

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

VS.

DE SCHUTES COUNTY,
Respondent,

and

**TUMALO IRRIGATION DISTRICT,
*Intervenor-Respondent.***

LUBA No. 2016-056

MOTION TO INTERVENE

Tumalo Irrigation District, the applicant below, moves to intervene on the side of respondent. No party opposes the motion and it is granted.

PETITIONER'S REPLY

24 Petitioner filed a reply to intervenor's response to petitioner's record
25 objections. Intervenor objects to the reply, arguing that LUBA's rules do not
26 grant petitioner the right to reply to intervenor's response, nor do they permit
27 petitioner to raise new objections after the period for filing objections has
28 passed.

29 As noted in *Curl v. City of Bend*, __ Or LUBA __, (LUBA No. 2007-
30 165, May 1, 2008, Order at n 1):

1 “[n]othing in our rules authorizes (or prohibits) filing a reply to a
2 response to a record objection. Parties sometimes do file such
3 replies, and the Board usually considers such a reply when it
4 responds to new issues raised in the response. However, the Board
5 is not required to consider a reply to a response, or to delay
6 resolution of the objection or motion for an additional 14 days to
7 allow a reply that our rules do not authorize and that a party may
8 or may not wish to file.”

9 In addition, the Board will not consider an additional record objection after an
10 initial record objection is filed. *Mintz v. Washington County*, 34 Or LUBA 781
11 (1998).

12 Because petitioner’s reply is a response to legal arguments raised in
13 intervenor’s response, rather than an attempt to submit additional record
14 objections, we consider petitioner’s reply to the extent it is relevant to our
15 disposition of the record objections. Petitioner’s motion to file a reply to
16 intervenor’s response on record objections is granted.

17 **PETITIONER’S RECORD OBJECTIONS**

18 OAR 661-010-0025(1)(b) requires that all “materials specifically
19 incorporated into the record or placed before, and not rejected by, the final
20 decision maker, during the course of the proceedings before the final decision
21 maker” be included in the record.¹ Petitioner argues that the record does not

¹ OAR 661-010-0025(1)(b) requires that the record 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 include documents that should be part of the record, and further that the table
2 of contents does not conform to OAR 660-010-0025(4)(a)(B).

3 **A. First Record Objection**

4 Petitioner argues that the hearings officer below reviewed the record
5 from a 2005 Lot of Record determination (LR-04-037), and therefore the LR-
6 04-037 record should be part of the present record before the county board of
7 commissioners, which under the county code includes all documents before the
8 hearings officer. According to petitioner, the hearings officer “relied on the
9 LR-04-37 record to find the current proceedings include factual evidence about
10 land conveyances that were not part of the 2005 lot-of-record determination[,]”
11 quoting portions of the hearings officer’s decision at Record 21-22.²

12 Petitioner’s Record Objection 2. From those quoted portions, petitioner

² Record 21-22 in relevant part provides:

“* * * By an administrative decision dated March 23, 2005 (LR-04-37), the county determined that Tax Lot 7891 did not constitute a lot of record. * * *

“* * * * *

“The Applicant’s burden of proof includes new evidence consisting of land conveyances that were not part of the record, or considered in the decision, for the 2005 lot-of-record determination. Therefore, the Hearings Officer finds that under Section 22.28.040(B) the county may consider the subject lot-of-record verification request and is not bound by the 2005 determination.”

1 extrapolates that the hearings officer “obviously reviewed” the record for LR-
2 04-037 and therefore, that entire record should be part of this record.

3 Intervenor disagrees and provides an affidavit from intervenor’s attorney
4 stating that the hearings officer advised intervenor’s attorney that she did not
5 consider the entire record of LR-04-27 when reviewing the 2015 application,
6 but instead relied on documents included in the current record: the decision for
7 LR-04-037 at Record 187-188 and intervenor’s burden of proof at Record 770.³

8 Petitioner objects to the affidavit but offers no reason to reject it, or
9 dispute its accuracy. It is petitioner’s burden to establish that disputed items
10 were actually placed before the final decision maker. *Weeks v. City of*
11 *Tillamook*, 23 Or LUBA 662 (1992). Petitioner has not demonstrated that the
12 entire record for LR-04-037 was actually “placed before” the hearings officer.
13 It is relatively clear that the hearings officer’s reference to the record for LR-
14 04-037 was based on a limited set of documents offered by the applicant.
15 Accordingly, petitioner has not met its burden in demonstrating that the record

³ The Applicant’s Burden of Proof at Record 770 provides:

“Deschutes County issued a lot of record decision involving Tax Lot 7891 in 2005 in LR-04-37 * * *. A review of the record of that case shows that the County did not consider the patent and historic deed records included as exhibits to this application. These documents were recently located by the applicant. Under DCC 22.28.040 a new lot of record determination to correct the County’s erroneous decision in LR-04-37 is allowed as the applicant is presenting new factual information not submitted with the prior application.”

