

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HOME BUILDERS ASSOCIATION

5 OF LANE COUNTY,

6 *Petitioner,*

7
8 and

9
10 DAN NEAL,

11 *Intervenor-Petitioner,*

12
13 vs.

14
15 CITY OF EUGENE,

16 *Respondent,*

17
18 and

19
20 PAUL T. CONTE, RENE KANE,
21 CAROLYN JACOBS, DEBORAH HEALEY,
22 MARK STEVEN BAKER, MARILYN MOHR,
23 CHARLES SNYDER and KEVIN MATTHEWS,
24 *Intervenors-Respondents.*

25
26 LUBA Nos. 2008-148 and 2008-149

27 ORDER

28 **MOTIONS TO INTERVENE**

29 Dan Neal, moves to intervene on the side of the petitioner in this appeal. There is no
30 opposition to the motion and it is granted.

31 Paul T. Conte, Rene Kane, Carolyn Jacobs, Deborah Healey, Mark Steven Baker,
32 Marilyn Mohr, Charles Snyder and Kevin Matthews move to intervene on the side of the
33 respondent in this appeal. There is no opposition to the motion, and it is granted.

34 **INTRODUCTION**

35 This appeal concerns what the parties refer to as the city's Minor Code Amendment
36 Project (MICAP or MiCAP). The zoning code amendments that are before us in this appeal
37 grew out of a public outreach and prioritizing process that began in 2007. However, the

1 record that the city transmitted to LUBA begins with the notice of proposed post-
2 acknowledgment land use regulation amendment that the city sent to the Department of Land
3 Conservation and Development (DLCD) on April 3, 2008. That record does not include all
4 the documents that were generated during the public outreach and planning commission
5 proceedings that winnowed the number of proposed changes from approximately 200 down
6 to approximately 20.

7 The city transmitted the record in this appeal on September 15, 2008. On September
8 29, 2008, petitioner filed three and one-half pages of precautionary record objections. On
9 October 10, 2008, the city filed a six-page response. On October 13, 2008 lead intervenor-
10 respondent Conte (Conte) filed a five-page response. On October 30, 2008, petitioner filed a
11 “Reply Memorandum Re Record Objections.” Petitioner’s October 30, 2008 memorandum
12 is 12 pages long and its Appendix is 91 pages long. On November 11, 2008, the city filed a
13 six-page motion to strike and a surreply. On November 13, 2008, Conte filed a four-page
14 motion to strike and a surreply. The target of those motions to strike is petitioner’s October
15 30, 2008 memorandum. Finally, on November 19, 2008, petitioner filed a four-page
16 response to the motions to strike.

17 Before turning to the pending record objections and motions, we note that although
18 LUBA’s enabling statutes generally limit LUBA’s review to the local government record,
19 those statutes do not provide any guidance regarding the required content of the local
20 government record.¹ LUBA has adopted an administrative rule to set out the minimum
21 contents for a local government record in a LUBA appeal. OAR 661-010-0025(1).² One of

¹ ORS 197.835(2)(a) simply provides “[r]eview of a decision under ORS 197.830 to 197.845 shall be confined to the record.” ORS 197.830(10)(a) provides in part:

“Within 21 days after service of the notice of intent to appeal, the local government, special district or state agency shall transmit to the board the original or a certified copy of the entire record of the proceeding under review. * * *”

² OAR 661-010-0025(1) provides as follows:

1 the key requirements appears at OAR 661-010-0025(1)(b), which requires that the record
2 include all testimony and written material that is “specifically incorporated into the record or
3 placed before, and not rejected by, the final decision maker, during the course of the
4 proceedings before the final decision maker.”

5 **MOTIONS TO STRIKE**

6 The city and Conte move to strike petitioner’s October 30, 2008 memorandum. We
7 understand the city and Conte to argue that the first time petitioner (1) sufficiently identified
8 the documents it wants added to the record and (2) articulated a legal theory for why those
9 documents should be included in the record was in that memorandum. We understand the
10 city and Conte to argue that petitioner should have both identified the disputed documents
11 and set out its legal theory for its record objections in its September 29, 2008 precautionary
12 record objections, and its attempt to do so for the first time in the October 30, 2008
13 memorandum came too late.

