

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OREGON COAST ALLIANCE,
5 WOHINK LAKE ASSOCIATION,
6 and SUZANNE NAVETTA,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF DUNES CITY,
12 *Respondent.*

13
14 LUBA No. 2011-113

15 ORDER

16 Petitioners object to the record that the city transmitted to LUBA in this appeal.

17 The city council adopted Dunes City Ordinance 203 on January 14, 2010. That
18 ordinance adopted regulations concerning septic system inspection and maintenance, and
19 Ordinance 203 was codified at Dunes City Code (DCC) Title 15, Chapter 157. This appeal
20 concerns a subsequent ordinance, Ordinance 211A. The findings the city adopted in support
21 of Ordinance 211A include the following explanation of the process that led to its adoption:

22 “After reviewing the existing standards for maintenance, inspections and
23 reporting of septic systems, the city initiated amendments to the septic system
24 maintenance requirements. Two alternatives were under consideration by the
25 city and both proposals are legislative text amendments to Title 15 of the
26 [DCC] by repealing Ordinance Number 203 entitled ‘Septic System
27 Maintenance,’ and replacing it with an alternative program for septic system
28 maintenance.

29 “The two options considered for an alternative septic maintenance program
30 were presented as Ordinance Number 210A and Number 211A. These two
31 options are described below:

32 “Option #1) Ordinance Number 210A repeals Ordinance Number 203 and
33 replaces it with new regulations to ensure proper septic system
34 maintenance by adding a new Chapter 142 entitled ‘Septic
35 System Maintenance’ in Title 14 of the [DCC].

1 “Option #2) Ordinance Number 211A repeals Ordinance Number 203 and
2 establishes an educational program to ensure proper septic
3 system maintenance.” Record 15.

4 On November 10, 2011, the city council adopted the Ordinance 211A option, and this
5 appeal followed. The record transmitted to LUBA begins with the city’s July 9, 2011 notice
6 of the first reading of Ordinances 210 and 211 and ends with the Department of Land
7 Conservation and Development’s November 17, 2011 “Notice of Adoption” for Ordinance
8 211A.¹ Petitioners contend the record should be supplemented to include Ordinance 203, the
9 legislative record of the adoption of Ordinance 203, the city’s legislative record concerning
10 “septic matters” between January 14, 2010 (the adoption of Ordinance 203) and July 9, 2011
11 (the notice of the first reading of Ordinances 210 and 211). Petitioners also argue that a letter
12 (the Farnsworth letter) should be included in the record.

13 The city agrees to submit a supplemental record that includes the Farnsworth letter,
14 but opposes the rest of petitioners’ objections.

15 **A. Ordinance 203**

16 As potentially relevant here, OAR 661-010-0025(1) requires that the record in this
17 appeal include any documents that were “specifically incorporated into the record or placed
18 before” the decision maker.² As noted earlier, the city’s findings in support of Ordinance
19 211A state, in part, “[a]fter reviewing the existing standards for maintenance, inspections and
20 reporting of septic systems, the city initiated amendments to the septic system maintenance
21 requirements.” Citing *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826, 829 (2006), *Wiper*
22 *v. Eugene*, 43 Or LUBA 649, 655 (2002) and *Abadi v. Washington County*, 34 Or LUBA

¹ Ordinance 210A and 211A replaced Ordinance 210 and 211 during the city’s adoption process.

² OAR 661-010-0025(1) provides, in part, that a record at LUBA must include:

“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.”

1 753, 754 (1998), petitioners contend that statement establishes that the city council in fact
2 reviewed Ordinance 203 and therefore establishes that Ordinance 203 was “placed before”
3 the city council, making it part of the record in this appeal.

