

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

3
4 DEVIN OIL CO., INC,
5 *Petitioner,*

6
7 vs.

8
9 MORROW COUNTY,
10 *Respondent,*

11
12 and

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14 LOVE'S TRAVEL STOPS & COUNTRY STORES, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2010-044

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19 DEVIN OIL CO., INC,
20 *Petitioner,*

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22 vs.

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24 MORROW COUNTY,
25 *Respondent.*

26
27 and

28
29 LOVE'S TRAVEL STOPS & COUNTRY STORES, INC.,
30 *Intervenor-Respondent.*

31
32 LUBA No. 2010-046

33 ORDER

34 **MOTION TO INTERVENE**

35 Love's Travel Stops & Country Stores, Inc. (intervenor), the applicant below, moves
36 to intervene on the side of respondent. There is no opposition to the motion, and it is
37 granted.

38 **RECORD OBJECTIONS**

39 In these consolidated appeals, petitioner challenges a county decision approving a

1 conditional use permit for a travel plaza in LUBA No. 2010-044. Petitioner challenges a
2 decision approving comprehensive plan text and map and zoning map changes (plan/zoning
3 changes) to authorize the same travel plaza in LUBA No. 2010-046. The county submitted
4 separate records in LUBA No. 2010-044 and 2010-046. Confusingly, the cover for the
5 record in LUBA No. 2010-046 was labeled “LUBA No. 2010-044,” while the cover for the
6 record in LUBA No. 2010-046 had a blank LUBA number.¹ Petitioner filed objections to
7 both records. The county then submitted first, second and third supplemental records in
8 LUBA No. 2010-044, with an amended table of contents for that appeal. The county also
9 submitted second and third supplemental records in LUBA No. 2010-046, with an amended
10 table of contents for that appeal. Adding to the confusion, there is no *first* supplemental
11 record in LUBA No. 2010-046. Petitioners have filed partial objections to the supplemental
12 records. The county filed two responses disputing some objections, and petitioner has filed a
13 reply. The parties appear to agree that the supplemental records together resolve most of
14 petitioner’s objections to the original records, but some objections remain unresolved. We
15 now attempt to address the outstanding objections.

16 **A. Consolidated Records**

17 Petitioner argues first that it is confusing to have separate records for LUBA No.
18 2010-044 and 2010-046, each with separate supplemental records, and requests that LUBA
19 order the county to submit a single consolidated record for both appeals. In our order
20 consolidating these two closely related appeals, we authorized the county to submit separate
21 records for each decision, and the county did so. The contents of the two records overlap to
22 some extent, and the filing of several supplemental records in each appeal makes citation, at

¹ We have corrected this error on LUBA’s copy of the records by switching the two record covers and handwriting “LUBA No. 2010-046” on the cover of that record. The parties should do likewise. We have also replaced the original table of contents in each record with the amended table of contents. The parties should do likewise.

1 least, somewhat complicated.² However, we agree with the county that because there were
2 separate applications, processed separately, resulting in separate records and decisions, it is
3 appropriate for the county to submit separate records to LUBA. It would likely be even more
4 confusing to intermingle the two records into a single record, particularly if the consolidated
5 record is organized by document date. This objection is denied.

6 **B. Objections to the Record in LUBA No. 2010-044 (CUP)**

7 LUBA No. 2010-044 challenges the county court’s final decision approving
8 intervenor’s CUP application, on appeal of the planning commission decision also approving
9 the CUP application.

10 **1. Untimely Response**

11 Petitioner first argues that the county’s July 7, 2010 response to its June 22, 2010
12 record objection in LUBA No. 2010-044 was filed one day late, under OAR 661-010-
13 0026(4).³ The county responds, and we agree, that filing a response to a record objection
14 one day late is at most a “technical violation” of LUBA’s rules that will not affect this review
15 proceeding unless the delay caused prejudice to a party’s substantial rights, under OAR 661-
16 010-0005. Petitioner has not alleged that the delay of one day prejudiced its substantial
17 rights, and this objection is denied.

18 **2. Inverse Chronological Order**

19 Petitioner objects that the record in LUBA No. 2010-044 and the first supplemental
20 record in that appeal are not organized in inverse chronological order (most recent document
21 on top) as required by OAR 661-010-0025(4)(a)(E), and requests that the Board order the
22 county to reorganize the records strictly by document date. As an example, petitioner notes

² In citing a specific record page, the parties should use a citation form that adequately identifies the appeal and record, such as “Record xx (LUBA No. 2010-044)” or “1st Supp Rec, xx (LUBA No. 2010-046).”

