

1 BEFORE THE LAND USE BOARD OF APPEALS

2
3 OF THE STATE OF OREGON

4
5 SCOTT FERNANDEZ,
6 *Petitioner,*

7
8 and

9
10 JEFFREY E. BOLY and FLOY JONES,
11 *Intervenors-Petitioners,*

12
13 vs.

14
15 CITY OF PORTLAND,
16 *Respondent.*

17
18 LUBA No. 2015-051

19 ORDER

20 **MOTION TO WITHDRAW**

21 Petitioner Rose Marie Opp moves to withdraw as a petitioner. The
22 motion is granted.

23 **MOTION TO INTERVENE**

24 Jeffrey E. Boly and Floy Jones move to intervene on the side of
25 petitioner. There is no objection to the motion, and the motion is granted.

26 **RECORD OBJECTIONS**

27 Petitioner filed record objections on October 12, 2015. The city filed a
28 response on October 26, 2015. Petitioner filed a reply on November 9, 2015.
29 And on November 13, 2015, the city filed a supplemental response. We have

1 considered all filings regarding the record objections, and resolve petitioner's
2 record objections below.

3 **A. Record Objections A-1 through A-6.**

4 These objections all concern documents that petitioner contends should
5 be included in the record. Based on petitioner's reply, we understand petitioner
6 to withdraw these objections.

7 Record objections A-1 through A-6 have been withdrawn.

8 **B. Record Objections B-1 through B-5**

9 **1. B-1**

10 This objection concerns a number of items in the record table of contents
11 marked with one, two or three asterisks. The record table of contents explains
12 that the asterisked items are color, difficult to duplicate or oversized documents
13 or media recordings and that the original documents or media recordings will
14 be provided to LUBA at oral argument and copies will be made available to
15 parties on request.¹ Petitioner objects that the city should be required to
16 include, at the end of the table of contents, a listing of the documents to be
17 provided to LUBA at oral argument. The city responds that no such separate

¹ Except for the Audio CD of a March 30, 2015 Historic Landmarks Commission meeting, in all other cases reduced copies or black and white photocopies of the retained color documents appear in the record where indicated in the table of contents.

1 listing is necessary or required by LUBA’s rules, but the city agrees to submit a
2 revised table of contents to list those documents.²

3 Our rules are not entirely clear about precisely what is required when
4 documents are both retained until oral argument and included in some form in
5 the record that is transmitted to LUBA prior to briefing. OAR 661-010-
6 0025(2)(a) provides, in part:

7 “* * * The governing body may * * * retain any large maps, media
8 recordings, or difficult-to-duplicate documents and items until the
9 date of oral argument. Where documents are retained until the date
10 of oral argument, those retained documents shall be identified in
11 the table of contents, as provided in OAR 661-010-0025(4)(B)
12 * * *.”³

13 We interpret OAR 661-010-0025(2)(a) and 661-010-0025(4)(B)(ii) to require
14 that all documents that are retained until oral argument must be identified on a
15 list at the end of the table of contents. And that complete listing is required
16 even if black and white or reduced copies of some or all of the retained
17 documents are included and indexed in the record that is transmitted to LUBA.

² The city points out that petitioner’s reference to Exhibits H-13 and H-14 are erroneous, because those are not retained items. In addition, petitioner’s reference to Exhibit I-20 is also in error and was likely intended as a reference to Record Item 20.

³ OAR 661-010-0025(4)(B)(ii) provides:

“Where large maps, media recordings, or other items or documents are retained by the governing body under section (2) of this rule, those retained items shall be separately listed at the end of the table of contents[.]”

1 At the end of the table of contents, the city in this case did include a list
2 of color photos that were included in the record in black and white format. But
3 a number of other record items, for which the original document was retained
4 under OAR 661-010-0025(2)(a), are not included on the list that appears on
5 page 10 of the table of contents. The city must submit a revised table of
6 contents that lists all record items that have been retained until oral argument
7 under OAR 661-010-0025(2)(a).

