

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 DEBRAH J. CURL, JERRY L. CURL,  
5 THOMAS L. DANIELS, ANDREW SHOOKS,  
6 HELEN FISHER, BILL TAYLOR  
7 and JAMES E. SWARM,  
8 *Petitioners,*

9  
10 and

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12 WESTERN RADIO, INC. and  
13 RICHARD OBERDORFER,  
14 *Intervenor-Petitioners,*

15  
16 vs.

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18 CITY OF BEND,  
19 *Respondent,*

20  
21 and

22  
23 NPG OF OREGON, INC.,  
24 *Intervenor-Respondent.*

25  
26 LUBA No. 2007-165

27 ORDER

28 **MOTIONS TO INTERVENE**

29 Western Radio Inc. and Richard Oberdorfer, move to intervene on the side of the  
30 petitioners in this appeal. NPG of Oregon, Inc. (NPG), the applicant below, moves to  
31 intervene on the side of the respondent in that appeal. There is no opposition to either  
32 motion, and they are granted.

33 **RECORD OBJECTIONS**

34 This appeal challenges a hearings officer decision issued August 3, 2007, that  
35 approves NPG's application for a 300 foot tall broadcast tower on a 19-acre parcel located on

1 top of Awbrey Butte.<sup>1</sup> Lead petitioner Debrah Curl filed objections to the record. We now  
2 resolve those objections.

3 **A. Documents Improperly Included**

4 Petitioner lists five sets of documents that petitioner alleges were improperly included  
5 in the record.<sup>2</sup> The city agrees, and proposes to submit a revised table of contents reflecting  
6 the removal of these items from the record. With that understanding, this objection is  
7 resolved.

8 **B. Omitted Media Materials**

9 Petitioner objects to omission of (1) an audio tape of the hearings officer's October  
10 12, 2006 hearing, (2) photographs of the hearings officer's site visit, and (3) any disclosure of  
11 the hearings officer's ex parte contacts during the site visit.

12 The city responds that the audio tape of the October 12, 2006 hearing will be  
13 submitted as an oversize exhibit at the time of oral argument, and a revised table of contents  
14 will be submitted to so reflect. With respect to the site visit photographs, the city states that  
15 the only such photographs are those found on the disc at Item 147. In a reply, petitioner  
16 accepts both responses.

17 With respect to disclosure of ex parte contacts, the city responds that there is no  
18 document that meets this description, noting that any disclosure may be on the recording of  
19 the October 12, 2006 hearing. Petitioner provides no meaningful response. This objection is  
20 denied.

21 **C. Audio Recordings of GCC Hearings**

22 Petitioner asserts that audio compact discs (CDs) of hearings on the GCC application

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<sup>1</sup> The city also approved separate but similar applications for other broadcast towers on the same 19-acre parcel. Those decisions were also appealed to LUBA. *Curl v. City of Bend*, LUBA No. 2007-156, and *Curl v. City of Bend*, LUBA No. 2007-166.

<sup>2</sup> Specifically, Item 19 (Record 272), Item 97 (Record 2515-2516), Item 98 (Record 2517-2518), Item 99 (Record 2519), and Item 142 (Record 2759 et seq).

1 at issue in LUBA No. 2007-166 were submitted into the record before the hearings officer  
2 during the proceedings on NPG's application, but were not included in the record in LUBA  
3 No. 2007-165 that the city filed with LUBA. The city responds that, according to planning  
4 staff's recollection, CD recordings of the GCC hearings were not physically submitted into  
5 the city's record of the NPG application.

6 Petitioner replies that (1) she physically submitted the CDs into the NPG record, and  
7 (2), in any case, the CDs of the GCC hearing must be included into the NPG record as a  
8 matter of law, because those CDs include ex parte communications with respect to the NPG  
9 application. We understand petitioner to assert that the hearings officer heard testimony  
10 regarding both applications at both sets of hearings, and the hearings officer discussed her  
11 site visit to the subject property at both hearings.

12 Petitioner offers no specific support to her claim that she submitted the CDs into the  
13 NPG record, and we have no basis to determine which side is correct in that dispute.  
14 Because the city is the custodian of the record, and petitioner has the ultimate burden of  
15 demonstrating that the record is deficient under OAR 661-010-0026(2), petitioner's mere  
16 disagreement with the city on this point is insufficient to establish that the record is deficient.

