

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ALAN MONTGOMERY,
5 *Petitioner,*

6
7 vs.

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

11
12 LUBA No. 2008-135

13 ORDER

14 Petitioner filed precautionary objections and a supplemental objection to the record
15 filed by the city in this appeal. The city filed a response to the record objections. Petitioner
16 filed a reply to the response, the city filed another response, and finally petitioner filed yet
17 another reply. In this order we attempt to sort out the parties' many disagreements over the
18 contents of the record.

19 **INTRODUCTION**

20 Petitioner was the applicant below for a residential subdivision that the city council
21 denied. When the application was first filed, the city had contracted with the Lane Council
22 of Governments (LCOG) for planning services. Planning responsibilities eventually returned
23 to the city, but during the course of the subject application, at least seven planners and two
24 city attorneys worked on the application. Because of LCOG's responsibilities, numerous
25 documents were submitted to LCOG directly rather than to the city itself. Many of those
26 documents are the subject of the following record objections. Because the resolution of
27 many of the record objections depends on the answer to a single legal question, we begin by
28 addressing that recurring legal question.

29 Petitioner argues that all the materials he submitted to LCOG, when LCOG was
30 providing planning services to the city, should be included in the record. OAR 661-010-
31 0025(1)(b) provides that the record includes:

1 “All written testimony and all exhibits, maps, documents or other written
2 materials specifically incorporated into the record or placed before, and not
3 rejected by, the final decision maker, during the course of the proceedings
4 before the final decision maker.”

5 The city responds that although these materials were submitted to LCOG when it was
6 providing planning services to the city, and were retained by LCOG, they were never
7 “specifically incorporated into the record or placed before, and not rejected by, the final
8 decision maker.” In other words, the city does not dispute that the materials were submitted
9 to the city via LCOG, but the city contends that neither LCOG nor anyone else actually
10 placed the materials before the city council.

11 The scope of written materials that are “placed before, and not rejected by, the final
12 decision maker,” within the meaning of OAR 661-010-0025(1)(b), is not necessarily limited
13 to materials that are physically placed on a table in front of decision makers. As we stated in
14 *ONRC v. City of Oregon City*, 28 Or LUBA 775, 778 (1994):

15 “Items are placed before the local decision maker if (1) they are physically
16 placed before the decision maker prior to the adoption of the final decision;
17 (2) they are submitted to the decision maker through means specified in local
18 regulations or through appropriate means in response to a request by the
19 decision maker for submittal of additional evidence; or (3) local regulations
20 require the item (*e.g.*, record of a lower level decision maker’s proceeding) be
21 placed before the decision maker.”

22 According to petitioner, under the second scenario described in *ONRC*, the disputed
23 materials were submitted through the means specified in the Dunes City Code (DCC). DCC
24 155.4.1.6(E)(5)(a) provides:

25 “The record shall contain all *testimony* and *evidence* that is submitted to the
26 City, the Planning Commission, and the City Council and not rejected.”
27 (Emphasis added.)

28 Petitioner also argues that the disputed materials also must be included in the record under
29 the third ONRC scenario—that is, that DCC 155.4.1.6(E)(5)(a) requires that such material be
30 included in the record.

Petitioner argues that it is not necessary for someone from city staff to physically place the disputed materials before the city council in order to make those materials part of the city's record. According to petitioner, as long as those materials were submitted to the city pursuant to DCC 155.4.1.6(E)(5)(a) they must be included in the record. The city's only response to this argument is that petitioner has not demonstrated that the disputed materials are "testimony" or "evidence," within the meaning of DCC 155.4.1.6(E)(5)(a). The city, however, makes no attempt to demonstrate that any of the specific disputed materials are something other than "testimony" or "evidence." We therefore determine below whether the disputed materials are "testimony or evidence." Any disputed materials that are "testimony" or "evidence" must be included in the record.¹ With that understanding, we now turn to the specific record objections.

RECORD OBJECTION 1

Petitioner objects that certain exhibits to petitioner's application submission of October 1, 2007 are improperly omitted from the record. The allegedly improperly omitted items are as follows:

"* * * Exhibit B (location map); Exhibit C (A&T map); Exhibit D (zoning map excerpt); Exhibit E (Comprehensive Plan Designation Map); Exhibit F (FIRM Map); Exhibit G (Subdivision Plans 18x24); Exhibit H (aerial photograph); Exhibit I (Comprehensive Plan Resource Maps); and Exhibit J (RLID Information)." Petitioner's Precautionary Record Objection 2-3.