8 Objection B-1, except for the objections regarding Exhibits H-13, H-14
9 and I-20, is sustained.

10 **2. B-2**

11 Record Item 6 is the “Findings and Conclusions” document that was
12 adopted in support of the challenged decision. Record Item 6 includes nine
13 Exhibits: Exhibits A through I. Exhibit I includes all the documents that were
14 submitted at the April 23, 2015 hearing in this matter. There are 68 entries
15 under Exhibit I. Objection B-2 concerns 17 of those 68 entries, all of which
16 include attachments. Each of the 17 documents provides a general description
17 of the attachments. If we understand petitioner correctly, he believes each of
18 the attachments should be separately listed in the table of contents.

19 OAR 661-010-0025(4)(B)(i) provides in part that “[w]here an item listed
20 in the table of contents includes attached exhibits, the exhibits shall be
21 separately listed as an exhibit to the item.” As a general rule, OAR 661-010-
22 0025(4)(B)(i) does not require that exhibits to exhibits must be separately listed

1 in the table of contents. *Maguire v. Clackamas County*, ___ Or LUBA ___
2 (LUBA No. 2011-040, August 5, 2011). It is debatable whether the 68 entries
3 under Exhibit I are more accurately described as record items with attached
4 exhibits that should be separately listed in the table of contents (petitioner’s
5 position) or exhibits with internal exhibits that under our rules need not be
6 separately listed (the city’s position). Given the sheer number of documents
7 and attachments, petitioner appears to have the stronger position.

8 Nevertheless, we agree with the city that for each of the 17 documents
9 that are the subject of petitioner’s B-2 objections, the record table of contents
10 includes a specific or general description of the attachments that is sufficient to
11 allow the parties and LUBA to identify and locate the attachments with
12 reasonable effort. *See 1000 Friends of Oregon v. Clackamas County*, 45 Or
13 LUBA 754, 755 (2003) (“what is essential in organizing and indexing the
14 record is that the parties and LUBA can identify and locate documents with
15 reasonable effort”).⁴ Any failure on the city’s part to fully comply with our

⁴ As an example, the record table of contents includes the following description of Exhibit I-15:

“Floy Jones submitted a letter from the Federal Energy Regulatory Commission; pages from the November 2001 Open Reservoir Study by Montgomery Watson Harza; and a 2/4/13 letter from Commissioner Steve Novick to the Oregon Health Authority requesting extension of LT2 compliance deadline (4/22/15)1418”

1 rules regarding the required specificity regarding attachments in the table of
2 contents is a technical violation of our rules and does not prejudice petitioner’s
3 substantial rights.

4 Objection B-2 is denied.

5 **3. B-3**

6 This objection concerns Exhibit F-14 under Record Item 6. The table of
7 contents identifies Exhibit F-14 as follows:

8 “F-14 Floy Jones (3/29/15).....585”

9 Record 585-88 is an email chain that was forwarded to the city via e-mail by
10 Floy Jones on March 29, 2015. Attached to that email chain is a December 10,
11 2010 report entitled:

- 12 “Washington Park Reservoirs
- 13 “Historic Structures Report
- 14 “Reservoir Nos. 3 and 4”

15 Petitioner objects that the table of contents makes no reference to the
16 attached report and that the report that appears in the record is incomplete. The
17 city responds that it will provide an amended table of contents that includes a
18 reference to the attached report in Exhibit F-14. The city also agrees to include

Record 1418 is an email message from Floy Jones, dated April 22, 2015. The Federal Energy Regulatory Commission letter appears at Record 1419. The Open Reservoir Study pages appear at Record 1420-31. The letter from Commissioner Novick appears at Record 1432-36.

1 in a supplemental record the last page of the report, “Figure 1 Site Plan,” which
2 the city contends is the only page missing from the copy of the report that is
3 included in the record.

