

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 HENRY KANE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BEAVERTON,
10 *Respondent,*

11 and

12
13 WILLAMETTE WEST HABITAT
14 FOR HUMANITY, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2009-132

18
19 ORDER

20 **MOTION TO INTERVENE**

21 Willamette West Habitat for Humanity, Inc. (intervenor), the applicant below, moves
22 to intervene on the side of the respondent in this appeal. There is no opposition to the motion
23 and it is granted.

24 **RECORD OBJECTIONS**

25 The challenged decision is a city council decision denying petitioner's local appeal of
26 a planning commission order approving intervenor's application for a five-lot subdivision.
27 The city submitted the 348-page record on December 21, 2009. On January 5, 2010
28 petitioner filed nine objections to the record. On January 21, 2010, the city filed a
29 supplemental record and a response that disputes most of petitioner's objections. In a reply,
30 petitioner withdrew the second and third objections. We now resolve the outstanding
31 objections.

1 **A. Other Related Applications.**

2 On April 10, 2009, intervenor filed five related applications with the city: an
3 application for preliminary plat approval for a five-lot subdivision, along with applications
4 for a variance, a flexible setback, a major adjustment, and a minor adjustment, all related to
5 the proposed subdivision. The five applications were supported by a single application
6 narrative. The city assigned each application a separate number. The county planning
7 commission approved each application under a separate order, supported by a single set of
8 findings. However, petitioner chose to appeal to the city council only the planning
9 commission order approving the subdivision application, LD 2009-007, and did not appeal
10 the four other planning commission orders.

11 The record transmitted to LUBA includes only those pages of the application
12 narrative that relate to the subdivision application, and omits pages that relate to the other
13 four applications. Record 265-311. Petitioner objects to the omission of those portions of
14 the narrative, arguing that the application narrative is a single document and without the
15 other portions of the application narrative he will be unable to file an effective petition for
16 review before LUBA.

17 Under OAR 661-010-0025(1)(b), the record shall include: “[a]ll written testimony
18 and all exhibits, maps, documents or other written materials specifically incorporated into the
19 record or placed before, and not rejected by, the final decision maker, during the course of
20 the proceeding before the final decision maker.” There is no dispute that petitioner appealed
21 only the planning commission decision approving the subdivision to the city council, and did
22 not appeal the planning commission decisions with respect to the other four applications.
23 The city council specifically found that the appeal of the subdivision approval is the only
24 matter before it, and that the other permits are “not in the record.” Record 2-3. Based on that
25 finding, we understand that only the redacted form of the application narrative was submitted
26 or “placed before” the city council. Petitioner does not contend otherwise.

1 Petitioner does not explain why the complete application narrative must be in the
2 record for him to prepare the petition for review. It may be that without the complete
3 application narrative the record on appeal will not include all of the information necessary to
4 support the city council’s decision approving the subdivision application. However, even if
5 so, that would only mean that petitioner could assign error to that evidentiary failing. It does
6 not mean that documents not placed before the city council or incorporated into the record
7 are part of the record on appeal. This objection is denied.

8 **B. Construction Plans.**

9 Beaverton Development Code (BDC) 50.30.4.E requires an applicant to submit along
10 with the application “[c]opies of written materials and 8.5” x 11” size plans presented at the
11 Neighborhood Review Meeting.” Petitioner first argues that BDC requires the applicant to
12 distribute “construction” plans, and that no such construction plans were distributed at the
13 neighborhood review meeting. The county responds that nothing in the BDC requires the
14 applicant to distribute “construction” plans at the neighborhood review meeting, and that
15 BDC 50.30.4.E requires only that if the applicant distributes written materials and 8.5 x 11
16 inch “plans” at the neighborhood review meeting that such information shall also be
17 submitted to the city as part of the application. The city appears to be correct.

18 Petitioner next objects that there *was* an 8.5 x 11 inch diagram distributed at the
19 neighborhood review meeting, but that diagram is not located in the record. The city
20 responds that what was distributed at the meeting is found at Record 332, which is an 11 x 14
21 inch copy of page 1 of the proposed preliminary plat. Petitioner disputes that the document
22 at Record 332 was distributed at the neighborhood review meeting. Confusingly, petitioner
23 argues that the 8.5 x 11 inch document distributed at the meeting is accurately described in
24 the planning commission findings at Record 180 as “a reduced copy of the proposed
25 subdivision preliminary plat * * *.” Apparently, petitioner is objecting that a reduced 8.5 x
26 11 inch copy of the 11 x 14 inch preliminary plat at Record 332 is not in the record. Even

1 more confusingly, petitioner goes on to state that he has examined the city's files and cannot
2 find the 8.5 x 11 inch document distributed at the neighborhood review meeting. In other
3 words, petitioner's objection appears to be the city failed to require the applicant to submit to
4 the city a copy of the reduced size plat distributed at the meeting. While that allegation
5 *might* conceivably constitute a basis for assigning error, petitioner appears to concede in
6 making that allegation that the 8.5 x 11 inch document distributed at the meeting was never
7 made part of the record before the final decision maker.

