

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

3
4 L. CALVIN MARTIN
5 and MARK HANEBERG,
6 *Petitioners,*

7
8 and

9
10 DAVID SMITH,
11 *Intervenor-Petitioner,*

12
13 vs.

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15 CITY OF CENTRAL POINT,
16 *Respondent,*

17
18 and

19
20 COSTCO WHOLESALE CORPORATION
21 and CHARLES E. BOLEN,
22 *Intervenors-Respondents.*

23
24 LUBA No. 2016-042

25
26 ORDER

27 **STANDING**

28 The notice of intent to appeal in this matter identifies L. Calvin Martin
29 (Martin) and Mark Haneberg (Haneberg) as co-petitioners (petitioners), and
30 indicates that petitioners will represent themselves. Martin is designated as lead
31 petitioner. OAR 661-010-0015(3)(f)(A).¹

¹ OAR 661-010-0015(3)(f)(A) provides in relevant part:

1 To have standing as a petitioner at LUBA, a petitioner must have
2 “[a]ppeared” before the city in this matter. ORS 197.830(2)(b).² The city moves
3 to dismiss Martin, arguing that Martin failed to “appear” on his own behalf
4 within the meaning of ORS 197.830(2). The city argues first that Martin
5 appeared only in a representative capacity for other unidentified parties and has
6 not identified that he has a “personal interest in opposing” intervenor-
7 respondent’s application. Motion to Dismiss 4. The city points to statements
8 Martin made in his testimony to the planning commission that “I am
9 representing several clients who have properties in the area * * * They have all
10 asked that I make this presentation and that they are opposed to this project
11 being done this way at this time.” Audio Recording of Planning Commission
12 meeting January 5, 2016. The city also points to a letter to the planning
13 commission from “L. Calvin Martin, Developer’s Agent,” which states in part
14 that “[m]y clients would urge you to not approve this application or require, at

“If the petitioner is not represented by an attorney, the petitioner’s name, address and telephone number shall be included. If an attorney represents the petitioner, the attorney’s name, address and telephone number shall be substituted for that of the petitioner. If two or more petitioners are unrepresented by an attorney, one petitioner shall be designated as the lead petitioner, but the Notice shall include the names, addresses, and telephone numbers of all such unrepresented petitioners. See OAR 661-010-0075(7)(a)[.]”

² ORS 197.830(2)(b) provides that a person may appeal a land use decision or limited land use decision if the person “[a]ppeared before the local government, special district or state agency orally or in writing.”

1 the very least, another independent traffic study.” Record 221-223. Finally, the
2 city points to Martin’s appeal statement in connection with his local appeal of
3 the planning commission’s decision to the city council, which we describe
4 below. Record 1111-1113.

5 Martin responds with an affidavit that avers that he appeared on his own
6 behalf and states that he has not received any fees from any clients for
7 appearing. Although that affidavit is not particularly helpful in ascertaining
8 whether Martin appeared on his own behalf, we have reviewed the appeal
9 statement, and we think that appeal statement makes clear that Martin appealed
10 the planning commission’s decision individually. The three page appeal
11 statement uses the pronoun “I” throughout, is signed by Martin individually,
12 and does not assert that Martin is appearing in any capacity other than for
13 himself. Moreover, the notice of the appeal hearing, and the city council’s
14 decision identify the appellant as “L. Calvin Martin.” Record 15, 17, 1107-08.
15 *See Heiler v. Josephine County*, 50 Or LUBA 562, 564-565 (2005) (petitioner
16 “appeared” on his own behalf, and not only as a representative of an
17 organization, where petitioner filed the local appeal statement in his own name,
18 the challenged decision identified petitioner as the local appellant, and
19 petitioner made a statement indicating that he was appearing on his own
20 behalf). Petitioner’s local appeal on his own behalf was sufficient to constitute
21 an appearance “before the local government” for purposes of ORS

1 197.830(2)(b), whether or not he initially appeared in a representative capacity
2 on behalf of others.

3 Second, the city argues that OAR 661-010-0075(6) prohibits Martin
4 from representing himself before LUBA, and that Martin must obtain legal
5 representation. We do not understand the argument. OAR 661-010-0075(6)
6 provides in relevant part:

7 “Appearances Before the Board: An individual shall either appear
8 on his or her own behalf or be represented by an attorney. A
9 corporation or other organization shall be represented by an
10 attorney. In no event may a party be represented by someone other
11 than an active member of the Oregon State Bar.”

12 The rule allows an individual such as Martin to appear before LUBA on his
13 own behalf, and does not require him to obtain legal representation.

14 The city’s motion to dismiss Martin is denied.

15 **RECORD OBJECTIONS**

16 The city transmitted the record, and Martin and Haneberg each filed
17 objections to the record. Intervenor-respondent Costco Wholesale Corporation
18 (Costco) and the city filed responses to the objections.

