

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

4 STOP TIGARD OSWEGO PROJECT, LLC,
5 NORMAN KING, PETE BEDARD,
6 MICHAEL MONICAL, CAROL ELSWORTH,
7 MARK ELSWORTH, SHANNON VROMAN,
8 JENNE HENDERSON, LAMONT KING,
9 THOMAS J. SIEBEN, GWEN L. SIEBEN,
10 SCOTT GERBER, JAN GERBER, JACK NORBY,
11 THOM HOLDER, GARY HITESMAN,
12 REBECCA WALTERS and DARRYL WALTERS,
13 *Petitioners,*

14
15 vs.

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17 CITY OF WEST LINN,
18 *Respondent,*

19
20 and

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22 CITY OF LAKE OSWEGO AND LAKE OSWEGO -
23 TIGARD WATER PARTNERSHIP and CITY OF TIGARD,
24 *Intervenors-Respondents.*

25
26 LUBA Nos. 2013-021 and 2013-022

27
28 WILLIAM J. MORE, CARL L. EDWARDS, LINA S. EDWARDS,
29 CURT SOMMER and ROBERT STOWELL,
30 *Petitioners,*

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32 vs.

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34 CITY OF WEST LINN,
35 *Respondent,*

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37 and

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39 CITY OF LAKE OSWEGO AND LAKE OSWEGO -
40 TIGARD WATER PARTNERSHIP and CITY OF TIGARD,
41 *Intervenors-Respondents.*

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43 LUBA No. 2013-023

44 ORDER

1 **MOTIONS TO INTERVENE**

2 The City of Lake Oswego and Lake Oswego-Tigard Water Partnership, and the City
3 of Tigard, the applicants below, move to intervene on the side of respondent in LUBA Nos.
4 2013-021, -022, and -023. There is no objection to the motions, and they are allowed.

5 **RECORD OBJECTIONS**

6 The two challenged decisions are (1) city council approval of a site design and
7 conditional use permit application to expand a municipal water treatment plant, and (2) city
8 council approval of a site design and conditional use permit application for an associated
9 water line. The first application was filed on January 17, 2012, and the second on June 25,
10 2012. The city council approved both applications on February 18, 2013. Both decisions
11 were appealed to LUBA and consolidated for review.

12 On April 15, 2013, petitioners filed objections to the 19-volume record. On April 29,
13 2013, the city filed an amended record table of contents, a supplemental record, and a
14 response that conceded some record objections but disputed others. On May 13, 2013,
15 petitioners filed objections to the amended table of contents. The city filed a response. We
16 now resolve the objections.

17 **A. Items Omitted from the Record**

18 Petitioners objected to the omission of 23 documents from the record. The parties
19 have resolved objections 7, 9 and 15-23. Specifically, the parties have agreed that items at
20 issue in objections 15 and 17 do not exist, that items 9, 22 and 23 are in the record or that
21 LUBA may take official notice of those items, and the city has agreed to submit a
22 supplemental record that includes or lists as retained items those identified in objections 7,
23 16, and 18-21. Outstanding are objections 1-6, 8, and 10-14.

24 **1. Objections 1-6 and 8**

25 These objections involve work session minutes or recordings for city council
26 meetings that occurred prior to the date that either application was filed. The city argues that

1 none of these work sessions occurred during the course of the proceedings on either
2 application, and no minutes or recordings of these meetings were placed before the city
3 council, the final decision maker, or incorporated into the record by the city council, during
4 the course of the proceedings on the two applications. OAR 661-010-0025(1).¹ Petitioners
5 offer no argument on these disputed items. We agree with the city that the work session
6 minutes or recordings that pre-date the date the applications were filed are not part of the
7 record. Unless the local code provides otherwise, permit proceedings generally begin when
8 the application is filed, for purposes of compiling the local record of a land use permit
9 proceeding. *Forest Highlands Neigh. Assoc. v. Lake Oswego*, 23 Or LUBA 723, 724 (1992).
10 Objections 1-6, and 8 are denied.

11 **2. Objection 10**

12 Petitioners object to the omission of the minutes or recordings of a city council work
13 session with staff on June 18, 2012, which involved discussion of the plant expansion
14 application then pending before the planning commission. The city responds that the meeting
15 occurred prior to the date the pipeline application was filed, and prior to the planning
16 commission hearings and decision on the two applications November 26, 2012, or the

¹ OAR 661-010-0025(1) provides:

“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, CD, DVD or other media recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. * * *.”

1 subsequent appeal of the planning commission’s decisions to the city council. The city
2 argues that the June 18, 2012 meeting was not part of the proceedings before the final
3 decision maker, the city council, and not placed before or incorporated into the record by the
4 city council.

5 We generally agree that the record of a permit decision need include only the minutes
6 or recordings of the permit proceedings before the final decision-maker, the city council,
7 unless the minutes or recordings of earlier proceedings are (1) “placed before” the final
8 decision-maker during the course of the proceedings before the final decision maker, (2)
9 incorporated by the final decision maker, or (3) incorporated pursuant to local regulations.
10 OAR 661-010-0025(1)(b), (c). *Union Gospel Ministries v. City of Portland*, 21 Or LUBA
11 557, 559 (1991). The June 18, 2012 city council meeting was not part of the proceedings on
12 the permit before the city council, and petitioners do not contend that minutes or recordings
13 of the June 18, 2012 meeting are part of the record under any other theory. Objection 10 is
14 denied.

15 3. Objections 11-14

16 Petitioners object to the omission of any written notes made by city councilors during
17 the proceedings before the city council, and to the omission of a written document that the
18 mayor read from or based his comments on during the February 11, 2013 meeting. The city
19 responds, and we agree, that petitioners have not established that any such written notes or
20 written documents that were created by the mayor or individual councilors were “placed
21 before” the city council or incorporated into the record by the city council. Objections 11-14
22 are denied.