8 Finally, petitioner notes that the notice of the neighborhood review meeting at Record
9 331 identifies the location of the subject property "as shown by the map on the reverse side
10 of this page." The reverse side of the document at Record 331 is blank. Petitioner appears to
11 argue that reverse side of the notice could be the 8.5. x 11 plan or plat distributed at the
12 meeting, or in any event a different map that should also have been submitted to the city.
13 Although petitioner does not cite it, BDC 50.30.4.A does requires the applicant to submit to
14 the city along with the application "[a] copy of the notice sent to surrounding property
15 owners * * *." That notice is found at Record 331. From the notice's description, the map
16 on the reverse side merely showed the address or location of the subject property, and was
17 not any kind of plat or plan of the proposed development. Why the reverse side of the copy
18 of the notice at Record 331 is blank is not clear. A distinct possibility is that only a one-
19 sided copy was submitted to the city under BDC 50.30.4.A, in which case the reverse side
20 was never part of the record. Petitioner does not argue that a two-sided copy of the notice
21 exists in the county's files and, absent some reason to believe a two-sided copy was placed
22 before the final decision maker, petitioner's record objection is denied.

23 **C. Color Photographs.**

24 Record 32-36 consists of black and white copies of color photographs petitioner
25 submitted into the record. Petitioner objects that the record should include the original color
26 photographs. The city agrees to provide the original color photographs to LUBA at oral

1 argument, pursuant to OAR 661-010-0025(2).¹ Petitioner replies that LUBA should instruct
2 the city to “provide three color copies of the photograph exhibits before commencement of
3 argument.” Petitioner’s Reply 4.

4 Petitioner does not dispute that the city may retain the original color photographs
5 until the date of oral argument under OAR 661-010-0025(2). We do not understand
6 petitioner’s request for the Board to instruct the city to provide three copies of the color
7 photographs at oral argument. Under OAR 661-010-0025(2), the city may retain certain
8 difficult-to-duplicate items and submit those originals to the Board at or before oral
9 argument. There is no provision requiring the city to submit three copies of original exhibits
10 at oral argument.

11 This objection is sustained in part and denied in part.

12 **D. Table of Contents.**

13 OAR 661-010-0025(4)(a)(B) requires that the record shall: “[b]egin with a table of
14 contents, listing each item contained therein, and the page of the record where the item
15 begins * * *.” The record in the present case is 348 pages. The table of contents lists 14
16 items, some of which have unnumbered subsections with separately listed documents. Some
17 listed items are staff reports and similar documents with unlisted attachments. Some listed
18 items explicitly bundle together multiple documents, while other sections list a single item
19 without noting that the item arguably consists of multiple unrelated documents. Petitioner
20 argues that four of the 14 listed items are inadequately described in the table of contents, and

¹ OAR 661-010-0025(2) provides:

“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 the table of contents must be amended to separately list all documents that comprise those
2 four listed items.

3 The city responds that LUBA rejected a similar objection to the table of contents in
4 *Oien v. City of Beaverton*, 45 Or LUBA 722, 723 n 2 (2003). In that order, we stated that
5 “[w]e might sustain some of these objections if intervenor made some attempt to show that
6 the additional detail [in the table of contents] is needed for intervenor and other parties to
7 locate material documents in the record.” *Id.* The city argues that in the present case
8 petitioner similarly makes no attempt to show that separately listing each attachment or
9 bundle of multiple documents is necessary to allow the parties to locate material documents
10 in the record.

11 Petitioner responds that there is no requirement under LUBA’s rules that a party
12 objecting that the table of contents does not comply with OAR 661-010-0025(4)(a)(B)
13 demonstrate that compliance is necessary to allow the parties to locate documents in the
14 record. According to petitioner, there is no basis under LUBA’s rules to excuse the city’s
15 failure to comply with OAR 661-010-0025(4)(a)(B).

