

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WILLAMETTE OAKS, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent,*

11 and

12
13 GOODPASTURE PARTNERS LLC,
14 *Intervenor-Respondent.*

15
16 LUBA Nos. 2010-060 and 2010-061

17
18 GOODPASTURE PARTNERS LLC,
19 *Petitioner,*

20
21 vs.

22
23 CITY OF EUGENE,
24 *Respondent,*

25
26 and

27
28 WILLAMETTE OAKS, LLC,
29 *Intervenor-Respondent.*

30
31 LUBA No. 2010-062

32
33 ORDER

34 **RECORD OBJECTIONS**

35 On July 22, 2010, the city filed the record. Petitioner Willamette Oaks, LLC
36 (Willamette) objected to the record. The city and intervenor each filed responses to
37 petitioner's objections, and the city also filed a supplemental record. Willamette objected to
38 the supplemental record, and the city filed a second supplemental record and a response to

1 the remaining objections. Willamette filed a reply to the city’s response. We now resolve
2 the objections.

3 **A. Resolved Objections**

4 **1. Objections 1 – 17 to the Original Record**

5 In objections 1 through 17 to the original record filed by the city, Willamette argues
6 that the city wrongly failed to include seventeen items in the record that are properly part of
7 the record. The supplemental record filed by the city includes all of the additional items that
8 Willamette requested be included in the record in its objections 1 through 17. The
9 supplemental record satisfies objections 1 through 17 to the original record.

10 **2. Objection 1 to the Supplemental Record**

11 In its first objection to the Supplemental Record, Willamette objects that the
12 document found at Supplemental Record (SR) Retained Exhibit A (RE-A) pages 172 and 173
13 was rejected by the planning commission and is not properly included in the record. The city
14 agrees, and requests that LUBA strike from the record and not consider those pages as part of
15 the record. SR RE-A pages 172-73 shall not be considered to be part of the record of this
16 appeal.

17 **3. Objections 2 and 3 to the Supplemental Record**

18 In these objections Willamette asserts that the supplemental record fails to include
19 certain documents. The second supplemental record filed by the city includes the documents,
20 and it satisfies these objections.

21 **B. Objections 18 and 19 to the Original Record/Objection 4 to the**
22 **Supplemental Record**

23 OAR 661-010-0025(1)(b) provides that the record includes “written testimony and all
24 exhibits, maps, documents or other written materials * * * placed before, and not rejected by,
25 the final decision maker, during the course of the proceedings before the final decision
26 maker.” OAR 661-010-0025(1)(b). In objections 18 and 19 to the original record, and in

1 objection 4 to the supplemental record that renews objection 19 to the original record,
2 Willamette argues that the city wrongly included two documents in the record that
3 Willamette argues are not properly part of the record.

4 First, in objection 18, Willamette argues that the city wrongly included in the record
5 Item 93, which is a copy of an e-mail message from the City of Eugene Natural Resources
6 Coordinator to a member of the planning department. That email message is dated
7 December 11, 2008. According to Willamette, Item 93 should not be included in the record
8 because the message was generated and transmitted before the application was filed, in June
9 2009 and was not placed before the decision maker in this matter. Second, in objection 19
10 (and in objection 4 to the supplemental record, which restates objection 19), Willamette
11 objects to Item 39(a)(iii) and argues that it is not properly part of the record because it is
12 dated July 17, 2008, before the application was filed, and was not placed before the decision
13 maker in this matter.

14 In its response, the city moves to take evidence not in the record pursuant to OAR
15 661-010-0045(1), in the form of an affidavit from a member of its planning staff.¹ The
16 motion is allowed. However, in granting the motion, we do not mean to indicate that a
17 motion to take evidence under OAR 661-010-0045 is a prerequisite for LUBA's
18 consideration of an affidavit like that submitted in the present case. LUBA's long-standing
19 practice is to accept and consider the parties' assertions regarding what was in fact placed
20 before or not placed before the final decision maker, for the limited purpose of resolving
21 record objections, whether or not those assertions are embodied in an affidavit, and even if
22 those assertions are unaccompanied by a motion to take evidence. We do not understand
23 OAR 661-010-0045(1) to *require* a motion to take evidence in such circumstances; it simply

¹ OAR 661-010-0045(1) provides in relevant part that:

“The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record * * *.”

1 authorizes the Board to conduct proceedings under OAR 661-010-0045, potentially including
2 issuance of subpoenas and depositions, where the Board deems it necessary to resolve a
3 material dispute regarding the content of the record.

4 In the affidavit, the planning staff member states that he placed the disputed
5 documents before the hearings official during the proceedings on the application, and that
6 when the hearings official's decision was appealed to the planning commission, the entire
7 record that was before the hearings official was provided to the planning commission.
8 Affidavit of Steve Ochs 2. Willamette does not dispute the accuracy of the affidavit.

9 Whether the disputed documents are dated prior to the date of the application being
10 filed is immaterial where the city establishes that the disputed documents were placed before,
11 and not rejected by, the final decision maker during the proceedings before the decision
12 maker. We agree with the city that Item 93 and Item 39(a)(iii) are properly part of the
13 record.²

14 Objections 18 and 19 to the original record, and Objection 4 to the supplemental
15 record, are denied.

16 **BRIEFING SCHEDULE**

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 3rd day of November, 2010.

21
22 _____
23 Melissa M. Ryan
24 Board Member

² Goodpasture Partners, LLC (Goodpasture) also filed responses to Willamette's objections that argued that the objections should be denied because Willamette failed to make a good faith attempt to resolve the objections prior to filing its objections, as required by OAR 661-010-0026(1), and because Willamette styled its objections as "precautionary" where, according to Goodpasture, LUBA's rules no longer provide for precautionary record objections. Because we deny the record objections, we need not address intervenors' arguments regarding the objections.