

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 BONNIE BRODERSEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF ASHLAND,
10 *Respondent,*

11 and

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13
14 WILLIAM MCDONALD and LYNN MCDONALD,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2010-056

18 ORDER ON RECORD OBJECTIONS

19 **INTRODUCTION**

20 This appeal concerns a planning commission decision approving a new or modified
21 application for a physical and environmental constraints permit authorizing a driveway. The
22 original decision approving the driveway was issued in 2007. That original 2007 decision
23 was appealed to LUBA and assigned LUBA No 2007-162. LUBA ultimately affirmed the
24 city's original 2007 decision. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007)
25 (*Brodersen I*).

26 In 2009, intervenors-respondents filed an application with the city to modify the 2007
27 permit, to move the location of the proposed driveway. In November 2009, city planning
28 staff approved the modified permit, and petitioner appealed the staff-approved modified
29 permit to the planning commission. On June 8, 2010, the planning commission approved
30 intervenors-respondents' application, apparently both as a modification of the 2007 permit
31 decision and as a new permit decision. Petitioner then appealed the planning commission
32 decision to LUBA. The city transmitted the original record on July 6, 2010. On July 15,
33 2010, the city transmitted an amended table of contents that purports to incorporate the

1 record in the earlier *Broderson I* appeal, LUBA No. 2007-162, into the record of LUBA No.
2 2010-056.

3 In a record objection filed July 23, 2010, petitioner argues that the purported
4 incorporation of the record in LUBA No. 2007-162 into the record of the 2010 planning
5 commission decision was untimely and ineffective. Petitioner also objects to the omission of
6 certain documents that she believed had been placed before the planning commission.

7 On August 10, 2010, the city transmitted an amended record that was intended to
8 replace the original record, accompanied by a response to petitioner's record objection. The
9 amended record's table of contents again reflects the incorporation of the record in LUBA
10 No. 2007-162. In its responses, the city sets out several theories supporting the inclusion or
11 incorporation of the LUBA No. 2007-162 record into the record of this appeal. The amended
12 record includes the documents that petitioner argued the city improperly omitted from the
13 original record.

14 Petitioner moves to strike the amended record and the city's response, as untimely.
15 Petitioner also renews her objection to the purported incorporation of the record in LUBA
16 No. 2007-162. In addition, petitioner argues that the amended record improperly includes
17 additional documents that were not placed before the planning commission. Finally,
18 petitioner argues that the record should include copies of superseded land use ordinances.
19 We now resolve the motion to strike and the record objections.

20 **MOTION TO STRIKE AMENDED RECORD AND RESPONSE**

21 OAR 661-010-0026(4) provides that a party may file a response to a record objection
22 within 14 days of the date that the objection was served on the party. Our rules provide no
23 deadline for filing an amended or supplemental record. The response and amended record
24 were filed 17 days after petitioner filed her record objections. Petitioner argues that the
25 timing of the filing of the amended record prejudiced her substantial rights. OAR 661-010-
26 0005 (technical violations of LUBA's rules not affecting the substantial rights of the parties

1 shall not interfere with the review of a land use decision). Petitioner states that she was
2 scheduled to leave for a one-week vacation on August 12, 2010, and the receipt of the
3 amended record on August 10, 2010, did not leave her sufficient time to review the amended
4 record before leaving on vacation.

5 However, as noted there is no deadline under our rules to file an amended or
6 supplemental record. Petitioner had 14 days under OAR 661-010-0026(2) to file an
7 objection to the amended record, and did in fact file such an objection. If due to her vacation
8 petitioner needed additional time beyond 14 days to review the amended record, a request to
9 that effect could easily have been filed, and would have been unlikely to draw an objection
10 from the city. Petitioner filed no such request. To the extent petitioner argues that the three-
11 day delay in filing the response memorandum itself prejudiced her substantial rights, she
12 identifies no such prejudice and we see none. The motions to strike the city's response and
13 to strike the amended record are denied.