16 We have previously noted that while OAR 661-010-0025(4)(a)(B) requires that the
17 table of contents list “each item,” it does not explicitly require that attachments to documents
18 be separately identified and listed. *Kane v. City of Beaverton*, 49 Or LUBA 712, 714 (2005).
19 Even if OAR 661-010-0025(4)(a)(B) explicitly required local governments to separately list
20 each attachment to each document in the record, if such failure to comply with the rule is a
21 “technical violation” of our rules that does not affect the substantial rights of the parties, then
22 no remedial action is necessarily required. OAR 661-010-0005.

23 Consistent with OAR 661-010-0005, we have held that the table of contents must be
24 amended to separately list attachments to documents in the record if that is necessary to
25 make the record usable for the parties and the Board, but otherwise we will not require
26 amendment to a deficient table of contents. *Id.*, citing *Emmons v. Lane County*, ___ Or

1 LUBA ____ (LUBA No. 2004-111, Order, November 10, 2004); *Oregon Department of*
2 *Transportation v. City of Klamath Falls*, ____ Or LUBA ____ (LUBA No. 2000-147, Order,
3 December 20, 2000). Where the record and the number of attachments and pages involved is
4 relatively small, we have not required the local government to amend the table of contents to
5 separately identify attachments, as was the case in *Kane*. Conversely, where the record is
6 large or the number of attachments and pages involved is substantial, making it difficult for
7 the parties to locate individual documents with reasonable effort, we have required the local
8 government to amend the table of contents to separately list each attachment. *See Sane*
9 *Orderly Development, Inc. v. City of Roseburg*, __ Or LUBA __ (LUBA No. 2008-226,
10 Order, April 17, 2009) (several hundred pages of unidentified attachments); *Rogue*
11 *Aggregates, Inc. v. Jackson County*, __ Or LUBA __ (LUBA No. 2007-158, Order on Record
12 Objections, December 26, 2007) (attachments spanning over 1,600 pages).

13 With that overview in mind, we turn to petitioner’s challenges to the adequacy of four
14 items listed in the table of contents.

15 **1. Item 6.**

16 Item 6, at Record 26 to 64, is listed in the table of contents as “Staff Memorandum
17 from Ken Rencher, Associate Planner to Mayor and Council, dated 11/2/09.” The
18 memorandum itself is only two pages. On the second page of the memorandum it provides
19 an internal list of 11 attachments to the memorandum, which span Record pages 28-64.
20 Petitioner argues that each of the attachments to the November 2, 2009 staff memorandum
21 must be separately listed in the table of contents.² However, given that the staff
22 memorandum provides an internal listing of attachments, petitioner has not established that
23 the table of contents must be amended to allow the parties to locate individual documents

² Petitioner actually identifies 15 separate documents in the span of Record 28-64, rather than 11. Most of the attachments to the staff memorandum consist of petitioner’s letters, some of which appear to have their own attached exhibits, which appears to account for the difference.

1 with reasonable effort. *See Emmons*, slip op 2 (documents with internal lists of attachments
2 helps the parties locate specific attachments and may obviate the need to list such
3 attachments in the table of contents). Nonetheless, for the reasons set out below we require
4 the city to amend the table of contents. Because the city must amend the table of contents in
5 any event, the city shall amend the listing for Item 6 to separately list the attachments to the
6 staff memorandum. To reflect the relationship between the staff memorandum and its
7 attachments, the table of contents may list the attachments as subsections to Item 6, as the
8 city did with Item 10, discussed below. This objection is sustained.

9 **2. Item 7.**

10 Item 7, located at Record 65-87, is a 22-page document that the table of contents
11 identifies as “Appellant’s Motion to Keep the Record Open, dated 11/2/09,” which
12 accurately reflects the caption on the first page of the document. Record 65. Petitioner
13 argues that the table of contents should instead or in addition identify the document at
14 Record 65-87 as “Appellant’s Written Testimony and Exhibits in Support of Appeal to City
15 Council,” which is a caption found lower on the first page of the document. However, the
16 table of contents accurately describes the lead caption of the document at Record 65-87. If
17 petitioner submits a single document that includes distinct parts or sections, set out by
18 different captions, he cannot complain if the table of contents identifies the document by the
19 first caption of the document. This objection is denied.

20 **3. Item 10.**

21 Item 10 is a staff memorandum dated October 5, 2009, with three attachments.
22 Unlike the listing for Item 6, the table of contents separately lists three attachments to that
23 memorandum, as subsections. The first attachment is identified as petitioner’s written
24 testimony dated October 5, 2009, at Record 102-111. Petitioner argues that that written
25 testimony itself has two attached exhibits, a notice of hearing at Record 108-09 and a letter
26 of completeness at Record 110-11. Petitioner contends that the two exhibits to his written

1 testimony should be separately listed in the table of contents. However, petitioner does not
2 explain what purpose that would serve. It is frequently the case that a staff report will
3 collect together much of the testimony or evidence submitted during lower proceedings, and
4 present those documents as attachments to the staff report, as was the case with Item 6 and
5 Item 10. In such cases, the attached documents have significance independent of the
6 collecting document, and in general it is appropriate, if not required, to separately list such
7 attached documents in the table of contents.

