BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOWARD GRABHORN and GRABHORN INC.,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

ART KAMP, JOHN FREDERICK,
DAVID VAN RIPER, ROBERT BURCHFIELD
and RICHARD PONZI,
Intervenors-Respondent.

LUBA Nos. 2004-065 and 2005-039

ART KAMP, JOHN FREDERICK,
DAVID VAN RIPER, ROBERT BURCHFIELD
and RICHARD PONZI,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

HOWARD GRABHORN and GRABHORN INC.,
Intervenors-Respondent.

LUBA No. 2004-125

HOWARD GRABHORN and GRABHORN INC.,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent.
LUBA No. 2005-055

ORDER

Before the Board is a motion to determine jurisdiction, a motion for *in camera* review, and objections to the record.

MOTION TO DETERMINE JURISDICTION

Howard Grabhorn and Grabhorn Inc. (Grabhorn) filed an application with the county to verify an existing landfill as a nonconforming use. Residential neighbors opposed the application. The county ultimately approved the application, with conditions, after a tortuous procedural journey that has resulted in four appeals that are now consolidated for our review. The following chronology may be useful:

1. March 30, 2004. The hearings officer issues a decision approving the nonconforming use verification, with conditions. Grabhorn files a timely appeal of the March 30, 2004 decision with LUBA (**LUBA No. 2004-065**).

2. May 13, 2004. The county withdraws the March 30, 2004 decision for reconsideration, limited to review of condition of approval No. 2.

3. July 14, 2004. The hearings officer issues a decision on reconsideration that revises condition of approval No. 2. The decision on reconsideration readopts, as modified, the March 30, 2004 decision. However, county staff attaches to the decision as Attachment D a copy of a draft decision dated March 29, 2004, instead of the March 30, 2004 decision. Grabhorn files an amended notice of intent to appeal the decision on reconsideration. Meanwhile, the intervenors-respondent in LUBA No. 2004-065 file a separate appeal of the July 14, 2004 decision on reconsideration (**LUBA No. 2004-125**).

4. February 16, 2005. The Board issues an order that (1) denies the county's request for voluntary remand to correct Attachment D, (2) grants in part Grabhorn's motion to depose the hearings officer, and (3) resolves the objections to the record filed in LUBA Nos. 2004-065 and 2004-125.

5. March 4, 2005. The county reissues the July 14, 2004 decision on reconsideration with a copy of the March 30, 2004 decision attached.

Grabhorn files a timely appeal of that decision to LUBA (**LUBA No. 2005-039**).

6. March 17, 2005. The county rejects Grabhorn's attempt to file a local appeal of the March 4, 2005 decision. Grabhorn files a timely appeal of that rejection with LUBA (**LUBA No. 2005-055**).

Grabhorn moves for a determination of jurisdiction over LUBA No. 2005-039, which appeals the March 4, 2005 decision reissuing the July 14, 2004 decision with a corrected attachment. According to Grabhorn, it is not clear what effect if any the county's action on March 4, 2005 has on the Board's review of the July 14, 2004 decision, which is at issue in LUBA Nos. 2004-065 and 2004-125. If the March 4, 2005 decision *replaced* the July 14, 2005 decision, then Grabhorn argues that the appeals of the July 14, 2004 decision may be moot.

On the other hand, Grabhorn contends, the county may lack the authority to modify or "correct" a decision that is on appeal to LUBA. *See Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, *rev'd on other grounds* 97 Or App 687, 776 P2d 1313 (1989) (absent statutory authority to the contrary, local governments lack authority to take further action on a land use decision while that decision is being reviewed by LUBA or the Court of Appeals); *see also Rose v. City of Corvallis*, __ Or LUBA ___ (LUBA Nos. 2004-221/222, April 15, 2005) (reaffirming *Standard Insurance*). If so, Grabhorn argues, then the March 4, 2005 decision is a nullity, and the county's action in reissuing the July 14, 2004 decision has no impact on LUBA's jurisdiction over the appeals of the July 14, 2004 decision.