We conclude that those materials constitute "testimony" or "evidence," and under DCC 155.4.1.6(E)(5)(a) those exhibits must be included in the Supplemental Record. We understand the city to contend that some or all of the comprehensive plan and zoning map exhibits listed above in Objection 1 are already included in the record. If so, and if the city

¹ The city also argues that petitioner has not demonstrated that the disputed materials were not "rejected by" the city council because they were left out of the record. In order to reject materials that have been submitted, a decision maker must explicitly reject those documents; the mere fact that documents are not included in the record is not sufficient to demonstrate that the documents were specifically rejected by the final decision maker.

1 wishes not to resubmit particular Exhibits in the Supplemental Record, the city may identify
2 the pages of the Record where those exhibits appear in the Supplemental Record Table of
3 Contents.

4 Record objection 1 is sustained.

5 **RECORD OBJECTION 2**

6 Petitioner argues that a portion of his application narrative was omitted from the
7 record. The city responds that the narrative is already included in the Record at pages 283-
8 323.

9 Record objection 2 is denied.

10 **RECORD OBJECTION 3**

11 Petitioner argues the record fails to include his “supplemental narrative dated 9/5/08
12 with headers of 4/7/08 with exhibits.” Petitioner’s Precautionary Record Objection 3. Those
13 materials constitute testimony and evidence and must be included in the Supplemental
14 Record.

15 Record objection 3 is sustained. This record objection will be resolved by the
16 Supplemental Record.

17 **RECORD OBJECTION 4**

18 Petitioner argues an original unsigned copy of the application should be included in
19 the record. There is already a signed copy of the application in the record. Record 274-82.
20 Petitioner identifies no purpose that would be served by including an otherwise identical
21 unsigned copy of the application. Petitioner does not even claim that he submitted an
22 unsigned copy of this application and, as far as we can tell, no possible purpose would be
23 served by requiring the city to include an unsigned copy of the application.

24 Record objection 4 is denied.

1 **RECORD OBJECTION 5**

2 Petitioner objects that two attachments to a March 25, 2008 letter (Record Item 25)
3 are improperly omitted from the record: “[an] amended Site Plan (18x24) and [an] Alternate
4 Road Layout Site Plan (18x24).” Petitioner’s Precautionary Record Objection 3.

5 The city responds that reduced copies of both of those site plans are already included
6 in the record at pages 259-61 of the Record. The city also advises that the larger format
7 originals will be retained by the city until oral argument and listed in the Amended Record
8 Table of Contents pursuant to OAR 661-010-0025(2).²

9 Record objection 5 will be resolved by the Amended Record Table of Contents.

10 **RECORD OBJECTION 6**

11 The city has agreed to include “[a] copy of the Notice of Limited Land Use Decision”
12 in the Supplemental Record.

13 Record objection 6 is sustained. This record objection will be resolved by the
14 Supplemental Record.

15 **RECORD OBJECTION 7**

16 Petitioner objects that an “18x24 Erosion Control Plan submitted at 6/24 Planning
17 Commission meeting (Item 15)” is not included in the record. Petitioner’s Precautionary
18 Record Objection 3. The city responds that a reduced copy of the erosion control plan is
19 included in the record at page 138 of the Record. The city will retain the larger format
20 original until oral argument and will identify the larger format copy of the erosion control
21 plan in the Amended Record Table of Contents pursuant to OAR 661-010-0025(2).

² OAR 661-010-0025(2) provides:

“Transmittal of Record: The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board a certified copy of the record of the proceeding under review. The governing body may, however, retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument. Transmittal of the record is accomplished by delivery of the record to the Board, or by receipt of the record by the Board, on or before the due date.”

1 Record objection 7 will be resolved by the Amended Record Table of Contents..

2 **RECORD OBJECTION 8**

3 Petitioner objects that an “18x24 amended Site Plan submitted at the 6/24 Planning
4 Commission meeting (Item 15)” is not included in the record. Petitioner’s Precautionary
5 Record Objection 3.

6 We understand the city to respond that a reduced copy of that site plan (dated
7 February 8, 2008) already appears at pages 251-53 of the Record. The city also responds that
8 a reduced copy of “the revised amended site plan” (dated June 24, 2008) will be included in
9 the Supplemental Record and that the originals of both the February 8, 2008 and June 24,
10 2008 plans will be retained until oral argument and listed in the Amended Record Table of
11 Contents pursuant to OAR 661-010-0025(2).

12 Record objection 8 will be resolved by the Amended Record Table of Contents.

13 **RECORD OBJECTION 9**

14 The June 18, 2008 planning commission staff report that is the subject of this
15 objection is already included in the Record at pages 158-62. Although we cannot be sure,
16 petitioner’s objection appears to be that it is not signed. However, petitioner does not allege
17 that there is a signed version of that staff report or that any such signed version is different
18 than the unsigned version.

