

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NEIGHBORS FOR SMART GROWTH,
5 and JAKE MINTZ,
6 *Petitioners,*

7
8 vs.

9
10 WASHINGTON COUNTY,
11 *Respondent,*

12
13 and

14
15 LENNAR NORTHWEST, INC.,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2016-122

19
20 ORDER ON
21 RECORD OBJECTIONS

22 **A. The Initial Record and Record Objections**

23 The county transmitted a 66-page record on February 28, 2017 (Initial
24 Record). Petitioners objected that a total of 17 items should be included in the
25 record. Intervenor-respondent (intervenor) objected that its original application
26 and the minutes of three board of county commissioner meetings should be
27 included in the record.

28 **B. The Supplemental Record, County Response and Further**
29 **Objections**

30 On March 31, 2017, the county submitted a Revised Index and
31 Supplemental Record. That Supplemental Record is 406 pages long. We

1 understand the county to propose that the Initial Record and the Supplemental
2 Record, together, should constitute the record in this appeal.

3 The county also submitted a Response to Record Objections. In the
4 response, the county states that the Supplemental Record includes all of the
5 documents requested by intervenor and includes most of the documents
6 petitioners requested (petitioners' Record Objections 1-2, 4-12, and 14). The
7 county responds that the documents identified in petitioners' Record Objection
8 3 "R&O 84-261" and Record Objection 13 "WA Co. Staff (Stephen Roberts)
9 11-08-16 thru 11-16-16 eMail String" were not included in the Supplemental
10 Record, because those documents were never placed before the decision maker
11 in this matter.¹

12 On April 12, 2017, intervenor objected to the Supplemental Record,
13 taking the position that Supplemental Record Items 3, 6 and 16 are incomplete.
14 On April 14, 2017, petitioners also objected to the Supplemental Record.
15 Petitioners' Supplemental Record Objection 1 is the same as Petitioners'
16 Record Objection 3. Petitioners' Supplemental Record Objection 2 states that,
17 although the county agreed to include the document identified in Petitioners'

¹ OAR 660-010-0025(1)(b) provides that the local 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 Record Objection 2, it is not included in the Supplemental Record. Petitioners’
2 Supplemental Record Objection 3 seeks to have the record supplemented with
3 “Westhaven Estates homeowner’s petition in opposition to VAC 530.”
4 Petitioners’ Supplemental Record Objection 4 seeks to supplement the record
5 with “THPRD Trails Functional Plan (full document).”

6 **C. Second Supplemental Record, County Response to**
7 **Supplemental Record Objections, and the Parties’ Further**
8 **Objections**

9 On April 24, 2017, the county submitted a Second Supplemental Record.
10 The Second Supplemental Record includes pages to replace pages in the
11 Supplemental Record (Second Supplemental Record pages 43-48b, 137-144a
12 and 333-333a are to replace Supplemental Record pages 43-48, 137-144 and
13 333, respectively). The Second Supplemental Record also includes pages
14 136c, d and e, which should have been included after Supplemental Record
15 page 136b.

16 On April 24, 2017, the county also submitted a document entitled
17 Respondent’s Response to Second Record Objections. In that response, the
18 county takes the position that the Second Supplemental Record fully responds
19 to intervenor’s April 12, 2017 objections and to one of petitioners’ April 14,
20 2017 objections (Objection 3). In response to petitioners’ remaining
21 objections, the county takes the position that none of the documents identified
22 in objections 1-2 or 4 were placed before the county decision maker.

1 On May 2, 2017, intervenor objected that Item 16 in the Second
2 Supplemental Record remains incomplete. On May 5, 2017, petitioners
3 reasserted three of their April 14, 2017 objections and objected to the format of
4 the copy of the Record, Supplemental Record and Second Supplemental
5 Record served on them. Petitioners also request a telephone conference to
6 resolve the remaining record objections.

7 Petitioners' request for a telephone conference call to resolve the
8 remaining record objections is denied. The county advised LUBA that the
9 county and intervenor have agreed that all of the notice letters identified in
10 Second Supplemental Record Item 16 included the exhibit map that is included
11 at Second Supplemental Record 33a and that with that agreement, intervenor's
12 remaining objection is resolved.

13 **D. Resolution of Remaining Objections**

14 **1. Petitioners' Objection 1**

15 This objection concerns "R&O 84-261," which we understand to be a
16 county resolution and order. As far as we can tell from the parties' arguments,
17 that resolution and order was not "placed before" the decision maker in this
18 matter, and for that reason petitioners' Objection 1 is denied.

19 Under Oregon Evidence Code (OEC) 202(7) LUBA may take official
20 notice of "[a]n ordinance, comprehensive plan or enactment of any county or
21 incorporated city in this state[.]" The resolution and order presumably is an
22 "enactment" of the county, which is subject to official notice. Assuming that is

1 the case, petitioners may attach a copy of R&O 84-261 to their petition for
2 review and request that LUBA take official notice.

