

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JERRY L. CURL, DEBRAH J. CURL,
5 THOMAS L. DANIELS, MARTHA DANIELS,
6 HELEN FISHER, ANDREW SHOOKS
7 and JAMES E. SWARM,
8 *Petitioners,*

9
10 and

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12 WESTERN RADIO, INC. and
13 RICHARD OBERDORFER,
14 *Intervenor-Petitioners,*

15
16 vs.

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18 CITY OF BEND,
19 *Respondent,*

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21 and

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23 CHACKEL FAMILY TRUST LLC,
24 *Intervenor-Respondent.*

25
26 LUBA No. 2007-156

27 ORDER

28 **MOTIONS TO INTERVENE**

29 Western Radio, Inc., and Richard Oberdorfer, move to intervene on the side of
30 petitioners in this appeal. There is no opposition to the motion and it is granted.

31 Chackel Family Trust LLC, the applicant below, moves to intervene on the side of
32 respondent in this appeal. There is no opposition to the motion and it is granted.

33 **RECORD OBJECTIONS**

34 **A. Petitioners' Record Objections**

35 **1. Objection 1**

36 Petitioners object that several e-mail messages that appear at Record 34-39 should not
37 be included in the record. The city agrees.

1 Objection 1 is sustained. The e-mail messages that appear at Record 34-39 shall not
2 be considered part of the record in this appeal.

3 **2. Objection 2**

4 Petitioners object that the record in this matter closed on May 17, 2007 and the record
5 improperly includes two documents that post-date the closing of the record: (1) a document
6 entitled “Index of Applicant’s Previously Submitted Materials for 06-578 Revised April 19.
7 2007 and (2) an e-mail message from the applicant’s attorney to the city dated August 22,
8 2006. Those documents appear at Record 126-133 and both documents are stamped “City of
9 Bend – Received 5-23-07.” Record 126, 131.

10 The city responds that the disputed documents were submitted before the hearings
11 officer rendered her decision in this matter and argues the city “is not authorized to exclude
12 documents submitted by the parties.”

13 Under OAR 661-010-0025(1)(b) the disputed documents are properly included in the
14 record if they (1) were placed before the final decision maker and (2) were not rejected by
15 the final decision maker.¹ The two documents described above apparently were not rejected
16 by either city planning staff or the hearings officer. Therefore, the only question that needs
17 to be answered is whether the documents were placed before the hearings officer. We
18 understand petitioners to argue that since documents that are filed outside public hearings are
19 sent directly to the city rather than to the hearings officer, the city not only may reject
20 evidence that is submitted after the record closes, it is obligated to do so. Petitioners point
21 out that no party was given an opportunity to review or rebut this evidence. We understand

¹ Under OAR 661-010-0025(1)(b), the record includes “All * * * documents or other written materials * *
* placed before, and not rejected by, the final decision maker, during the course of the proceedings before the
final decision maker.”

1 petitioners to argue the disputed documents either were not provided to the hearings officer
2 or should not have been provided to the hearings officer.²

3 In cases where documents are filed directly with a city or county after the close of the
4 evidentiary hearing, and those documents are not submitted directly to the final local
5 decision maker, the safest course would be for city or county staff to forward the late-filed
6 documents to the final decision maker so that the final decision maker can determine whether
7 the documents should be accepted as part of the record or rejected. The city does not
8 contend that is what happened here. In fact, the city's response is so ambiguous that the city
9 does not appear to take a position on whether the disputed documents were placed before the
10 hearings officer. Given that lack of clarity on the critical question, and petitioners' apparent
11 contention that the documents were not and should not have been provided to the hearing
12 officer, we will assume that they were not placed before the hearings officer.

13 Objection 2 is sustained. The documents that appear at Record 126-33 shall not be
14 considered part of the record in this appeal.

15 **3. Objection 3**

16 Objection 3 concerns four digital CDs and an aerial map. Record 4778, 4779, 4780,
17 4786, 4788. Because the record table of contents indicates that those items are undated,
18 petitioners contend the record does not establish that these record items were submitted
19 before the record closed on May 17, 2007.

20 The city responds that it has investigated and believes all five items were submitted
21 during the open record period and before the record closed on May 17, 2007. Based on that
22 response, we reject this objection.

23 Objection 3 is denied.

² Petitioners confuse the question of whether the documents were placed before the final decision maker with the question of whether the city may have committed error in accepting those documents as part of the record after the evidentiary record closed.