14 **A. Petitioner’s September 29, 2008 Precautionary Record Objections**

15 In petitioner’s September 29, 2008 precautionary record objections, petitioner
16 contends that the record should be supplemented to include documents that were generated

“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. * * *
- “(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 by the planning commission as it reduced the number of proposed changes from
2 approximately 200 down to 20:

3 “The city elected to begin the record it filed with LUBA with the preadoption
4 notice the city filed with the DLCD on April 3, 2008. * * *

5 “However, the Planning Commission formally started its work on the
6 ordinance content about one year earlier, in May 2007. It conducted this work
7 in an occasional dialogue with the City Council. Petitioner believes that the
8 record on this matter should begin at the point in 2007 when the Planning
9 Commission formally began its work on the MICAP legislative package. The
10 record should, of course, include all the materials generated after that date but
11 prior to the preadoption notice to the DLCD, which begins the record already
12 submitted to LUBA. * * *

13 “* * * * *

14 “Petitioner believes the record should start at least as early as May 17, 2007,
15 which was the date that the Planning Commission became formally involved
16 in the MICAP process. * * *

17 “Following the May 17[, 2007] Planning Commission meeting on the contents
18 of MICAP, there were at least the following series of Planning Commission
19 proceedings relating to the contents of MICAP:

20 “● July 12, 2007 Planning Commission meeting, with Planner Nystrom
21 Staff Report (second roundtable discussion with public to work on
22 amendments);

23 “● August 29, 2007 Planning Commission meeting, with Planner
24 Nystrom Staff Report on selecting priority items to include in the
25 amendments;

26 “● March 18, 2008 Planning Commission meeting, with Planner Hansen
27 staff report reviewing ‘white papers’ on specific draft amendments;

28 “● April 1, 2008 Planning Commission meeting and Hansen Staff report
29 reviewing ‘white papers’ on specific draft amendments.

30 “The list above may be partial, as it reflects documents that Petitioner already
31 has. Petitioner’s point here is that the record needs to include all materials
32 following the date the Planning Commission formally began its work on the
33 MICAP amendments. That would appear to begin on May 17, 2007.”
34 Petitioner’s Precautionary Record Objections 1-4.

1 **B. The City’s and Conte’s October 10, 2007 and October 13, 2007 Replies**

2 Conte and the city oppose petitioner’s request that the record be supplemented with
3 documents that were generated in the outreach and prioritizing processes. According to
4 Conte and the city the record that was transmitted to LUBA includes all documents that were
5 actually placed before the *city council*, which was the decision maker in this matter, as
6 required by OAR 661-010-0025(1). *See* n 2. The city explains:

7 “Beginning in 2005, the City engaged in a public outreach process in an effort
8 to better understand the public’s issues with the City’s land use code. * * *
9 [T]he city hired a consultant to manage a continued public outreach process
10 designed to identify substantive code amendments desired by the public. The
11 consultant identified approximately 200 suggested code amendments. The
12 Planning Commission then agreed upon a strategy for prioritizing the
13 amendments and did so. Around 20 of the more minor amendments were then
14 packaged to be considered in the context of another Type V legislative
15 process. The other 180 ± proposed amendments have been set aside for future
16 procedures.

