

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

3
4 GUNDERSON, LLC
5 *Petitioner,*

6
7 vs.

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9 CITY OF PORTLAND,
10 *Respondent,*

11 and

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14 FRIENDS OF CATHEDRAL PARK NEIGHBORHOOD
15 ASSOCIATION, UNIVERSITY OF PORTLAND,
16 AUDUBON SOCIETY OF PORTLAND,
17 and WILLAMETTE RIVERKEEPER,
18 *Intervenors-Respondents.*

19
20 LUBA No. 2010-039

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22 WORKING WATERFRONT COALITION,
23 *Petitioner,*

24
25 vs.

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27 CITY OF PORTLAND,
28 *Respondent,*

29 and

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32 FRIENDS OF CATHEDRAL PARK NEIGHBORHOOD
33 ASSOCIATION, UNIVERSITY OF PORTLAND,
34 AUDUBON SOCIETY OF PORTLAND,
35 and WILLAMETTE RIVERKEEPER,
36 *Intervenors-Respondents.*

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38 LUBA No. 2010-040

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40 SCHNITZER STEEL INDUSTRIES, INC.,
41 *Petitioner,*

42
43 vs.

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45 CITY OF PORTLAND,

1 Petitioners argue that the city’s inclusion of the agenda, minutes, and documents of
2 the July 26, 2005 planning commission hearing demonstrate that the city has determined that
3 the legislative process for the North Reach River Plan began on July 26, 2005, and that the
4 documents that were created by or received by the task groups and committees became part
5 of the record during the Three Year Period that elapsed between the two planning
6 commission hearings after the legislative process had begun. We understand petitioners to
7 argue that the city’s posting of links to the various materials on the North Reach River Plan
8 website served to make all of those materials part of the record by placing them before the
9 decision maker, albeit in virtual format, and that petitioners reasonably believed that all of
10 the materials linked on the web site would be placed before the planning commission and the
11 city council.

12 In support of their contention that petitioners reasonably believed that the materials
13 were part of the record, petitioners point to the fact that the chair of the planning commission
14 also served as the chair of the River Plan Committee and one of the Task Groups and argue
15 “[b]ased on the city’s conduct in placing the Chairman of the Planning Commission as chair
16 of the liaison between the task groups and the decision makers * * *,” it was reasonable for
17 petitioners to believe that the documents on the website were part of the record. Petitioners’
18 Reply Regarding Record Objections 4.

19 Petitioners also point to Appendix C of the adopted North Reach River Plan at
20 Record 150. Appendix C is entitled “Related Publications and Documents” and contains the
21 following introductory paragraph prior to a list of documents:

22 “The following documents include background material that informed the
23 [North Reach River Plan] process and [North Reach River Plan] publication.
24 These and other related documents are available on the River Plan website at
25 www.portlandonline.com/bps/riverplan, unless otherwise noted. All
26 documents were produced by Bureau of Planning and Sustainability staff, in
27 collaboration with numerous individuals and organizations, unless otherwise
28 noted.” Record 150.

1 Petitioners argue that Appendix C’s reference to documents that “informed the River
2 Plan/North Reach process and River Plan/North Reach publication” means that those
3 documents were placed before the planning commission and the city council via posting on
4 the city’s website.

5 In support of their contentions, petitioners cite *Graser-Lindsey v. City of Oregon City*,
6 58 Or LUBA 703 (2009). *Graser-Lindsey* involved an appeal of a legislative land use
7 decision adopting a concept plan for an area of the city. City staff expressly stated that it was
8 the city’s intent to make documents that were listed as attachments and referred to in a
9 planning commission report to the city commission part of the record of the local legislative
10 land use proceeding.⁴ We concluded that certain materials that were listed on the city’s
11 website for the disputed plan were part of the record:

12 “[W]hen a local government expresses an intent to make documents that are
13 available on the city’s website part of the record of a local legislative land use
14 proceeding and in fact makes those documents available to the local
15 government decision makers and parties via the city’s website, those
16 documents are ‘placed before local decision makers,’ within the meaning of
17 OAR 661-010-0025(1)(b), notwithstanding that only selected documents are
18 also placed before the local decision maker in paper copy form.” *Id.* at 707.

19 However, rather than require the city to provide paper copies of all of those documents as
20 part of the record that the city transmitted to LUBA in *Graser-Lindsey*, LUBA allowed the
21 city to make the documents available to the parties and to LUBA on an appropriate electronic
22 medium.

⁴ That language is quoted in the order and provided:

“Hardcopies of Exhibits 3, 11, 55, 59 and 60 have been provided. The remainder of the exhibits are available as PDF’s on the City’s website * * * under ‘Beavercreek Road Concept Plan City Commission Packet’ or are on file. The complete record is available at City Hall and may be reviewed Monday through Friday * * *. If you are interested in copies of the record, which can be provided for a fee, please make a public records request * * *.” *Id.* at 706.

