BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BILL BURNESS and KATIE BURNESS,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

GREAT AMERICAN PROPERTIES
LIMITED PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2010-032

ORDER

MOTION TO INTERVENE

Great American Properties Limited Partnership (intervenor), the applicant below, moves to intervene on the side of respondent. No party opposes the motion, and it is granted.

RECORD OBJECTIONS

Petitioners object to the record filed by the county in this appeal on various grounds.

1. Record Objection 1

The challenged decision is the county's approval of intervenor's subdivision. The decision was initially approved by the planning director. Petitioners appealed the planning director's decision to the planning commission, who also approved the subdivision. Petitioners then appealed the planning commission's decision to the board of county commissioners, who also approved the subdivision. In this record objection, petitioners argue that the record fails to include all of the materials contained in the record before the planning director.

Under the Douglas County Land Use and Development Ordinance (LUDO), the planning director may approve a subdivision as an administrative action, which he did. Such decisions are appealable to the planning commission, and appeals to the planning commission are de novo. LUDO 2.060.3(c). Appeals to the board of commissioners are de novo based on the closed record before the planning commission. The planning staff submitted a number of documents to the planning commission from the materials that were before the planning director when making the administrative decision; however, planning staff apparently did not submit all of the documents that were before the planning director. Petitioners now argue that those materials that were before the planning director but were not submitted to the planning commission and are not part of the record submitted to LUBA by the county should be included in the record.

OAR 661-010-0025(1)(b) provides that the record includes:

> "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.*" (Emphasis added.)

Under OAR 661-010-0025(1), the record before LUBA includes those materials that were placed before the final decision maker, in this case the board of commissioners. Materials placed before intermediate decision-makers, such as the planning director, are not automatically part of the record. However, in *ONRC v. City of Oregon City*, 28 Or LUBA 775, 778 (1994), we recognized that items may be included in the record before the final decision by operation of law, even if those items were not physically placed before the final decision maker:

> "Items are placed before the local decision maker if (1) they are physically placed before the decision maker prior to the adoption of the final decision; (2) they are submitted to the decision maker through means specified in local regulations or through appropriate means in response to a request by the decision maker for submittal of additional evidence; or (3) local regulations require the item (*e.g.*, record of a lower level decision maker's proceeding) be placed before the decision maker."

In the present case, petitioners argue that LUDO 2.400.7 requires the planning director to present the planning commission with "any materials submitted by the applicant as part of his application, staff exhibits used in making the administrative decision, an explanation of the request and the findings of fact articulated in making the decision." To the extent petitioners argue that LUDO 2.400.7 requires staff to forward *everything* that was before the planning director in making the administrative decision, we disagree. However, we agree with petitioners that LUDO 2.400.7 requires staff to forward to the planning commission at least the materials described in LUDO 2.400.7, which thence become part of the record before the board of commissioners.

It appears from the record that staff forwarded to the planning commission a copy of the subdivision application, the planning director's decision and findings, notices with attached maps, etc. Record 272-338. Petitioners suggest that there may be other materials submitted by the applicant or staff exhibits used in making the planning director's decision that were *not* forwarded to the planning commission. However, petitioners do not identify what those materials might be. We understand the county to take the position that staff forwarded to the planning commission all materials required by county code. That may or may not be the case, but absent some effort by petitioners to identify materials described in LUDO 2.400.7 that were not forwarded to the planning commission, we will not require the county to search the planning file for unidentified materials. This objection is denied.

2. Record Objection 2

Petitioners object that the record is not filed in inverse chronological order as required by OAR 661-010-0025(4)(a)(E).[1] Petitioners contend that the language of the rule

[1] OAR 661-010-0025(4) provides, in relevant part:

"(a) The record, including any supplements or amendments, shall:

"* * * * *

is mandatory, requiring that the record "shall" be filed in inverse chronological order. Further, petitioners note that OAR 661-010-0025(4)(c) provides that "[a] record which does not conform to the preceding requirements *shall* not be accepted by the Board." (Emphasis added). According to petitioner, LUBA lacks authority under its rules to treat noncompliance with the OAR 661-010-0025(4)(a)(E) inverse chronological order requirement as a "technical violation" of its rules under OAR 661-010-0005, and therefore a violation that can be overlooked if it does not prejudice the substantial rights of the parties.[2]

Petitioners cite no authority for the proposition that noncompliance with the mandatory OAR 661-010-0025(4)(a)(E) requirement that the record be organized in inverse chronological order cannot be treated as a "technical violation" for purposes of OAR 661-010-0005. LUBA's practice for many, many years has been to treat noncompliance with the inverse chronological order requirement as a "technical violation" of LUBA's rules, as long as the record is organized in a manner that is reasonably usable by the parties and the Board. *Mar-Dene Corporation v. City of Woodburn*, 32 Or LUBA 481, 483 (1997). Recent rule amendments, which do not govern this appeal, codify that practice. OAR 661-010-

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> "(E) Be arranged in inverse chronological order, with the most recent item first. Upon motion of the governing body, the Board may allow the record to be organized differently.
>
> "* * * * *
>
> "(c) A record which does not conform to the preceding requirements shall not be accepted by the Board."

[2] OAR 661-010-0005 provides:

> "These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under 661-010-0030(1) is not a technical violation."

0025(4)(a)(E) and (c) (2010). Even without that codification, however, we believe that that practice is consistent with LUBA's rules read as a whole. LUBA's rules are full of mandatory requirements, yet OAR 661-010-0005 specifies only two rule violations that categorically cannot be treated as a technical violation. The inverse chronological order requirement is not one of those two rules, and we decline to treat it as such.

Petitioners argue that the record is "grossly out of order," from which we understand petitioners to argue that the record as currently organized is not readily usable by the parties. However, petitioners do not explain why. The record is 351 pages long. Petitioners complain that the record is organized in "hearing packets," which are apparently collections of related documents that reflect how information was submitted into the record below rather than the chronological date of each individual document. If so, that organization is probably more useful and reflective of how documents actually entered the record and relate to each other than a strict chronological order based on document date. *1000 Friends of Oregon v. Clackamas County*, 45 Or LUBA 754, 757 (2003). In any case, petitioners have not demonstrated that requiring the county to re-organize the record in strict chronological order is necessary to render it useable by the parties.

Record objection 2 is denied.

3. Record Objection 3

Petitioners originally objected that intervenor's final argument contained new evidence when it was restricted to merely legal argument, and therefore should be stricken from the record. In their reply, petitioners acknowledge that even if the county improperly accepted the final argument, it is nonetheless part of the record, and the proper avenue is an assignment of error. Petitioners therefore withdraw their record objection.

4. Record Objection 4

Petitioners argue that the county failed to include various items in the record that should have been included. First, petitioners argue that meeting agendas from January 14,

2010 and December 10, 2009 should be included in the record. The county responds that there is nothing in the agendas that is not also included in the minutes from those meetings which are included in the record. While that may be true, the county does not dispute that the meeting agendas were placed before the final decision makers and are therefore properly included in the record.

Petitioners also argue that two staff memoranda dated December 18 and 23, 2009, were left out of the record. The county responds, correctly, that the memoranda are found at Record 115 and 162.

Record objection 4 is sustained in part.

CONCLUSION

Petitioners' fourth record objection is sustained in part. Within 14 days of the date of this order, the county shall submit a supplemental record including the January 14, 2010 and December 10, 2009 meeting agendas. After receipt of that supplemental record, the Board will issue an order settling the record and providing a briefing schedule.

Dated this 15th day of July, 2010.

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Tod A. Bassham
Board Member