

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 SAVE DOWNTOWN CANBY,

4 *Petitioner,*

5 vs.

6 CITY OF CANBY,

7 *Respondent,*

8 and

9 GREAT BASIN ENGINEERING,

10 *Intervenor-Respondent.*

11 LUBA No. 2012-097

12 ORDER

13 On January 28, 2013, petitioner objected to the record that was transmitted by the city  
14 in this appeal. On February 13, 2013, LUBA received a Supplemental Record and a response  
15 from the city and intervenor-respondent. We now resolve the pending record objections.

16 **A. Main Street Handbook and Transportation Analysis (Objections B1 and B4)**

17 Petitioner objects that the Main Street Handbook that appears at Record 72-176 and  
18 the Transportation Impact Analysis that appears at Record 381-557 were not placed before  
19 the city council, the local decision maker in this appeal. Petitioner contends that both  
20 documents should therefore be stricken from the record.

21 In their response, the city and intervenor-respondent argue that both documents were  
22 placed before the city council. In support of that response, the city and intervenor-respondent  
23 provide an affidavit signed by the city recorder, in which she states that the city council was  
24 provided electronic copies of both documents on October 29, 2012, and that the city recorder  
25 placed complete paper copies of both documents “on the City Council’s dais” at the

1 November 7, 2012 city council hearing in this matter and that both documents were available  
2 to the city council at that November 7, 2012 hearing.

3 Petitioner offers no reason to question the response and the affidavit, and these  
4 objections are denied.

5 **B. Power Point Presentation (Objection B2)**

6 Petitioner concedes there was a PowerPoint presentation by planning staff at the  
7 November 7, 2012 city council hearing in this matter. A paper copy of that PowerPoint  
8 presentation appears at Record 177-84. Because no paper copy of that PowerPoint  
9 presentation was placed before the city council at the November 7, 2012 hearing, petitioner  
10 objects that the paper copy of that presentation that appears at record 177-84 should be  
11 stricken

12 The city and intervenor-respondent contend there is nothing inappropriate about  
13 including a paper copy of a PowerPoint presentation in the record in the circumstance  
14 presented in this appeal (i.e., it is undisputed that the paper copy is a paper copy of at  
15 PowerPoint presentation that was actually presented to the decision maker). Respondent and  
16 intervenor-respondent have also included in the Supplemental Record an electronic copy of  
17 that PowerPoint Presentation.

18 It is somewhat surprising that LUBA's administrative rule governing the contents of  
19 the record does not explicitly recognize the possibility that a slide projector, overhead  
20 projector or other electronic device may be used to make a visual presentation to the decision  
21 maker in a land use hearing, without submitting a paper or electronic copy of the presentation  
22 for the record. Neither do our rules provide any explicit guidance on how a local government  
23 is to go about reflecting such presentation in a record that is transmitted in a LUBA appeal,  
24 where a paper or electronic copy of the presentation is not submitted for the record at the  
25 hearing. OAR 661-010-0025(1) provides in relevant part:

1 “Contents of Record: Unless the Board otherwise orders, or the parties  
2 otherwise agree in writing, the record shall include at least the following:

3 “\* \* \* \*

4 “(b) All *written* testimony and all exhibits, maps, documents or *other*  
5 *written materials* specifically incorporated into the record or placed  
6 before, and not rejected by, the final decision maker, during the course  
7 of the proceedings before the final decision maker.” (Emphases  
8 added.)

9 OAR 661-010-0025(1) does not purport to be exhaustive, because it provides “the  
10 record shall include at least the following[.]” Visual presentations at a land use hearing are  
11 properly included in the record that is transmitted to LUBA if there is an appeal of the  
12 decision that results from that land use hearing. Despite the lack of explicit guidance in our  
13 rules, local governments routinely include either paper or electronic media copies of such  
14 visual presentations, when preparing the record that is transmitted to LUBA. Either is  
15 appropriate, regardless of whether the electronic media or paper copy is placed before the  
16 decision maker at the hearing at which the visual presentation is made. The city has now  
17 provided both a paper copy and an electronic copy of the PowerPoint presentation.  
18 Petitioner’s objection is not well-taken and is denied.

19 **C. Record Pages 264, 380, 209, 243 and 299 (Objections B3 and B5)**

20 The parties agree that Record pages 264, 380, 209, 243 and 299 should be stricken  
21 from the record. Those pages shall not be considered part of the record in this appeal.

22 **D. City Council Packet Pages 168-99 (Objection C)**

23 Petitioner objects that pages 178-99 of the City Council Packet that all parties agree  
24 was provided to the city council is missing from the record. Respondent and intervenor-  
25 respondent agree that the cited pages were improperly excluded from the record and contend  
26 that ten more pages should be included to fully correct the omission.

27 The missing pages have been included in the Supplemental Record. Those pages  
28 shall be cited Supplemental Record A168 through A199.

1           This objection is sustained.

2           With the Supplemental Record and this order, all pending record objections are  
3 resolved, and the record is settled as of the date of this order. OAR 661-010-0026(6). The  
4 petition for review shall be due 21 days from the date of this order. The response briefs shall  
5 be due 42 days from the date of this order. The Board's final opinion and order shall be due  
6 77 days from the date of this order.

7           Dated this 5<sup>th</sup> day of March, 2013.

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Michael A. Holstun  
Board Member