

1 copy of a September 7, 2007 letter from Kane to the city that lists others.

2 On September 14, 2007, the city responded to Kane’s “Objections,” arguing that the
3 August 30, 2007 document states no record objections and should be denied. On September
4 17, 2007, petitioner Oien submitted an “affidavit” that, among other things, includes what
5 appear to be several objections to the record. On September 20, 2007, petitioner Kane
6 submitted an “affidavit” replying to the city’s September 14, 2007 response. Finally, on
7 September 28, 2007, Kane submitted an additional reply to the city’s September 14, 2007
8 response. Attached to the reply is another copy of Kane’s September 7, 2007 letter to the
9 city. We now attempt to sort out and resolve the issues that arise from these miscellaneous
10 pleadings.

11 **A. Motions to Compel the City to Comply with Public Record Requests**

12 As the city notes, LUBA does not have jurisdiction to enforce public records laws.
13 *Jackman v. City of Tillamook*, 29 Or LUBA 391, 400 (1995). Kane’s two motions to compel
14 compliance with the public records laws are denied.

15 **B. Motion to Compel the City to File an Amended Record**

16 This motion is in essence an objection to the record, repeated in other pleadings. As a
17 motion, it is denied.

18 **C. August 30, 2007 “Objections to the Record”**

19 As the city points out, the August 30, 2007 pleading entitled “Objections to the
20 Record” in fact describes no specific objections to the record. At best, it advances only a
21 general concern that documents are missing and some pages are not numbered. Kane
22 followed that document, however, with a September 4, 2007 letter to the city and subsequent
23 letters and pleadings filed with LUBA that adequately describe several objections to the
24 record, discussed below. Although the August 30, 2007 pleading did not comply with our
25 rules regarding record objections, we decline the city’s invitation to summarily reject Kane’s
26 record objections based on the inadequate August 30, 2007 pleading. Our rules allow for the

1 filing of precautionary record objections, to allow the parties time to work out record
2 objections. While a precautionary record objection like any other record objection must state
3 specific objections, it appears that petitioner met the intent of the rule by immediately
4 following up with specific objections and attempting to work out his record objections with
5 the city. OAR 661-010-0005 (technical violations not affecting the substantial rights of
6 parties shall not interfere with the review of a land use decision or limited land use
7 decision).¹

8 At the same time, we do not believe that it is appropriate or consistent with our rules
9 to allow petitioners unlimited time and opportunity to add new and ever-evolving record
10 objections. Accordingly, we shall consider only those sufficiently-stated record objections
11 we can glean from petitioners' pleadings that were filed with LUBA on or before the date of
12 the city's response, September 14, 2007. In other words, we shall consider only those
13 objections stated in Kane's August 30, 2007 pleading and Kane's September 11, 2007
14 motion, including objections stated in the September 4, 2007 and September 7, 2007 letters
15 to the city attached to that motion.

16 **D. Inverse Chronological Order**

17 In the September 4, 2007 letter petitioner Kane complains that the record is not
18 entirely organized in inverse chronological order, as OAR 661-010-0025(4)(a)(E) requires.²

¹ We note, however, that those record objections are buried in numerous pages of confusing verbiage and irrelevant argument.

² OAR 661-010-0025(4)(a) provides, in relevant part:

“The record, including any supplements or amendments, shall:

“(A) Be filed in a suitable folder; the cover shall bear the title of the case as it appears in the Notice or in the Board's order consolidating multiple appeals, and the Board's numerical designation for the case, and shall indicate the numerical designation given the land use decision or limited land use decision by the governing body; if the record consists of multiple volumes, the cover shall indicate the page numbers contained in each volume;

1 However, petitioner does not identify what particular portions of the record do not comply
2 with the rule, or explain why any noncompliance with the rule affects the Board’s or the
3 parties’ ability to use the record. This objection is denied.

