

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 ROGUE ADVOCATES,
5 *Petitioner,*
6

7 and
8

9 MICHAEL L. WALKER,
10 *Intervenor-Petitioner,*
11

12 vs.
13

14 JOSEPHINE COUNTY,
15 *Respondent,*
16

17 and
18

19 RICHARD WHITAKER,
20 CHRISTINE WHITAKER,
21 and BOB HART,
22 *Intervenors-Respondents.*
23

24 LUBA No. 2011-037

25 ORDER

26 **MOTIONS TO INTERVENE**

27 Michael L. Walker (Walker) moves to intervene on the side of the petitioner. There
28 is no opposition to the motion and it is allowed.

29 Richard Whitaker, Christine Whitaker and Bob Hart move to intervene on the side of
30 the respondent. There is no opposition to the motion and it is allowed.

31 **RECORD OBJECTIONS**

32 On November 10, 2011, intervenor-petitioner Walker filed numerous objections to
33 the record. The county advised LUBA that it was negotiating the objections with Walker and
34 would file a response if negotiations were not successful. On March 22, 2012, the county
35 filed a response disputing all of Walker's objections. On March 28, 2012, intervenor-

1 respondent Bob Hart (Hart) filed a response concurring with the county’s position. On April
2 2, 2012, Walker filed a reply to the county’s and Hart’s responses. We now resolve the
3 objections and settle the record.

4 **A. Record Table of Contents**

5 OAR 661-010-0025(4)(a)(B) provides that the record must “[b]egin with a table of
6 contents, listing each item contained therein, and the page of the record where the item
7 begins (see Exhibit 2). Where a listed item includes attached exhibits, the exhibits shall be
8 separately listed.” In addition, OAR 661-010-0025(4)(a)(E) provides that the record must be
9 “arranged in inverse chronological order, with the most recent item first. Exhibits attached to
10 a record item shall be included according to the numerical or alphabetical order in which they
11 are attached, not the date of the exhibits.”

12 In the present case, the table of contents for the 1300-page record lists only 14
13 separate “items.” Items 4, 5, 7, 9 and 12 are described as the “Agenda, Minutes, and
14 Exhibits” for different hearings, and each “item” consists of an agenda for the hearing, the
15 minutes of that hearing, and then a large number of documents labeled as “exhibits” that are
16 individually listed and described in the table of contents. For example, Item 4 is described as
17 the “Agenda, Minutes and Exhibits” from the board of commissioners’ February 28, 2011
18 hearing. The agenda is at Record 45, the minutes at Record 46-49, and a number of exhibits
19 follow, which are separately identified in the table of contents. Record 50-163. The exhibits
20 apparently represent a miscellany of documents and testimony the county received between
21 the date of its previous hearing and the hearing on February 28, 2011, and do not represent
22 documents that were actually submitted during the proceedings below as “attachments” to
23 any other document. Some of the documents listed as “exhibits” have separate documents
24 attached; however, those attached documents are not separately listed. For example, exhibit
25 UU under Item 4 at Record 113-48 is labeled “Testimony from Mike Walker,” and includes a
26 separate document as an attached exhibit at Record 136-48, but the table of contents does not

1 separately identify that attached exhibit. Finally, all of the exhibits are listed in the
2 chronological order they were received by the county, with the earliest received document
3 first and the most recently received document last in the series.

4 Walker objects that the exhibits that follow Item 4, 5, 7, 9 and 12 are not in fact
5 “exhibits” “attached” to an “item” within the meaning of OAR 661-010-0025(4)(a)(B), but
6 instead are simply collections of miscellaneous documents received by the county within a
7 certain time frame. According to Walker, OAR 661-010-0025(4)(a)(B) requires that such
8 “exhibits” instead be listed as separate “items.” Walker argues that one reason to treat such
9 independently submitted documents as “items” rather than “exhibits” is that documents
10 actually *attached* to items are identified and listed as “exhibits,” as OAR 661-010-
11 0025(4)(a)(B) requires. In the present case, Walker argues, such exhibits are completely
12 unidentified, which makes the record less usable for the parties and the Board. *See Maguire*
13 *v. Clackamas County*, __ Or LUBA__ (LUBA No. 2011-040, Order on Record Objections,
14 August 5, 2011) (the table of contents must list only a single layer of exhibits, and need not
15 separately list internal exhibits that are attached to exhibits that are attached to items).
16 Walker notes that under the county’s approach approximately 35 exhibits are not identified
17 or listed at all, as OAR 661-010-0025(4)(a)(B) requires.

18 Finally, Walker argues that each of the “exhibits,” when properly listed as separate
19 items, should be listed in *inverse* chronological order with the most recent item first, not in
20 chronological order of the date they were received by the county, with the most recently
21 received item last.