17 “Pursuant to the City’s Type V procedures set out at [Eugene Code] EC
18 9.7500-9.7560, the Eugene City Council is the final decision-maker on any
19 amendment made to the City’s land use code. The City’s Type V process
20 requires that the Planning Commission consider the proposed amendments
21 first, however, and make a recommendation to the City Council. *Id.* In
22 accordance with the City’s Type V process, in April and May, 2008, the City
23 provided several notices of a Planning Commission public hearing to consider
24 the set of 20± minor code amendments. The Planning Commission received
25 testimony, deliberated and made recommendations on the package of
26 proposed code amendments. * * *

27 “In addition to giving the City Council the Planning Commission’s final
28 recommendations on the MiCAP amendments, City staff also provided the
29 City Councilors with background materials from the Planning Commission’s
30 Type V consideration of the proposed MiCAP amendments. The LUBA
31 record filed by the City includes all of those material that were placed before
32 the City Council – the final decision maker – in the course of its Type V
33 proceedings on the proposed MiCAP amendments. The LUBA record does
34 not include documents from the public outreach process or from the
35 prioritization process, unless those documents were specifically provided to
36 the City Council by City staff or interested parties as part of the City
37 Council’s Type V review of the MiCAP amendments.” Response to Record
38 Objections 2-3 (footnote and record citations omitted).

1 The city then objects that petitioner cites no authority for its contention that the
2 record in this matter must include documents from the public outreach and prioritization
3 process that (1) predated the April 3, 2008 notice to DLCD and (2) were not actually placed
4 before the city council during its deliberations in this matter:

5 “Without reference to any specific documents, Petitioner appears to argue that
6 the LUBA record should include all materials generated after May 17, 2007.
7 This choice of date reflects Petitioner’s belief that the record for this matter
8 should include materials related to the public outreach and the process of
9 prioritizing the 200± citizen-proposed code amendments that came out of the
10 outreach program. * * *

11 “Petitioner fails to set forth grounds for its objection. Assuming Petitioner
12 asserts this record objection pursuant to OAR 661-010-0026(2)(a), Petitioner
13 must specifically identify the documents that should be included in the record
14 and must set forth the basis for the claim that the items are a part of the
15 record. Petitioner has done neither. * * *” Response to Precautionary Record
16 Objections 3-4 (footnotes and record citations omitted).³

17 C. Discussion

18 The city and Conte contend that when petitioner filed its September 29, 2008
19 precautionary record objections arguing that additional documents must be included in the
20 record, OAR 661-010-0026(2)(a) required that “[t]he omitted item(s) shall be specified, as
21 well as the basis for the claim that the item(s) are part of the record.” See n 3. According to
22 the city and Conte, petitioner identified only a few of the many documents that come within
23 the scope of its October 30, 2008 memorandum. More importantly, argue the city and Conte,
24 petitioner failed to state the basis for its claim that documents that predate the April 3, 2008
25 notice to DLCD must be included in the record. The city and Conte argue that petitioner
26 should not be permitted to file a legally inadequate precautionary record objection on
27 September 29, 2008 and then belatedly attempt to correct the inadequacies by identifying

³ Where a party is objecting that a record that has been filed with LUBA does not include documents that should be included, OAR 661-010-0026(2)(a) requires that “[t]he omitted item(s) shall be specified, as well as the basis for the claim that the item(s) are part of the record.”

1 legal theories for why additional documents should be included in the record and the specific
2 documents that petitioner believes should be included in the record for the first time in its
3 October 30, 2008 memorandum. *See Kane v. City of Beaverton*, 55 Or LUBA 669, 671
4 (2007) (petitioner does not have unlimited time to add new and ever evolving record
5 objections after the initial record objection is filed); *Mintz v. Washington County*, 34 Or
6 LUBA 781, 788 (1998) (petitioner only has one opportunity to file record objections).

7 We first note that the only material difference between a precautionary record
8 objection and a record objection is that the former is filed to advise LUBA that the objecting
9 party is continuing to work with the governing body’s legal counsel to resolve the
10 objections.⁴ Both record objections and precautionary record objections must specify the
11 allegedly omitted item and state “the basis for the claim that the item(s) are part of the
12 record.” *See* n 3.