1 The city responds that the documents that were generated by the various task groups
2 and committees and referred to or linked to on the city’s website are not a part of the record,
3 because they were not physically placed before the planning commission or the city council
4 and there is no indication in the record that by placing them on the website the city intended
5 to place them before the planning commission or city council.⁵ Citing *Home Builders*
6 *Association v. City of Eugene*, 58 Or LUBA 688 (2009), the city argues that documents do
7 not become part of the record merely because they pertain to the North Reach River Plan,
8 and that in the absence of any argument that the documents were physically placed before the
9 planning commission or the city council, the documents are not part of the record. The city
10 also points out that the city’s website expressly states that the task groups’ function was to
11 “advise River Plan Staff” regarding the contents of the River Plan and that the materials were
12 developed by those task groups to assist the city’s *planning staff*, rather than the planning
13 commission or the city council, in preparing a draft of the North Reach River Plan for
14 presentation to the planning commission. The city maintains that petitioners have not
15 identified anything in the record that would reasonably suggest to participants to the land use
16 proceeding that by posting materials posted on the website the city intended that those
17 materials would thereby become part of the record of the proceedings on this legislative land
18 use decision. The city argues that *Graser-Lindsey* is inapposite in the present appeal,

⁵ OAR 661-010-0025(1) provides as follows:

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

“ * * * * *

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

1 because nothing in the city’s record evidences a city intent to make the website materials part
2 of the record.

3 We disagree with petitioners that the inclusion of documents on a city website
4 dedicated to the North Reach River Plan means those materials were “placed before * * * the
5 decision maker,” within the meaning of OAR 661-010-0025(1)(b), such that they became
6 part of the record of the legislative proceedings. Absent an express indication that the city
7 intended that documents on a city’s website would become part of the record of this land use
8 proceeding, the mere act of making documents available on a website is not sufficient to
9 place the documents before a decision maker, just as making documents in a physical folder
10 in the planning department’s central files available to the public is not sufficient to place
11 those documents before the decision maker.

12 Other than citing the introductory paragraph to Appendix C at Record 150, which we
13 discuss below, petitioners do not point to any language in the city’s decision or other parts of
14 the record that indicates an intent on the city’s part that the documents that were posted on
15 the city’s North Reach River Plan website would by that posting become part of the record of
16 the proceeding. While petitioners point to an “Outreach Log” at Record 34 that lists the task
17 groups and the River Plan Committee that is part of the final adopted North Reach River
18 Plan, we do not think that that Outreach Log is sufficient evidence that the city intended to
19 make all documents generated by those task groups and committees part of the record.

20 Moreover, we do not think that petitioners could reasonably have expected all
21 documents generated by the task groups to be included in the record where nothing in the
22 city’s actions indicated that all documents created by the task groups would become part of
23 the record. We do not agree with petitioners that the mere fact that the same person served
24 as the chair of the River Plan Committee and one of the task groups while also serving for a
25 portion of the Three Year Period as the chair of the planning commission has any bearing on
26 whether the documents are part of the record.

1 It is a closer question as to whether the introductory paragraph to Appendix C of the
2 final adopted North Reach River Plan, quoted above, can be read to say that the documents
3 listed in that Appendix and that appear to be available by accessing the city's website were
4 being "placed before * * * the decision makers" via the city's website, within the meaning
5 of OAR 661-010-0025(1)(b). However, we conclude that the quoted language simply
6 identifies background materials that city planning staff relied on in drafting the plan. That
7 language does not rise to the level of the language in *Graser-Lindsey* that we found
8 expressed an intent by the city that the documents should be considered part of the record of
9 the city's legislative land use proceedings. See n 4.

10 For the reasons explained above, petitioners have not demonstrated that the city
11 intended to place the documents that were available on the website before the planning
12 commission or the city council. We therefore agree with the city that the documents
13 included in petitioners' appendices 1 through 13 are not part of the record.

14 **2. Letters to the River Plan Committee Chair**

15 Petitioners further object that the record fails to include two letters from petitioner
16 Working Waterfront Coalition (WWC) to the chair of the River Plan Committee. For similar
17 reasons, we agree with the city that the two letters from WWC to the chair of a committee
18 and a task group were not placed before the planning commission or the city council as
19 required by OAR 661-010-0025(1).