4 As we have already noted, Ordinance 203 is codified at DCC Title 15, Chapter 157
5 and is part of the city’s acknowledged land use regulations. That a local government
6 considers a land use regulation in adopting a land use decision does not, by itself, make the
7 “considered” land use regulation part of the record that must be submitted in a LUBA appeal.
8 Rather, unless there is some reason to believe the local government meant to make the land
9 use regulation part of the record of the local government’s proceedings, mere consideration
10 of a land use regulation is insufficient to obligate a local government to include the land use
11 regulation as part of the local government’s record. Requiring local governments to in all
12 cases include in the record any comprehensive plan or land use regulation that was
13 considered during the local government’s decision making process would both be potentially
14 burdensome and serve no purpose, since OAR 661-010-0030(4)(f) requires that a petition for
15 review must include “a copy of any comprehensive plan provision, ordinance or other
16 provision of local law cited in the petition, unless the provision is quoted verbatim in the
17 petition,” and LUBA routinely takes official notice of comprehensive plans and land use
18 regulations under ORS 40.090(7) (OEC 202(7)). *Sunburst II Homeowners v. City of West*
19 *Linn*, 18 Or LUBA 695, 698 (1990).

20 *Tualatin Riverkeepers, Wiper and Abadi* do not require a different conclusion. In
21 each of those cases, as here, there were statements or other reasons to believe that the
22 disputed documents had been considered by the decision maker. However, in each case the

1 disputed documents were *evidence*, and none of those documents were land use regulations
2 that were subject to official notice.³

3 Petitioners’ objection concerning Ordinance 203 is denied. However, if petitioners
4 wish LUBA to take official notice of Ordinance 203 or the version of Ordinance 203 that is
5 codified at DCC Title 15, Chapter 157 they may attach it to their brief and LUBA will take
6 official notice.

7 **B. The Ordinance 203 Legislative Record and the Post Ordinance 203/Pre**
8 **Ordinance 211A Legislative Record**

9 It is not entirely clear why petitioners believe the legislative record for Ordinance 203
10 and the city’s legislative record concerning “septic matters” between January 14, 2010 and
11 July 9, 2011 should be included in the record of this appeal. Under OAR 661-010-0025(1) a
12 document must be included in the record if it was “specifically incorporated into the record,”
13 or was “placed before” the decision maker. *See* n 2. We understand petitioners to argue that
14 those legislative records include material that may be relevant in this matter, but whether a
15 document is “relevant” has no bearing on whether the document must be included in the
16 record under OAR 661-010-0025(1). *Calvary Construction, LLC v. City of Glendale*, 59 Or
17 LUBA 539, 544 (2009); *Sommer v. City of Grants Pass*, 52 Or LUBA 802, 805 (2006);
18 *Adkins v. Heceta Water District*, 22 Or LUBA 826, 828 (1991). Unless those legislative
19 records were “specifically incorporated into the record” in this appeal or were “placed
20 before” the decision maker, they are not part of the record.

21 The statement that the city council considered the regulations adopted by Ordinance
22 203 does not operate to incorporate those legislative records as part of the record of its
23 proceedings to adopt Ordinance 211A. A mere reference to a document is not sufficient to

³ It may be that the storm water management manuals at issue in *Tualatin Riverkeepers* are not accurately described as evidence. But those manuals were not comprehensive plans or land use regulations and no party argued that those manuals were subject to official notice.

1 incorporate that document into the record. *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616,
2 617 (2002); *Henderson v. Lane County*, 26 Or LUBA 603 (1993); *Mannenbach v. City of*
3 *Dallas*, 24 Or LUBA 618, 619 (1992). Here the reference is to the text of Ordinance 203 and
4 is not even a reference to the legislative record for Ordinance 203 or the legislative record
5 concerning “septic matters” between January 14, 2010 and July 9, 2011. And the reference
6 to Ordinance 203 is just as clearly insufficient to place those legislative records before the
7 city council.

8 Petitioners’ objections concerning the Ordinance 203 legislative record and the
9 legislative record concerning “septic matters” between January 14, 2010 and July 9, 2011 are
10 denied.

11 **C. Conclusion**

12 Petitioners’ objection concerning the Farnsworth letter is sustained. Petitioners’ other
13 record objections are denied. The city shall submit a supplemental record that includes the
14 Farnsworth letter within 21 days from the date of this order. Thereafter, the Board will issue
15 an order settling the record and establishing a briefing schedule.

16 Dated this 3rd day of February, 2012.

17
18
19
20
21
22
23

Michael A. Holstun
Board Member