)(b) "knew or should have known" standard differs from the ORS 197.830(3)(a) "actual notice" standard in that the former imposes an objective "discovery rule," that may have the effect of starting the 21-day appeal period before a petitioner receives written notice or a copy of a decision, or equivalent information:

> "Determining the date a petitioner 'should have known' of the decision that is appealed under ORS 197.830(3)(b) (1997) is not complicated where a petitioner has no reason to suspect that the decision was made until the petitioner is given a copy of the decision. However, where there are circumstances that would lead a reasonable person to realize that an appealable land use decision may have been rendered, it is necessary to consider whether a reasonable person would have made appropriate inquiries and thereby discovered the actual decision or confirmed the existence of the decision. We emphasize that the obligation to make reasonable inquires under ORS 197.830(3)(b) (1997) is an objective one, and it turns on what a reasonable person would do rather than what the petitioner actually did. Therefore, if a petitioner observes activity that would reasonably suggest that an appealable land use decision may have been adopted, the petitioner is obligated under ORS 197.830(3)(b) (1997) to make appropriate inquiries with the local government and discover the decision. If the petitioner does so and files an appeal within 21 days after discovering the decision, the appeal is timely under ORS 197.830(3)(b) (1997). However, if the petitioner fails to make such appropriate inquiries, the 21-day appeal period nevertheless begins to run." 38 Or LUBA at 390.

In *Willhoft*, the city approved a permit to expand an existing RV park, subject to a condition that the permit would be void if no substantial construction took place within one year. The petitioners appeared during those proceedings, and knew of the city's decision. Two years passed, no construction took place, and the permit became void. The applicant

1 then sought and obtained from the city an "extension" of the permit, and proceeded to expand
2 the park. One of the petitioners, who lived nearby, observed substantial clearing and filling
3 activities on the property, and erection of a large sign advertising expansion of the park.
4 However, the petitioner made no further inquiries and delayed appealing the city's extension
5 decision for more than six months. We commented that, if ORS 197.830(3)(b) applied, the
6 petitioner's observations were sufficient to obligate a reasonable person to make appropriate
7 inquiries with the city and that the petitioner "should have known of the decision," within the
8 meaning of ORS 197.830(3)(b). 38 Or LUBA at 393.[5]

9 Similarly, in *Abadi v. Washington County*, 35 Or LUBA 67 (1998), the county
10 approved a grading permit for a previously approved subdivision that allowed the applicant
11 to construct a retaining wall and place fill behind the wall, on a portion of the subdivision
12 adjacent to the petitioner's property. The applicant began constructing the retaining wall and
13 placing fill behind it. On or before January 6, 1998, the petitioner observed the retaining
14 wall and made inquiries during which he discovered the grading permit. The grading permit
15 authorized 76,000 cubic yards of fill but did not specify where that fill would be placed. The
16 petitioner then wrote the county a letter asking several questions regarding the retaining wall
17 and the permit. The county responded on January 16, 1998, explaining that the wall and fill
18 were necessary to bring a road grade within required parameters, and enclosing and referring
19 to the grading plan approved under the permit, which depicts the retaining wall and fill. The
20 petitioner filed an appeal of the grading permit with LUBA within 21 days of January 16,
21 1998, but more than 21 days from January 6, 1998. We held that the petitioner's appeal was
22 untimely, concluding that, notwithstanding that the petitioner did not see the grading plan
23 until January 16, 1998,

24 > "[p]etitioner knew on or before January 6, 1998, that the applicant was
25 > building a retaining wall and placing fill behind it, that the county had

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[5]We ultimately concluded that the ORS 197.830(3)(a) "actual notice" standard applied to the petitioner, and that his appeal was timely because he filed within 21 days of receiving actual notice of the decision. *Id.*

> approved a grading permit for the subdivision and that the permit approved 76,000 cubic yards of fill. A person with that knowledge knows, or at least should know, that the county had made a decision, the grading permit, that authorizes the retaining wall and fill." 35 Or LUBA at 72.

We reached the opposite conclusion in *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991). In that case, the petitioner observed the construction of a building that would house a city-approved waste incinerator, but nothing about the building distinguished it from the larger structure where the applicant conducted a long-standing manufacturing operation. We held that observation of building construction did not trigger the 21-day appeal period for that petitioner, because the central issue in the case was the permissibility of the incinerator use, and nothing about the appearance of the building "would reasonably alert a person of the use for which the building was being constructed." 22 Or LUBA at 396.[6]

Similarly, in *Goddard v. Jackson County*, 34 Or LUBA 402, 410 (1998), the petitioners received notice of an application for nonfarm dwellings on neighboring property, with a map showing the proposed dwellings on reconfigured lots. The petitioners made timely inquiries with the county, during which they discovered an earlier decision reconfiguring the lots. We held that the petitioners' appeal to LUBA of the reconfiguration decision, filed within 21 days of the date they discovered that decision, was timely, and that receipt of the map showing the reconfigured lots, while perhaps sufficient to put the petitioners on inquiry notice, did not demonstrate that the petitioners knew or should have known of the decision under ORS 197.830(3)(b) on the date of that receipt.

