

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

3
4 OAKLEIGH-MCCLURE NEIGHBORS,
5 BRYN THOMS, SANDY THOMS, TAMMY CRAFTON,
6 KAREN FLEENER-GOULD, SCOTT FLEENER-GOULD,
7 CECELIA BAXTER-HEINTZ and PAUL BAXTER-HEINTZ,
8 *Petitioners,*

9
10 and

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12 PAUL CONTE and SIMON TRAUTMAN,
13 *Intervenors-Petitioners,*

14
15 vs.

16
17 CITY OF EUGENE,
18 *Respondent,*

19
20 and

21
22 OAKLEIGH MEADOWS CO-HOUSING, LLC,
23 *Intervenor-Respondent.*

24
25 LUBA No. 2014-001

26 ORDER

27 The challenged decision is a December 16, 2013 city planning
28 commission decision approving a planned unit development application.

29 **MOTIONS TO INTERVENE**

30 OAR 661-010-0050(1) allows in relevant part “[t]he applicant and any
31 person who appeared before the local government * * * [to] intervene” in an
32 appeal to LUBA.

33 **A. Undisputed Motions**

34 Paul Conte moves to intervene on the side of the petitioners. Oakleigh

1 Meadows Co-Housing, LLC (Oakleigh Meadows), the applicant below, moves
2 to intervene on the side of respondent. There is no opposition to the motions
3 and they are granted.

4 **B. Disputed Motion**

5 Simon Trautman (Trautman) moves to intervene on the side of the
6 petitioners. Oakleigh Meadows opposes the motion. A brief background of
7 the events that led to the filing of Trautman’s motion is set out below.

8 On January 3, 2014, petitioners filed their notice of intent to appeal
9 (NITA). As required by OAR 661-010-0015(2) and (3)(f)(D), petitioners
10 served copies of the NITA on “[a]ny * * * person to whom written notice of the
11 land use decision or limited land use decision was mailed as shown on the
12 governing body’s records.” After the NITA was filed, the city later discovered
13 that not all persons who participated orally or in writing during the proceedings
14 before the city were mailed notice of the final decision. On February 20, 2014,
15 petitioners provided a certificate of service certifying that petitioners served a
16 copy of their NITA on additional parties whom the city identified as being
17 mailed written notice of the decision, and who were thus entitled to a copy of
18 the NITA under OAR 661-010-0015(3)(f)(D). One of those additional parties
19 is Trautman. On March 11, 2014, nineteen (19) days after receiving the NITA,
20 Trautman moved to intervene on the side of the petitioners in the appeal.

21 Oakleigh Meadows opposes the motion. According to Oakleigh
22 Meadows, ORS 197.830(7) requires that “[w]ithin 21 days after a notice of
23 intent to appeal has been filed with [LUBA]” a person who appeared before the
24 local government may file a motion to intervene in the appeal. ORS
25 197.830(7)(c) states that failure to file a motion to intervene with LUBA within
26 21 days after the notice of intent to appeal is filed “shall result in denial of the

1 motion to intervene.”

2 We granted a motion to intervene that was filed after the 21-day deadline
3 specified in ORS 197.830(7)(c), where the late filing of the motion to intervene
4 was attributable to the petitioner’s failure to serve a copy of the NITA on the
5 applicant intervenor. *Mountain West Investment Corp. v. City of Silverton*, 38
6 Or LUBA 932, 934 (2000) (LUBA will not deny the applicant’s motion to
7 intervene filed 53 days after the NITA is filed, where the petitioner failed to
8 serve a copy of the NITA on the applicant). In the present appeal, Trautman’s
9 late filing of the motion to intervene was attributable to the petitioners’ failure,
10 through no fault of their own, to initially serve a copy of the NITA on “[a]ny
11 other person to whom written notice of the * * * decision was mailed as shown
12 on the governing body’s records[.]” The city mailed Trautman written notice
13 of the decision on February 4, 2014, and petitioners served a copy of their
14 NITA on Trautman on February 20, 2014. In these circumstances, we will not
15 deny a motion to intervene filed nineteen days after a copy of the NITA was
16 served on the moving party.

17 Trautman’s motion to intervene is granted.

18 **RECORD OBJECTIONS**

19 Intervenor-petitioner Paul Conte (Conte) filed objections to the record
20 transmitted by the city, and the city transmitted a supplemental record and a
21 response to the record objections. Conte filed a Reply to Respondent’s
22 Response. The supplemental record resolves some of the objections, and we
23 now resolve the remaining objections.

1 **A. Resolved Objections**

2 **1. Objection 1**

3 In his first objection, Conte objects that the record fails to include two
4 notices that were mailed by the city to interested parties on January 28, 2014
5 and on February 4, 2014. The supplemental record includes the notices and
6 resolves this objection.