20 Record Objection 1 is denied.

21 **B. Record Objection 2**

22 The challenged decision was adopted on April 15, 2010. The final adopted ordinance
23 and all exhibits to it are found in the record at Record 7 to 1500. Volumes 1A, 3A and 3C
24 are exhibits to the final adopted ordinance, some of which are drafts dated April, 2010 and
25 others which are drafts dated November, 2009. Some of the original exhibits to the final
26 ordinance contain color maps and diagrams on 11 x 17 inch sized paper. All of the maps and

1 diagrams from the drafts dated April 2010 and November 2009 included in the record
2 transmitted by the city are black and white copies on 8 x 11 inch sized paper.

3 Petitioners object that the record includes black and white copies of maps and
4 diagrams that were originally submitted to the city in color. According to petitioners “all of
5 the maps and diagrams in [the drafts of] Volume 1A (Policies, Objectives and
6 Recommendations), Volume 3A (NR1), and Volume 3C (ESEE Analysis and
7 Recommendations for Riparian Corridors and Wildlife Habitat)” dated April 15, 2010,
8 February 10, 2010, November 28, 2009, and October 28, 2008 were submitted into the record
9 in color. Petitioners’ Precautionary Record Objections 6. Petitioners request that the city
10 replace the black and white copies in the record with color copies.

11 OAR 661-010-0025(2) provides in relevant part that a local government may “retain
12 any large maps, tapes, or difficult to duplicate documents and items until the date of oral
13 argument,” instead of copying and including such large and difficult to copy documents and
14 including them in the copies of the record that are transmitted to LUBA and served on the
15 parties. The city does not dispute that the maps and diagrams were submitted in color but
16 responds that the disputed items are “difficult to duplicate” because they contain over 500
17 pages of color maps and diagrams on 11 x 17 inch sized paper. Accordingly, the city
18 included with the Supplemental Record a revised table of contents that specifies that color
19 copies of maps and diagrams found at Record 14-177, and at Record 658-907 and Record
20 1160-1422 will be provided at oral argument.

21 The city also responds that maps and diagrams presented to the city at the February,
22 2010 city council meeting are the drafts dated November, 2009 and that the table of contents
23 has been revised to reflect that.

24 Finally, the city also responds that color versions of certain maps and diagrams dated
25 October 28, 2008 are found in Volume 1A at Record 5649 to 5790, in Volume 3A at Record

1 6909 to 7254 and in Volume 3C at Record 7501-7817 and those have been provided in color
2 in the record transmitted to the Board and the parties on a compact disc.

3 Petitioners respond that the city’s explanation that certain documents are too difficult
4 to duplicate in color is inconsistent with the city’s statement that all of the color maps and
5 diagrams are available electronically, and that petitioners “should not be forced to pay for
6 documents that are indisputably part of the record of this proceeding and which documents
7 should have been produced in the original record transmittal to LUBA and the parties.”
8 Petitioners’ Reply Regarding Record Objections 7.

9 Petitioners do not argue that the black and white copies of the color originals are
10 inadequate or omit key information, and the city makes no attempt to identify those
11 documents where the black and white copy is adequate to convey all the key information that
12 is shown on the color original. In that circumstance, we have previously decided that it is
13 permissible for the city to provide black and white copies in the record transmitted to LUBA
14 and served on petitioners, and retain color originals until oral argument under OAR 661-010-
15 0025(2). *Oien v. City of Beaverton*, 45 Or LUBA 722, 727 (2003). If petitioners desire to
16 accept the city’s offer to provide them color copies of the requested documents on a compact
17 disc, petitioners shall notify the city in writing and reimburse the city for the cost of such
18 copies.

19 Record objection two is denied.

20 **C. Record Objection Three**

21 In this objection, we understand petitioners to object that certain items retained by the
22 city until oral argument are not properly retained under OAR 661-010-0025(2). .

23 **1. Audio Recordings**

24 Petitioners argue that audio recordings of city council and planning commission
25 meetings are easily producible on compact disc, and request that the city provide them with
26 copies of the audio recordings retained by the city under OAR 661-010-0025(2). The city

1 responds, and we agree, that petitioners' complaint is not a record objection and that OAR
2 661-010-0025(3) provides that if a party requests an audio recording that is included in the
3 record, the local government shall serve a copy on that party provided the requesting party
4 reimburses the local government for reasonable expenses incurred in copying the recording.
5 Petitioners do not indicate that they have made such a request or agreed to reimburse the city
6 for the expense of producing a copy. Petitioners' complaint does not provide a basis to
7 object to the record.

8 **2. Record Item 151**

9 The original record transmitted to LUBA and the parties listed certain portions of
10 Record Item 151 as items that were being retained by the city until oral argument pursuant to
11 OAR 661-010-0025(2). In response to petitioners' record objection, the city provided a
12 supplemental record that includes a black and white copy of one of the documents listed in
13 Record Item 151, the original of which was in color and oversized. The remaining portion
14 of retained Record Item 151 is a compact disc that the city maintains is the original format in
15 which the record item was submitted and thus the city is entitled to retain until oral
16 argument. However, the city offers in its response to provide a copy of the disc to petitioners
17 if petitioners agree to reimburse the city for its reasonable expense in making the copy.