1 **4. Objection 4**

2 Petitioners object that the record should be supplemented to include an audio
3 recording of the hearings officer’s October 26, 2006 public hearing in this matter. In
4 addition, petitioners argue that photographs taken by planning staff and the hearings officer
5 during a site visit on October 11, 2007 should be included in the record. The city agrees that
6 the record should be supplemented with a CD audio recording and a CD with the photos.

7 Objection 4 is sustained. The city shall submit an amended Record Table of Contents
8 that lists the two CDs as oversized/difficult to duplicate items that will be provided to LUBA
9 at oral argument pursuant to OAR 661-010-0025(2).³

10 **5. Objection 5**

11 **a. First Objection 5**

12 Petitioners submit two Objections Number 5. The first Objection 5 concerns two
13 digital CD recordings, which petitioners refer to as recordings of the “NPG and GCC Public
14 Hearings.” Petitioners’ Record Objections 3. The city agrees those CDs should be included
15 in the record.

16 The first Objection 5 is sustained. The amended Record Table of Contents that will
17 be required by our resolution of Objection 4 will also list the two CD recording of the “NPG
18 and GCC Public Hearings” as oversized/difficult to duplicate items that will be provided to
19 LUBA at oral argument pursuant to OAR 661-010-0025(2).

³ Under OAR 661-010-0025(2), a local government may “retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument.” Under OAR 661-010-0025(2) a local government is not required to include any retained documents in the copy of the record that the local government serves on the parties in a LUBA appeal. Petitioners and intervenor-respondent argue elsewhere that the city should not be allowed to list digital CDs as oversized or difficult to duplicate documents. Petitioners and intervenor-respondent argue the city should be required to include all digital CDs in the copy of the record that is filed with LUBA and served on the parties. The city takes the position that the CDs are properly retained by the city until the time of oral argument, pursuant to OAR 661-010-0025(2). Later in this order we rule in the city’s favor on this issue.

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b. Second Objection 5

In their Second Objection 5 petitioners object that the record includes no site plan dated December 31, 2006, even though the hearings officer refers three times to a site plan dated December 31, 2006. Record 72, 87, 93. Petitioners object that the record should be supplemented with the referenced site plan.

The city responds that there is no site plan dated December 31, 2006 and speculates that the hearings officer was referring to the site plan that is listed as Item 192, an oversized exhibit that is dated December 7, 2006 but includes a surveyor stamp of December 31, 2006. Petitioners dispute the city’s speculation, but other than citing to the December 7, 2006 date on Item 192 offer no other reason to dispute the city’s representation that no December 31, 2006 site plan exists.

Petitioners’ Second Objection 5 is denied.

6. Objections 6 and 7

Petitioners object that Record Items 73, 74, and 75 should not be included in the record.⁴ The city agrees.

Objection 6 is sustained. The Amended Table of Contents that will be required to respond to our resolution of Objections 4 and First Objection 5 shall also be amended to indicate that Record Items 73, 74, and 75 have been stricken from the record.

7. Objections 8 and 9

Petitioners have withdrawn these objections.

8. Objections 10 Through 13

a. Objection 10

A document that petitioners identify as “the Rodney Burrows PE study” begins at Record 2125 and continues to Record 2242. Petitioners’ Record Objections 4. Large

⁴ Petitioners also include a reference to Record Item 72, but that reference appears to be an error.

1 handwritten page numbers 1 through 123 have been added to the pages of that document.
2 Handwritten page number 34 appears at Record 2154 and handwritten page number 36
3 appears at record 2155. Petitioners object that handwritten page number 35, “a photograph
4 of the neighboring US West facility,” is missing. Petitioners object that the city should be
5 ordered to supplement the record with the missing page 35.

6 The city responds that “This photograph was not included in Petitioners’ original
7 submittal.” Response to Record Objections Filed by Petitioners 2.

8 The city is the custodian of the record. Aside from disagreeing with the city’s
9 response that the disputed pages were not included in the original document as submitted to
10 the city, petitioners offer no reason to question the city’s representation. In such
11 circumstances, absent some reason to resolve the record objection otherwise, we defer to the
12 custodian of the record. *See Chauncey v. Multnomah County*, 23 Or LUBA 685, 686 (1992)
13 (where respondent represents that a report was not placed before the local decision maker
14 and petitioner offers no basis for questioning that representation, petitioner’s objection that
15 the report should be included in the record will be denied).

16 Objection 10 is denied.

17 **b. Objections 11 Through 13**

18 Objections 11 through 13 also allege that pages are missing in documents that have
19 been included in the record. In response to those objections the city responds that the
20 original documents that were submitted by petitioners were missing the disputed pages. As
21 with Objection 10, petitioners simply disagree with the city. For the same reason we denied
22 Objection 10, we deny Objections 11 through 13.