22 The county responds that the table of contents complies with OAR 661-010-
23 0025(4)(a)(B) and (E). We disagree. A document that is submitted independently of any
24 other document during the proceedings below is, in the parlance of OAR 661-010-
25 0025(4)(a)(B), an “item” rather than an “exhibit.” As OAR 661-010-0025(4)(a)(B) uses the
26 term, an “exhibit” is a document that is “attached” to a lead document that is listed as an

1 “item.” While the terminology is not important at all, it is important for the Board and
2 parties that the table of contents accurately reflects the relationship between different
3 documents in the record, and provides an adequate, usable description of many varied
4 documents in what can be a large and unwieldy record. As Walker notes, under the county’s
5 approach a number of lengthy exhibits that are attached to documents are not identified or
6 listed at all in the table of contents, as OAR 661-010-0025(4)(a)(B) requires, which makes
7 locating such exhibits somewhat more difficult.

8 We also agree with Walker that the “exhibits” that should have been identified as
9 separate “items” are not arranged in inverse chronological order, with the most recent item
10 first, or on top, as OAR 661-010-0025(4)(a)(E) requires. Instead they are arranged
11 chronologically by the date the county received them, with the most recently received
12 document last in order. This problem is much less significant than the above item/exhibit
13 problem. The last sentence of OAR 661-010-0025(4)(a)(E) allows a local government to
14 seek the Board’s permission to organize the record differently than inverse chronological
15 order based on document date. The Board frequently allows records to be organized
16 differently, for example in the form of “packets” of documents collected by staff and
17 attached to a staff report, because such an organization often better reflects the record in the
18 form it was actually presented to the final decision maker than a strict inverse chronological
19 organization, and is therefore more usable to the Board and parties.

20 However, a violation of OAR 661-010-0025(4)(a)(B) or (E) is a “technical violation”
21 of LUBA’s rules that does not warrant any remedial action, unless we find that the violation
22 prejudices a party’s substantial rights. OAR 661-010-0005. In our view, that items are listed
23 as exhibits and the items/exhibits are not organized in inverse chronological order are not, in
24 themselves, sufficient to prejudice any party’s substantial rights. The unidentified exhibits
25 present a closer question. As noted above under the county’s approach approximately 35
26 exhibits attached to documents are not identified or listed at all, as OAR 661-010-

1 0025(4)(a)(B) requires. The unlisted exhibits total over 100 pages. Failure to identify that
2 number of exhibits makes it somewhat more difficult for the parties and Board to locate
3 particular documents in the 1300-page record. If the Board were requiring the county to
4 submit a supplemental record or revised table of contents for other reasons, we would likely
5 also require the county to revise the table of contents to comply with OAR 661-010-
6 025(4)(a)(B) and (E) in response to these objections. However, below we discuss and deny
7 all of Walker's remaining objections. In our view, the added minor degree of difficulty in
8 locating unidentified exhibits in the record resulting from the county's failure to list those
9 exhibits in violation of OAR 661-010-025(4)(a)(B) does not warrant further delay in this
10 appeal solely to require the county to submit a revised table of contents. The record as it
11 stands can be used with reasonable effort by the Board and parties.

12 **B. Omitted Items**

13 Under OAR 661-010-0025(1)(b), the record includes "[a]ll written testimony and all
14 exhibits, maps, documents or other written materials specifically incorporated into the record
15 or placed before, and not rejected by, the final decision maker, during the course of the
16 proceedings before the final decision maker." Walker objects to the omission of 10
17 documents from the record. The county responds that none of the 10 documents are properly
18 in the record.

19 Document 1 is a map that Walker argues was the second page of a letter from a
20 Department of Land Conservation and Development (DLCD) representative, the first page of
21 which is located at Record 1263. The county responds that it has searched its files and the
22 document at Record 1263 in the form submitted to the county did not include a second page.
23 We agree with the county that Walker has not demonstrated that the second page was
24 provided to the county.

25 Documents 2-3 are drafts of letters from DLCD to the county that Walker obtained
26 from DLCD via a public records request. The county responds that final versions of the

1 letters are in the record and the drafts were not provided to the county. We agree with the
2 county that Walker has not demonstrated that documents 2-3 were placed before the county
3 during the proceedings below.

4 Documents 4-10 are various documents and e-mails from DLCD to the county that
5 are dated after February 17, 2011, the date the local evidentiary record closed except for final
6 written comments from the applicant. The county argues that it properly excluded
7 documents 4-10 because they were submitted to the county after the close of the evidentiary
8 record. Walker replies that the county accepted two documents dated after February 17,
9 2011, at Record 151 to 163. However, those documents appear to be from the applicant's
10 representatives, and apparently represent the applicant's final written comments. Even if
11 those documents were untimely submitted to the county and should not be in the record, that
12 does not mean that other untimely submitted documents should also be included. Finally,
13 Walker argues that the DLCD correspondence with the county after February 17, 2011, has
14 significance with respect to the likely issues in this appeal. That may or may not be the case,
15 but because the DLCD correspondence occurred after the date the record was closed to
16 submissions from all parties other than the applicant, Walker has not demonstrated that
17 documents 4-10 should be included in the record. These objections are denied.

18 **C. Conclusion**

19 The record is settled as of the date of this order. The petition(s) for review are due 21
20 days, and the response brief(s) due 42 days, from the date of this order. The Board's final
21 opinion and order is due 77 days from the date of this order.

22 Dated this 26th day of April, 2012.

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28 _____
29 Tod A. Bassham
Board Member