1 for LR-04-037 was before the decision maker in this appeal, and the objection
2 is denied.

3 **B. Second Record Objection**

4 Petitioner's second record objection argues that materials relating to the
5 county staff's "work[ing] with the applicant" to write the board of
6 commissioners' decision after the February 29, 2016 meeting should be
7 included in the record, along with "documents, emails, and notes of phone
8 conversations or meetings." Petitioner acknowledges that under OAR 661-010-
9 0025(1)(b), only "materials specifically incorporated into the record or placed
10 before, and not rejected by, the final decision maker, during the course of the
11 proceedings before the final decision maker" are part of the record, but argues
12 that the applicant's communications with planning staff should be treated as if
13 they were indirectly "placed before" the county commissioners.

14 Intervenor responds that petitioner does not claim that "documents, e-
15 mails and staff notes about communications between County staff and
16 [intervenor's] lawyer" were actually placed before the final decision maker, but
17 rather attempts to expand the scope of evidence that may be included in the
18 record to include materials "indirectly" placed before the board.

19 We agree with intervenor. OAR 661-010-0025(1)(b) does not require
20 that communications between an applicant and planning staff be included in the
21 record, unless planning staff is the final decision maker, which is not the case
22 here, or those communications are placed before the final decision maker.

1 Petitioner has not carried its burden to establish that those materials were
2 placed before the final decision maker. Petitioner's second record objection is
3 denied.

4 **C. Petitioner's Third Record Objection**

5 In its third record objection, petitioner argues that an April 11, 2016
6 email from petitioner to county counsel should be included in the record.
7 Petitioner asserts that “[i]n this email [petitioner] objected to the County’s draft
8 decision on the basis that [petitioner] did not raise issues the County’s decision
9 claims it did, and that therefore the decision was based in part on matters that
10 were not part of the proceedings.” Petitioner’s Record Objection 6.

11 Intervenor responds that the email was sent to county counsel not the
12 final decision maker. The county further represents that county counsel has
13 advised that the email was not placed before the board of commissioners.

14 Petitioner makes no attempt to demonstrate that the email to county
15 counsel was placed before the board of commissioners, the final decision
16 maker. Accordingly, this record objection is denied.

17 **D. Petitioner’s Objections to the Table of Contents**

18 Petitioner’s remaining objections argue that the record does not conform
19 to OAR 660-010-0025(4)(a)(B) (“The record * * * shall * * *[b]egin with a
20 table of contents, listing each item contained therein, and the page of the record
21 where the item begins (see Exhibit 2).”)

1 Petitioner first argues that documents at Record 49 and 78 are mislabeled
2 in the table of contents. Intervenor does not dispute that the table of contents
3 mislabels these documents. Accordingly, this record objection is sustained and
4 the county shall submit a revised table of contents that changes the entry for
5 Document No. 5 at Record 49 to be dated 4/20/16 and described as “BOCC
6 4/27/16 Agenda Request & Staff Report, with draft Decision.” The revised
7 table of contents shall also include a change to the listing for Document No. 6
8 starting at Record 78 to be described as “BOCC 2/29/16 Minutes of Business
9 Meeting.”

10 Petitioner next argues that the table of contents does not include page
11 numbers for individual documents and items that are part of a larger document
12 entry. Petitioner argues that “[t]he page numbers should be provided at least for
13 those individual contents where 100 or more pages or 10 or more different
14 documents are included under one entry. This would apply to document entries
15 7, 23, 40, and would be very helpful in finding those identified contents[.]”
16 Intervenor takes no position on this objection.

17 OAR 660-010-0025(4)(a)(B)(i) and Exhibit 2 to our rules provide that
18 attached exhibits are to be listed separately in the table of contents with the
19 beginning page number of the exhibit. Accordingly, we sustain petitioner’s
20 record objection and require the revised table of contents to include specified
21 page numbers for attachments to Documents Nos. 7, 23, and 40.

1 Petitioner's final record objection requests that the table of contents be
2 printed in larger font where single spacing is used. This is not a cognizable
3 record objection under our rules.

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

5 Intervenor's record objection is styled as an objection contingent on
6 LUBA sustaining petitioner's second record objection. Intervenor argues that if
7 LUBA requires the record to include unidentified evidence relating to drafting
8 of the decision by staff and intervenor's attorney, then intervenor seeks
9 inclusion of documents relating to petitioner's involvement in the draft
10 decision. Because we deny petitioner's record objection on this subject, we
11 need not reach intervenor's record objection and it is summarily denied.

12 **CONCLUSION**

13 Consistent with petitioner's objections sustained above, the county shall
14 transmit to LUBA and serve on the parties a revised table of contents within 7
15 days of the date of this order. Thereafter, the Board will issue an order settling
16 the record and establishing the briefing schedule.

17 Dated this 15th day of September, 2016.
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22 Tod A. Bassham
23 Board Member