7 **2. Objection 5**

8 In his Reply to Respondent’s Response (Reply), Conte confirms that
9 objection 5 is resolved.

10 **3. Objection 6**

11 In his Reply, Conte withdraws this objection.

12 **4. Objection 8**

13 In his Reply, Conte confirms that objection 8 is resolved.

14 **B. Unresolved Objections**

15 **1. Objections 2 and 4**

16 OAR 661-010-0025(4)(a)(B) provides in part that the record must
17 “[b]egin with a table of contents, listing each item contained therein, and the
18 page of the record where the item begins (see Exhibit 2).” In his second and
19 fourth objections, we understand petitioner to object that the table of contents
20 fails to comply with OAR 661-010-0025(4)(a)(B) because the table of contents
21 does not cross-reference or otherwise refer to documents according to the city’s

1 internal document identification system that it used to identify documents that
2 were submitted into the record during the proceedings below.¹

3 The city responds that OAR 661-010-0025(4)(a)(B) does not require the
4 city to include internal identifiers or cross-references in the table of contents, as
5 long as the record is usable by the parties and the Board. The city also
6 provides the record page citations and cross-references to the city’s internal
7 identification numbers for the documents that petitioner identifies in his
8 objections. Response to Record Objections 2.

9 A table of contents complies with OAR 661-010-0025(4)(a)(B) if it is
10 specific enough to enable the parties to locate individual documents in the
11 record with reasonable effort. We agree with the city that the record table of
12 contents is specific enough to enable the parties and the Board to locate
13 documents in the record. The city’s provision of the cross-references in its
14 response addresses any remaining uncertainty about the location of the
15 documents that petitioner points to.

16 Objections 2 and 4 are denied.

17 **2. Objection 3**

18 OAR 661-010-0025(4)(a)(B)(i) provides that “[w]here an item listed in
19 the table of contents includes attached exhibits, the exhibits shall be separately
20 listed as an exhibit to the item.” In his third objection, Conte objects:

21 “It appears that multiple items do not conform with OAR 661-010-
22 0025(4)[(a)](B)(i) in that exhibits are not separately listed. For
23 example, Items 2, 22a, 22d, and 26 do not list the multiple
24 attached exhibits. These are just examples. It is the City’s

¹ Petitioner points out that some documents are referred to in the final decision by reference to their internal document identification number.

1 responsibility to review the record and complete the TOC, as
2 required.” Objection to Record 2.

3 The city does not dispute that Items 2, 22a, 22d and 26 include multiple
4 attached exhibits or that the table of contents does not separately list the
5 attached exhibits, and agrees that it will supply a revised table of contents for
6 the four items identified by Conte. Accordingly, we agree with petitioner that
7 the table of contents should be amended to comply with OAR 661-010-
8 0025(4)(a)(B)(i) with respect to Items 2, 22a, 22d, and 26 that Conte identifies
9 in his objection.

10 We disagree with Conte, however, that the city is required to undertake a
11 complete independent review of the record to determine whether any other
12 items fail to comply with OAR 661-010-0025(4), absent any attempt by Conte
13 to identify other items that fail to comply with that rule.

14 Objection 3 is sustained, in part.

15 **3. Objection 10**

16 OAR 661-010-0025(4)(a)(B) requires the record to “[b]egin with a table
17 of contents, listing each item contained therein, and the page of the record
18 where the item begins.” In his tenth objection, Conte objects:

19 “City Exhibits PH-36, PH-37, PH-38 and PH-40 are not listed
20 independently in the Table of Contents.” Objection to Record 3.

21 Although his objection is not easy to understand, we understand Conte to be
22 referring to four, one-page letters submitted into the record by the applicant’s
23 representative that are located at Record pages 1288, 1289, 1290 and 1291, and
24 to argue that each of the letters must be identified in the table of contents as a
25 separate item. We disagree. Item 27.jj. lists “Letters submitted by [applicant’s
26 representative], received September 9, 2013” and includes Record pages 1289

1 through 1291. That identification is sufficient to allow the parties and the
2 Board to locate the four single page letters.

3 Objection 10 is denied.

4 **4. Objection 7**

5 In his seventh objection, Conte objects that the document at Record page
6 1036 is partially illegible because the date received stamped on the document is
7 illegible. The city responds that record page 1036 is a copy of Retained
8 Exhibit RE-R and that the oversized exhibit shows the date clearly. With that
9 response, objection 7 is denied.

