

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 DAVID SETNIKER and JOAN SETNIKER,
5 *Petitioners,*

6
7 and

8
9 RICKREALL COMMUNITY WATER ASSOCIATION,
10 MADJIC FARMS, INC., MICHAEL S. CALEF,
11 SUSAN D. CALEF and E.M. EASTERLY,
12 *Intervenors-Petitioners,*

13
14 vs.

15
16 POLK COUNTY,
17 *Respondent,*

18
19 and

20
21 CPM DEVELOPMENT CORPORATION,
22 *Intervenor-Respondent.*

23
24 LUBA No. 2010-057

25 ORDER

26 **MOTIONS TO INTERVENE**

27 Rickreall Community Water Association, Madjic Farms, Inc., Michael S. Calef,
28 Susan D. Calef and E.M. Easterly move to intervene on the side of petitioners. CPM
29 Development Corporation moves to intervene on the side of respondent. No party opposes
30 the motions, and they are granted.

31 **RECORD OBJECTIONS**

32 The county filed the three-volume, 1900-page record on July 26, 2010. The table of
33 contents indicates that the records of five prior, related appeals are incorporated by reference,
34 but does not include copies of those records. On August 9, 2010, petitioners filed
35 precautionary objections to the record, listing 15 objections. Petitioners object that some
36 documents were omitted from the record, some improperly included, and some are illegible.

1 In Objection 8, petitioners argue that the table of contents for the 1900-page record is
2 inadequate and fails to list “each item contained therein.” OAR 661-010-0025(4)(a)(B).

3 The county responded to petitioners’ objections in a letter to petitioners on August
4 13, 2010, indicating an intent to file a supplemental record to resolve some of petitioners’
5 objections, and disputing other objections. However, the county never filed a copy of that
6 letter with LUBA. On September 1, 2010, the county filed a supplemental record that
7 appears to resolve some of petitioners’ objections. Item 133 in the supplemental record
8 includes a copy of the county’s August 13, 2010 response to petitioners’ objections, which is
9 the only reason that LUBA is aware of the August 13, 2010 response.

10 On September 9, 2010, petitioners copied LUBA with a letter to the county counsel,
11 in which petitioners refer to a fax from county counsel indicating that county counsel wished
12 to withdraw Item 133 from the supplemental record. Petitioners urged the county to contact
13 LUBA to advise it that item 133 is withdrawn from the record, and to present the county’s
14 position regarding resolved and unresolved record objections.

15 On September 13, 2010, the county mailed LUBA a letter stating:

16 “This shall serve as follow-up regarding the Record Objection that is currently
17 pending before LUBA. By my count 16 of the 17 objections have been
18 resolved. Polk County and [petitioners’ counsel] have agreed to removal of
19 the following pages from the Record:

20 “08-1 to 08-5, 08-34, 08-274, 10-001 to 10-002, 10-569 to 10-605, 10-1923 to
21 10-1932.

22 “The only issue still pending and which requires a ruling from LUBA is
23 Objection #8 (table of contents). Thank you.”

24 Reading together the county’s response in Item 133 of the supplemental record,
25 petitioners’ September 9, 2010 letter to county counsel that was copied to LUBA, and the
26 county’s September 13, 2010 letter to LUBA, it appears that (1) the supplemental record
27 resolves petitioners’ objections regarding omitted or illegible documents, (2) petitioners and
28 the county have resolved some of petitioners’ objections regarding improperly included

documents by agreeing to exclude the documents listed in the county's September 13, 2010 letter, and (3) petitioners have withdrawn or accepted the county's position regarding their remaining objections, with the exception of Objection 8 to the adequacy of the table of contents. We note that the county's September 13, 2010 letter refers to 17 objections, but we are not aware of any additional objections beyond the 15 objections set out in petitioners' August 9, 2010 objections. As far as we can tell, the only unresolved objection is Objection 8. We now resolve that objection.

A. Table of Contents

The table of contents lists 122 separate items in the 1900-plus page record. Petitioners argue that a number of briefly listed items include hundreds of pages of separate documents. For example, item 81 is simply identified as "Sherlock submittal" and spans Record page 754 to 1144. Item 82 is identified as "Noren submittal" and spans Record 1145 to 1365, spread across two volumes. Item 90 is described as "Madjic Farms submittal" and spans Record 1498 to 1704. Item 114 is identified as "Valley Concrete Submittal" and spans Record 1778 to 1903. Each of these submittals include many separate documents or attachments and exhibits, which are not separately listed. These four items alone total over 900 pages, almost half of the record. Petitioners argue that the table of contents does not comply with OAR 661-010-0025(4)(a)(B), because it does not separately list the many separate documents comprising each submittal.