23 **9. Objection 14**

24 Petitioners object that the record includes all of the applicant’s final argument as
25 submitted on May 17, 2007. Petitioners contend that submittal improperly includes new

1 evidence, in violation of ORS 197.763(6)(e). Petitioners contend that the city should be
2 ordered to exclude the new evidence from the record.⁵

3 We understand the city to contend that (1) the entire applicant's submittal was sent to
4 the hearings officer and (2) despite petitioners' objections, the hearings officer did not
5 exclude any part of the applicant's submittal from the record.

6 Based on the city's response, we agree the entire applicant's submittal is properly
7 included in the record of this appeal. Whether the city may have committed error by
8 accepting final legal argument under ORS 197.763(6)(e) that included new evidence may
9 provide a basis for reversal or remand of the hearings officer's decision, but it does not mean
10 such evidence should not be included in the record of this appeal.

11 Objection 14 is denied.

12 **10. Objection 15**

13 Petitioners' fifteenth Objection is set out below in pertinent part:

14 "Petitioner objects that Petitioner did not receive a record securely fastened on
15 the left side, which made it difficult, at best, to review this 4,457 page Record.
16 Some record objections may have been missed during the review of the
17 voluminous material which was not transmitted as a true copy to that served
18 upon LUBA, e.g., securely fastened on the left side." Petitioners' Record
19 Objections 4.

20 The city's response is set out below:

21 "The Petitioner received a complete record, which was organized by page
22 number as was the record as was the record submitted to LUBA. It is
23 doubtful that Petitioner overlooked any record objections, contrary to their
24 assertion." Response to Record Objections Filed by Petitioners 3.

⁵ ORS 197.763(6)(e) provides:

"Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. * * *"

1 The eight-volume record in this appeal was transmitted to LUBA in eight three-ring
2 binders—one binder for each volume. The binders are large and somewhat cumbersome to
3 use, but the pages are three-hole punched and are more or less securely bound by placing
4 those pages in the three-ring binders. Although we cannot be sure from petitioners’ and the
5 city’s arguments, petitioners apparently were provided a copy of the record but were not
6 provided with eight binders like the ones that LUBA was provided. In other words, we
7 understand that petitioners were provided with an unbound copy of this 4,457 page record.
8 OAR 661-010-0025(4)(a)(C) requires that the record “[b]e securely fastened on the left
9 side[.]” Since the record that was served on petitioners was not divided into eight separate
10 three-ring binders, as was the record that was transmitted to LUBA, the copy of the record
11 that the city served on petitioners did not comply with OAR 661-010-0025(4)(a)(C).

12 Objection 15 is sustained. The city shall provide petitioners eight three-ring binders,
13 comparable to and labeled in the same way as the eight binders that were provided to LUBA.
14 Petitioners may then place the pages of the record into the appropriate three-ring binder.

15 **11. Objection 16**

16 Under OAR 661-010-0025(2), a local government has the option of excluding any
17 “tapes and difficult-to-duplicate documents and items” from the record that is originally
18 transmitted to LUBA and served on petitioners. Under OAR 661-010-0025(2), the local
19 government retains those record items and provides them to LUBA at oral argument. In
20 order to obtain copies of those retained items, petitioners must request that the local
21 government make copies.⁶ Local governments generally require that petitioners pay the cost
22 of making those copies.

⁶ 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

1 The city identifies a total of eight digital CDs as part of the record in this appeal and
2 in the table of contents states that those CDs will be provided at oral argument. We
3 understand the city to be relying on OAR 661-010-0025(2). Petitioners object. Petitioners
4 argue that while CDs are easily copied the city’s practice is to charge \$26 each to copy CDs.
5 Petitioners contend that the city’s reliance on OAR 661-010-0025(2) places an unreasonable
6 burden on petitioners.

7 According to the city it does not have the capability of copying CDs in-house and
8 charges \$10 not \$26 dollars to copy digital CDs. The city contends that it will promptly
9 make any copies of CDs requested upon payment of the required copying fee. The city also
10 argues that it will make a computer available at city hall to view the CDs.

11 It may be that with recent advances in technology, OAR 661-010-0025(2) should be
12 revised to require that digital media be included in the record that is transmitted to LUBA
13 and served on the parties. However, not all local governments have the capability to easily
14 and cheaply copy digital media. The City of Bend is apparently one of those local
15 governments. In any event, unless and until OAR 661-010-0025(2) is amended to provide
16 otherwise, a local government is entitled to identify “tapes” as record items that will be
17 retained at the time the record is transmitted to LUBA and served on petitioners, and
18 separately transmitted to LUBA at oral argument. We agree with the city that digital CDs
19 are the functional equivalent of “tapes,” as that term is used in OAR 661-010-0025(2), and
20 that Objection 16 therefore should be denied.