13 Turning first to the OAR 661-010-0026(2)(a) requirement that allegedly missing
14 documents must “be specified,” we do not agree with the city and Conte that petitioner’s
15 precautionary record objection inadequately specified the documents it wants added to the
16 record. The parties’ overarching dispute concerning the record is the date the local
17 proceeding began. If the local proceeding began when petitioner believes it began, the
18 record must be supplemented with a large number of documents. As far as we can tell, given
19 time constraints, petitioner did all that it reasonably could be expected to do in the
20 precautionary record objections to specify the documents that predated the April 3, 2008
21 notice to DLCD. However, petitioner’s failure to adequately specify the legal basis or bases
22 for its position that those documents belong in the record is a different question.

⁴ OAR 661-010-0026(2) provides:

“An objection to the record or an objection to an amendment or supplement to the record shall be filed with the Board within 14 days of the date appearing on the notice of record transmittal sent to the parties by the Board. A party may file a precautionary record objection while continuing to resolve objections with the governing body’s legal counsel. * * *”

1 In the September 29, 2008 precautionary record objection, petitioner simply
2 expresses its opinion that the city is wrong about when the local proceeding began. In the
3 September 29, 2008 precautionary record objections, petitioner did not argue that the
4 disputed documents were placed before the city council or offer any legal theory for why
5 those documents should be added to the record without regard to whether they were placed
6 before the city council. In the September 29, 2008 precautionary record objections,
7 petitioner did not mention the statute it relies on in the October 30, 2008 memorandum or
8 OAR 661-010-0025(1), *see* n 2, or argue that sections of the Eugene Code that it cites in the
9 October 30, 2008 memorandum have the legal effect of placing the public outreach and
10 prioritization phase documents before the city council, without regard to whether they were
11 physically placed before the city council. All of these potential bases for sustaining
12 petitioner's record objections appear for the first time in petitioner's October 30, 2008
13 memorandum.

14 If our review is limited to the September 29, 2008 precautionary record objections,
15 the legal theory or theories underlying those record objections are not sufficiently developed
16 and for that reason the precautionary record objections would have to be denied. Although
17 it is an exceedingly close question, we do not agree with the city and Conte that petitioner's
18 October 30, 2008 memorandum should be stricken. It is true that petitioner's delay until
19 October 30, 2008 in elaborating on the bases for its record objection led to additional rounds
20 of memoranda and has resulted in a significant delay in this appeal.⁵ However, petitioner's
21 contention that the local proceeding began long before the April 3, 2008 notice was sent to
22 DLCD is certainly not unreasonable. While petitioner probably should have anticipated that

⁵ When the precautionary record objections and the ensuing replies, October 30, 2008 memorandum, sur-replies and petitioner's final response were filed in this appeal, LUBA had a large number of appeals with statutory deadlines for final opinions pending. Sorting out and resolving the parties' arguments concerning the record was delayed while final opinions in those appeals were issued. Simply stated, petitioner's failure to more completely set out its legal theories for its precautionary record objections in this matter has resulted in a fair amount of extra work for all parties and LUBA.

1 the city might take the position that documents generated during the public outreach and
2 prioritizing phase in this matter did not become part of the record unless those documents
3 were actually placed before the city council, and addressed that issue in its precautionary
4 record objections, we do not believe summary dismissal of petitioner’s precautionary record
5 objections is the appropriate sanction for that failure on petitioner’s part.

6 The city’s and Conte’s motions to strike are denied.⁶

7 **PETITIONER’S RECORD OBJECTIONS**

8 As we have already explained, petitioner’s October 30, 2008 memorandum states
9 several bases for why petitioner believes the record should be supplemented to include
10 documents from the public outreach and prioritizing phases that preceded the April 3, 2008
11 notice to DLCD. We summarize and discuss each of those bases below:

12 **A. ORS 197.830(10)(a)**

13 Petitioner first argues that LUBA should rely on ORS 197.830(10)(a) to adopt a
14 “bucket rule,” whereby from the start of local proceedings to the conclusion of local
15 proceedings all relevant material is included in the record bucket:

16 “Under LUBA’s rules, resolving record issues has evolved into a byzantine
17 exercise that could keep a dedicated cadre of law clerks fully employed. We
18 urge LUBA to revisit the statute to refresh its navigational bearings. The
19 statute is beautiful in its simplicity. ORS 197.830(10)(a) states:

20 “‘Within 21 days after service of the notice of intent to appeal,
21 the local government, special district or state agency shall
22 transmit to the board the original or a certified copy of the
23 entire record of the proceeding under review.’