17 We do not understand petitioner's argument that the CDs of the GCC hearing include  
18 ex parte communications with respect to the NPG hearing. Even if that is the case, petitioner  
19 does not cite any basis under our rules to order the city to include the recordings of the GCC  
20 hearing in the record of the NPG application as a matter of law. OAR 661-010-0025(1)(c)  
21 requires that the record include the tape recordings of the "meetings conducted by the final  
22 decision maker."<sup>3</sup> While not explicit in the rule, it is clear that "the meetings conducted by

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<sup>3</sup> OAR 661-010-0025(1) provides, in relevant part:

"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;

1 the final decision maker” means the meetings or hearings that lead to the decision under  
2 appeal, not meetings conducted on an entirely separate application leading to a different  
3 decision. The GCC hearing, while involving a similar application on the same property as the  
4 NPG application, was a separate application conducted under separate proceedings.  
5 Therefore, OAR 661-010-0025(1)(c) does not require that the NPG record include the audio  
6 recordings of the hearings on the GCC application. Because petitioner cites no other basis  
7 under our rules to include those recordings, this objection is denied.

#### 8 **D. Burden of Proof Narratives**

9 Petitioner argues that the record in this appeal omits two burden of proof narratives  
10 from the GCC application at issue in LUBA No. 2007-166 and the Chackel application at  
11 issue in LUBA No. 2007-156, that petitioner claims she submitted into the record of NPG’s  
12 application. The city responds that, according to city staff’s recollections, the two narratives  
13 “were not actually produced and submitted into the record.” Response to Petitioner’s  
14 Objections 2.

15 In reply, petitioner cites to Record 1927, a rebuttal document submitted by petitioner  
16 into the record in this appeal. The document argues that NPG has not proved that it has  
17 mitigated the cumulative impacts of all three towers (NPG’s, GCC’s and Chackel’s), and in a  
18 parenthesis states in relevant part (“See Burdens of Proof 06-587 [Chackel] and 06-584

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“(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. \* \* \*

“(d) Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed during the course of the land use proceeding, including affidavits of publication, posting or mailing. Such notices shall include any notices concerning amendments to acknowledged comprehensive plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1) and (2).”

1 [GCC] \* \* \* as submitted to support this rebuttal testimony.”) Record 1927.<sup>4</sup> We  
2 understand petitioner to argue that Record 1927 supports her claim that she physically  
3 submitted the two burden of proof narratives into the NPG record.

4 However, the reference at Record 1927 is insufficient to overcome the city’s assertion  
5 that the two narratives were not physically submitted into the NPG record. The document at  
6 Record 1927 was evidently produced originally for the Chackel hearing. References and  
7 citations to Chackel and the Chackel application number are crossed out in black ink, and  
8 NPG and the NPG application number written above them, and vice-versa. Thus, whatever  
9 the phrase “*See Burdens of Proof* \* \* \* submitted to support this rebuttal testimony” meant  
10 when the original document was submitted into the Chackel record, that phrase in the  
11 modified document at Record 1927 does not carry a particularly strong implication that  
12 petitioner actually, physically submitted the Chackel and GCC narratives into the NPG  
13 record, when petitioner submitted the modified document at Record 1927 into the NPG  
14 record. Mere reference to documents in material submitted into the record does not have the  
15 legal effect of incorporating or otherwise placing referenced documents into the record.  
16 *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616, 617 (2002). Absent some stronger  
17 indication that petitioner actually submitted the Chackel and GCC narratives into the NPG  
18 record, petitioner has not demonstrated that the NPG record is deficient in that respect. This  
19 objection is denied.

20 **E. Items 73, 74, 75 in LUBA No. 2007-156**

21 The city agrees with petitioner that items 73, 74 and 75 in the record of LUBA No.  
22 2007-156 (Chackel) belong instead in this record and will include those items in a  
23 supplemental record. This objection is sustained.

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<sup>4</sup> The Chackel application number was actually 06-578, not 06-587.

1           **F.       Item 76**

2           The city and the petitioner apparently agree that Item 76, Record 2461-66, which the  
3 table of contents identifies as an “Order Resuming Post Hearing Schedule,” is the hearings  
4 officer’ third order (of four) extending the deadline for filing written material. Petitioner  
5 requests however that the table of contents be amended to refer to Item 76 as both the “Order  
6 Resuming Post Hearing Schedule” *and* the “Third Order.”

7           The document at Record 2461-66 is entitled “Order Resuming Post Hearing  
8 Schedule,” and therefore the table of contents accurately labels that document. Because all  
9 parties understand that it is also the third order in a series of four, there is no need to amend  
10 the table of contents. This objection is denied.

11           **G.       Missing Documents**

12           Apparently, the copy of the record served on petitioner was missing pages 1501-1600,  
13 due to a copying error. The city has agreed to provide the missing pages to petitioner. This  
14 objection is sustained.

