

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 HOWARD MEREDITH,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF LINCOLN CITY,  
10 *Respondent.*

11  
12 LUBA No. 2002-167

13 ORDER ON MOTION  
14 FOR EVIDENTIARY HEARING

15 On January 14, 2003, petitioner filed a motion to take evidence not in the record  
16 pursuant to OAR 661-010-0045.<sup>1</sup> Petitioner seeks to establish the following “facts”: (1) that  
17 he has installed light emitting diodes on his existing sign, and that installation does not  
18 change the size and shape of the existing sign; (2) his purpose in installing the diodes is to  
19 engage in constitutionally protected speech; and (3) the message currently displayed on the  
20 existing sign is the subject of ongoing litigation between petitioner and the Oregon

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<sup>1</sup> 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 [the] unconstitutionality 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 Department of Transportation (ODOT). Motion to Take Evidence 1-2.

2 **A. Background**

3 We take the following facts from the record and the parties' pleadings. Petitioner  
4 owns an undeveloped lot zoned General Commercial (GC) located adjacent to Highway 101.  
5 On January 27, 1997, the city adopted Ordinance 97-01, which in relevant part prohibited  
6 signs on undeveloped lots in several zones, including the GC zone. On January 28, 1997,  
7 petitioner applied for a sign permit, to construct a 100-square foot, unilluminated,  
8 freestanding sign on the property. Shortly thereafter, on February 12, 1997, petitioner  
9 installed the proposed sign, without receiving the requested permit.<sup>2</sup> On February 27, 1997,  
10 Ordinance 97-01 became effective. As a result of litigation between petitioner and the city,  
11 the parties subsequently entered a settlement agreement under which the city agreed to issue  
12 a permit for the sign. The city also stipulated that nothing in the agreement affects or limits  
13 petitioner's right to change the copy on the sign face.

14 On July 8, 2002, petitioner filed a sign permit application with the city, proposing to  
15 alter the existing sign. The application stated that the sign would have "[i]nternal" and  
16 "[i]ndirect" lighting, and would be altered to "[a]dd copy without changing existing signage  
17 area to display moving and/or flashing signs indicating time, tide and temp." Record 14.  
18 Petitioner did not submit any construction plan or other details. On July 31, 2002, the  
19 planning director asked petitioner to clarify his proposal, and to submit construction plans so  
20 that the city could review the nature and extent of the proposed modifications. In particular,  
21 the planning director requested more information regarding the proposed lighting. Petitioner  
22 responded that no structural changes are proposed and the city should rely on the plans  
23 submitted with the 1997 application. Petitioner clarified that:

24            "\* \* \* An electronic message will be added to the sign, without increasing the  
25            display area. The electronic message will be internally illuminated, and there

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<sup>2</sup> The text of the woodcarved sign apparently read "I think Lincoln City has the worst state planner in the state of Oregon" and "Personal Opinion of Howard Merideth."

1 will be no substantial change of the existing indirect illumination on the  
2 premises.” Record 217.

3 On September 18, 2002, the planning director denied the application on the following  
4 grounds:

5 “1. The existing sign is non-conforming in that it is on an undeveloped lot  
6 in the [GC] zone, which are prohibited under Zoning Ordinance  
7 13.040(7).

8 “2. The proposed alteration amounts to a ‘structural alteration.’ Structural  
9 alterations are not permitted to be made to non-conforming signs under  
10 Zoning Ordinance 13.080 unless they are brought into conformance  
11 with the current sign regulations. In this case that is an impossibility  
12 since the only way to bring the existing sign into conformance with  
13 current regulations is to remove it.” Record 216.

14 Petitioner appealed the planning director denial to the city planning commission,  
15 disputing, among other things, the planning director’s determination that the proposed  
16 alteration was a “structural alteration.” Record 215. The staff report for the planning  
17 commission hearing described the proposed alteration as a proposal

18 “\* \* \* to add an internally lighted ‘box’ to the existing wooden sign that will  
19 contain changeable time, temperature and tide information. Although no  
20 construction plans were provided showing how this will be added to the  
21 existing sign, it will change the shape of the sign in that now a different  
22 lighted area will be displayed. Additionally, it will change the shape of the  
23 sign in terms of volume in that the existing volume will be changed by the  
24 addition of the box. The original sign permit indicated that the sign would not  
25 have illumination. The current request indicates both internal and indirect  
26 lighting. This, again, alters the visible sign shape.” Record 203.

27 Following an evidentiary hearing, the planning commission voted to deny petitioner’s  
28 appeal, affirming the planning director’s decision, on the grounds that the proposed alteration  
29 was a “structural alteration” and thus not permissible with respect to a non-conforming sign.  
30 Petitioner appealed the planning commission’s decision to the city council, which conducted  
31 a hearing on the record before the planning commission. The final order of the city council,  
32 issued on November 25, 2002, affirmed the planning commission decision, with additional  
33 findings. In relevant part, the city council found:

1           “The Council accepts and believes the evidence in the record that in order for  
2 [petitioner] to make the change he has applied for, so that his sign will be able  
3 to display moving and/or flashing signs indicating time, tide and temperature,  
4 it will be necessary for him to install material and parts that will support and  
5 contain electronics, including the light emitting diodes that will provide the  
6 sign message; and that those materials and parts will be within a box that will  
7 increase the depth and thus the size and shape of that which has been  
8 constructed to support the sign message. If this evidence is incorrect,  
9 [petitioner] had the burden of proving otherwise. [Petitioner] declined,  
10 however, to submit construction drawings showing the changes that would  
11 have to be made. Neither did he otherwise substantially contradict this  
12 evidence. He therefore did not meet the burden of proving otherwise. Rather,  
13 he appeared only to argue that the change would not constitute a ‘sign  
14 structural alteration.’ In accord with the Council’s interpretation of the term  
15 ‘sign structural alteration,’ however, the change will constitute a structural  
16 alteration of the sign.” Record 23.