³ OAR 661-010-0026(4) provides that “[a] party may, within 14 days from the date of service of a record objection, file a response.”

1 that Record 63-147 in LUBA No. 2010-044 consists of a staff memorandum with three
2 attachments, some of which themselves have attachments, and that the various attachments
3 and sub-attachments are not organized in inverse chronological order, as reflected by
4 document dates. With respect to the first supplemental record, petitioner argues that the
5 county organized 130 pages of documents under two topics (water, wastewater and sewer
6 issues and traffic impact analysis issues) rather than by chronological, document date order.

7 We understand the county to respond that Record 63-147 and the first supplemental
8 record reflect how the documents therein were actually organized and distributed to the
9 parties and decision makers during the proceedings below, and that as long as the record is
10 usable by the parties and documents can be located with reasonable effort, LUBA should not
11 require the county to reorganize the record in strict chronological order by document date.
12 *Stahl v. Tillamook County*, 43 Or LUBA 623, 626 (2002).

13 We agree with the county. In many cases, placing documents with attachments in the
14 same relationship those documents were presented below results in a more usable and
15 accurate record than one in which documents and attachments are reorganized by the strict
16 document date of each attachment.⁴ Similarly, if documents on a related topic but with
17 different dates are submitted into the record together, it can be more useful, and accurate, to
18 keep those documents together in the record rather than to separate them by document date.
19 Petitioner has not demonstrated that the county's deviation from the inverse chronological
20 order requirement of OAR 661-010-0025(4)(a)(E) warrants reorganization of the records.
21 This objection is denied.

22 3. Planning Commission Record on the CUP Application

23 Petitioner argues that the CUP record in LUBA No. 2010-044 at Record 216-316

⁴ We note that OAR 661-010-0025(4)(a)(E) was amended effective for appeals filed after July 1, 2010, to provide that where a listed item in the record includes attached exhibits, the exhibits shall be set out in the order in which they were originally attached, not by the date of the exhibits.

1 includes documents from the record before the planning commission on the CUP application
2 that were not subsequently placed before the county court, on appeal of the planning
3 commission's decision approving the CUP. Petitioner initially objected to inclusion of the
4 these pages of the planning commission CUP record in the record of LUBA No. 2010-044,
5 but now concedes that the entire planning commission record on the CUP application was
6 automatically incorporated into the record before the county court, the final decision maker,
7 by operation of Morrow County Zoning Ordinance 9.030(C).⁵ This objection is denied.

8 **4. First Supplemental Record in LUBA No. 2010-044**

9 Resolution of the next two record objections is complicated by the fact that, based on
10 two affidavits submitted by the county planning director, it appears that county staff prepared
11 a notebook for the planning commission that combined some but not all of the documents in
12 the otherwise separate CUP record and plan/zone change record, and then forwarded that
13 notebook to the county court. The county court held separate hearings on the CUP and
14 plan/zone change applications, but we understand the county to take the position that the
15 same notebook was placed before the county court for purposes of both proceedings. With
16 that understanding, which petitioner does not dispute, we turn to petitioner's objections.

17 The first supplemental record in LUBA No. 2010-044 consists of documents related
18 to water, wastewater and stormwater issues and the traffic impact analysis. Petitioner objects
19 that these documents were prepared to support the plan/zone change application at issue in
20 LUBA No. 2010-046, and were not placed before the county court, the final decision maker,
21 during the appeal of the CUP application at issue in LUBA No. 2010-044.

22 Based on the second affidavit submitted by the county planning director, we
23 understand the county to argue that the documents in the first supplemental record in LUBA

⁵ MCZO 9.030(C) provides “[a]n appeal or review proceeding shall be based upon, but not limited to, the record of the decision being appealed or reviewed.” See footnote 6, below, for the complete text of MCZO 9.030.

1 No. 2010-044 were included in the notebook that was forwarded to the county court, and
2 “placed before” the county court in the proceedings on the CUP appeal. If that is correct,
3 and we are given no reason to conclude otherwise, then we agree with the county that those
4 documents were placed before the county court in the proceedings on the CUP appeal and
5 thus are properly part of the CUP record before the county court in LUBA No. 2010-044.
6 This objection is denied.