23 B. Table of Contents

24 OAR 661-010-0025(4)(a)(B) provides in part that the record must “[b]egin with a
25 table of contents, listing each item contained therein, and the page of the record where the

1 item begins (see Exhibit 2). Where a listed item includes attached exhibits, the exhibits shall
2 be separately listed.”

3 Petitioners object that the record table of contents lists numerous items that consist of
4 multiple documents or that have attached exhibits, but without separately listing the
5 constituent documents or attached exhibits. Petitioners identify three examples, at Record
6 278-323, Record 1421-25, and Record 428-34. The city submitted a revised table of contents
7 that specifically lists the exhibits to the three documents identified by petitioners. However,
8 the city argues that it is not necessary to further revise the table of contents to list any other
9 exhibits or attachments to listed items, because the record and table of contents is usable with
10 reasonable effort and petitioners have not demonstrated that any remaining deviation from
11 OAR 661-010-0025(4)(a)(B) prejudices their substantial rights and warrants further remedial
12 action.

13 Petitioners submitted a reply styled as an Objection to the Amended Record, which
14 argues in relevant part that the table of contents must be further revised in order to locate
15 attachments to items with reasonable effort. Petitioners identify three additional problematic
16 listings that, in their view, warrant remedial action. Record 2186-2268, 2349-2623, and
17 4621-5532. However, petitioners argue that it is not their job to identify each of the
18 problematic listings in the record; instead it is the city’s job to provide a table of contents that
19 complies with OAR 661-010-0025(4)(a)(B).

20 The city responds that LUBA should not consider what are in essence new objections
21 to the record filed by petitioners. On the merits, the city argues that there is no need to revise
22 the listings for the items at Record 2186-2268, 2349-2623, and 4621-5532, to allow attached
23 documents therein to be identified with reasonable effort.

24 The record table of contents is 31 pages long, and lists 228 discrete items in the 19-
25 volume, 11,881-page record. It appears that many persons participated in the proceedings
26 below, with numerous submittals. Many items are identified simply by the name of the

1 person who submitted the item, with no other information or descriptions. From the page
2 numbers, it appears that most such items are only a few pages in length and probably consist
3 of a single document. However, a number of items span numerous pages, and at least some
4 appear to consist of multiple documents or documents with multiple attachments.

5 We generally agree with petitioners that with a record this large, compiled from the
6 submissions of many persons, a substantial effort must be made to separately identify exhibits
7 or attachments to documents, or the contents of collections of documents, in order for the
8 parties and LUBA to locate individual documents with reasonable effort. We do not mean to
9 suggest that every attached document in the record must be separately identified. As the city
10 notes, LUBA's rules require that only a single layer of attachments to be identified;
11 documents that are attached to exhibits or attached documents need not be separately listed.
12 *Maguire v. Clackamas County*, 64 Or LUBA 445, 448 (2011). Further, the city argues that
13 some multiple-attachment documents have internal indices or tables of contents, including
14 two of the items identified in petitioners' reply. If so, no remedial action may be necessary to
15 enable the attached documents to be located with reasonable effort. *Emmons v. Lane County*,
16 __ Or LUBA __ (LUBA No. 2004-111, Order, November 10, 2004), slip op 2. Finally, the
17 major concern addressed by OAR 661-010-0025(4)(a)(B) is large collections of separate,
18 unattached documents, or documents with multiple attachments that span a significant
19 number of pages. The rule is less concerned with documents with one or two short
20 attachments.

21 That said, we agree with the city that petitioner bears the ultimate burden of
22 demonstrating that the record table of contents needs revision. That burden includes
23 specifically identifying the listings that allegedly violate OAR 661-010-0025(4)(a)(B).
24 Petitioners initially identified only three such listings, and in a subsequent pleading provided
25 three more examples. In both pleadings, petitioners broadly allege that the table of contents
26 includes many other problematic listings, but petitioners offer no help to the city or LUBA in

1 verifying those allegations. Resolving record objections in a timely manner requires the
2 active cooperation of all parties. OAR 661-010-0026(1). Without assistance from
3 petitioners, we decline to require the city to comb through a very large record to determine
4 whether listings for unidentified items and attachments documents might violate OAR 661-
5 010-0025(4)(a)(B).

6 The city has submitted a revised table of contents that addresses the first set of three
7 examples provided by petitioners. Petitioners have not demonstrated that further revisions
8 are necessary with respect to the second set of examples, or any other listings. This
9 objection is denied.

10 **C. Third Paper Copy of Record**

11 Petitioners Stop Tigard *et al.* filed two appeals (LUBA No. 2013-021 and 2013-022),
12 while petitioners More *et al.* filed one appeal, each with separate filing fees and deposits for
13 costs, as required by LUBA's rules. The three appeals were consolidated and the city filed a
14 single consolidated record. The city served a paper copy on each of the two attorneys who
15 represent the two groups of petitioners, along with an electronic copy. Petitioners insist,
16 however, that collectively they are entitled to three paper copies of the record, because they
17 filed three appeals.

18 The city responds, and we agree, that because there are two sets of petitioners each
19 represented by an attorney, the city is obligated to provide only a single copy of the
20 consolidated record to each attorney. Petitioners do not explain what purpose would be
21 served by requiring the city to provide petitioners with a third paper copy of the nearly
22 12,000-page record. This objection is denied.

23 **D. Briefing Schedule**

24 The record is settled as of the date of this order. Unless the parties agree otherwise in
25 writing, the petition for review is due 21 days, and the response brief due 42 days, from the
26 date of this order. The Board's final opinion and order is due 77 days from the date of this

1 order.

2 Dated this 13th day of June, 2013.

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Tod A. Bassham
Board Member