4 Objection B-3 is sustained. The city will submit a revised table of
5 contents that includes a revised entry for Exhibit F-14 that refers to the attached
6 report. The city will submit a supplemental record that includes “Figure 1 Site
7 Plan,” which is missing from the copy of that attached report in the record.

8 **4. B-4**

9 This objection concerns a geotechnical report that was presented at a
10 public meeting approximately two and one half months after the city rendered
11 the decision that is the subject of this appeal. Petitioner argues the report and a
12 number of documents that were considered at that meeting and are accessible
13 via hyperlinks should be included in the record.

14 The city responds that the report postdates the challenged decision and
15 for that reason could not be part of the record in this appeal. We agree with the
16 city. *Jackman v. City of Tillamook*, 27 Or LUBA 704, 705 (1994); *Bicycle*
17 *Transportation Alliance v. Washington County*, 25 Or LUBA 798, 802-03
18 (1993); *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695, 698-
19 99, *aff'd*, 101 Or App 458, 790 P2d 1213, *aff'd*, 310 Or 243 (1990). We
20 understand the city also to contend that even if the documents that are
21 accessible via the hyperlinks identified by petitioner were placed before the
22 city council at a public meeting that postdated the challenged decision, that

1 would not be sufficient to place those documents “before * * * the final
2 decision maker, during the course of the proceedings,” that led to the
3 challenged decision, within the meaning of OAR 661-010-0025(1)(b).⁵ Again,
4 we agree with the city.

5 Objection B-4 is denied.

6 **5. B-5**

7 Objection B-5 is set out below:

8 “The 3 CDs provided to Petitioner et al are of little value. The
9 hyperlinks do not work.” Record Objection 5.

10 In its initial response, the city pointed out that it served a paper copy of
11 the record on petitioners Fernandez and Opp and a digital copy of the record on
12 three CDs on intervenors-petitioners. The city also responded that because the
13 objection is limited to “nonfunctional hyperlinks to material that is not part of
14 the record, this objection should be denied.” Response to Record Objections 7.

15 In its reply to the city’s response, petitioner complains for the first time
16 that the digital copy of the record on the CDs provided to intervenors-
17 petitioners is not searchable.

⁵ OAR 661-010-0025(1)(b) provides that the record in a LUBA appeal includes:

“All written testimony and all exhibits, maps, documents or other 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.”

1 In its supplemental response, the city agrees to supply petitioner with a
2 searchable copy of the record on CDs. We assume the city will do the same for
3 intervenors-petitioners.

4 With the city’s agreement, this objection is resolved. We address
5 petitioner’s objections regarding the hyperlinks in our discussion below.
6 Objection B-5 will be resolved by the city providing searchable copies of the
7 record on CDs to petitioner and intervenor petitioner.

8 **C. Objections C-1 through C-20.**

9 In these objections, petitioner identifies a large number of hyperlinks in
10 documents that are included in the record. Petitioner also identifies a number of
11 places where the city invited participants to visit websites to obtain
12 information. If we understand petitioner correctly, he contends that all of the
13 documents that are accessible via those hyperlinks and relevant documents on
14 the referenced websites should be considered part of the record in this appeal.
15 Petitioner goes even further and argues that the city should be required to
16 obtain documents that in the past were accessible via those hyperlinks, but are
17 not longer accessible via those hyperlinks.

