

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JOHN FREWING and BRAD PERKINS,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11 and

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13
14 PHK DEVELOPMENT, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2016-006

18 ORDER

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20 **MOTION TO INTERVENE**

21 PHK Development, Inc., the applicant below, moves to intervene on the
22 side of respondent. No party opposes the motion, and it is granted.

23 **MOTION TO RELEASE CO-PETITIONER**

24 On March 31, 2016, lead petitioner John Frewing filed a motion entitled
25 “Motion to Release Co-Petitioner.” The motion is signed by John Frewing, and
26 states that Frewing moves to release his co-petitioner Brad Perkins from further
27 involvement in this appeal. The motion states that Perkins feels that his
28 interests are not consistent with the principal points of this appeal, and further
29 states that the motion has the agreement of Brad Perkins.

1 Both Frewing and Perkins are unrepresented by counsel. While Frewing
2 is designated as lead petitioner, OAR 661-010-0075(7)(a) provides that each
3 unrepresented petitioner is responsible for his or her own representation. Thus,
4 Frewing cannot represent Perkins or file motions on Perkins' behalf.

5 Frewing's motion to withdraw Perkins as a party is denied. If Perkins
6 wishes to withdraw from this appeal, Perkins should so advise LUBA in
7 writing, and provide service copies to the other parties, pursuant to OAR 661-
8 010-0075(2)(b). Unless and until that happens, LUBA will send all service
9 copies of correspondence and pleadings to the addresses provided by both
10 petitioners, rather than solely to lead petitioner Frewing, and all parties should
11 do the same.

12 **RECORD OBJECTIONS**

13 On February 24, 2016, the city filed the record of this appeal. Petitioner
14 Frewing objected to the record, stating nine objections. On March 14, 2016,
15 the city filed a response stating that it agrees with three of the nine objections,
16 and intends to file a supplemental record and revised table of contents to
17 resolve those three objections. The city disputes the remaining objections.

18 On March 24, 2016, Frewing filed a reply stating that he accepts the
19 city's position regarding all objections, with the exception of the final
20 objection, Objection D. In Objection D, Frewing objects that the organization
21 of the record does not comply with OAR 661-010-0025(4)(E), which requires
22 that items in the record be arranged in inverse chronological order, with the

1 exception of exhibits that are attached to an item. In that circumstance, OAR
2 661-010-0025(4)(E) instructs, the exhibits shall be included in the numerical or
3 alphabetical order in which they were attached to the item, not the
4 chronological date of the documents that comprise the exhibits.¹

5 Aside from mailing lists and notices, the bulk of the record transmitted
6 by the city consists of a single item, the 28-page hearings officer’s decision,
7 and its attached exhibits, Exhibits A through H. We understand that the
8 organization of the record submitted by the city, as reflected in the table of
9 contents, mirrors the organization of the hearings officer’s decision and its
10 attached exhibits. That is, the hearings officer’s decision is followed by
11 Exhibit A, which has thirteen listed documents within it, followed by Exhibit
12 B, etc. Each exhibit appears to collect together related documents. For
13 example, Exhibit A is labeled “Applicant’s Statement,” and appears to include
14 submittals from the applicant. Exhibit E is labeled “Agency Responses,” and
15 appears to collect together all agency responses to the application. Under that
16 organization, the individual documents in various exhibits, or even within

¹ OAR 661-010-0025(4)(E) provides that the record shall:

“Be arranged in inverse chronological order, with the most recent item first. Exhibits attached to a record item shall be included according to the numerical or alphabetical order in which they are attached, not the date of the exhibits. Upon motion of the governing body, the Board may allow the record to be organized differently.”

1 exhibits, are not in either chronological or inverse chronological order by date
2 of document. They do not appear to be in any chronological order.

3 Frewing objects that that organization makes it impossible for a
4 reasonable person to locate documents with reasonable effort. We understand
5 Frewing to argue that the record should be re-organized with each document in
6 chronological order by document or submittal date, with the application
7 materials first, and the hearings officer's decision last. Frewing also appears to
8 argue that if groups of related documents are collected together, the documents
9 should be in chronological order within that collection. Frewing submitted a
10 partial table of contents illustrating his preferred organization.

11 The city responds that the organization of the record accurately reflects
12 the record as it was presented to the hearings officer and used by the parties
13 below, and that that organization is consistent with OAR 661-010-0025(4)(E).
14 The city argues that the organization makes it easier to locate documents than
15 would an organization where each document is separated from other related
16 documents and placed elsewhere in the record in chronological or inverse
17 chronological order.

18 Frewing filed a reply arguing in favor of his preferred chronological
19 order, citing as an example of potential confusion a geotechnical report
20 included in the original application and found at Record 149. Frewing argues
21 that the non-chronological order of the record makes it difficult to follow how
22 and when that document and its subsequent revision were reviewed by various

1 city departments. Intervenor-respondent filed a response, disputing that any
2 confusion warrants re-organizing the record.

3 The record organization is unusual and makes it potentially difficult to
4 understand the chronological relationship between different documents
5 submitted at different times. However, the record organization appears to
6 accurately reflect the organization of the record before the hearings officer, and
7 as used by the hearings officer and parties below. Frewing was a party below,
8 and is presumably familiar with the record's organization. The record as a
9 whole is only 731 pages long, and the six-page table of contents lists and
10 identifies each document in each exhibit, which makes it relatively easy to
11 locate individual documents. The grouping of related documents into exhibits
12 provides an organizational principle that is probably at least as useful as would
13 be a record organized strictly by chronological or inverse chronological order
14 by document date. Accordingly, Frewing has not established that any purpose
15 would be served by ordering the city to reorganize the record differently. This
16 objection is denied.

17 **SUPPLEMENTAL RECORD**

18 As noted, the city proposes to submit a supplemental record and revised
19 table of contents that resolve three of Frewing's nine objections. Once the city
20 submits the supplemental record and revised table of contents, the Board will
21 issue an order settling the record.

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1 Dated this 7th day of April, 2016.

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Tod A. Bassham

6 Board Chair