7 **C. Objections to the Record in LUBA No. 2010-046 (Plan/Zoning Change)**

8 **1. Entire Planning Commission Record on the Plan Amendment**

9 The planning commission held hearings on intervenor’s plan/zoning change
10 application on January 19, 2010 and February 23, 2010, and voted to recommend approval to
11 the county court. The county court, the final decision maker, ultimately approved the
12 plan/zoning change. Petitioner argues that the record in LUBA No. 2010-046 improperly
13 includes the entire plan/zoning change record before the planning commission, found at
14 Record 320 to 587. According to petitioner, only selected documents from the planning
15 commission plan/zoning change record were forwarded to the county court for its
16 deliberations on the plan/zoning change. Because the entire planning commission record
17 was never placed before the county court for its deliberations on the plan/zoning change, or
18 specifically incorporated into the record by the county court, petitioner argues that the entire
19 planning commission plan/zoning change record is not properly part of the record in this
20 appeal. OAR 661-010-0025(1)(b) (the record includes documents placed before or
21 specifically incorporated by the final decision maker). To the extent the county relies on
22 MCZO 9.030(C) to automatically incorporate the entire planning commission plan/zoning
23 change record, petitioner argues that MCZO 9.030(C) applies only to appeals of permit
24 applications, and does not apply to review of comprehensive plan text, plan map and zoning
25 map amendments, which are governed by different regulations.

26 The county responds that MCZO 9.030(C) applies to both “appeals” and “review

1 proceedings,” and argues that the county court’s review of the planning commission
2 recommendation to approve the plan/zoning change constituted a “review proceeding” for
3 purposes of MCZO 9.030(C), and therefore the entire planning commission record was
4 automatically incorporated into the county court record. In any case, the county argues, most
5 of the planning commission documents in the record of LUBA No. 2010-046 were in fact
6 “placed before” the county court. As noted above, the affidavits submitted by the county
7 planning director state that a notebook including many of the documents in the planning
8 commission record on the plan/zone change was forwarded to the county court.

9 Based on the planning director’s affidavits, we agree with the county that most of the
10 documents at Record 320 to 587, including the comprehensive plan and zoning map
11 amendment application, were forwarded to the county court and hence placed before the final
12 decision maker. There are, however, some documents listed in Record 320 to 587 that are
13 not fairly described in the planning director’s affidavit. For example, the plan/zone change
14 record includes the minutes of the two planning commission hearings, but the affidavit does
15 not indicate that the minutes were among the documents forwarded to the county court. We
16 understand the county to rely on MCZO 9.030(C) as the basis to include such documents in
17 the record before the county court, and therefore turn to the parties’ dispute over MCZO
18 9.030(C).

19 MCZO 9.030(C) is part of MCZO Article 9, which is entitled “Administrative
20 Provisions” and which sets out procedures for processing applications for permits and zoning
21 map changes. MCZO 9.030 is a subsection entitled “Appeals” and governs in relevant part
22 appeals to the county court “from a decision or requirement made by the Planning
23 Commission.”⁶ MCZO 9.030(B) provides that even if no appeal is filed the county court or

⁶ MCZO 9.030 provides, in full:

“SECTION 9.030. APPEALS. A person may appeal to the County Court from a decision or requirement made by the Planning Commission. A person may appeal to the Planning

1 planning commission may “review” a lower body’s decision. As noted, MCZO 9.030(C)
2 provides that “[a]n appeal or review proceeding shall be based upon, but not limited to, the
3 record of the decision being appealed or reviewed.” Given this context, it is relatively clear
4 that the “review proceeding” referenced in MCZO 9.030(C) is the “review” referenced in
5 MCZO 9.030(B), where the county court or planning commission calls up a lower body’s
6 decision in the absence of an appeal. There is nothing cited to us in MCZO Article 9 or
7 elsewhere indicating that MCZO 9.030(C) is intended to apply to the county court’s review
8 of a planning commission recommendation on an application for a comprehensive plan text,
9 plan map, and zoning map amendments. We note that Article 8, entitled “Amendments,” sets
10 out the process and criteria for adopting zoning ordinance text and map amendments, and in
11 relevant part requires a county court hearing on the planning commission’s recommendation,
12 but includes no analogue to MCZO 9.030(C). Further, MCZO Article 8 does not use the
13 word “review” or “review proceeding.” We therefore agree with petitioner that the county
14 cannot rely on MCZO 9.030(C) to include documents from the planning commission record

Commission from a decision or requirement made pursuant to this Ordinance by the Commission Secretary, Planning Director or other county official. Written notice of the appeal must be filed with the county within 15 days after the decision or requirement is made. The notice of appeal shall state the nature of the decision or requirement and the grounds for appeal.