19 Record objection 9 is denied.

20 **RECORD OBJECTION 10**

21 Petitioner argues that his June 18, 2008 public records request should be included in
22 the Record. Petitioner makes no attempt to explain why he believes the public records
23 request itself is “testimony” or “evidence” that was submitted in support of his application,
24 and we conclude that it is not. Therefore, the city was not required to include that public
25 records request as part of the record under DCC 155.4.1.6(E)(5)(a).

26 Record objection 10 is denied.

1 **RECORD OBJECTION 11**

2 Petitioner argues that the final minutes from the June 24, 2008 planning commission
3 meeting are not included in the record. The city responds that the minutes are located at
4 pages 107-116 of the Record. The minutes referenced by the city, however, are draft
5 minutes. If there are approved, signed minutes from the June 24, 2008 planning commission
6 meeting, they must be included in the Supplemental Record.

7 Record objection 11 is sustained. This objection will be resolved by the
8 Supplemental Record.

9 **RECORD OBJECTION 12**

10 Petitioner argues that a memorandum from Brandie Bell to Dunes City dated June 27,
11 2008 should be included in the record. Petitioner states that the memorandum is “testimony”
12 or “evidence” under DCC 155.4.1.6(E)(5)(a), and the city does not specifically dispute that
13 assertion. The city shall include the memorandum in the Supplemental Record.

14 Record objection 12 is sustained. This objection will be resolved by the
15 Supplemental Record.

16 **RECORD OBJECTION 13**

17 Petitioner argues that the approved, final minutes from the July 1, 2008 planning
18 commission meeting are not included in the record. The city responds that the minutes are
19 located at pages 98 through 105 of the Record. The minutes referenced by the city, however,
20 are draft minutes. If the approved, final minutes from the July 1, 2008 planning commission
21 meeting are available, they must be included in the Supplemental Record.

22 Record objection 13 is sustained. This objection will be resolved by the
23 Supplemental Record.

24 **RECORD OBJECTION 14**

25 It is difficult to decipher the parties’ arguments concerning this objection. The
26 Record includes draft planning commission findings that are dated June 18, 2008 and

1 presumably were transmitted to the planning commission sometime before its June 24, 2008
2 hearing in this matter. Those draft findings recommend denial of the application. The city
3 council apparently ultimately approved the draft findings with changes. Record 105. We
4 understand petitioner to contend that revised findings were prepared and forwarded to the
5 city council—findings which recommend approval of petitioner’s application—and that the
6 revised findings are inconsistent with certain conditions of approval that appear at Record 67.

7 We are not sure that petitioner argues that the conditions of approval that appear at
8 Record 67 were not placed before the city council. If they were, they are properly included
9 in the record and it does not matter whether they are inconsistent with any revised findings
10 that may have been prepared and sent to the city council. We therefore deny petitioner’s
11 objection regarding the conditions of approval that appear at page 67 of the Record.

12 With regard to any revised or amended findings that the planning commission may
13 have adopted and transmitted to the city council, the parties are in a far better position to
14 determine whether such amended or revised findings exist and whether they were provided to
15 the city council. If revised findings were prepared and sent to the city council we do not
16 understand why petitioner did not clearly say so. Similarly, if revised findings were not
17 prepared and sent to the city council, we do not understand why the city did not say so. If
18 amended findings were prepared and sent to the city council, the city shall include them in
19 the Supplemental Record. If such findings were not prepared and adopted or sent to the city
20 council, the city can so advise LUBA and petitioner at the time it transmits the Supplemental
21 Record and the Amended Record Table of Contents.

22 Record objection 14 is denied in part and sustained in part. This record objection will
23 be resolved by the Supplemental Record or confirmation by the city that the city planning
24 commission did not adopt revised findings and did not forward revised findings to the city
25 council.

1 **RECORD OBJECTION 15**

2 The city has agreed to include the “[a]pplicant’s ‘Response to Planning Commission
3 Staff Report’ dated 7/1/08 submitted at July 1 City Council hearing” in the Supplemental
4 Record. Response to Petitioner’s Record Objections 3.

5 Record objection 15 is sustained. This objection will be resolved by the
6 Supplemental Record.

7 **RECORD OBJECTION 16**

8 The city has agreed to include the “[a]pplicant’s ‘Response to Dunes City Planning
9 Commission Draft Findings of Fact and Decision’ * * *.” Response to Petitioner’s Record
10 Objections 4.

11 Record objection 16 is sustained. This objection will be resolved by the
12 Supplemental Record.

13 **RECORD OBJECTION 17**

14 This record objection concerns an alternate road plan. According to the city, a
15 reduced copy of the alternate road plan already is included in the Record at pages 149-50. A
16 larger format (18” x 24”) copy of the alternate road plan will be retained by the city until oral
17 argument and will be listed in the Amended Record Table of Contents pursuant to OAR 661-
18 010-0025(2).