Reading these cases together, it is clear under ORS 197.830(3)(b) that where a

[6]*Citizens Concerned* did not apply ORS 197.830(3)(a) or (b), but rather applied an "actual notice" standard derived from several LUBA and Court of Appeals cases, not explicitly based on any statute. *See Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515, 531 (1991) (citing cases). The notice standard applied in *Citizens Concerned* has largely if not entirely been superseded or overruled by subsequent statutes and cases, and the specific facts in that case would now be analyzed under ORS 197.830(4). Nonetheless, *Citizens Concerned* is instructive in the present case, because it is clear from our holding, discussed in the text, that we understood the standard applied there to be roughly equivalent to the "knew or should have known" standard at ORS 197.830(3)(b).

petitioner does not have knowledge of the decision, but observes activity or otherwise obtains information reasonably suggesting that the local government has rendered a land use decision, the petitioner is placed on inquiry notice. If the petitioner makes timely inquiries and discovers the decision, the 21-day appeal period begins on the date the decision is discovered. Otherwise, the 21-day appeal period begins to run on the date the petitioner is placed on inquiry notice.

Turning to the present case, if we assume that the facts stated in the Whittle affidavit are true, at most petitioners had some knowledge during the first week of February 2002 that an application to subdivide the property north of lot 203 was pending before the city. The city rendered its final decision on February 12, 2002, so petitioners obviously could not have known during the first week of February 2002 that the city had issued a *decision* approving the application. That problem aside, there is no suggestion in the Whittle affidavit that petitioners knew that the subdivision application proposed to develop lot 203 inside the *Butte Crest* subdivision as an access street to intervenor's subdivision. There is no evidence or even allegation that petitioners knew or should have known about the proposed use of lot 203 in the Butte Crest subdivision until February 19, 2002. The use of lot 203 as an access street to intervenor's subdivision appears to be the central issue in this case. Indeed, the proposed conversion of lot 203 to a street is the only aspect of intervenor's application that, petitioners allege, entitled them to notice of the hearing on that application. Similarly, the city's approval of the conversion of lot 203 to an access street is, presumably, the aspect of the challenged decision that most "adversely affects" petitioners. Petitioners could not reasonably suspect that a pending subdivision application for property some distance from their own lot would propose converting a residential lot within *petitioners*' subdivision to an access street. Therefore, even assuming that petitioners knew something about the pending subdivision application prior to February 19, 2002, that fact was not sufficient to place them on inquiry notice of the city's decision, much less to establish that they knew of the city's

1 decision. It is clear that petitioners obtained information that placed them on inquiry notice
2 no earlier than February 19, 2002. Thereafter, petitioners made timely inquiries; indeed,
3 petitioners discovered the city's decision that same day. Thus the appeal period under
4 ORS 197.830(3)(b) began running February 19, 2002, and petitioners' appeal, filed March
5 11, 2002, was timely.

6 Intervenor's motion to take evidence outside the record is denied; the motion to
7 dismiss is denied.

8 **PETITIONERS' MOTION TO TAKE EVIDENCE**

9 Petitioners move to take evidence not in the record, pursuant to OAR 661-010-
10 0045(1) and (2).[7] Specifically, petitioners request that the Board consider five documents not
11 in the record, attached as exhibits to the motion. Exhibit 1 is the warranty deed to lot 179,
12 petitioners' property within the Butte Crest subdivision. Exhibit 2 is a county assessment
13 roll, dated November 15, 2001, indicating that petitioners own lot 179. Exhibit 3 is a site
14 plan to the Butte Crest subdivision, showing the proximity of lot 179 to lot 203. Exhibit 4 is
15 a copy of the Covenants, Conditions and Restrictions (CC&Rs) for the Butte Crest
16 subdivision. Exhibit 5 is a transcript of the testimony of a city planner, taken during a circuit

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[7]OAR 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 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
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> "(2) Motions to Take Evidence:
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> "(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:
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> "(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish[.]"

court proceeding between petitioners and intervenor. Supporting the motion is the affidavit of petitioner Michelle Rogers.

The motion indicates that the exhibits contain evidence that petitioners believe is necessary to establish the following claims: (1) that petitioners live within 100 feet of lot 203 and thus were entitled to individual mailed notice of the public hearings held by the city in this case; and (2) that the city's decision adversely affects an enforceable property interest of petitioners found in the CC&Rs, specifically a restriction on development of lot 203 that, in petitioners' view, prohibits converting that lot to a street. We understand that exhibits 1, 2, 3 and 5 are offered to establish the predicate facts to support the first claim, while exhibit 4 is offered to establish what the CC&Rs require, in support of the second claim.

The city and intervenor (respondents) oppose petitioners' motion on a number of grounds. For the following reasons, we agree with respondents that petitioners' motion must be denied.