4 **E. Record Table of Contents**

5 In the affidavit to the September 11, 2007 motions, petitioner Kane argues that the
6 record table of contents does not list each item contained therein, as OAR 661-010-
7 0025(4)(a)(B) requires, but instead lists several thousand pages of miscellaneous material
8 submitted by petitioner Kane together as single items. For example, petitioner argues, item
9 20 is described as “Appellant Submittal: Materials from Appellant Henry Kane, dated 5/21 –
10 5/23/07.” Item 20 includes over a thousand pages of documents from an earlier related
11 appeal, occupying Record 301 to Record 1313. Similarly, Item 50 is described as
12 “Correspondence from Appellant Henry Kane.” Item 50 occupies Record 1667 to Record
13 5258, and spans eight volumes of the 11-volume record. Item 50 appears to consist largely
14 of portions and summaries of hundreds of medical reports and studies. Petitioner also
15 argues that documents at Record 1535-69, 1570-88, and 1589-1615 should be separately
16 listed.

17 The city does not respond to this objection. We agree with petitioner, in the abstract,
18 that a record table of contents that, for example, lists thousands of pages of miscellaneous
19 material spread over eight volumes as single item does not comply with the OAR 661-010-

“(B) Begin with a table of contents, listing each item contained therein, and the page of the record where the item begins (see **Exhibit 2**), and listing each large map, tape, item or document retained by the governing body under section (2) of this rule;

“* * * * *

“(E) Be arranged in inverse chronological order, with the most recent item first. Upon motion of the governing body, the Board may allow the record to be organized differently.

1 0025(4)(a)(B) requirement that the table of contents list “each item contained therein, and the
2 page of the record where the item begins * * *.” On the other hand, petitioner apparently
3 made little effort, in presenting this undigested mass of material on the city, to organize the
4 material in any way that would assist the city in preparing the table of contents. Petitioner is
5 presumably familiar with the material he submitted to the city. Therefore, we order the
6 following:

- 7 1. Within seven days of the date of this order petitioner Kane may submit to the
8 city a proposed revised table of contents that more specifically lists the
9 various documents that currently comprise items 20 and 50, and Record 1535
10 to 1615.
- 11 2. If petitioner Kane submits such a revised table of contents, the city shall
12 submit the revised table of contents to LUBA within 14 days of the date of
13 this order. The city may make any revisions it deems necessary to any table
14 of contents proposed by petitioner.
- 15 3. If petitioner Kane does not submit to the city a revised table of contents within
16 the time specified above, this objection will be denied.

17 **F. Omitted Documents**

18 Petitioner Kane’s September 7, 2007 letter to the city describes with reasonable
19 specificity a dozen or more documents that petitioner asserts are omitted from the record,
20 totaling 68 pages. The city’s September 14, 2007 response does not address these objections,
21 other than to state that “[i]f Mr. Kane would have reviewed the record, he could have easily
22 found the pages he claims are missing.”

23 The city’s position, apparently, is that the documents petitioner describes as missing
24 are in fact found in the record. However, the city does not identify the location of those
25 documents in the record, to assist the Board in resolving this objection. The table of contents
26 is of no assistance, for the reasons set out above. Within 14 days of the date of this order, the

1 city shall submit to LUBA (1) a supplemental record that includes any of the described
2 documents that the city agrees were omitted, and/or (2) a response that explains why a
3 supplemental record is not warranted. If the city believes that some or all of the identified
4 documents are currently in the record, the city's response may simply identify their location
5 in the record.

6 **G. Any Remaining Objections**

7 As noted, we have not considered any objections or other arguments in petitioners'
8 pleadings filed after the city's September 14, 2007 response. Any such objections are denied
9 without further discussion. To the extent the pleadings filed before that date include
10 objections other than those addressed above, such objections are not sufficiently stated for
11 our review and are also denied without discussion.

12 Dated this 10th day of October, 2007

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Tod A. Bassham
Board Member