

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

3
4 BONNIE HEITSCH,
5 *Petitioner,*

6
7 vs.

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9 CITY OF SALEM,
10 *Respondent,*

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12 and

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14 DAVE MOSS and
15 PIONEER ALLEY LLC,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2011-105

19 ORDER SETTLING RECORD

20 In this appeal, petitioner seeks review of an ordinance that vacates an alley right of
21 way on intervenors-respondents' property. Petitioner raised two objections to the record that
22 the city transmitted in this appeal. On January 6, 2012, LUBA received a supplemental
23 record from the city that resolves one of those objections. The parties do not agree on the
24 remaining objection concerning a September 16, 2011 staff report.

25 The September 16, 2011 staff report is a prior version of the September 26, 2011 staff
26 report that was provided to the city council in this matter. A copy of the September 26, 2011
27 staff report is included in the record. Record 54-58. The last page of the September 26, 2011
28 staff report indicates the September 26, 2011 staff report was prepared on September 16,
29 2011 and revised September 21, 2011. Record 58. The city takes the position that while the
30 September 26, 2011 staff report was placed before the city council, the earlier September 16,
31 2011 version of the staff report was not placed before the city council, and, for that reason, is
32 not part of the city's record in this matter.

1 As potentially relevant, OAR 661-010-0025(1) provides that the city's record in this
2 appeal is to include the following:

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

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9 "(d) Notices of proposed action, public hearing and adoption of a final
10 decision, if any, published, posted or mailed during the course of the
11 land use proceeding, including affidavits of publication, posting or
12 mailing. ***"

13 As clarified in her January 19, 2012 Reply to Respondent's Response to Record
14 Objection, we understand petitioner to concede that the September 16, 2011 version of the
15 staff report was not placed before the city council or specifically incorporated into the record
16 and need not be included in the record under subsection (b) of OAR 661-010-0025(1).
17 However, petitioner contends the September 16, 2011 staff report was part of the city's
18 notice of the September 26, 2011 city council meeting, and under subsection (d) of OAR
19 661-010-0025(1) must be included in the city's record in this appeal.

20 The city's notice of the September 26, 2011 city council meeting appears four times
21 in the record. Record 132-33 (notice with map); 135-36 (notice with list of addressees); 138
22 (notice only); 140-41 (notice with map). The notice at Record 132-33 was transmitted to
23 interested persons via an e-mail message dated September 13, 2011. The notice at Record
24 135-36 is attached to an affidavit of mailing that states the notice and map were mailed to 23
25 addressees. The notice at Record 138 is attached to an affidavit that states the notice was
26 posted at the city library and civic center bulletin board. The notice at Record 140-41 is
27 attached to an affidavit that states the notice was posed at two locations on the property.

28 Based on our reading of the September 13, 2011 e-mail message and affidavits to
29 which the copies of the notice of the September 26, 2011 hearing are attached, neither the

1 September 16, 2011 version of the staff report nor any other version of the staff report was
2 transmitted with the notice via e-mail or regular mail or included with the copies of the
3 notice that were posted. However, the notice of the September 26, 2011 hearing states, in
4 part:

5 “* * * A copy of the staff report will be available no later than September 19,
6 2011 for inspection at no cost and copies will be provided at reasonable cost.
7 The above-referenced materials are available at the City of Salem Public
8 Works Department, Civic Center, 555 Liberty Street SE, Room 325, Salem,
9 Oregon * * * and will be available online no later than 5:00 p.m., September
10 23, 2011 at:

11 “[http://www.cityofsalem.net/CouncilMeetingAgenda/default.aspx?InstanceID](http://www.cityofsalem.net/CouncilMeetingAgenda/default.aspx?InstanceID=20110926)
12 [=20110926](http://www.cityofsalem.net/CouncilMeetingAgenda/default.aspx?InstanceID=20110926)

13 “* * * * .” Record 132, 135, 138, 140.

14 According to petitioner, if the September 16, 2011 staff report was in fact made available to
15 the public prior to the September 26, 2011 hearing, the above-quoted language in the notice
16 is sufficient to make the September 16, 2011 staff report part of the notice and therefore part
17 of the record under OAR 661-010-0025(1)(d).

18 We might agree with petitioner that the September 16, 2011 version of the staff report
19 is properly viewed as part of the city’s notice of the September 26, 2011 public hearing if
20 that version of the staff report had been included with the notices that were mailed by regular
21 mail, transmitted by e-mail and posted in various locations. But as we have already
22 explained, that is not the case. The above-quoted statement simply gives notice of where
23 copies of the staff report can be obtained from the city and accessed on the city’s webpage.
24 That statement is legally insufficient to make the referenced staff report part of the “[n]otices
25 of proposed action [or] public hearing,” within the meaning of OAR 661-010-0025(1)(d),
26 without regard to whether the September 16, 2011 version of the staff report was actually
27 made available to the public before the public hearing. We reject petitioner’s argument to
28 the contrary.

1 The record is settled as of the date of this order. The petition for review is due 21
2 days from the date of this order. The respondent's brief is due 42 days from the date of this
3 order. The Board's final opinion and order is due 77 days from the date of this order.

4 Dated this 25th day of January, 2012.
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11 Michael A. Holstun
 Board Member