

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

3
4 JAMES J. NICITA,
5 *Petitioner,*

6
7 and

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9 ELIZABETH GRASER-LINDSEY,
10 CHRISTINE KOSINSKI,
11 and PAUL EDGAR,
12 *Intervenors-Petitioners,*

13
14 vs.

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16 CITY OF OREGON CITY,
17 *Respondent,*

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19 and

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21 HISTORIC PROPERTIES, LLC,
22 *Intervenor-Respondent.*

23
24 LUBA No. 2016-045

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26 ORDER ON RECORD OBJECTIONS

27 **PETITIONER’S OBJECTION**

28 Petitioner Nicita (petitioner) filed objections to the Record on June 10,
29 2016. On June 24, 2016, LUBA received a Replacement Record from the city
30 and the city’s response to petitioner’s objections as well as the city’s response

1 to objections filed by other parties.¹ The Replacement Record is in digital
2 format. Petitioner withdrew all but one of his Record objections on July 11,
3 2016. In his July 11, 2016 withdrawal of most of his record objections,
4 petitioner elaborated considerably on his remaining record objection that he did
5 not withdraw.

6 Petitioner's remaining record objection A(3), as stated in his June 10,
7 2016 record objection, asserts that the record should include:

8 "Documents from the two notebooks Petitioner submitted to the
9 City Commission on March 2, 2016 with his bias challenge. Some
10 documents are missing; some are out of order. This may not be
11 the fault of Respondent; rather Petitioner feels that as a courtesy to
12 the Board the documents should be in the proper order. * * *"
13 Precautionary Record Objections 2.

14 The city and intervenor-respondent object that petitioner could have
15 provided the detail he belatedly supplied on July 11, 2016, and argue LUBA
16 should not consider petitioner's attempt to do so long after the deadline for
17 filing record objections has expired.

18 We agree with the city and intervenor-respondent. Petitioner's
19 remaining record objection A(3) is denied.

¹ That response includes an appendix that has been extremely helpful in sorting out the overlapping and sometimes confusing record objections that have been filed in this appeal. Nevertheless, there has been a long delay in resolving the record objections, and LUBA regrets the delay.

1 **INTERVENORS-PETITIONERS' RECORD OBJECTIONS**

2 Intervenor-petitioners' objections fall into three categories: (1)
3 hyperlinks in the record to access video and audio recordings of hearing, (2)
4 testimony that the city rejected, and (3) the quality of copies in the record. We
5 discuss below intervenors-petitioners' objections that they contend were not
6 satisfied by the Replacement Record.

7 **A. Hyperlinks to Hearing Recordings**

8 Intervenor-petitioners initially objected that the hyperlinks included in
9 the Record did not work properly. In response, the city filed the Replacement
10 Record. That Replacement Record includes new hyperlinks, and the city also
11 provided copies of all the hyperlinked recordings on nine computer disks.

12 Although there have been cases in the past where LUBA has accepted
13 records with hyperlinks to documents that are part of the record, including an
14 appeal with many of the same parties in this appeal, we recently determined
15 that merely supplying a hyperlink to a document that is physically located on
16 the local government's website, as the sole means of accessing a document that
17 is part of the local record, is insufficient. *Terra Hydr Inc. v. City of Tualatin*,
18 68 Or LUBA 511, 513 (2013). However, the city has now provided LUBA and
19 the parties with nine computer disks that contain recordings of all the hearings.
20 Those computer disks appear to resolve intervenors-petitioners' complaints
21 about access to the recordings of the hearings. The city advises it has attempted
22 to assist intervenors-petitioners in using those disks and is willing to allow

1 intervenors-petitioners to use the planning office copy of the disks to view and
2 listen to the hearings if intervenors-petitioners continue to encounter difficulty
3 in using the disks.

4 With the actions taken by the city, we conclude intervenors-petitioners'
5 objections concerning the video and audio recordings of the hearings in this
6 matter have been adequately resolved.

7 **B. Rejected Testimony**

8 The remaining dispute between the parties appears to be whether the city
9 commission correctly rejected certain documents and whether the city
10 commission was sufficiently clear in identifying the documents it rejected and
11 refused to include in the record.

12 If intervenors-petitioners believe the city commission incorrectly
13 rejected offered evidence, they may assign error to the city commission's
14 refusal to accept that evidence for the record. That error, assuming it was error,
15 is not a basis for including the rejected evidence in the record. *Dorgan v. City*
16 *of Albany*, 26 Or LUBA 621, 623 (1994); *Testa v. Clackamas County*, 26 Or
17 LUBA 596, 598 (1993).² Similarly, if intervenors-petitioners believe the city
18 commission was not sufficiently clear in identifying the documents it was
19 refusing to include in the record, it may assign error to that aspect of the city

² Intervenor-petitioners may attach copies of the rejected documents to their petition for review, for the limited purpose of arguing it was error to refuse to accept the documents and include them in the record.

1 commission's decision and argue that documents included in the record were
2 erroneously included or that documents that are not included in the record were
3 erroneously excluded.

4 **C. Readability of Record Pages**

5 Intervenors-petitioners objected that the copies of document pages at
6 Record pages 1180, 1184, 1185, 1186 and 2280 are unreadable. The city
7 attempted to provide higher resolution copies in the Replacement Record, but
8 intervenors-petitioners contend the pages in the Replacement Record remain
9 unreadable. Intervenors-petitioners propose that they be allowed to append
10 readable paper copies of those pages to their petition for review. Intervenors-
11 petitioners may do so, so long as they clearly indicate the corresponding
12 Replacement Record page number.

13 This objection is resolved.

14 **INTERVENOR-RESPONDENT'S RECORD OBJECTION**

15 Intervenor-respondent contends that Record pages 2280, 3302, and
16 3303-04 are included in the record, but were rejected by the city commission
17 and for that reason should not be included in the record.

18 The city responds that Record pages 3303-04 were rejected by the city
19 commission and have not been included in the Replacement Record. But the
20 city responds that Record pages 2280 and 3302 were accepted and are properly
21 included in the Record. Those pages are included in the Replacement Record.
22 We agree with the city.

1 Intervenor-respondent’s objections concerning Record pages 2280 and
2 3302 are denied.

3 **CONCLUSION**

4 All record objections have been resolved. The record is settled as of the
5 date of this order. The petitions for review shall be due 21 days from the date
6 of this order. The response briefs shall be due 42 days from the date of this
7 order. The Board’s final opinion and order shall be due 77 days from the date
8 of this order.

9 Dated this 8th day of September, 2016.

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Michael A. Holstun
Board Chair