8 However, petitioner's October 5, 2009 written testimony is not such a collecting
9 document, and the two exhibits attached to that testimony simply illustrate or support
10 arguments made in that written testimony. The table of contents treats petitioner's testimony
11 and the two attached exhibits as a single "item," and given the apparent relationship between
12 the testimony and the exhibits that seems accurate. Certainly petitioner has not established
13 that the two exhibits to petitioner's testimony must be separately listed in order to allow the
14 parties to locate the two exhibits with reasonable effort. This objection is denied.

15 **4. Item 14.**

16 Item 14 is a collecting document like that described above, in this case an "Agenda
17 Bill" that the table of contents lists along with 15 listed attachments spanning Record 135-
18 347. Item 14 as a whole apparently represents a collection of documents submitted during
19 the planning commission proceedings regarding the subdivision application that were
20 forwarded by staff to the city council, for purposes of hearing petitioner's appeal of the
21 subdivision approval. It is clear that in listing the attachments the city's approach was that of
22 a "lumper." Petitioner is just as clearly a "splitter," and argues that the 15 listed attachments
23 represent over 50 different documents that should be separately listed.

24 As with Item 6, some of the discrepancy between the 15 attachments identified by the
25 city and the 50+ separate documents identified by petitioner appears to reflect attachments to
26 documents. For example, the city listed as a single item the planning commission decision

1 and the findings attached to that decision, under the notation “Planning Commission Land
2 Use Order * * * with Findings[.]” Record ii. Given the close relationship between the
3 decision and the attached and incorporated findings, it is certainly reasonable to view the
4 decision plus findings as a single item and list them accordingly in the table of contents.

5 However, as petitioner notes, the table of contents lists as a single “item” numerous
6 letters submitted by petitioner on various dates. For example, the city listed together four
7 documents under the single heading “Additional Written comments by Mr. Kane noting
8 corrections, dated 9/15/09, 9/9/09, 9/4/09 and 8/31/09.” Record ii. Similarly, the city listed
9 as a single item ten letters submitted by petitioner to the planning commission, dated
10 “8/11/09, 8/11/09, 8/10/09, 7/31/09, 7/30/09, 7/29/09, 6/22/09, 5/22/09, 5/20/09, and
11 5/15/09.” *Id.* Those letters span 39 pages of the record. These letters were apparently
12 submitted separately, and cannot reasonably be viewed as a single item. Given the number
13 of letters bundled together into single listings and the number of pages involved, we agree
14 with petitioner that a significant effort is required to locate any particular letter, and therefore
15 agree that the table of contents must be amended to list the letters separately and identify the
16 page number of the first page of each letter.

17 The largest such collective listing is from Record 265 to 346, which the table of
18 contents identifies as “Applicant’s Written Statement and Submitted Plans (applicable
19 sections), rec’d 7/22/09.” *Id.* That section of the Record consists of a miscellany of
20 documents, including two versions of the subdivision narrative, letters from the city to the
21 applicant, affidavits of mailing notices, notices of meetings, subdivision plats, meeting notes,
22 sign-up sheets, mailing lists, grading plans, utility plans, aerial photographs, etc. While the
23 applicant may have submitted those documents together on the same date, the city identifies
24 no cognizable basis to view them as a single “item.” There is no internal list of exhibits or
25 other internal organizing principle, other than that the documents were apparently submitted
26 on the same date by the applicant and involve materials submitted to support the application.

1 Finding a particular document in that miscellaneous collection requires significant effort. We
2 agree with petitioner that the table of contents must be amended to identify the various
3 separate items in that collection.

4 This objection is sustained in part.

5 **E. Conclusion**

6 Within seven days from the date of this order, the city shall file with LUBA and serve
7 on the parties an amended table of contents that responds to the objections sustained above.
8 The amended table of contents shall list as retained items the original colored photographs to
9 be submitted on or before the date of oral argument, under OAR 661-010-0025. When
10 LUBA receives the amended table of contents it will issue an order settling the record and
11 setting a briefing schedule.

12 Dated this 17th day of February, 2010.

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Tod A. Bassham
Board Chair