24 “Under this statute, the compilation and submission of the record should be
25 pretty simple. One would ask when ‘the proceeding’ began, as that term is
26 used in the statute. From that point, to the end of the local proceeding,
27 everything that was dumped into the bucket of the proceeding would be
28 scooped up, organized, indexed, and submitted to LUBA. * * *

⁶ The city’s and Conte’s request to allow their alternative surreplies to the October 30, 2008 memorandum
are granted. We have considered those surreplies as well as petitioner’s final memorandum.

1 “The language of the statute has some attractive hallmarks. Its focus is on
2 ‘the proceeding.’ It does not distinguish between preliminary and final
3 decision makers. It does not distinguish between those who recommend and
4 those who decide. It does not hyper scrutinize who saw what.” Petitioner’s
5 October 30, 2008 Memorandum 6-7.

6 We understand petitioner to argue that LUBA’s rules permit the city to file a record that
7 omits documents that must be included under the bucket rule that petitioner believes is
8 required by ORS 197.830(10)(a). Petitioner contends that LUBA’s rule may not “shrink the
9 statute.” Petitioner’s October 30, 2008 Memorandum 7.

10 Petitioner is certainly correct that the meaning of the “record of the proceeding under
11 review” in ORS 197.830(10)(a) is a question of state law. Petitioner may also be correct that
12 ORS 197.830(10)(a) is “beautiful in its simplicity.” It may even be that the statute *could* be
13 interpreted to allow LUBA or a local government to adopt a bucket rule so that any
14 document that has any bearing on a legislative proceeding would be included in the record if
15 that document was created after the proceeding began and before it ended, notwithstanding
16 that the local decision maker never saw the document and did not consider the document in
17 making its decision. But the statute simply makes no attempt to set any parameters around
18 the statutory words “record of the proceeding under review.” Given the great variety in the
19 nature of local land use proceedings there are a large number of possible meanings for those
20 words. Stated differently, the statute may be simple, but it is also undeniably ambiguous,
21 given the context in which the term is used.

22 OAR 661-010-0025(1) is LUBA’s attempt to establish *minimum* standards for what
23 must be included in a record that is filed with LUBA. *Jackson v. City of Portland*, 53 Or
24 LUBA 612, 615 (2007). We do not agree that OAR 661-010-0025(1) is inconsistent with
25 ORS 197.830(10)(a) or that the rule exceeds LUBA’s rulemaking authority.⁷ Under OAR

⁷ ORS 197.820(4) provides:

“[LUBA] shall adopt rules governing:

1 661-010-0025(1), documents must be included in the record if they have been placed before
2 the decision maker, either physically or through operation of local law, or the documents
3 were specifically incorporated into the record. OAR 661-010-0025(1) is not a bucket rule.

4 Similarly, while local governments must comply with OAR 661-010-0025(1), they
5 retain some authority under that rule to control when city legislative land use proceedings
6 begin, for purposes of compiling the record that must be filed with LUBA. That authority is
7 not without bounds, but the city’s decision here is clearly within any implied limits imposed
8 by ORS 197.830(10)(a) or OAR 661-010-0025(1) in deciding when city legislative land use
9 proceedings begin. In this case, all the city has done is decide that the local proceeding
10 began, for purposes of the official record that must be filed with LUBA, on the date the city
11 provided notice of the planning commission’s hearing on the proposal. We believe the city is
12 entitled to make that determination. *See Central Eastside Industrial Council v. City of*
13 *Portland*, 29 Or LUBA 541, 546 (1995) (record of meetings between advisory committee
14 and city council is not part of the record of city council’s legislative land use decision where
15 local advisory committee’s charge was not limited to the amendments adopted by the
16 legislative land use decision). It is true that in *McKay Creek Valley Assoc. v. Washington*
17 *County*, 19 Or LUBA 500 (1990), a decision that is not cited or discussed by petitioner,
18 LUBA concluded that documents placed before the board of county commissioners during a
19 citizen input and prioritization phase must be included in the record. However, in *McKay*
20 *Creek Valley Assoc.* the board of county commissioners participated in the citizen input and
21 prioritization phase with the planning commission, here the planning commission was
22 responsible for those preliminary phases.