The county responds that the March 4, 2005 decision is not a new decision that supersedes the July 14, 2004 decision, and therefore the appeals of that decision are not moot. According to the county, the March 4, 2005 decision simply "corrects the original notice of the July 2004 decision," by attaching a copy of the March 30, 2004 decision that was expressly adopted by the hearings officer in the July 14, 2004 decision. Response to Motion to Determine Jurisdiction 3. The county explains that the July 14, 2004 decision includes four attachments. As indicated in the decision, the hearings officer intended that attachment D would consist of the March 30, 2004

decision with strike-through of the findings revised by the July 14, 2004 reconsideration decision.[1] However, the county states, when the July 14, 2005 notice of decision was mailed to the parties the county inadvertently included as attachment D a copy of an earlier draft of the March 30, 2004 decision, dated March 29, 2004. The March 29, 2004 document attached to the July 14, 2005 decision includes strike-throughs in two sections, apparently representing language revised by the July 14, 2005 decision.[2] The county contends that it is appropriate under these circumstances for the county to correct its notice of decision, and to reissue the July 14, 2004 decision with the correct attachment D. According to the county, its action in doing so has no impact on LUBA's jurisdiction over the July 14, 2004 decision in LUBA No. 2004-125.

There is no dispute in the present case that the hearings officer intended to readopt and incorporate the March 30, 2004 decision, as modified by the July 14, 2004 decision, and that the

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[1] The July 14, 2004 decision states, in relevant part:

> "On July 14, 2004, the Washington County Hearings Officer reconsidered his written decision and order issued on March 30, 2004 (Attachment 'C') * * *. His reconsideration resulted in a revised set of conditions of approval found in Attachment B. The original Order dated March 30, 2004 is included as Attachment D, and includes strike-through of the findings revised by the reconsideration. * * * His decision on reconsideration is as follows:
>
> "ORDER:
>
> "Based on the findings and discussion herein, including the findings, conclusions, conditions and record incorporated by reference herein, the hearings officer readopts the March 30, 2004 final order * * * in total except as modified herein. The Application for the Property Line Adjustment is Dismissed and the Non Conforming Use Determination is Approved subject to the Revised Conditions set forth in Attachment 'B.'
>
> "Attachments:
>
> "A. Vicinity Map
>
> "B. Revised Conditions of Approval
>
> "C. Reconsideration of March 30, 2004 Hearings Officer's Findings, Conclusion and Order.
>
> "D. March 30, 2004 Hearings Officer's Findings, Conclusion and Order." Record 11.

[2] The March 29, 2004 draft and the original March 30, 2004 final decision differ in several other particulars. The parties dispute whether these differences are substantive. For present purposes, it is not necessary to describe these differences.

hearings officer did not intend to adopt or incorporate the March 29, 2004 document as part of the July 14, 2004 decision. The July 14, 2004 decision expressly readopts the March 30, 2004 decision, as revised, and makes no mention of the March 29, 2004 document. In our view, the fact that the county inadvertently attached the March 29, 2004 document to the July 14, 2004 decision rather than the revised March 30, 2004 decision has no effect on the express incorporation of the revised March 30, 2004 decision. Stated differently, the revised March 30, 2004 decision is incorporated as part of the July 14, 2004 decision, whether or not it was attached to that decision when the decision was mailed. The March 29, 2004 document is not (and never has been) a part of the July 14, 2004 decision, notwithstanding that it was attached to that decision when mailed. Under this view, the county's act in attaching the March 29, 2004 document to the July 14, 2004 decision rather than the March 30, 2004 decision would appear to be, at most, harmless error.[3]

Turning to the March 4, 2005 decision that reissued the July 14, 2004 decision with the March 30, 2004 decision attached, we do not believe at this juncture that the March 4, 2005 decision, has any impact on our jurisdiction over the July 14, 2004 decision. It is relatively clear that the county did not intend the March 4, 2005 decision to replace the July 14, 2004 decision, the March 4, 2005 decision does not purport to do so, and therefore the March 4, 2005 decision does not moot the appeals of the July 14, 2004 decision.

More than that we cannot say. The March 4, 2005 decision introduces additional uncertainties into this already complicated matter. The March 4, 2005 decision purports to provide the parties with the correct Attachment D, the March 30, 2004 decision that the July 14, 2004

[3] No briefs have yet been filed in these appeals, and it is not clear whether Grabhorn or others intend to argue that the county committed reversible error in attaching the March 29, 2004 document to the July 14, 2004 decision, rather than the March 30, 2004 decision. Notwithstanding our suggestion that the act of attaching the March 29, 2004 document to the July 14, 2004 decision rather than the March 30, 2004 decision was probably harmless error, we do not intend that suggestion to preclude the parties, if they wish, from assigning error to that act.

decision incorporates and re-adopts, as modified by the decision on reconsideration.[4] However, it is not clear to us that it in fact does so. As Grabhorn points out, while attachment D of the July 14, 2004 decision as reissued on March 4, 2005 includes a copy of the March 30, 2004 decision, that copy is apparently the original, *unrevised* March 30, 2004 decision. The copy attached to the reissued decision does not include any "strike-through of the findings revised by the reconsideration[,]" as the text of the July 14, 2004 decision indicates it should. *See* n 1.