17           Petitioner’s appeal to LUBA followed.

18           **B. Evidence Regarding Alterations**

19           As noted, petitioner moves to take evidence not in the record to establish three  
20 alleged “facts.” The first is that

21           “Petitioner has installed light emitting diodes on the subject sign, and those  
22 materials are not within a box that increases the depth and thus the size and  
23 shape of that which has been constructed to support and contain the sign  
24 message. A photograph is attached as Exhibit A to petitioner’s affidavit  
25 herein.” Motion to Take Evidence 1.

26           Exhibit A is a photograph of the sign. The photograph shows two circular objects that appear  
27 to be an analog wall clock and an analog temperature gauge attached to the bottom portion of  
28 the sign.<sup>3</sup> The photograph also shows an electrical meter between two posts and, in front of  
29 the sign, two additional posts with what appear to be floodlights on them, directed at the  
30 sign.<sup>4</sup> In an affidavit attached to the motion, petitioner states:

31           “Since receiving the respondent’s Final Order from which I have filed my  
32 Notice of Intention to Appeal in the matter, I have installed lights on my

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<sup>3</sup> Although the change appears to have no relevance to this case, the photograph also shows that the sign text now reads “ODOT is in violation of President of USA Executive Order 12630 of Fifth Amendment and Ore Constitution Article 1 Section 8 and 20. Opinion H.E. Merideth.” Motion to Take Evidence, Exhibit A.

<sup>4</sup> If the photograph shows any “light emitting diodes,” we do not see them.

1 outdoor sign to assist in the publication of my political beliefs. I attach a  
2 photograph which fairly and accurately depicts my outdoor sign. \* \* \* The  
3 photograph demonstrates, and I depose and say herein, that I added flashing  
4 lights on my sign without the need to structurally change the size, shape, or  
5 dimension of my sign. Therefore, respondent's conclusion that flashing lights  
6 could not be attached to my sign without installing a box that would change  
7 the size, shape, and depth of my sign is not supportable by evidence. \* \* \*.”  
8 Affidavit of Howard Meridith 1.

9 Petitioner argues that the proffered evidence will affect the outcome of this review  
10 proceeding “by demonstrating that the petitioner can engage in constitutionally protected  
11 speech by adding electronics to the existing permitted sign without the need to install a box  
12 altering the size and shape of the sign, and without otherwise ‘structurally altering’ the sign  
13 \* \* \*”. Motion to Take Evidence 3.

14 The city advances a number of responses, but we need address only one. The city  
15 argues that petitioner had ample opportunities during the city's evidentiary proceedings to  
16 submit evidence as to whether the sign could be altered without changing the structure.  
17 According to the city, petitioner failed to seize those opportunities and is now belatedly  
18 trying to introduce evidence into the record to support his burden of proof before the city.  
19 We agree with that characterization and that taking evidence into LUBA's record for that  
20 purpose under OAR 661-010-0045 is not permissible. *See St. Johns Neighborhood Assn. v.*  
21 *City of Portland*, 33 Or LUBA 836, 838 (1997) (evidentiary proceedings before LUBA do  
22 not provide a mechanism to add to the local record facts that could have been, but were not,  
23 submitted during the proceedings below); *Palmer v. Lane County*, 32 Or LUBA 484, 487  
24 (1997) (parties may not use an evidentiary hearing before LUBA to expand on their  
25 evidentiary presentation below).

26 **C. Constitutionally Protected Speech**

27 The second “fact” petitioner wishes to establish is that:

28 “Petitioner installed light emitting diodes on the subject sign to engage in  
29 constitutionally protected speech under Article I, Section 8 of the Oregon  
30 Constitution and Amendments I and XIV of the United States Constitution.”  
31 Motion to Take Evidence 1.

1           The city responds, and we agree, that whether petitioner’s alterations are intended to  
2 engage in constitutionally protected speech is a legal conclusion, not an assertion of fact.  
3 Our authority under ORS 661-010-0045 is limited to “disputed factual allegations.” *See*  
4 *Jones v. Lane County*, 27 Or LUBA 654, 655 (1994) (an evidentiary hearing is not warranted  
5 where the dispute between parties concerns only the legal conclusions or consequences to be  
6 drawn from facts in the record).

7           **D.       Litigation with ODOT**

8           The third “fact” that petitioner wishes to establish is that:

9           “[The] message displayed on petitioner’s sign is the subject of ongoing  
10 litigation between petitioner and [ODOT], in state and federal court. The  
11 constitutionality of the government limiting petitioner’s free expression on the  
12 subject sign are challenged in [those] proceedings \* \* \*.” Motion to Take  
13 Evidence 1-2.

14           However, petitioner offers no explanation for how that alleged fact pertains to any  
15 ground for taking evidence under OAR 661-010-0045(1), or how the alleged fact will affect  
16 the outcome of this review proceeding. OAR 661-010-0045(2)(a).

17           The motion to take evidence not in the record is denied.

18           Pursuant to OAR 661-010-0045(9), the petition for review is due 21 days, and the  
19 response brief due 42 days, from the date of this order. The Board’s final opinion and order  
20 is due 77 days from the date of this order.

21           Dated this 13th day of March, 2003.

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Tod A. Bassham  
Board Chair