BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HENRY KANE,
Petitioner,

and

MARIAM JANE CORBY
and SCOTT MONSON,
Intervenors-Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2005-018

ORDER

MOTIONS TO INTERVENE

Mariam Jane Corby and Scott Monson move to intervene on the side of petitioner. There is no opposition to those motions, and they are allowed.

The Board also received five motions to intervene filed by Barnes Road Professional Campus LLC and four related LLCs, signed on behalf of the LLCs by an individual who is not an attorney. OAR 661-010-0075(6) requires that corporations must be represented before the Board by an attorney. By letters dated January 25, 2005, the Board gave the LLCs seven days to bring the motions to intervene into compliance with OAR 661-010-0075(6). The Board has received no responses. Accordingly, the motions to intervene filed on behalf of Barnes Road Professional Campus LLC and the four related LLCs are denied.

RECORD OBJECTIONS

The present appeal involves a decision that approves the annexation of portions of Barnes Road and Cedar Hills Boulevard. On February 12, 2005, petitioner filed eight objections to the record. The city responded on February 23, 2005, disputing each of petitioner's objections.

Petitioner replied on February 28, 2005, withdrawing the second objection and adding a ninth. We now resolve the disputed objections.

A. Objection 1

Petitioner notes that ORS 197.830(10)(a) requires the local government to file "the original or certified copy of the entire record of the proceedings under review," but argues that the record is missing the required certification. The last page of the record is a certificate of filing wherein the city attorney certifies that he filed a true copy of the original record with LUBA. Petitioner does not explain why that certificate is insufficient to comply with ORS 197.830(10)(a), and we do not see that it is.

Petitioner also argues that record does not include the affidavit of mailing required by OAR 661-010-0025(1)(d) or a list of persons to whom notices were mailed. However, as far as we can tell those documents are found at Record 189 and 192-95. This objection is denied.

B. Objections 3 and 4

Petitioner objects that the record is not "arranged in inverse chronological order" as required by OAR 661-010-0025(4)(a)(E), noting that three items appear to be out of chronological order. Petitioner also complains that the table of contents does not separately identify the attachments to the final decision.

The city responds that one disputed item, a staff report attached to the final decision, is correctly located next to the final decision, and that a copy of the staff report also appears at the appropriate chronological place. Record 143. We agree with the city that petitioner has shown no violation of OAR 661-010-0025(4)(a)(E) with respect to the staff report. *Boly v. City of Portland*, 36 Or LUBA 793, 794 (1999) (exhibits need not be separated from the document to which they are attached in order to satisfy OAR 661-010-0025(4)(a)(E)).

With respect to the table of contents, OAR 661-010-0025(4)(a)(B) requires that the table of contents list "each item," but does not explicitly require that attachments to documents be separately identified. We have held that separate identification of attachments may be required if

necessary to make the record usable for the parties and the Board, but otherwise not. *Emmons v. Lane County*, __ Or LUBA __ (LUBA No. 2004-111, Order, November 10, 2004); *Oregon Department of Transportation v. City of Klamath Falls*, __ Or LUBA __ (LUBA No. 2000-147, Order, December 20, 2000). Petitioner has not demonstrated that an amended table of contents is necessary.

The other two disputed items are a notice and affidavit, which the city gathered with three other affidavits at the end of the record in a separate section entitled "Public Notices," even though some items in that section do not strictly reflect the chronological order of the record as a whole. Given the small number of items, there appears to be no possibility of confusion from organizing the record in this way. Petitioner has not established the need to reorganize the record. *See Wiper v. City of Eugene*, 43 Or LUBA 649, 657 (2002) (deviations from inverse chronological order require reorganization only if it affects the substantial rights of the parties or hampers LUBA's review). These objections are denied.

C. Objections 5 and 6

Petitioner objects to the omission of a document dated December 20, 2004, entitled "Motions and Notice of Pending Notice of Intent to Appeal" that petitioner submitted on that date to the city.[1] The city responds that the city council closed the record for submission of new materials at 5:00 p.m. on December 17, 2004. In a reply, petitioner explains that during the December 13, 2004 city council hearing he requested that the record remain open for an additional seven days pursuant to ORS 197.763(6)(a), (b) and (c).[2] Petitioner argues that the city council

[1] Petitioner also objects to the omission of any other documents related to this appeal that the city received by the end of that day, but did not include in the record. However, petitioner does not identify any such document or assert that any exist. We reject this objection without further discussion.