Like Grabhorn, we do not know what to make of this. It is possible that the county mistakenly attached the original unrevised March 30, 2004 decision, instead of the revised March 30, 2004 decision with strike-throughs. It is also possible that no strike-through version of the March 30, 2004 decision actually exists (because the hearings officer mistakenly added strike-throughs to the March 29, 2004 document instead of the March 30, 2004 decision). It might also be that the existence of a strike-through version is immaterial, because the modifications that the July 14, 2004 decision made to the March 30, 2004 decision are clear from the text of the July 14, 2004 decision. Whatever the case, we conclude that the county's act on March 4, 2005 in reissuing the July 14, 2004 decision has no impact on our *jurisdiction* over the July 14, 2004 decision, although it may complicate our *review* of that decision.

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[4] The first page of the March 4, 2005 decision is a memorandum addressed to "Interested Parties" from "Mark Brown, Land Development Manager." The memorandum states, in relevant part:

> "In the process of reviewing the record in this case that is now before [LUBA], it was discovered that the decision issued on July 14, 2004 included the draft of an attachment rather than the final version that had previously been issued. The purpose of this notice is to correct this oversight.
>
> "Attachment D to the Hearings Officer's July 14, 2004 decision inadvertently included a March 29, 2004 draft of the Hearings Officer's Final Order rather than the March 30, 2004 version that had previously been issued. We are reissuing the July 14, 2004 Hearings Officer's decision with the correct version of Attachment D." Record 1 (LUBA No. 2005-039/055.

For the foregoing reasons, we agree with Grabhorn and the county that the March 4, 2005 decision does not moot or otherwise affect our jurisdiction over the appeals of the July 14, 2004 decision.[5]

MOTION FOR REVIEW *IN CAMERA* AND PRODUCTION

Pursuant to the Board's February 16, 2004 order, the hearings officer was deposed on March 30, 2005, and April 5, 2005. In preparation for that deposition, the hearings officer reviewed at least a portion of an e-mail dated March 25, 2005, between the assistant county counsel and the hearings officer. During the deposition, the county declined to allow Grabhorn's attorneys to view the March 25, 2005 e-mail, on the basis that its contents or a portion of its contents are subject to attorney-client privilege. That March 25, 2005 e-mail was marked as Exhibit 4A, and sealed in an envelope. Subsequently, the county provided Grabhorn's attorneys with what was marked as Exhibit 4B, an e-mail dated April 3, 2005 between the assistant county counsel and the hearings officer that includes a hand-redacted version of the March 25, 2005 e-mail. The redacted version blacks out three portions, approximately half, of the March 25, 2005 e-mail. At the April 5, 2005 continuation deposition, the hearings officer stated that he did not review portions of the March 25, 2005 e-mail that are redacted in Exhibit 4B, in preparing for the deposition.

Grabhorn now moves for LUBA to conduct an *in camera* review of Exhibit 4A, and require its production if the Board determines that (1) the redacted portions are relevant to the issues of ex parte contact, bias and prejudgment that have been raised in these appeals, and (2) not protected by attorney-client privilege. Exhibit 4A has been forwarded to us in its sealed envelope.

[5] In its response, the county suggests that LUBA lacks jurisdiction over LUBA No. 2005-055, which appeals the planning director's decision rejecting a local appeal of the March 4, 2005 decision. According to the county, it is clear under the county code that there is no local appeal of a hearings officer's decision, and that rejecting the local appeal of the March 4, 2005 decision falls within the exception to LUBA's jurisdiction for "ministerial" decisions, under ORS 197.015(10)(b)(A). Grabhorn disputes both points. We find it unnecessary to address this dispute at this juncture.

