

1                               BEFORE THE LAND USE BOARD OF APPEALS

2                               OF THE STATE OF OREGON

3                               BRIAN MAGUIRE,  
4                               *Petitioner,*

5                               vs.  
6

7                               CLACKAMAS COUNTY,  
8                               *Respondent.*

9                               LUBA No. 2011-040  
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11                              ORDER ON RECORD OBJECTIONS  
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14               On June 16, 2011, petitioner filed objections to the record, while continuing to work  
15 with the county to resolve the objections. On July 7, 2011, the county responded, disputing  
16 two objections. We now resolve all objections.

17               **A.       Audio Recording of Hearing**

18               The county submitted a revised table of contents listing the audio recording of the  
19 hearing and stating that the county is retaining the recording until oral argument, pursuant to  
20 OAR 661-010-0025(2) (authorizing the county retain until oral argument “large maps, media  
21 recordings, or difficult-to-duplicate documents and items”). This objection is resolved.

22               **B.       Exhibit 9**

23               At the local hearing, petitioner submitted a paper copy of his written testimony,  
24 attached to which were seven documents, self-labeled as exhibits 9, 10, 11, 16, 17, 20 and 21.  
25 Record 82-114. At the same time, petitioner submitted a compact disc (CD), described  
26 further below, that petitioner states includes electronic copies of a large number of  
27 miscellaneous documents and materials, including files, photographs, audio recordings and  
28 an electronic copy of the 260-page county soil survey. The record table of contents lumps  
29 the written testimony, attached exhibits and the CD together under the heading of “Exhibit  
30 9,” described simply as “CD & written testimony from B. Maquire (2/5/10).”

1           Petitioner states that he labeled all the exhibits to his written testimony in numeric  
2 order 1 through 22. Apparently, seven of the 22 exhibits are paper documents that were  
3 physically attached to his written testimony, and found at Record 82-114. We understand  
4 petitioner to assert that the remainder of the 22 self-labeled exhibits are found only on the  
5 CD, which the county retained until oral argument, pursuant to OAR 661-010-0025(2).

6           Petitioner argues first that the attached exhibits at Record 82-114 are not presented in  
7 the same numerical order in which petitioner handed them to the county. For example,  
8 petitioner's exhibit 16 precedes petitioner's exhibit 11. In addition, petitioner argues that  
9 some of the exhibits attached to his written testimony are "entirely missing from the record."  
10 Objection 3. Petitioner, however, does not identify what documents are missing. The county  
11 responds, supported by affidavit, that the paper copies in the record are all of the written  
12 documents that petitioner submitted at the hearing, in the order in which petitioner submitted  
13 them. The county suggests that the "missing" exhibits are either found on the CD, or are  
14 paper documents that for some reason petitioner chose not to hand over to the county.

15           It is impossible for LUBA to resolve the parties' dispute over which paper documents  
16 were provided to the county at the hearing, or in what order. The burden is on petitioner to  
17 demonstrate that allegedly omitted documents were in fact submitted into the record, or that  
18 the order of documents in the record does not reflect the order in which they were submitted.  
19 Petitioner has not met that burden.

20           As noted, the table of contents describes petitioner's written testimony and its paper  
21 attachments as part of a single item, "Exhibit 9 - CD & written testimony." That is not  
22 consistent with OAR 661-010-0025(4)(a)(B), which was amended in 2010 to require that  
23 where a listed item includes attached exhibits, the table of contents shall list the attached

1 exhibits separately.<sup>1</sup> However, petitioner does not specifically request that the table of  
2 contents be revised to list the paper exhibits attached to his written testimony at Record 82,  
3 and since petitioner is the person who submitted the document any shortcoming in the table  
4 of contents presumably will not interfere with petitioner's ability to locate documents in the  
5 record that are needed to prepare his petition for review.

6 The objection is denied.

7 **C. Compact Disc**

8 As noted, petitioner also submitted a CD containing miscellaneous files, photographs,  
9 audio recordings and an electronic copy of the 260-page county soil survey. The record table  
10 of contents states that the county will retain the CD until the time of oral argument, pursuant  
11 to OAR 661-010-0025(2). Petitioner argues that the CD is not "difficult-to-duplicate," and  
12 that it would be easy for the county to burn a copy of the CD and provide that copy to LUBA in  
13 advance of oral argument, rather than retain it until oral argument.