18 The supplemental record resolves the portion of this record objection relating to the
19 oversized documents. Regarding the remainder of the objection, the city properly identified
20 the portion of Record Item 151 that was submitted in disc format as a retained exhibit. That
21 portion of petitioners' record objection is denied.

22 **3. Record Item 269**

23 Petitioners object that the city improperly retained portions of Record Item 269, and
24 that Record Item 269 is not "difficult to duplicate" because Record Item 269 consists of
25 paper documents and a digital video disc (DVD), all of which petitioners argue are easily
26 reproducible. The city responds that Record Item 269 contains many oversized color maps

1 that if reduced in size will make the text difficult to read. However, the city submitted a
2 supplemental record that includes (1) a compact disc with copies of the some of the original,
3 oversized color documents, and (2) paper black and white copies of other original, oversized
4 color documents, with the color originals being retained until oral argument, beginning at
5 Supplemental Record 960. The supplemental record satisfies the objection to Record Item
6 269.

7 Record objection three is denied, in part.

8 **D. Record Objection Four**

9 Petitioners object that the record does not include an April 21, 2010 notice to the
10 Department of Land Conservation and Development (DLCD) regarding the North Reach
11 River Plan. The city responds that the DLCD Notice is found at Record 304 and that the
12 revised table of contents transmitted on July 6, 2010, satisfies the objection. We agree with
13 the city. Record objection 4 is resolved.

14 **E. Record Objection Five**

15 Petitioners object that the record is missing a draft of a document entitled “Appendix
16 E - Natural Resource Inventory/Portland Plan Background Report/Fall 2009” that should be
17 included in the record. The city responds that Appendix E is part of a separate planning
18 effort that is currently in process at the city and should not be included in the record because
19 it was not placed before the city council during the proceedings on the North Reach River
20 Plan. Petitioners do not dispute the city’s response. Record objection five is denied.

21 **F. Record Objection Six**

22 Petitioners object that the zoning maps at record pages “3216-3218 do not appear to
23 have any separate significance from proposed zoning maps contained in Volume 1B * * *
24 were not separately submitted by the City or by any of the parties and should therefore be
25 excluded from the record.” Petitioners’ Precautionary Record Objections 8. The city
26 responds that the maps at Record 3216-3218 were submitted into the record as an exhibit to

1 one of the ordinances challenged in this appeal and were placed before the city council. We
2 think the city's response is adequate to justify the inclusion of the maps in the record.
3 Record objection six is denied.

4 **G. Record Objection Seven**

5 Petitioners object that the table of contents does not match the documents in the
6 record. In response the city included a revised Table of Contents with the supplemental
7 record transmitted on July 6, 2010. This record objection is resolved.

8 **H. Record Objection Eight**

9 Petitioners object that the record is missing copies of a notice mailed by the city to
10 property owners in the North Reach River Plan area regarding the city's proposed use of
11 portions of their property as possible restoration sites for the North Reach River Plan. The
12 city responds that the notices are not "notices of proposed action * * * mailed during the
13 course of the land use proceeding * * *" under OAR 661-010-0025(1)(d). The city explains
14 that it sent letters to certain property owners to inform them of the city's interest in
15 discussing the possibility of acquiring their property as potential mitigation or restoration
16 sites, and the letters did not mention the North Reach River Plan or any action on or hearing
17 about the plan.

18 We agree with the city. Record Objection 8 is denied.

19 **I. Record Objection 9**

20 Petitioners argue that the record is missing the first page of the document that begins
21 at Record 2297, which is a letter from WWC and which is included in petitioners'
22 appendices as Exhibit 17. The city responds that the first page of the letter was not included
23 in the original documents submitted by petitioner WWC to the city Auditor, who is the Clerk
24 of the City Council and responsible for maintaining public records. Absent any response
25 from petitioners to establish that the first page was in fact submitted to the city Auditor, we

1 think the city's response is adequate to demonstrate that the first page of the document is not
2 part of the record. Record objection 9 is denied.

3 **BRIEFING SCHEDULE**

4 The record is settled as of the date of this order. The petitions for review shall be due
5 21 days from the date of this order. The respondent's and intervenors-respondents' briefs
6 shall be due 42 days from the date of this order. The Board's final opinion and order shall be
7 due 77 days from the date of this order.

8 Dated this 21st day of September, 2010.

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Melissa M. Ryan
Board Member