Documents used to refresh a witness's recollection before a deposition may be discoverable under Oregon Evidence Code (OEC) 612.[6] Grabhorn argues that the hearings officer testified that he reviewed Exhibit 4A prior to the deposition, and therefore Exhibit 4A is subject to discovery under the rule.[7] According to Grabhorn, there is no dispute that the content of Exhibit 4A is "related to the subject matter of the testimony." Further, Grabhorn argues, it is "necessary in the interests of justice" to require disclosure of the redacted portions. Grabhorn points out that the assistant county counsel is one of the parties to some of the ex parte contacts that were the subject of the hearings officer's deposition, pursuant to our order. Grabhorn contends that:

> "The deposition cannot be effective to deliver evidence of ex parte contacts and bias if one of the key parties to the ex parte communications, who was also an advocate against Grabhorn, can have a role as both purveyor of an adverse position and of unlawful ex parte contacts and also as attorney shield to prevent such

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[6] OEC 612 provides, in relevant part:

> "**Writing used to refresh memory.** If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying or before testifying if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this section, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial."

[7] Grabhorn cites to the following deposition testimony:

> "Q And we've also marked as a separate deposition [Exhibit 4A]. And I understand that you and [counsel] are taking the position that the attorney-client privilege covers that material; is that correct?
>
> "A That's correct.
>
> "Q Okay. In aid of objection, * * * did you review those materials to prepare for your deposition?
>
> "A Yes, I did." Deposition 24:16-25.

> contacts from being fully explored. * * *" Motion for Review *in camera* and Production 6.

The critical issue, according to Grabhorn, is whether Exhibit 4A is protected by attorney-client privilege, as the county asserted during the deposition. Grabhorn contends that attorney-client privilege does not protect Exhibit 4A or the redacted portions of Exhibit 4B because (1) there is no attorney-client relationship between the assistant county counsel and the hearings officer, and (2) any privilege was lost when the hearings officer reviewed the redacted portions to refresh his memory prior to testifying.

The county responds that Exhibit 4A is both attorney work-product and an attorney-client privileged communication and that Grabhorn has failed to establish a sufficient basis for *in camera* review, much less for production of Exhibit 4A. According to the county, the proponent of *in camera* review of privileged materials on the basis of an exception to that privilege must "present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability." *Frease v. Glazer*, 330 Or 364, 372, 4 P3d 56 (2000) (quoting *United States v. Zolin*, 491 US 554, 109 S Ct 2619, 105 L Ed 2d 469 (1989) (proponent of *in camera* review failed to demonstrate that attorney-client communication fell within the "crime-fraud" exception to the privilege); *see also Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 144, 20 P3d 837 (2001) (proponent of *in camera* review failed to demonstrate that disputed materials fell within any exception to the child abuse reporting privilege).

Here, the county argues that Grabhorn has failed to establish that the hearings officer in fact reviewed the redacted portions of the March 25, 2005 e-mail to refresh his memory prior to testifying, and the only direct evidence on the point is to the contrary. The county cites to the following testimony:

> "Q [Assistant County Counsel]: And for purposes of refreshing your memory for the testimony you provided last Wednesday and today, did you review the e-mail in Exhibit 4A and 4B that was from myself to you?
>
> "A [Hearings Officer]: Yes.

"Q And are there portions of that document that you did not review for purposes of refreshing your memory?

"A Yes.

"Q And are those portions redacted on Exhibit 4B?

"A Yes." Deposition 205: 13-21.[8]

Because the hearings officer did not review the redacted portions of the March 25, 2005 e-mail to refresh his memory prior to testifying, the county argues, OEC 612 is inapplicable, and there is no basis to conduct an *in camera* review or require production of the e-mail.

We assume, without deciding, that there is an attorney client relationship between the assistant county counsel and the hearings officer, and that Exhibit 4A is an attorney-client communication for purposes of OEC 503.[9] For the following reasons, however, we agree with the county that Grabhorn has not established a sufficient basis for *in camera* review and production under *Frease*.