14 **RECORD OBJECTIONS**

15 **A. Incorporation of Record in LUBA No. 2007-162**

16 The amended table of contents states that “[t]he record for this LUBA case includes
17 the entire Record of LUBA No. 2007-162, and that prior record is hereby incorporated into
18 the record of this appeal.”

19 Petitioner argues first that the city cannot, in preparing the record table of contents,
20 effect an incorporation of documents that were not in fact included or incorporated into the
21 record by the final decision maker during the proceedings below. We agree that, to the
22 extent the city is purporting to effect the incorporation of the record in LUBA No. 2007-162
23 into the record of the present appeal by inserting words of incorporation into the amended
24 table of contents, the attempt fails. OAR 661-010-0025(4)(b) provides that “[w]here the
25 record includes the record of a prior appeal to this Board, the table of contents shall specify
26 the LUBA Number of the prior appeal, and indicate that the record of the prior appeal is

1 incorporated into the record of the current appeal.” However, OAR 661-010-0025(4)(b) is
2 referring to circumstances where the record of the prior appeal has actually been included in
3 the new record during the proceedings below, either because it was placed before the final
4 decision maker, specifically incorporated into the record by the final decision maker, or is
5 otherwise incorporated by operation of law.¹ Local government staff, in preparing the table
6 of contents for a record on appeal to LUBA, cannot incorporate by reference documents that
7 were not in fact incorporated into the record during the proceedings below.

8 However, the city does not appear to argue that the table of contents itself effects the
9 incorporation of the record in LUBA No. 2007-162. In its pleadings, the city argues that the
10 record in LUBA No. 2007-162 was either “placed before” the planning commission during
11 the proceedings below, or was specifically incorporated into the record in several ways.² We
12 need not address the city’s theories regarding how the record in LUBA No. 2007-162 was
13 specifically incorporated into the record, because the city has adequately demonstrated that
14 the record in LUBA No. 2007-162 was “placed before” the planning commission.

15 The city first argues that because the 2009 application was for a modification of the
16 2007 permit, the city planning manager who issued the initial November 22, 2009 decision
17 approving the 2009 application necessarily had before her the record of the 2007 approval.
18 Record 449 (November 22, 2009 planning manager decision adopting by reference the
19 “whole record of the original approval”). We understand the city to take the position that the
20 “whole record” before planning staff included not only the original planning file but the

¹ Where the decision on appeal is on *remand* from LUBA, we have held that the record of the prior appeal is presumed to be included into the record of the decision on remand, unless the local government on remand expressly excluded it from the record. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 611, 612-13 (2004). However, that presumption does not apply in the present case, because the challenged decision is not on remand from LUBA.

² OAR 661-010-0025(1)(b) provides in relevant part that the record transmitted to LUBA shall include “[a]ll written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.”

1 record on appeal in LUBA No. 2007-162. When the November 22, 2009 decision was
2 appealed to the planning commission, the city states that planning staff “physically took all
3 of the files associated with [the 2007 and 2009 applications], including the record for LUBA
4 No. 2007-162, to the Planning Commission meetings.” August 20, 2010 Response, 5.
5 Moreover, the city argues that it is the planning commission’s practice that copies of the
6 record are not printed out for the commissioners, unless the commissioners request, and
7 instead planning staff provide packets that include links to the city’s website where
8 electronic copies of the record before the planning commission can be found. According to
9 the city, the staff packet provided to the planning commission for the April 13, 2010 planning
10 commission hearing included a page stating: “For packet material relating to the previous
11 approval and subsequent LUBA appeal, see <http://www.ashland.or.us/GrandviewAppeal>.”
12 Record 399. Following that link, we understand the city to argue, leads to an electronic copy
13 of the same record in LUBA No. 2007-162 that was carried by staff to the planning
14 commission hearings and is listed in the amended table of contents. We understand the city
15 to argue that this is a customary manner for planning commission members to review
16 documents in the record. In addition, the city argues, it is evident that the planning
17 commission in fact examined the record in LUBA No. 2007-162, because the planning
18 commission’s final decision cites repeatedly to LUBA’s decision in that appeal and addresses
19 various arguments petitioner presented based on assignments of error in that appeal.