“(a) The conduct of review proceedings brought before it under ORS 197.830 to
197.845.

“* * * *”

1 It is true that the city’s decision that the city proceedings in this matter began on
2 April 3, 2008 means that potentially relevant documents and other evidence concerning the
3 legislative proposal that were generated during the public outreach and prioritization phases
4 did not become part of the record that was filed with LUBA, unless someone took the
5 initiative to place that evidence before the planning commission and city council after the
6 April 3, 2008 notice was given. Of course the city’s decision also means that a great deal of
7 potentially irrelevant evidence concerning the approximately 180 proposals that the city did
8 not approve is not included in the record. Under EC 9.7500, the city was required to provide
9 notice and a public hearing before the planning commission, and the planning commission
10 was required to make a recommendation to the city council regarding a decision in this
11 matter. *See* n 8. The city’s decision that the local proceeding began when the city gave the
12 required April 3, 2008 notice to DLCD rather than much earlier during the public outreach
13 and prioritization phases is not inconsistent with ORS 197.830(10)(a) or OAR 661-010-
14 0025(1). We reject petitioner’s arguments to the contrary.

15 **B. The January 1, 2007 Application Started the Proceeding**

16 Petitioner next argues that the city submitted an application to itself on January 1,
17 2007. Petitioner contends that the “local proceeding,” as ORS 197.830(10)(a) uses that term,
18 began on that date and continued until the city council adopted the ordinances that led to this
19 consolidated appeal. Petitioner contends that documents that were generated during the
20 city’s public outreach and prioritizing phases after this application was filed must be
21 included in the record without regard to whether they were “put under the noses of the City
22 Council members * * *.” Petitioner’s October 30, 2008 Memorandum 8. We understand
23 petitioner to argue that under ORS 197.830(10)(a) all of the documents that were generated
24 during the public outreach and prioritization phases after the January 1, 2007 application are
25 part of the record of the “local proceeding” and under the statute must be included in the
26 record.

1 Petitioner’s argument that its record objections should be sustained because the city
2 proceedings in this matter began with a January 1, 2007 application has a couple of
3 problems. First, the city contends there is no January 1, 2007 application, and petitioner
4 offers no substantial basis for questioning that contention. Second, even if there were such
5 an application, under OAR 661-010-0025(1)(b), it is not sufficient that a relevant document
6 have been generated sometime during the local proceedings that leads to a legislative post-
7 acknowledgment plan amendment. That document must either be placed before the ultimate
8 decision maker in some legally sufficient way or be specifically incorporated into the record.
9 The documents that petitioner seeks to have added to the record were not placed before the
10 city council and were not specifically incorporated as part of the record.

11 **C. Documents Placed Before the City Council on October 7, 2007 and**
12 **March 10, 2008.**

13 At October 7, 2007 and March 10, 2008 work sessions, the city council was briefed
14 by planning staff on the progress that had been made during the prioritization phase. We
15 understand petitioner to argue that, even under OAR 661-010-0025(1)(b), *see* n 2, the
16 documents that were given to the city council in those meetings were “placed before” the city
17 council and belong in the record.

18 Any documents that were given to the city council on these dates predated the start of
19 the city’s proceeding in this matter. It follows that these documents are not part of the record
20 unless they were also placed before the city council after the proceedings commenced.
21 Petitioner neither alleges nor demonstrates that these documents were placed before the city
22 council after the local proceedings commenced on April 3, 2008.