In its August 13, 2010 response included in Item 133 of the supplemental record, the county argues:

"* * * In *DS Parklane v. Metro*, 33 Or LUBA 848 (1997) LUBA stated that the purpose of the rules regarding organization of the Record is to 'ensure the Record is usable by the parties and that all documents in the Record can be identified and located with reasonable effort.' * * * I have full confidence that you and the other lawyers (all of whom have been involved with this matter for a decade) can locate any document within the Record quickly and with reasonable effort." Supplemental Record Item 133 (original emphasis deleted).

1 This appeal involves many different parties. It is probably the case that a party who
2 submitted materials below will be sufficiently familiar with their own submittal that a more
3 adequate table of contents is not necessary in order for that party to locate documents within
4 that submittal with reasonable effort. However, other parties may not be so familiar with
5 other parties' submittals. Moreover, LUBA has no familiarity at all with the record, and
6 relies on a reasonably itemized table of contents to quickly locate documents in the record.

7 OAR 661-010-0025(4)(a)(B) was amended in 2010, effective for appeals filed after
8 June 30, 2010, to require that the table of contents list each attachments to each document in
9 the record. The present appeal was filed on June 29, 2010, and is governed by OAR 661-
10 010-0025(4)(a)(B)(2002), which does not explicitly require that attachments to documents be
11 separately listed. We have interpreted OAR 661-010-0025(4)(a)(B)(2002) to require
12 separate listing of attachments if necessary to make the record usable for the parties and the
13 Board. *Kane v. City of Beaverton*, 49 Or LUBA 712, 714 (2005). We have generally
14 required a revised table of contents to separately list attachments in circumstances where the
15 attachments comprise a large portion of a large record. That is the present circumstance. *See*
16 *Sane Orderly Development, Inc. v. City of Roseburg*, ___ Or LUBA ___ (LUBA No. 2008-
17 226, Order, April 17, 2009) (several hundred pages of unidentified attachments); *Rogue*
18 *Aggregates, Inc. v. Jackson County*, ___ Or LUBA ___ (LUBA No. 2007-158, Order on
19 Record Objections, December 26, 2007) (attachments spanning over 1,600 pages). Here, the
20 table of contents lists as four items almost half the 1900-page record, comprising many
21 different unidentified documents. The county has not demonstrated that the items in the
22 record can be located with reasonable effort. Accordingly, the county must revise the table
23 of contents to comply with OAR 661-010-0025(4)(a)(B). Objection 8 is sustained.

24 **B. Incorporated Records of Previous Appeals**

25 Finally, as noted above, the table of contents lists five records of prior LUBA appeals
26 that are apparently incorporated into the record of LUBA No. 2010-057 by reference.

1 OAR 661-010-0025(4)(b) (“[w]here the record includes the record of a prior appeal to this
2 Board, the table of contents shall specify the LUBA number of the prior appeal, and indicate
3 that the record of the prior appeal is incorporated into the record of the current appeal”). The
4 table of contents states that these five incorporated records were “previously mailed to appeal
5 participants.” The record supplied to LUBA did not include copies of those incorporated
6 records. The county may presume that LUBA still possesses copies of the local records in
7 those five appeals, but in fact LUBA’s practice in recent years is to return its copy of the
8 local record in the appeal to the local government once LUBA’s decision is final. Therefore,
9 the county must transmit to LUBA copies of the incorporated records. The county may, if it
10 wishes, retain LUBA’s copies of the incorporated records pursuant to OAR 661-010-0025(2)
11 until oral argument, and transmit them to LUBA at that time. If the county elects this option,
12 it must reflect that choice in the amended table of contents.

13 **C. Conclusion**

14 All objections other than Objection 8 have been resolved by the supplemental record
15 or the parties’ agreement. Pursuant to that agreement, Record pages 08-1 to 08-5, 08-34, 08-
16 274, 10-001 to 10-002, 10-569 to 10-605, 10-1923 to 10-1932 are excluded from the record,
17 and will not be considered in this appeal. The county shall either transmit copies of the five
18 incorporated records to LUBA or retain them until the date of oral argument. The county
19 shall submit a revised table of contents consistent with this order, following which LUBA
20 will issue an order settling the record and starting the briefing schedule.

21 Dated this 22nd day of September, 2010.
22
23
24
25
26
27

28

Tod A. Bassham
29 Board Member