19 Record objection 17 will be resolved by the Amended Record Table of Contents.

20 **RECORD OBJECTIONS 18, 19 AND 20**

21 This record objection concerns the July 1, 2008, July 15, 2008 and July 22, 2008 city
22 council minutes in this matter. We understand petitioner to object that the minutes that
23 appear at pages 59-66, 35-45 and 11-14 of the Record are not the final approved city council
24 minutes for those meetings. We understand the city to contend that the minutes that appear
25 at those pages of the Record are the minutes that were approved by the city council for those
26 meetings. With that understanding, these objections are denied.

1 Record objections 18, 19 and 20 are denied.

2 **RECORD OBJECTIONS 21 THROUGH 23**

3 Petitioner argues that the agenda, minutes, and media recording from a May 8, 2008
4 city council meeting should be included in the record. The city responds that the May 8,
5 2008 city council hearing was not part of the proceedings that led to a decision regarding
6 petitioner's application. Petitioner has not responded to that argument, other than stating that
7 his application was discussed at the May 8, 2008 meeting. Merely because a permit
8 application was discussed at a public hearing does not mean that that public hearing was part
9 of the record of that permit application. Absent any evidence from petitioner that the May 8,
10 2008 city council meeting was part of the proceedings in this matter, we reject petitioner's
11 contention that the disputed materials must be included in the record.

12 Record objections 21-23 are denied.

13 **RECORD OBJECTION 24**

14 Petitioner argues that numerous e-mail messages "regarding the subject application"
15 sent to the city and by the city should be included in the record.

16 The city has agreed to include one e-mail message "dated Sept. 27, 2007, with subject
17 reference of 'Road discussion,'" in the record. Response to Petitioner's Record Objections 5.
18 We understand the city to take the position that the remaining e-mail messages do not
19 constitute "testimony" or "evidence" concerning the application and that they were not
20 placed before the city council. Without a more developed argument from petitioner, we do
21 not agree that the disputed e-mail messages are "evidence" or "testimony" that must be
22 included in the record under DCC 155.4.1.6(E)(5)(a), and we have no reason to question the
23 city's assertion that those e-mail messages were not placed before the city council during the
24 proceedings before the city council in this matter.

1 Record objection 24 is sustained with regard to the September 27, 2007 e-mail
2 message, but this objection is otherwise denied. This objection will be resolved by the
3 Supplemental Record.

4 **SUPPLEMENTAL RECORD OBJECTION**

5 Petitioner originally argued that any written material that was submitted to LCOG as
6 well as any e-mail messages sent to or from LCOG in connection with petitioner's
7 application must be included in the record. Petitioner subsequently obtained most or all of
8 that written material through his public record request, and many of those materials are the
9 subject of the preceding record objections that we have already resolved.

10 Petitioner also bound and transmitted to LUBA and served on the city all of the
11 documents that were produced by LCOG following petitioner's public record request. The
12 transmittal includes hundreds of pages. Many of those pages are e-mail messages. Under the
13 reasoning in our resolution of Record Objection 24 petitioner's contention that those e-mail
14 messages must be included in the record is rejected. Petitioner makes no attempt to
15 demonstrate that those e-mail messages constitute "evidence" or "testimony," within the
16 meaning of DCC 155.4.1.6(E)(5)(a), and petitioner offers no reason to question the city's
17 representation that they were not placed before the city decision maker in this matter.

18 However, other documents that were produced in response to petitioner's public
19 records request likely qualify as "evidence" or "testimony," and indeed we have already
20 required the city to include some of those documents in the Supplemental Record in our
21 resolution of petitioner's other record objections above. The city shall review the documents
22 that were produced in response to petitioner's public records request, and with the exception
23 of the e-mail messages, any documents that were attached to those e-mail messages or other
24 documents that qualify as "evidence" or testimony" must be included in the Supplemental
25 Record. If the city takes the position that any of those remaining documents should not be
26 included in the Supplemental Record, it must explain why.

1 Petitioner’s Supplemental Record Objection is sustained in part and denied in part.

2 **CONCLUSION**

3 In accordance with the above, the city shall submit a Supplemental Record and
4 Amended Record Table of Contents within 21 days from the date of this order. Given the
5 amount of time that it has taken LUBA to resolve these record objections and the amount of
6 work that may be required on the city’s part to review the documents that were produced in
7 response to petitioner’s public records request, the city may request a reasonable extension of
8 time to do so if necessary. In addition, a cooperative response by the city and petitioner to
9 the remaining questions to be resolved to settle the record likely would facilitate settling the
10 record. The Board encourages such a cooperative response and is prepared to grant
11 reasonable extensions of time to allow such cooperation.

12 Dated this 10th day of June, 2009.

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Michael A. Holstun
Board Member