[2] ORS 197.763(6) provides:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record

voted to continue the hearing for seven days, but to hold the record open only until December 17, 2004, less than the seven days required by ORS 197.763(6)(c). Petitioner states that when petitioner submitted the document to the city on December 20, 2004, city staff wrote "NOT TO BE INCLUDED IN THE RECORD" across the top, and apparently did not forward the document to the city council for consideration at the December 20, 2004 meeting.

It may be that the city committed procedural error in holding the record open less than seven days, as petitioner alleges. However, the question here is whether the December 20, 2004 document is properly part of the local record. As relevant here, the record includes all written testimony and documents "placed before and not rejected by, the final decision maker, during the course of proceedings before the final decision maker." OAR 661-010-0025(10(b).

Generally, the local record submitted to LUBA is not limited to materials submitted to the local decision maker prior to the close of the public hearing or the close of the evidentiary record. *Rochlin v. Multnomah County*, 25 Or LUBA 783 (1993); *Joines v. Linn County*, 24 Or LUBA 588 (1992); *Wissusik v. Yamhill County*, 19 Or LUBA 571, 573 (1990); *Eckis v. Linn County*, 17 Or LUBA 1117, 1118 (1989). If items submitted after the close of evidentiary proceedings are "placed before and not rejected by" the final decision maker, such items are part of the local record.

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open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

"(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

"(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

Here, petitioner does not allege and it does not appear to be the case that the December 20, 2004 document was ever "placed before" the city council. Even if we assume it was constructively "placed before" the council, the council clearly dictated that the city would accept additional written submissions only until December 17, 2004. City staff apparently understood that dictate as a rejection of any written documents submitted after that date, and acted accordingly. For purposes of the content of the record, we conclude that petitioner has not established that the December 20, 2004 document was "placed before, and not rejected by," the final decision maker. These objections are denied.

D. Objection 7

Petitioner objects to the omission of a letter from Thomas Barron dated December 7, 2004. The city responds that the letter is specifically directed at a different annexation proposal (known as the Mobile Home Corral annexation), not the annexation challenged in this appeal. Petitioner responds that the city processed both annexations together, and held a joint hearing at which the city accepted testimony on both proposals at the same time. Petitioner argues that Barron's letter is relevant to the challenged decision, as well as to the Mobile Home Corral annexation.

The December 7, 2004 letter refers to and discusses only the Mobile Home Corral annexation. Petitioner does not explain how anything in the letter is "relevant" to the challenged annexation. Although it is somewhat unusual for a local government to conduct a joint hearing on separate applications involving different properties, we disagree with petitioner that in doing so documents that clearly relate to only one proposal become part of the record of the other proposal. This objection is denied.

E. Objection 8

Petitioner objects to the omission of the local record compiled for the Mobile Home Corral annexation decision, which was apparently appealed to LUBA and subsequently dismissed. *Meeke v. City of Beaverton*, ___ Or LUBA ___ (LUBA No. 2005-023, March 28, 2005). The city responds, and we agree, that the petitioner has not established that the record of the Mobile Home

Corral decision should be included in the present record. In a reply, petitioner concedes that point, but argues that the present record should include a two-page document that was read aloud by the planning director during the joint hearing on December 6, 2004 and that clearly refers to both annexation proposals. Petitioner attaches the document to his reply, and argues that it was included in the record of the Mobile Home Corral decision at Record 65-66, and should be included in the present record.

The document attached to petitioner's reply memorandum refers to both annexations and describes the procedures applicable to the city council hearing on both annexations. We agree with petitioner that that document should be part of the present record. This objection is sustained, in part.

F. Settlement Agreement

In his reply memorandum, petitioner argues that the record should include a draft settlement agreement referred to on page 5 of the record. However, petitioner does not argue that the draft settlement agreement was "placed before" the city council or otherwise explain why the agreement is part of the local record. This objection is denied.

G. Conclusion

We see no purpose in requiring the city to formally submit a separate supplemental record to include the two-page document discussed in Objection 8. We will consider the document attached to the reply memorandum to be part of the record, and the parties shall do likewise. With that understanding, the record is settled as of the date of this order.

The petition for review is due 21 days, and the response brief due 42 days, from the date of this order. The Board's final order and opinion is due 77 days from the date of this order.

Dated this 6th day of April, 2005.

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Tod A. Bassham
Board Member