14 The county responds that the CD petitioner submitted is copy-right protected and  
15 cannot be copied with any software available to the county. For that reason alone, we agree  
16 with the county that it can retain the CD until oral argument under OAR 661-010-0025(2).  
17 In any case, the CD is a "media recording," and thus the county can retain it under OAR 661-  
18 010-0025(2) even if it is not a "difficult-to-duplicate" item.

19 **D. Listing Contents of the Compact Disc**

20 Petitioner additionally requests that the county revise the table of contents to  
21 separately list the various files and documents on the CD. We understand petitioner to argue  
22 that the CD includes electronic copies of exhibits that are "attached" to his written testimony

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<sup>1</sup> OAR 661-010-0025(4)(a)(B) provides in relevant part that "[w]here a listed item includes attached exhibits, the exhibits shall be separately listed. Each large map, media recording, item or document retained by the governing body under section (2) of this rule shall be separately listed at the end of the table of contents[.]"

1 at Record 82, and therefore OAR 661-010-0025(4)(a)(B) requires the county to separately  
2 list those attached exhibits.

3 As noted, the CD apparently includes a miscellaneous collection of documents and  
4 materials, some of them voluminous. Petitioner chose to submit those documents and  
5 materials in electronic form on a CD, without, however, providing the county with a written  
6 table of contents or similar indication of what the CD includes, or what relationship the CD  
7 or its contents have to petitioner's written testimony. OAR 661-010-0025(4)(a)(B) requires  
8 the county to separately list "exhibits" to a listed item in the record that are "attached" to that  
9 item. County staff are not clairvoyant, and the county is not obliged to separately list  
10 exhibits to a document in the record unless the exhibits are clearly labeled as such and are  
11 clearly "attached" to that document. Here, as far as we are informed, the CD itself is not  
12 labeled as an "exhibit" to petitioner's written testimony and was not "attached" to that  
13 written testimony, although it was submitted at the same time. Even if the CD were labeled  
14 as an exhibit and attached in some manner to the written testimony, OAR 661-010-  
15 0025(4)(a)(B) would not require the county to separately list the *contents* of the CD, because  
16 the rule does not require the county to list internal exhibits to exhibits that are attached to  
17 documents. In other words, only a single layer of exhibits attached to documents must be  
18 separately listed, not exhibits within exhibits. Therefore, OAR 661-010-0025(4)(a)(B) does  
19 not require the county to separately list the contents of the CD.

20 If the CD is viewed not as an exhibit to petitioner's testimony but as a stand-alone  
21 submittal, a separate "item" to be listed in the table of contents, petitioner has not established  
22 that the county is required to go further and separately list the contents of the CD. Where in  
23 lieu of paper copies of multiple documents a party chooses to submit electronic copies of  
24 those documents on a media recording such as a CD, the best practice is for that party to also  
25 provide the local government with a written list of the contents of the CD, which the local  
26 government can place in the record or use to generate a list in the record table of contents.

1 Petitioner failed to do so. Petitioner now repeats that failure in its record objection, referring  
2 to the documents on the CD only as “numerous documents and audio recordings,” and asks  
3 that LUBA order the county to prepare the list of the contents of the compact disc that  
4 petitioner failed to prepare at the time the CD was submitted.

5 There may be circumstances where the local government will be required to create a  
6 list of the contents of a media recording submitted into the record , in order to make a usable  
7 record table of contents for purposes of LUBA’s review. However, in the present case,  
8 petitioner and respondent are the only parties in this appeal. Petitioner is presumably  
9 familiar with the contents of the CD, and will identify them in his petition for review if they  
10 are material in this appeal. In that circumstance, the county and eventually LUBA will be  
11 able to locate and access any material documents on the CD, assuming no software issues  
12 arise. Accordingly, petitioner has not demonstrated that the county must amend the table of  
13 contents to lists the contents of the CD in order to provide a usable record. We might feel  
14 differently if there were intervening parties in this appeal who are unfamiliar with the  
15 contents of the CD. However, in the circumstances presented in this appeal, we conclude  
16 that the county’s listing the CD in the table of contents without itemizing the contents of the  
17 CD is sufficient.

18 This objection is denied.

19 **E. Conclusion**

20 The record is settled as of the date of this order. The petition for review is due 21  
21 days, and the response brief due 42 days, from the date of this order. The Board’s final  
22 opinion and order is due 77 days from the date of this order.

23 Dated this 5<sup>th</sup> day of August, 2011.

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29 Tod A. Bassham  
Board Member