A. Exhibits 1, 2, 3 and 5

The city responds, in part, that the motion with respect to exhibits 2, 3 and 5 should be denied because evidence regarding the proximity of lot 179 to lot 203 and the city's failure to provide notice to petitioners is already in the record. We understand the city to concede that petitioners own lot 179, and to assert that the record already contains evidence establishing that lot 179 is within 100 feet of lot 203, that the city did not provide notice to petitioners, and therefore the evidence to that effect in exhibits 2, 3 and 5 is unnecessary. Intervenor objects that exhibits 1, 2, 3 and 5 are "irrelevant"; however, we do not understand intervenor to dispute that petitioners own lot 179, that lot 179 is 100 feet from lot 203, and that the city did not provide notice of the hearing to petitioners.[8]

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[8]The city and intervenor may indeed dispute the claim that petitioners advance or may advance based on those facts, *i.e.*, that petitioners were entitled to receive notice of the hearing and the city's failure to provide such notice is reversible error, but we do not understand either the city or intervenor to dispute the underlying facts.

1 Without "disputed factual allegations," we have no basis to grant a motion to take
2 evidence not in the record under OAR 661-010-0045. *Wilbur Residents v. Douglas County*,
3 33 Or LUBA 761, 765 (1997). Under such circumstances, it is appropriate for petitioners to
4 assert the foregoing allegations in the petition for review, in support of an assignment of
5 error. If either respondent disputes those allegations, or objects that they are not supported in
6 the record, petitioners may then renew their motion to take evidence. *Horizon Construction,*
7 *Inc. v. City of Newberg*, 25 Or LUBA 656, 662 (1993).[9]

8 **B. Exhibit 4**

9 Exhibit 4, the CC&Rs for the Butte Crest subdivision, provides in relevant part that:

10 "No building or other structure shall be constructed, erected or permitted on
11 any portion of any lot lying within the platted area other than single building
12 or structure designed for single family residence purposes * * *." Petitioners'
13 Motion to Take Evidence Exhibit 4, Page 2.

14 Petitioners state that the assignments of error in the petition for review will allege
15 constitutional error, based on the above-quoted restriction, and argue that LUBA must have
16 exhibit 4 before it in order to resolve such assignments of error.

17 The city and intervenor respond that petitioners' motion fails to explain "with
18 particularity what facts the moving party seeks to establish, how those facts pertain to the
19 grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will
20 affect the outcome of the review proceeding." OAR 661-010-0045(2). We agree.
21 Petitioners' theory of constitutional error, as shown in the motion and related pleadings, is
22 conclusory and undeveloped, and fails to establish a basis under OAR 661-010-0045(2) to

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[9]In *Horizon Construction, Inc.,* we stated:

"* * * To minimize the need for lengthy delays to resolve motions for evidentiary hearing, it is the practice at LUBA for a party that wishes the Board to consider a document not in the local record, for one of the purposes described [in ORS 197.835(2)(b)], to attach that document to its brief and explain in its brief why the Board should consider the document. If another party does not object to the Board considering the document, the document becomes part of the Board's record (although not the local record) and is considered by the Board for the requested purpose. If an objection is entered, the party offering the document may then file a motion for evidentiary hearing under [OAR 661-010-0045]. * * *" 25 Or LUBA at 662.

take evidence not in the record. It is also premature. As noted above, the Board's practice and preference in most cases is to address motions under OAR 661-010-0045 after the parties have submitted briefs on the merits. *Horizon Construction, Inc.*, 25 Or LUBA at 662; *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550, 555-56 (1991). We do not understand either the city or intervenor to dispute that the above-quoted portion of the CC&Rs for the Butte Crest subdivision says what it says, although they presumably dispute that it means what petitioners apparently believe it to mean, or that it forms the basis for reversible error. They may also dispute that the Board should consider the CC&Rs, in resolving any assignment of error brought by petitioners. However, consistent with the above-cited cases, we see no reason why petitioners cannot assign error to the city's decision, based on a more developed constitutional theory, and cite to the CC&Rs in support of that assignment of error. If the city or intervenor objects to our consideration of the CC&Rs, petitioners may renew their motion to take evidence, this time with the support of a more developed argument. As we explained in *Citizens Concerned*, when disputes regarding extra-record evidence proceed in this manner, LUBA "has the benefit of a reasonably clear view of both the disputed facts and the parties' legal arguments, and may determine whether the disputed allegations of fact will affect the outcome of the appeal and whether an evidentiary hearing is, therefore, warranted." *Id.* at 555-56.

For the foregoing reasons, petitioners' motion to take evidence is denied.

SCHEDULE

Filing of the motion to take evidence suspends the time limits for all other events in our review proceeding. OAR 661-010-0045(9). Consistent with the expedited schedule earlier proposed by petitioners, the petition for review shall be due 14 days from the date of this order, and the response brief(s) shall be due 21 days thereafter.

Dated this 18th day of July, 2002.

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2 __________________________________
3 Tod A. Bassham
4 Board Member