20 Finally, the city notes, the planning commission’s final decision states that “[b]ecause
21 of the nature of this application, the entire record for PA 2006-01784/LUBA 2007-162 has
22 been incorporated into this record to support this application.” Record 8. The above
23 language is framed in the past tense, and we understand the city to argue that that language
24 does not purport to effect incorporation of documents not previously before the planning
25 commission, but instead simply recognizes that the record in LUBA No. 2007-162 had been

1 previously incorporated or was actually before the planning commission during the
2 proceedings on the 2009 application.³

3 There are potential pitfalls in each of the city’s arguments for how the record in
4 LUBA No. 2007-162 was “placed before” the planning commission during the proceedings
5 below, within the meaning of OAR 661-010-0025(1)(b). The practice of staff directing
6 decision makers and hearing participants to copies of electronic documents through a website
7 link placed on the local government’s website is particularly fraught with potential for
8 confusion regarding what is in the record, however convenient that practice may be.⁴
9 Nonetheless, taken together, it seems evident that during the proceedings before the planning
10 commission, both planning staff and the planning commission believed that the record in
11 LUBA No. 2007-162 was before the planning commission. Planning staff brought physical
12 copies of the record in LUBA No. 2007-162 to the planning commission hearings, and in
13 packets given to the commission directed commissioners to additional “packet material,”
14 consisting of electronic copies of the record in LUBA No. 2007-162 found on the city’s
15 website. The planning commission decision includes findings that appear to be based on
16 review of the record in LUBA No. 2006-162. While the city certainly could have been

³ Petitioner argues that it is impermissible for the city to effect incorporation of documents into the record in its final decision, which was issued after the close of the evidentiary record, without providing participants an opportunity to respond to those newly incorporated documents. We understand petitioner to argue that any such incorporation in the final decision is either ineffective or, if effective, would constitute reversible procedural error. Because we do not understand the planning commission decision to effect incorporation of the record in LUBA No. 2007-162, we need not address this argument. However, if petitioner believes that the city otherwise committed procedural error in the manner it placed the record in LUBA No. 2007-162 before the planning commission, petitioner is free to advance an assignment of error to that effect in her petition for review.

⁴ Petitioner disputes that the city in fact had placed a link to an electronic copy of the record in LUBA No. 2007-162 on its website at the time of the April 13, 2010 planning commission hearing. According to petitioner, she checked the city’s website in early May and found no such link or documents at that time. Petitioner alleges that the city placed the link to the electronic copy of the record in LUBA No. 2007-162 on its website sometime thereafter, in a belated attempt to include those documents in the record to support the planning commission decision. The city on the other hand cites to the packet material at Record 399 as evidence that the LUBA No. 2007-162 record was on the city’s website at the time of the April 13, 2010 hearing. We need not resolve that dispute here.

1 clearer during the proceedings below about what was included in the record, based on the
2 foregoing, the city has adequately established that the record in LUBA No .2007-162 was in
3 fact “placed before” the planning commission during the commission hearings, when staff
4 physically brought the record before the planning commission and gave the commissioners a
5 packet including a link to the city’s website where, staff indicated, a copy of that record
6 could be viewed.

7 That said, it is not clear to us what “the record of LUBA No. 2007-162” consists of,
8 for example whether it includes only the local record transmitted to LUBA in that appeal, or
9 also includes the record compiled on appeal, such as the parties’ briefs and LUBA’s final
10 decision. The amended record does not physically include a copy of that record, and LUBA
11 no longer has the copy of the local record that the city transmitted to LUBA in LUBA No.
12 2007-162. Generally, after LUBA issues its final opinion and order and all appeal deadlines
13 run, LUBA will either return its copy of the local record to the local government, or recycle
14 it if the local government does not want it returned. That is especially the case if the decision
15 is affirmed and there is no chance that a decision on remand will come before LUBA. In
16 such circumstances, a local government that includes or incorporates the record of a prior
17 appeal into the record of a new appeal must transmit a physical copy of that prior record to
18 LUBA. It is insufficient to simply list the prior record in the table of contents as an
19 incorporated record pursuant to OAR 661-010-0025(4)(b).