It is important to note, initially, the limited nature of the deposition authorized by our February 16, 2005 order. As a general matter, there is no right to discovery of documents or taking of depositions under LUBA's rules. LUBA's evidentiary review is confined to the local record. ORS 197.835(2)(a). LUBA is authorized to consider evidence outside the record only under limited circumstances, as provided in ORS 197.835(2)(b) and OAR 661-010-0045. Our

[8] It is not clear to us whether the hearings officer testified that in preparing for the deposition he literally did not read the portions of Exhibit 4A that were later redacted, or that he did not read them to refresh his memory for the purpose of testifying. The distinction appears to be immaterial, as we do not understand OEC 612 to require disclosure of everything read in preparation for testimony, only writings used to "refresh memory for the purpose of testifying." *See Doe v. Denny's, Inc.*, 327 Or 354, 364, 963 P2d 650 (1998) (document reviewed in preparation for deposition was not discoverable under OEC 612, where the document was not in fact used to refresh the deponent's memory).

[9] We note, in passing, that Grabhorn's objection to the assertion of an attorney client relationship is based on the alleged impropriety of the assistant county counsel representing both the county and the hearings officer, rather than to the absence of the usual indicia of an attorney-client relationship. We tend to agree with the county that LUBA lacks authority to inquire into the propriety, and perhaps even the existence, of an attorney-client relationship. However, even assuming that LUBA could inquire into these matters, it is unnecessary for us to do so in the present case.

February 16, 2005 order authorized a deposition of the hearings officer only with respect to (1) the content of alleged ex parte communications between the hearings officer, county staff, and the assistant county counsel that occurred prior to issuing the March 30, 2004 and July 14, 2004 decisions, and (2) the hearings officer's alleged bias or prejudgment. We denied all other aspects of Grabhorn's motion to take evidence, including a request to depose other persons and to discover documents. Accordingly, we review Grabhorn's arguments under OEC 612 for *in camera* review and production of the March 25, 2005 with due appreciation for the limited nature of the deposition we authorized under OAR 661-010-0045 and the statutory limits on our ability to compel and consider evidence outside the local record.

OEC 612 allows production of a document read prior to testimony only if (1) a witness uses the writing to refresh memory for the purpose of testifying, and (2) the court in its discretion determines that production is necessary in the interests of justice. Here, the parties dispute whether the hearings officer reviewed the redacted portions of the March 25, 2005 e-mail to refresh his memory for the purpose of testifying. The hearings officer initially stated, under examination by Grabhorn's attorney, that he had reviewed the March 25, 2005 e-mail prior to the deposition. *See* n 7. The hearings officer did not further qualify that statement. Later, under questioning by his counsel, the hearings officer clarified that he did not review the redacted portions, for purposes of refreshing his memory. Grabhorn argues that the second statement is inconsistent with the first, and that the second statement is simply not credible. However, the two statements are not necessarily inconsistent, and Grabhorn offers no reason to believe the second statement is not credible. It is not unusual or unbelievable for a deponent to review only a portion of a document, for purposes of refreshing memory, prior to testifying. Grabhorn has not established that, contrary to his sworn testimony, the hearings officer in fact read the redacted portions of the March 25, 2005 e-mail to refresh his memory.

Even if there were a stronger basis to believe that the hearings officer in fact reviewed the redacted portions to refresh his memory prior to testifying, Grabhorn has not established that *in*

camera review or production of Exhibit 4A is "necessary in the interests of justice." The main focus of the limited deposition authorized by our order was to determine the content of the alleged ex parte contacts that occurred prior to July 14, 2004. As the extensive transcript of the two-day deposition attests, the parties had ample opportunity to explore that question, and others. It seems highly unlikely that a communication between the assistant county counsel and the hearings officer nearly a year later could yield anything probative about the content of the alleged ex parte communications or the other issues authorized under our order, at least anything that the parties did not already have a full opportunity to explore on direct examination. In applying the discretion afforded to us under OEC 612 and our rules, we do not see that *in camera* review or production of the redacted portions is necessary in the interests of justice.

Finally, it is not clear to us whether Grabhorn argues that production during the deposition of Exhibit 4B, which includes the redacted version of Exhibit 4A, waives any attorney-client privilege with respect to Exhibit 4A. One could argue, based on OEC 511, that production of the unredacted portions of Exhibit 4A had the effect of waiving any privilege with respect to the redacted portions.[10] However, Grabhorn does not cite OEC 511, or make a focused argument to that effect. Even if Grabhorn is understood to make that argument, OEC 511 only governs the circumstances under which a privilege may be waived; it does not provide an independent basis for discovery of a document. The only asserted basis for production of Exhibit 4A is under OEC 612. For the reasons explained, Grabhorn has not demonstrated that *in camera* review or production of Exhibit 4A is warranted under OEC 612.

