BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL PAPADOPOULOS,
Petitioner,

vs.

BENTON COUNTY,
Respondent,

and

SANDRA LUEBBERS and
RICHARD LUEBBERS,
Intervenors-Respondent.

LUBA No. 2004-151

ORDER

MOTION TO INTERVENE

Sandra Luebbers and Richard Luebbers move to intervene on the side of respondent Benton County. There is no opposition to this motion, and it is allowed.

MOTION TO STRIKE PETITIONER'S REPLY TO RECORD OBJECTION RESPONSES

On October 20, 2004, petitioner filed precautionary record objections. Thereafter, the county responded to the record objections, and petitioner filed a reply to that response. The county moves to strike petitioner's reply because LUBA's rules do not provide for filing replies to record objection responses. Motion to Strike Petitioner's Reply to Response to Objections to Record 1 (citing *White Marine Services, Inc. v. City of Portland*, ___ Or LUBA ___ (LUBA No. 98-066, June 10, 1998).

In *White Marine Services, Inc.*, the petitioner filed record objections, and the intervenor and local government filed responses. We promptly issued an order denying the objections and settling the record. Prior to receiving our order, the petitioner filed a

"Supplemental Memo." Upon receiving the order denying the objections, the petitioner filed a Motion to Reconsider. In response to the petitioner's argument that we should not have issued our order before allowing it an opportunity to respond to the city's and intervenor's responses, we stated, "LUBA's rules do not provide for an opportunity to reply to record objection responses, or to supplement a record objection once a response has been filed." *Id.*, ___ Or LUBA at ___ (slip op 2 n 2). The county relies exclusively on that case to support its motion to strike petitioner's reply in this case. We do not agree with the county regarding the significance of that footnote.

LUBA's rules specifically provide for filing objections to the record, OAR 661-010-0026(2), and for filing responses to record objections, OAR 661-010-0026(4). The county is correct that there is no rule specifically authorizing replies to such responses. For that reason, we explained in *White Marine Services, Inc.*, it was not improper for LUBA to issue an order before allowing some unknown period of time for the petitioner to file a reply. However, we did not hold in *White Marine Services, Inc.*, as the county seems to believe, that because LUBA's rules do not specifically authorize a reply to record objection responses, any such reply must be stricken.

While we have never stricken a reply to a record objection response simply because the rules do not allow it, we have acknowledged our lenient application of OAR 661-010-0026(4) and the potential detrimental effect of filing serial responses. *Village Properties, L.P. v. City of Oregon City*, 33 Or LUBA 206, 207 (1997). However, we also recognized that additional submissions can actually enhance our review in some circumstances, *e.g.*, where the response introduces new arguments that could not have been anticipated by the moving party. *Id.*; *see also Frevach Land Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000) (citing *Fechtig v. City of Albany*, 31 Or LUBA 441, 442 (1996) (reply to response to motion to dismiss is generally allowed if limited to new issues raised in response memorandum)).

Petitioner objects to the county's motion to strike, arguing that the county makes no claim that the reply prejudices the substantial rights of the parties or that its filing interferes with our review. Response to Respondent's Motion to Strike Petitioner's Reply 1. The reply, petitioner argues, responds only to new issues raised by the county in its response to the record objections and, while not specifically provided for in our rules, promotes the purposes of our rules.[1] A substantial portion of petitioner's reply responds to arguments in the county's response that petitioner could not have been expected to anticipate.

We decline to adopt the county's suggestion that we reject out of hand petitioner's reply in this instance. The county has not shown that allowing petitioner's reply affects its substantial rights or impedes our review and has provided no substantive reason to strike the reply.

The county's motion to strike is denied.

RECORD OBJECTIONS

A. Order of Record

Petitioner objects to the record because it is not arranged in inverse chronological order, as required by OAR 661-010-0025(4). Petitioner does not explain how or why the record is not arranged in inverse chronological order, and it appears to us that it is.

This objection is denied.

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[1] OAR 661-010-0005 provides:

> **"Purpose**
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> "These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision."

B. Items Improperly Included

The challenged decision in this appeal is a decision by the county board of commissioners (BOC) on appeal of a determination by the county planning commission. Petitioner objects to several items that are included in the record.[2] Petitioner contends that these items are not properly part of the record because they were not specifically incorporated into the record or placed before the final decision maker pursuant to OAR 661-010-0025(1)(b).[3]

The county argues that the challenged items were part of the local record before the BOC as a matter of law. *Salem Golf Club v. City of Salem*, 27 Or LUBA 715, 717 (1994). In that case, we held:

> "The record before the city council includes the record of the planning commission proceeding if either (1) the planning commission record was actually placed before the city council, or (2) local code provisions require that the planning commission record be made part of the record before the city council as a matter of law. *Leonard v. Union County*, 23 Or LUBA 664, 667 (1992); *Union Gospel Ministries v. City of Portland*, 21 Or LUBA 557, 560 (1991)." *Id*. at 717.

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[2] The items petitioner objects to include the following:

Record 176 – 183	Staff report and attachments, dated June 10, 2004, submitted to planning commission.
Record 201 – 212	Staff report to planning commission dated May 26, 2004.
Record 232 – 241	Staff report for variance application dated April 23, 2004.
Record 247 – 253	Application of Sandra Luebbers.