20 In the present case, the city apparently believes that the electronic documents placed
21 on its website represent “the record of LUBA No. 2007-162” that was placed before the
22 planning commission. However, even assuming that is the case, the city must still transmit
23 an actual copy of “the record of LUBA No. 2007-162” to LUBA and, if necessary, serve a
24 copy of that record on petitioner. Placing documents on a local government’s website is
25 insufficient to transmit those documents to LUBA or to serve them on the parties as required
26 under our rules. Documents located on a website may be modified, links can be lost,

1 webpages removed, etc. For purposes of LUBA’s review, the Board must have before it a
2 concrete, usable copy of the record on review.

3 Therefore, the city must either transmit to LUBA, with service on petitioner, (1) a
4 paper copy of what it believes to be the “record of LUBA No. 2007-162,” or (2) an electronic
5 copy of that record on a read-only compact disc, in a .pdf file or similar readable format. If
6 the city elects the first option, and petitioner already possesses a complete copy of “the
7 record of LUBA No. 2007-162” from the earlier appeal, the city need not serve petitioner an
8 additional paper copy. If the city elects the second option, the city shall serve petitioner with
9 a copy of the compact disc that is transmitted to LUBA. Whichever option the city chooses,
10 if the documents included in the supplemental record do not already include an adequate
11 internal table of contents, the city shall supply a table of contents for the supplemental
12 record.

13 This objection is sustained, in part.

14 **B. Additional Documents included in the Amended Record**

15 As noted, the amended record includes a number of documents that the city added at
16 petitioner’s request. Petitioner objects that in doing so the city also included approximately
17 115 pages of new documents that, petitioner argues, the city has not demonstrated were
18 placed before the final decision or otherwise properly included in the record. The only
19 specific example petitioner provides of a new document that she believes is improperly
20 included is the November 22, 2009 planning staff decision approving the 2009 modification
21 application. Petitioner argues that the city has provided no evidence that the staff decision
22 was “placed before” the planning commission.

23 The city responds that the additional 115 pages in part represent missing pages from
24 several documents that were included in the original record, and that the remaining additional
25 documents represent items before the planning commission that were inadvertently omitted
26 in the original record. The city’s response does not specifically address the November 22,

1 2009 planning staff decision. However, there is no dispute that petitioner appealed that
2 decision to the planning commission. Petitioner does not explain how the planning
3 commission could possibly conduct an appeal proceeding on the November 22, 2009 staff
4 decision without having that staff decision before them, and we conclude that the staff
5 decision is properly part of the record before the planning commission. With respect to the
6 remaining additional documents, because neither party identifies which documents are in
7 dispute, and the city takes the position, to which petitioner does not respond, that all
8 additional documents in the amended record were before the planning commission, this
9 objection is denied.

10 **C. Superseded Ordinances**

11 Petitioner argues that the record should include copies of superseded ordinances that
12 were in effect in 2006, which petitioner argues are not readily accessible to petitioner.
13 However, petitioner does not argue that any superseded ordinance was placed before the final
14 decision maker. To the extent petitioner wishes to draw our attention to a superseded
15 ordinance in effect in 2006, petitioner can attach a copy of the superseded ordinance to her
16 petition for review and request that LUBA take official notice of the ordinance. With respect
17 to petitioner's complaint that it is difficult to obtain access to the city's superseded
18 ordinances, it is beyond LUBA's authority to order the city to provide petitioner with copies
19 of superseded ordinances, unless such ordinances are part of the record on appeal. Petitioner
20 has not demonstrated that any such ordinance is part of the record on appeal, and therefore
21 this objection is denied.

22 **D. Conclusion**

23 The city shall submit a supplemental record in accordance with Subsection A, above.
24 On receipt of the supplemental record, the Board will issue an order settling the record and
25 establishing a briefing schedule.

26 Dated this 10th day of September, 2010.

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Tod A. Bassham
Board Member