21 Objection 16 is denied.

22 **12. Objection 17**

23 Petitioners’ argument in support of Objection 17 is set out in part below:

24 “Petitioners object that Respondent finds that 24” x 36” maps are categorized
25 as ‘Oversized Exhibits.’ The Community Development Department at the

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 City of Bend has a combination Planning/Building Department reception area
2 from which copies of this size are routinely produced. I have obtained many
3 of these sized maps during routine visits to the Planning Department and the
4 reproduction process of one of these maps did not appear to be even slightly
5 burdensome or difficult to reproduce. * * *

6 Petitioners' Record Objections
7 Our resolution of the above record objection is complicated by three factors. First,
8 petitioners do not clearly identify the maps that are the subject of Objection 17. There are
9 four items that are identified as oversized exhibits that appear to be something other than
10 digital CDs. Item 190 is identified as "9 Maps – SOS/Shooks." Item 191 is identified as
11 "Exhibit 22 – Construction Drawings." Item 192 is identified as "Map – CCI Tower Site
12 Plan." Item 193 is identified as "Aerial Map w/Site Plan Overlay." Second, because the city
13 has retained these items, we cannot look at them to determine which of these items, if any,
14 might be 24" x 36" maps. Finally, the city has not responded to Objection 17.

15 Given the city's failure to respond to petitioners' contention that the disputed maps
16 are easily and routinely reproduced, we sustain Objection 17. If Record Items 190, 191, 192,
17 193 include any maps that are 24" x 36" or smaller, the city must include copies of those
18 maps in a Supplemental Record and transmit that Supplemental Record to LUBA and serve a
19 copy on petitioners and any other party who has requested a copy of the record pursuant to
20 OAR 661-010-0025(3).

21 Objection 17 is sustained.

22 **B. Intervenor-Respondent's Record Objections.**

23 **1. Objection 1**

24 This objection concerns the digital CDs that the city retained pursuant to OAR 661-
25 010-0025(2) and is the same as petitioners' Objection 16, which we deny above. We deny
26 intervenor-respondent's Objection 1 for the same reason.

27 Objection 1 is denied.

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2. Objection 2

Intervenor-respondent objects that record item 184, which is a digital video disc of a tower collapse, “was not part of the record during the proceedings before the Hearings Officer because the DVD was not received in a readable (viewable) format before the record closed.” Objection to the Record 3.

The city responds that the DVD was submitted before the record closed and was not excluded from the record by the hearings officer.

We are not sure we understand the record objection. If intervenor-respondent’s argument is that the DVD was received in an unreadable format before the record closed and that DVD was somehow rendered readable after the record closed, that may provide a basis for reversal or remand. But we fail to see how it would provide a basis for striking the DVD from the record. If intervenor-respondent’s point is that the DVD was submitted in an unreadable format before the record closed and it remained in that format after the record closed, the result is the same.

We understand the city to argue that the DVD that was submitted before the record closed was given to the hearings officer and was never rejected by the hearings officer. Assuming that is the case, and as far as we can tell it is the case, the DVD is properly included in the record.

Objection 2 is denied.

C. Summary and Conclusion

Intervenor-respondent’s record objections are denied. Petitioners’ Objections 3, 10, 11, 12, 13, 14, and 16 and Petitioners’ Second Objection 5 are denied. Petitioners’ Objections 8 and 9 were withdrawn. Petitioners’ remaining record objections are sustained.

The documents discussed in Petitioners’ Objections 1 and 2 (Record 34-39 and 126-33) are stricken from the record and shall not be considered part of the record in this appeal. The city must file and serve an amended table of contents to respond to our resolution of

1 Petitioners' Objections 4, 6, and 7 and Petitioners' First Objection 5. The city must provide
2 petitioners binders, pursuant to our resolution of Objection 15. The city must include copies
3 of any maps that are 24" x 36" or smaller in a Supplemental Record, pursuant to our
4 resolution of Objection 17.

5 LUBA will issue an order settling the record in this appeal after it receives the
6 amended table of contents and Supplemental Record noted above and the city advises LUBA
7 that it has provided record binders to petitioners.

8 Dated this 22nd day of January, 2008.

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Michael A. Holstun
Board Chair