Petitioner originally objected to Record 175 –183, but the parties appear to agree that the staff report begins at Record 176, not Record 175.

[3] OAR 661-010-0025(1)(b) provides that the record before LUBA shall include, among other things:

> "(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."

The relevant code provision in that case, Salem Revised Code (SRC) 114.200(3)(d), provided:

> "Unless the [city] council on its own motion or at the appellant's request determines to hear the appeal on the record only, the appeal shall proceed to a de novo hearing, provided that *the record of the proceeding appealed from shall also be part of the record before the [city] council on review*. * * *" (Emphasis added.)

We held that SRC 114.200(3)(d) placed the planning commission record before the city council as a matter of law. *Id*. at 718.

The county argues that the Benton County Development Code (BCC) contains a provision that has the same effect as the code provision at issue in *Salem Golf Club*. BCC 51.840(1) provides that an appellate authority "shall review the record of the decision that is under appeal, and shall additionally consider any new evidence or testimony that is submitted into the record at the hearing." Pursuant to this code provision, the county asserts, "the entire record of the Planning Commission becomes the underlying record at the Board of Commissioner level." Respondent's Response to Petitioner's Precautionary Objection to Record 2.[4]

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[4] The county also cites to BCC 51.710, which provides:

> "(1) All documents or evidence relied on by the applicant shall be submitted to the Development Department at least ten days prior to the date of the hearing and be made available to the public at the time notice pursuant to BCC 51.610 and 51.615 is provided.
>
> "(2) The staff report to be used at the hearing shall be available at least seven days prior to the date of the hearing.
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> "(3) Any person may submit exhibits or written comments prior to or at a public hearing. Such exhibits and written comments shall be attached to the staff report. If such exhibits or written comments are submitted after the staff report is made available pursuant to subsection (2) of this section, the Planning Official shall submit them at the public hearing for inclusion into the record."

The county argues that this provision creates a vehicle for inclusion of written materials into the record; *i.e.*, attaching evidence to the staff report that is then submitted to the planning commission or BOC. While this may be true, we do not see how this provision resolves the issues raised in this record objection; *i.e.*, what documents are part of the record before the BOC and, thus, part of the record in this appeal. None of the challenged items

Petitioner counters, arguing that the cited code provision does not have the effect the city attributes to it. According to petitioner, BCC 51.840(1) requires the county commissioners to review the "record of the decision that is under appeal," but says nothing about whether those materials then become part of the local record before the county board of commissioners. He also claims that the "record" of the underlying decision merely refers to the written version of what was decided. Although neither party cites to any authority regarding the meaning of the term "record", it is clear to us that the term "record" in this context has legal significance beyond that given to it by petitioner.

The BCC language is not as clear as was the language at issue in *Salem Golf Club*, where the code clearly stated that the record of the planning commission proceeding became part of the record before the city council, but we agree with the city that BCC 51.840(1) has the same effect. BCC 51.840(1) requires the BOC to review the record of the planning commission decision. As the county argues, BCC 51.840(1) then goes on to state that the commissioners "shall *additionally* consider any new evidence or testimony that is submitted into the record * * *." (Emphasis added). The use of the word "additionally" clarifies that the record on appeal consists of the record from the underlying decision *and* any new evidence or testimony presented at the appeal hearing. *See* Respondent's Response to Petitioner's Precautionary Objection to Record 4. Accordingly, the planning commission record became part of the BOC record as a matter of law pursuant to BCC 51.840(1) under *Salem Golf Club*.

The county addresses each item challenged by petitioner and explains how each item is part of the record. We need not address each item individually, however, because petitioner only argues that those items were not specifically incorporated into the record or placed before the final decision maker. Petitioner does not argue that the items were not part of the planning commission's record or that the planning commission or board of

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are staff reports to the BOC. One item is the application, and three items are staff reports prepared at the administrative staff or planning commission level.

commissioner's rejected any of the challenged items. As discussed above, the entire record of the planning commission decision is part of the local record before the BOC. Accordingly, the challenged items are properly included in the record in this appeal.[5]

This objection is denied.

The record is settled as of the date of this order. The petition for review shall be due 21 days after the date of this order. The respondent's brief shall be due 42 days after the date of this order. The final opinion and order shall be due 77 days after the date of this order.

Dated this 30th day of November, 2004.

_____

Anne C. Davies
Board Member

[5] Petitioner also argues that the items should not be included in the record because, although they were undoubtedly available for public inspection at the planning department, they were not available for review at the BOC hearing. Reply to Respondent's Response to Objection to Record 2 (citing *Naumes Properties, LLC v. City of Central Point*, 45 Or LUBA 708 (2003) (mere presence of documents at hearing does not make those documents part of the record)). This argument was raised for the first time in petitioner's reply. In any event, we need not address the argument because we have already determined that the challenged items were part of the record before the BOC as a matter of law pursuant to BCC 51.840(1) and *Salem Golf Club*. Therefore, it does not matter whether the items were actually present at the BOC hearing.