23 **D. Documents Placed Before the Planning Commission that were not**
24 **Physically Placed Before the City Council**

25 A large number of documents were placed before the planning commission during the
26 public outreach and prioritization phases. Petitioner’s final argument is that even under OAR
27 661-010-0025(1)(b) those documents should be included in the record. As previously noted,

1 OAR 661-010-0025(1)(b) requires that the record include “[a]ll written testimony and all
2 exhibits, maps, documents or other written materials specifically incorporated into the record
3 or placed before, and not rejected by, the final decision maker, during the course of the
4 proceedings before the final decision maker.” In *ONRC v. City of Oregon City*, 28 Or LUBA
5 775, 778 (1994), LUBA explained that documents are “placed before” the decision maker,
6 within the meaning of OAR 661-010-0025(1)(b) in three circumstances:

7 “Items are placed before the local decision maker if (1) they are physically
8 placed before the decision maker prior to the adoption of the final decision;
9 (2) they are submitted to the decision maker through means specified in local
10 regulations or through appropriate means in response to a request by the
11 decision maker for submittal of additional evidence; or (3) local regulations
12 require that the item (e.g., record of a lower level decision maker’s
13 proceeding) be placed before the decision maker.”

14 Petitioner argues the EC requires that anything placed before the planning commission in a
15 Type V proceeding is also considered to be placed before the city council under (2) and (3)
16 above. Petitioner argues that this is so for two reasons. First, the EC creates a single unified
17 proceeding that begins with the planning commission and ends with the city council.⁸
18 Second, EC 9.7545 requires that the city council provide notice of its public hearing to all
19 persons who testified before the planning commission or requested notice of the planning
20 commission’s decision.⁹ We understand petitioner to contend that these sections of the EC

⁸ We understand petitioner to rely on EC 9.7500, which provides:

“**General Overview of Type V Application Procedures.** Type V applications provide for a legislative review by the planning commission and city council of changes to this land use code, amendments to refinement plans that include policies or map changes that are broad in scope (not limited to a specific site), and adoption of an entire update to a refinement plan. The Type V process includes public notice and a public hearing before the planning commission, which forwards a recommendation to the city council. The city council holds a public hearing before making a final decision. The city council’s decision is based on compliance with the applicable criteria of this land use code. * * *”

⁹ EC 9.7545 provides:

“**Public Hearing Notice.** At least 10 days before the city council hearing, the city shall mail written notice of the hearing to the following:

1 demonstrate an intent to create a single and unified local proceeding, and a single and unified
2 record, notwithstanding that the city council is the final decision maker and notwithstanding
3 that documents submitted during the initial public outreach and prioritizing phases were not
4 given to the city council.

5 Petitioner is simply wrong about the legal effect of EC 9.7500. That section of the
6 code requires that the city provide notice and hearings before the planning commission and
7 the city council when adopting a Type V amendment. It also requires that the planning
8 commission provide a recommendation to the city council. EC 9.7500 says nothing about
9 what must be included in the record that is compiled during a Type V procedure and it says
10 nothing about whether documents that are generated during public outreach and prioritization
11 effort before the planning commission must be included in the record of a Type V
12 amendment that is ultimately adopted by the city council.

13 The EC 9.7545 requirement that the city council provide notice of its hearing to
14 anyone who provided oral or written testimony during the planning commission hearing or
15 who requested notice of the planning commission's decision simply means the planning
16 commission will have to provide that information to the city council, it does not operate to
17 make all documents generated during the public outreach and prioritization phases before the
18 planning commission part of the record in this matter.

19 **E. Conclusion**

20 For the reasons explained above, petitioner's precautionary record objections are
21 denied. Petitioner's and intervenor-petitioner's petition for review shall be due 21 days from
22 the date of this order. The respondent's brief shall be due 42 days from the date of this order.
23 The Board's final opinion and order shall be due 77 days from the date of this order.

“(1) Any person who provided oral or written testimony in a timely manner during the
planning commission hearing procedures.

“(2) Any person who requested notice of the planning commission's decision.”

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Dated this 13th day of March, 2009.

Michael A. Holstun
Board Member