15           **H.       Missing Page Between Record 497 and 498**

16           Petitioner withdraws this objection.

17           **I.       Applicant’s Final Argument**

18           Petitioner argues that the applicant’s final argument improperly includes new  
19 evidence. The city responds, and we agree, that any impropriety in the content of the final  
20 argument is not a basis to exclude the final argument from the record, under OAR 661-010-  
21 0026. Petitioner may, of course, assign error in the petition for review to the city’s  
22 acceptance or consideration of the final argument. This objection is denied.

23           **J.       Securely Fastened on the Left Side**

24           Petitioner objects that the copy of the 3,171-page NPG record served on her was a  
25 loose collection of documents, and not securely fastened on the left side, which makes it

1 difficult to use the record. The city responds that the copy provided to petitioner is sufficient  
2 to allow petitioners to review it and file the petition for review.

3 The copy of the record provided to LUBA in the NPG appeal was bound in five three-  
4 ring binders. Apparently, the record served on the lead petitioner was not bound or fastened  
5 together in any way. We agree with petitioner that the record copy served on the lead  
6 petitioner under OAR 661-010-0025(3) is subject to the requirements of OAR 661-010-  
7 0025(4), and therefore must also be “securely fastened on the left side.” OAR 661-010-  
8 0025(4)(a)(C). A 3,171-page record that is a collection of loose documents is sufficiently  
9 inconvenient to use that the city’s noncompliance with OAR 661-010-0025(4) cannot be  
10 overlooked. At the time the city files the supplemental record required by this order, the city  
11 shall also provide petitioner with a suitable means to bind or fasten together the service copy  
12 of the original record earlier provided to petitioner. The supplemental record served on  
13 petitioner shall also be suitably bound or fastened together. This objection is sustained.

14 **K. Compact Disc as Oversize Exhibit**

15 OAR 661-010-0025(2) permits the city to retain “any large maps, tapes, or difficult-  
16 to-duplicate documents and items” until the time of oral argument.<sup>5</sup> Petitioner objects that  
17 one such retained item is a “compact disc” of some kind that, petitioner alleges, includes

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<sup>5</sup> OAR 661-010-0025(2) and (3) provide, in relevant part:

- “(2) Transmittal of Record: The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board a certified copy of the record of the proceeding under review. The governing body may, however, retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument. Transmittal of the record is accomplished by delivery of the record to the Board, or by receipt of the record by the Board, on or before the due date.
- “(3) Service of Record: Contemporaneously with transmittal, the governing body shall serve a copy of the record, exclusive of large maps, tapes, and difficult-to-duplicate documents and items, on the petitioner or the lead petitioner, if one is designated. \* \* \* The governing body shall also serve a copy of any tape included in the record, or any tape from which a transcript included in the record was prepared, on any party requesting such a copy, provided such party reimburses the governing body for the reasonable expense incurred in copying the tape.”

1 electronic documents that could be printed on standard size paper and included in the record.  
2 As an apparent alternative, petitioner argues that the disc is not “difficult-to-duplicate” and  
3 therefore the city could simply provide petitioner with a copy of the disc.

4 The city responds that if petitioner wants a copy of the recording, petitioner may  
5 obtain one by reimbursing the city for the reasonable expense of copying it, under OAR 661-  
6 010-0025(3).

7 Neither party bothers to identify which retained item is at issue, but we surmise that it  
8 is Item 147, which is identified as a “CD of Hearings Officer’s site visit.” It is not clear what  
9 that disc is, whether it is an audio or video recording (as the city suggests) or a computer disc  
10 of some kind, as petitioner suggests. In either case, we disagree with petitioner that such  
11 electronic media may not be retained by the city until oral argument as a “tape” or “difficult-  
12 to-duplicate” item under OAR 661-010-0025(3). *Curl v. City of Bend*, \_\_ Or LUBA \_\_  
13 (LUBA No. 2007-156, Order, January 22, 2008), slip op 9-10 (rejecting similar argument).  
14 This objection is denied.

#### 15 **L. Oversized Site Plan**

16 The city retained as an oversize exhibit Item 148, identified as a “Site Plan.”  
17 Petitioner argues that site plans and similar oversize documents are easily reproduced in the  
18 city’s planning offices, and argues that the site plan is thus not a “difficult-to-duplicate”  
19 document. Petitioner requests therefore that the city provide her with a free copy of the site  
20 plan.

21 We agree with the city that a 24 x 36 inch document is a “difficult-to-duplicate” item  
22 that the city may retain until oral argument under OAR 661-010-0025(2). This objection is  
23 denied.

#### 24 **M. Conclusion**

25 The city will submit a supplemental record and revised table of contents, as required  
26 above. After receiving the supplemental record and revised table of contents and resolving



1 any objections thereto, the Board will issue an order settling the record and setting the  
2 briefing schedule.

3 Dated this 4th day of March, 2008.

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10 Tod A. Bassham

11 Board Member