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[10] OEC 511 provides, in relevant part:

> "A person upon whom ORS 40.225 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. * * *"

The motion for *in camera* review and production is denied.[11]

RECORD OBJECTIONS

Pursuant to our order dated April 5, 2005, the county submitted a one-volume record for LUBA Nos. 2005-039 and 2005-055. Those appeals were previously consolidated with LUBA Nos. 2004-065 and 2005-125, for which the county has already submitted a multi-volume record. On May 5, 2005, Grabhorn objected to the record filed in LUBA Nos. 2005-039 and 2005-055, arguing that it should include six documents that are exhibits to the deposition of the hearings officer. The six documents consist of (1) hand-written notes of the hearings officer and (2) five e-mails. Grabhorn argues that the six items are either in the nature of "minutes" or are items "placed before" the hearings officer, and thus properly included in the record pursuant to OAR 661-010-0025(1).[12]

We note, initially, that Grabhorn's record objection is directed to the record compiled in LUBA Nos. 2005-039 and 2005-055, which was submitted April 21, 2005. The record objections in LUBA Nos. 2004-065 and 2004-125 were resolved in our February 16, 2005 order. While all four appeals have been consolidated, pursuant to our order there are two separate records. As far as we can tell, the e-mails and hand-written notes were all generated prior to and relate exclusively to the July 14, 2004 decision that is the subject of LUBA Nos. 2004-065 and

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[11] Our resolution of the motion makes it unnecessary to consider the county's claim that the March 25, 2005 e-mail is protected by the work product doctrine.

[12] OAR 661-010-0025(1) provides:

> "Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:
>
> "(a) The final decision including any findings of fact and conclusions of law;
>
> "(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.
>
> "(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. * * *"

2004-125. Grabhorn does not explain why documents that relate to the July 14, 2004 decision should be included in the record of the March 4, 2005 and March 17, 2005 decisions. Nonetheless, because our February 16, 2005 order did not formally settle the record in LUBA Nos. 2004-065 and 2004-125, and it appears that some or all of the six documents did not come to light until the deposition, we assume that Grabhorn would argue that it is appropriate to advance untimely objections to the record in LUBA Nos. 2004-065 and 2004-125. We therefore address those objections.

The e-mails and hand-written notes are clearly not "minutes" of "meetings conducted by the final decision maker as required by law," as those terms are used in OAR 661-010-0025(1)(c). Four of the five e-mails are from the hearings officer to other persons. Grabhorn does not explain why an e-mail *from* the final decision maker to another person should be viewed as "placed before" the final decision maker, for purposes of OAR 661-010-0025(1)(b). One e-mail dated December 2, 2003, from the hearings officer to a county planner responds to an earlier e-mail from that planner and includes that earlier e-mail. However, the included e-mail simply updates the hearings officer on the status of negotiations between Grabhorn and opponents to the application, and advises the hearings officer to expect to conduct a hearing on the application. We do not see that such administrative contacts between county staff and the decision maker constitute "written testimony" or "other written materials" that must be included in the record under OAR 661-010-0025(1)(b).

Grabhorn's objection to the record in LUBA Nos. 2005-039 and 2005-055 is denied.

DEPOSITION AND DEPOSITION EXHIBITS

Grabhorn requests that the Board clarify whether the deposition and deposition exhibits ordered by the Board's February 16, 2005 order are included in the local record, and how the parties may cite and refer to the deposition and deposition exhibits in the briefs.

The deposition and deposition exhibits are not part of the local record; however, they are part of LUBA's record. The parties' briefs may cite to any portion of the deposition or deposition

exhibits, in support of or in response to assignments of error. If there are preserved objections or other bases to object to our consideration of any cited portions or exhibits, any party may bring that objection to our attention and request resolution of the objection. No party has requested, and the Board does not contemplate, making findings of fact based on the deposition or deposition exhibits at the present time.

BRIEFING SCHEDULE

The record in LUBA Nos. 2004-065 and 2004-125 is settled as of the date of this order. The record in LUBA Nos. 2005-039 and 2004-055 is settled as of the date of this order. Pursuant to OAR 661-010-0045(9), the petitions for review are due 21 days, and the response briefs are due 42 days, from the date of this order, unless the parties agree in writing otherwise.

Dated this 31st day of May, 2005.

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Tod A. Bassham
Board Member