- “A. The County Court or Planning Commission shall hold a hearing on the appeal within 30 days from the time the appeal is filed. The County Court or Commission may continue the hearing for good cause.
- “B. The County Court or Planning Commission may review a lower decision upon its own motion after giving twenty (20) days notice to the parties involved in the decision, and if such review is within 15 days of receipt of notices of said initiated lower decision.
- “C. An appeal or review proceeding shall be based upon, but not limited to, the record of the decision being appealed or reviewed.
- “D. Following the hearing, the County Court or Commission may overrule or modify any decision or requirement and shall set forth findings for such decision.
- “E. The procedure, public notice and type of hearing for an appeal or review shall be in the same manner as for any application under this Ordinance.”

1 that were not actually forwarded to the county court.

2 Unfortunately, the document descriptions in the planning director's affidavit differ
3 somewhat from those in the amended table of contents, and it is not always clear exactly
4 which documents were forwarded to the county court and which were not. Nonetheless, we
5 believe the following planning commission documents listed in the amended table of
6 contents were not forwarded to the county court: (1) the minutes of the February 23, 2010
7 planning commission hearing at Record 326-337, (2) the minutes of the January 19, 2010
8 planning commission hearing at Record 362-373, (3) a hearing sign up sheet at Record 382,
9 and (4) a letter at Record 587. As far as we can tell, every other document listed in Record
10 320 to 587 was forwarded to the county court or otherwise is indisputably part in the record.
11 Accordingly, the documents at Record 326-337, 362-373, 382, and 587 are stricken from the
12 record, and the Board and parties will not consider them for purposes of this appeal.

13 In a separate objection, we understand petitioner to object to inclusion of the audio
14 recordings of the January 19, 2010 and February 23, 2010 planning commission hearings in
15 the record of LUBA No. 2010-046. For the same reasons set out above, we agree with
16 petitioner that the audio recordings of the planning commission hearings on the plan and
17 zoning amendments are not part of the record in LUBA No. 2010-046. However, we note
18 that the February 23, 2010 planning commission hearing was a joint hearing on the plan/zone
19 change and the CUP application, and we understand petitioner to concede that the audio
20 recording of that joint February 23, 2010 hearing is part of the record in LUBA No. 2010-
21 044.

22 **2. E-mails at Record 118-133**

23 Petitioner objects to several e-mails found at Record 118-133. The county does not
24 object to removing these documents from the record. Therefore, the documents at Record
25 118-133 are stricken from the record, and the Board and parties will not consider them for
26 purposes of this appeal.

1 **3. Resolution of Objections to the Record in LUBA No. 2010-046**

2 To sum up, the following items are stricken from the record in LUBA No. 2010-046
3 and will not be considered by the Board for purposes of that appeal.

- 4 1. Record 118-133, 326-337, 362-373, 382, and 587.
5 2. Audio recordings of the January 19, 2010 and February 23, 2010
6 planning commission hearings.

7 As far as we can tell, all other objections to the record in LUBA No. 2010-046 have been
8 resolved by the supplemental records and county responses.

9 **D. Conclusion**

10 The records in LUBA No. 2010-044 and 2010-046 are settled as of the date of this
11 order. Given the state of the records and the parties’ pleadings, it is entirely possible that we
12 have overlooked an outstanding objection. If that is the case, any party may, within 14 days
13 of the date of this order, file a renewed record objection asking us to resolve any outstanding
14 objections not addressed in this order. If such an objection is filed within 14 days from the
15 date of this order, the briefing schedule set out in the next paragraph will be automatically
16 suspended pending resolution of the objection. OAR 661-010-0026(6).

17 The petition for review shall be due 21 days from the date of this order. The
18 respondent’s brief shall be due 42 days from the date of this order. The Board’s final opinion
19 and order shall be due 77 days from the date of this order.

20 Dated this 27th day of August, 2010.

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Tod A. Bassham
Board Member