18 Petitioner does not really identify a legal theory for why all those
19 documents should be considered part of the record. The only possible legal
20 theory we can think of is that by virtue of a hyperlink included in a document
21 that was submitted for the record, the document that is or was accessible via the
22 link is also “placed before * * * the final decision maker, during the course of

1 the proceedings,” within the meaning of OAR 661-010-0025(1). *See* n 5. If that
2 is petitioner’s legal theory, it is without merit. Just because the city provided
3 hyperlinks to sources of information, or posted relevant information on its
4 website, or parties to a city land use proceeding submitted documents that
5 include hyperlinks to reports and other information, that does not mean the
6 documents that are accessible via those links or are on the website become part
7 of the evidentiary record. *See Citizens Against LNG, Inc. v. Coos County*, 62 Or
8 LUBA 550, 552 (2010) (posting a hyperlink on the city’s website to a video of
9 a public hearing made by a local cable access channel is not sufficient to make
10 the video part of the record, where the video was neither specifically
11 incorporated into the record nor placed before the city decision maker);
12 *Gunderson, LLC v. City of Portland*, 62 Or LUBA 505, 509-10 (2010)
13 (documents prepared by task groups to assist planning staff that are placed on a
14 city website and accessed by links do not become part of the record unless the
15 documents were also physically placed before the decision maker).

16 In his reply, petitioner complains that the city never informed citizen
17 opponents “that hyperlinked documents would be rejected by the city,” and that
18 the city itself included hyperlinked documents in the record. Petitioner
19 contends that the city’s inclusion of hyperlinked documents in the record,
20 without extending the same courtesy to other parties “offends that fundamental
21 fairness required by the due process clause of the 14th Amendment to the
22 United States Constitution.” Reply to Respondent’s Response 5.

1 We do not fault the city for failing to anticipate that parties might believe
2 they could include hyperlinks throughout documents they submitted for the
3 record and thereby make the documents that were accessible via those
4 hyperlinks, at the time the document was submitted, part of the record. And it is
5 not accurate to say the city has *rejected* those hyperlinked documents; the city
6 is simply taking the position that inserting hyperlinks in documents that are
7 submitted for the record, without more, is not sufficient to make the
8 hyperlinked document part of the record in this matter. That position is entirely
9 consistent with our precedent regarding making documents on electronic media
10 part of the record.

11 Petitioner's second point is also without merit. Petitioner suggests that
12 the city relied on a hyperlink that is included in a newspaper article that is
13 identified at Record 993 to include a paper copy of a letter that appears at
14 Record 2174-78. Petitioner also suggests that the city relied on the hyperlink in
15 another newspaper article that is identified at Record 994 to include a drawing
16 that appears at Record 90. Petitioner's suggestion is entirely undeveloped. The
17 letter that appears at Record 2174-78 was an attachment to written testimony
18 that was submitted by a project opponent. Record 2147-96. The drawing that
19 appears at Record 90 was part of the application for historic demolition review.
20 Record 56-158. There is no suggestion in the record that the cited hyperlinks
21 had anything to do with the disputed documents making their way into the
22 record.

1 Objections C-1 through C-20 are denied.

2 **D. New Matter-Incomplete Exhibit**

3 In his reply to the city’s response, petitioner for the first time objected
4 that Record 460 is the first page of a multipage document and that the
5 “remainder of the document should be provided in order for the exhibit to be
6 complete.” Petitioner’s Reply to Respondent’s Response 5.

7 The city points out that this objection is untimely, but agrees to include
8 the missing pages in a supplemental record.

9 Petitioner’s objection regarding the incomplete exhibit at Record 460 is
10 sustained.

11 **E. Summary and Conclusion**

12 Within 21 days of the date of this order, the city shall:

- 13 1. Serve on petitioner and intervenors-petitioners a searchable
14 copy of the record in this matter on CDs, in accordance with
15 our resolution of Objection B-5.
- 16 2. Transmit to LUBA and serve on the parties a revised table
17 of contents to respond to our resolution of Objection B-1
18 and Objection B-3.
- 19 3. Transmit to LUBA and serve on the parties a supplemental
20 record to respond to our resolution of Objection B-3 and
21 petitioner’s objection regarding the incomplete exhibit at
22 Record 460.

23 Thereafter, the Board will issue an order settling the record and
24 establishing the briefing schedule.

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1 Dated this 24th day of November, 2015.

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Michael A. Holstun
Board Member