19 Petitioners seek to include in the record (1) Resolution 1217, a resolution
20 adopted by the city council in June 2009 that authorizes membership
21 warehouse clubs as a conditional use in the light industrial (M-1) zone, (2)
22 Resolution 764, a resolution adopted by the planning commission in March,
23 2009, that was appealed to the city council and resulted in adoption of

1 Resolution 1217, and (3) documents and materials included in city planning
2 file number 09022.

3 After Haneberg filed his record objection, he filed a second record
4 objection that seeks to include city planning file number 09004 in the record.
5 The Board will not consider an additional record objection after an initial
6 record objection is filed, and we do not consider Haneberg's second record
7 objection. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).

8 Petitioners object that Resolution 1217, Resolution 764 and planning file
9 number 09022 should be included in the record. We understand petitioners to
10 argue that the city council's decision and the record include references to some
11 or all of the documents listed above, and for that reason the documents should
12 be included in the record.

13 The city and Costco respond that petitioners have not established that the
14 disputed documents were "specifically incorporated into the record or placed
15 before, and not rejected by, the final decision maker, during the course of the
16 proceedings before the final decision maker[.]" OAR 661-010-0025(2)(b). We
17 agree. Mere reference to a document in a decision is not sufficient to establish
18 that the decision maker specifically incorporated that document into the record.
19 *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 452, 455-56 (2012);
20 *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616, 617 (2002). Petitioners have
21 also failed to establish that the documents were "placed before" the final
22 decision maker.

1 Petitioners’ record objections are denied.

2 **MOTION TO TAKE OFFICIAL NOTICE**

3 After petitioners filed their initial objections, Haneberg filed a motion to
4 take official notice of Resolution 1217, Resolution 764 “and their history[.]”
5 Haneberg’s Motion to Take Official Notice 2. Although Haneberg’s motion to
6 take official notice is not specific, we understand Haneberg in referring to the
7 “history” of Resolution 1217 and Resolution 764 to move that the Board take
8 official notice of the legislative record of those resolutions, which is the same
9 as the planning files that he argued should be included in the record. Under
10 ORS 40.090(7) (Oregon Evidence Code (OEC) 202), the Board may take
11 official notice of “[a]n ordinance, comprehensive plan or enactment of any
12 county or incorporated city in this state, or a right derived therefrom.”

13 The city and Costco do not object to LUBA taking official notice of
14 Resolution 1217, a resolution adopted by the city council. The city and Costco
15 object to LUBA taking official notice of planning commission Resolution 764
16 and the legislative record of Resolution 1217 and Resolution 764. According to
17 the city and Costco, Resolution 764 is not an “enactment of the city” because
18 Resolution 764 was appealed to the city council, and the city council enactment
19 of Resolution 1217 is therefore the “enactment of [the] city” that is subject to
20 official notice.

21 LUBA may take official notice of local government enactments under
22 OEC 202(7). *Jackman v. City of Tillamook*, 27 Or LUBA 704 (1994).

1 Resolution 1217 is judicially cognizable law under OEC 202. We may take
2 official notice of that local government enactment. However, as we understand
3 Resolution 764, it was superseded by Resolution 1217, and planning files
4 09022 and 09004 consist of the legislative history of Resolution 1217. LUBA
5 does not have authority to take official notice of local legislative history. *19th*
6 *Street Project v. City of the Dalles*, 20 Or LUBA 440 (1991). Neither does
7 LUBA have authority to take official notice of adjudicative facts. *ODOT v.*
8 *Clackamas County*, 27 Or LUBA 141 (1994); *Blatt v. City of Portland*, 21 Or
9 LUBA 337, 342, *aff'd* 109 Or App 259, 819 P2d 309 (1991), *rev den* 314 Or
10 727 (1992). Accordingly, neither Resolution 764 nor the two planning files are
11 judicially cognizable law and we do not take official notice of them.

12 Petitioners' motion to take official notice of Resolution 1217 is granted.
13 Petitioners' motion to take official notice of planning commission resolution
14 764 and the two planning files is denied. Additionally, we note that while we
15 take official notice of Resolution 1217, it does not thereby become part of the
16 local record which may provide evidentiary support for petitioners'
17 assignments of error that assign error to the challenged decision, or for the
18 challenged decision itself.

19 **BRIEFING SCHEDULE**

20 The record is settled as of the date of this order. The petitions for review
21 are due 21 days from the date of this order. Respondent's and intervenors-

1 respondents' briefs are due 42 days from the date of this order. The final
2 opinion and order is due 77 days from the date of this order.

3 Dated this 10th day of June, 2016.

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Melissa M. Ryan
Board Member