10 **5. Objection 9**

11 In his ninth objection, we first understand Conte to object that the record
12 “does not include all materials included as part of the record during the
13 proceedings before the final decision maker. * * *” OAR 661-010-0026(2)(a).
14 In his Reply, Conte elaborates on his original objection and explains that city
15 planning staff displayed a Powerpoint presentation during the planning
16 commission hearings, and passed out printed materials during the hearings.
17 Conte takes the position that the record improperly omits “[t]he content of the
18 documents that were presented in the PowerPoint Presentation” and “the
19 content of the printed documents that were distributed at the [planning
20 commission hearings].” Reply 5.

21 The city has not provided any meaningful response to Conte’s objection
22 that the record improperly omits the Powerpoint presentation and the
23 documents that were distributed at the planning commission hearings. OAR
24 661-010-0025(1)(b)(2014) provides that the record “[a]ll written testimony and
25 all exhibits, maps, documents or other materials specifically incorporated into
26 the record or placed before, and not rejected by, the final decision maker,

1 during the course of the proceedings before the final decision maker.” The rule
2 is broad enough to include as “materials” a visual Powerpoint presentation that
3 staff presents at a hearing. *See Save Downtown Canby v. City of Canby*, __ Or
4 LUBA __ (Order, LUBA No. 2012-097, March 5, 2013, slip op 3) (explaining
5 that, under a prior version of OAR 661-010-0025(1)(b), “[v]isual presentations
6 at a land use hearing are properly included in the record that is transmitted to
7 LUBA if there is an appeal of the decision that results from that land use
8 hearing. Despite the lack of explicit guidance in our rules, local governments
9 routinely include either paper or electronic media copies of such visual
10 presentations, when preparing the record that is transmitted to LUBA. Either is
11 appropriate, regardless of whether the electronic media or paper copy is placed
12 before the decision maker at the hearing at which the visual presentation is
13 made.”) Accordingly, Conte’s objection is sustained.

14 The city shall transmit a supplemental record that includes the staff
15 Powerpoint presentation and the printed materials that staff distributed at the
16 planning commission hearings or identify the location in the original record
17 where those items are contained.

18 We also understand Conte to object that the record improperly includes
19 the retained exhibits because the retained exhibits were not “placed before” the
20 planning commission. OAR 661-010-0025(1)(b). That is so, Conte argues,
21 because “[t]here is no indication from viewing the video recordings that all of
22 the oversized, retained exhibits, some of which are key evidence in this case,
23 were actually presented to the Planning Commission in their original form.”
24 Reply 5.

25 By including the retained exhibits in the record, we understand the city
26 to take the position that the items were “placed before” the planning

1 commission, either physically or by operation of law. Because the city is the
2 custodian of the record, and Conte has the ultimate burden of demonstrating
3 that the local record is deficient, Conte’s mere speculation regarding whether
4 the retained exhibits were placed before the planning commission is
5 insufficient to establish a basis to sustain the objection. *Curl v. City of Bend*, 56
6 Or LUBA 794, 796 (2008). This part of the objection is denied.

7 Objection 9 is sustained, in part.

8 **6. Objection 11**

9 OAR 661-010-0025(1)(d) requires the record to include “[n]otices of
10 proposed action, public hearing and adoption of a final decision, if any,
11 published, posted or mailed during the course of the land use proceeding,
12 including affidavits of publication, posting, or mailing. * * *” Items 39 and 40
13 included in the record are affidavits of mailing and posting. In objection 11,
14 Conte objects that Items 39 and 40 are improperly included in the record
15 because they were not “placed before * * *” the planning commission.² The
16 city responds that Items 39 and 40 are included in the record because OAR
17 661-010-0025(1)(d) requires them to be included. We agree with the city.

18 Objection 11 is denied.

19 **C. Conclusion**

20 Within fourteen days of the date of this order, the city shall transmit to
21 the Board and the parties a second supplemental record that is paginated where
22 appropriate and that includes: (1) a revised table of contents that separately lists

² OAR 661-010-0025(1)(b) provides in relevant part that the record includes “[a]ll written testimony and all exhibits, maps, documents or other materials * * * placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.”

1 the attached exhibits for Items 2, 22a, 22d and 26; (2) an electronic media or
2 paper copy of the staff Powerpoint presentation made during the planning
3 commission hearing; and (3) a copy of the printed documents that were
4 distributed by the city's planning staff at the planning commission hearings. In
5 the alternative, the city may specify the location in the original record where
6 the Powerpoint presentation and the printed documents that were distributed at
7 the hearings are located.

8 Thereafter, the Board will issue an order settling the record and
9 establishing the briefing schedule.

10 Dated this 1st day of May, 2014.

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Melissa M. Ryan
Board Member