3 Petitioners' first objection is denied.

4 **2. Petitioners' Objection 2**

5 This objection concerns a PowerPoint presentation. There is no dispute
6 that Charles Flaxel presented a PowerPoint presentation to the board of county
7 commissioners on November 22, 2016. We understand petitioners to contend
8 that Mr. Flaxel provided a digital and paper copy of the PowerPoint
9 presentation to the county. The county disputes that contention and argues it
10 has no paper or digital copy of the PowerPoint presentation.

11 We conclude, based on the county's description of events, that Mr.
12 Flaxel did not leave a paper or digital copy of his PowerPoint presentation with
13 the county. Therefore, Mr. Flaxel's reference to the PowerPoint presentation is
14 inadequate to make it part of the record. *ONRC v. City of Oregon City*, 28 Or
15 LUBA 775, 780 (1994)

16 There has been one instance where LUBA concluded that a PowerPoint
17 presentation qualified as "materials" that were "placed before" "the final
18 decision maker," within the meaning of OAR 661-010-0025(1)(b), without the
19 necessity of a digital or paper copy of the PowerPoint presentation being
20 placed before the decision maker. *See* n 1. As we explained in *Save*
21 *Downtown Canby v. City of Canby*, 67 Or LUBA 480, 482 (2013), under a
22 prior version of OAR 661-010-0025(1)(b),

1 “* * * Visual presentations at a land use hearing are properly
2 included in the record that is transmitted to LUBA if there is an
3 appeal of the decision that results from that land use hearing.
4 Despite the lack of explicit guidance in our rules, local
5 governments routinely include either paper or electronic media
6 copies of such visual presentations, when preparing the record that
7 is transmitted to LUBA. Either is appropriate, regardless of
8 whether the electronic media or paper copy is placed before the
9 decision maker at the hearing at which the visual presentation is
10 made. * * *”

11 However, there is a critical difference between the PowerPoint
12 presentation in *Save Downtown Canby* and Mr. Flaxel’s PowerPoint
13 presentation. In *Save Downtown Canby* the planning staff presented the
14 PowerPoint presentation, and although a paper or digital copy of the
15 presentation was not physically placed before the decision maker, the city
16 retained the original PowerPoint presentation. Here a party presented the
17 PowerPoint presentation and that party did not leave a copy of the PowerPoint
18 presentation with the county. That difference makes this case much closer to
19 the case where a party merely refers to a document in making his or her
20 presentation, and we have consistently held those references are inadequate to
21 make the referenced document part of the record. *ONRC v. City of Oregon*
22 *City*, 28 Or LUBA at 780 (and cases cited therein).

23 To summarize, a party who gives a PowerPoint presentation in a land use
24 hearing and wants that PowerPoint presentation to be part of the record must
25 place a paper or digital copy of the PowerPoint Presentation before the decision
26 maker. Mr. Flaxel failed to place a copy of his PowerPoint presentation before

1 the county decision maker, and for that reason it is not part of the record in this
2 appeal.

3 Petitioners' Objection 2 is denied.

4 Petitioners also request that the county be ordered to include a Tualatin
5 Valley Community TV (TVCTV) video recording that apparently was made of
6 the board of commissioners hearing, which is available on the TVCTV website.
7 Respondent contends that it did not make the video and has no control over
8 TVCTV. For those reasons, the county contends the video is not properly
9 included in the record. We agree with the county, and this part of petitioners'
10 Objection 2 is denied. *See Citizens Against LNG, Inc. v. Coos County*, 62 Or
11 LUBA 550, 552 (2010) ("the act of placing a link on the local government's
12 website to a recording not made by the local government, and found on a
13 different website not under the local government's control" is not sufficient to
14 make the linked document part of the record). This part of petitioners'
15 Objection 2 is also denied.

16 Petitioners' Objection 2 is denied.

17 **3. Petitioners' Objection 3**

18 Petitioners object that a complete copy of the Tualatin Hills Park and
19 Recreation District Trails Functional Plan (TFP) should be included in the
20 record. If we understand the parties correctly, a complete copy of that plan was
21 in fact given to the county with a request that it be included in the record. But

1 the county planning staff in fact gave the board of county commissioners only
2 the parts of the TFP that are already included in the record.

3 In *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA
4 600, 601 (1995), we described the three ways documents normally are
5 submitted for the record:

6 “First, it can be physically placed before (and not rejected by) the
7 decision maker prior to the adoption of the final decision (the first
8 way). Second, it can be submitted to the decision maker through
9 means specified in local regulations or through appropriate means
10 in response to a request by the decision maker for submittal of
11 additional evidence (the second way). Third, local regulations can
12 require that the item be placed before the decision maker (the third
13 way). *ONRC v. City of Oregon City*, 28 Or LUBA 775, 778
14 (1994).”

15 The county does not argue that giving planning staff a copy of the TFP with a
16 request that staff include the TFP in the record does not qualify as the second
17 way described above. Absent such an argument we conclude that it does.

18 Petitioners’ Objection 3 is sustained.

19 **E. Conclusion**

20 To achieve a more usable record with less need to switch back and forth
21 between supplements, the county shall transmit and serve a Final Supplemental
22 Record that combines the Supplemental Record and Second Supplemental
23 Record. That Final Supplemental Record will replace the Supplemental Record
24 and Second Supplemental Record entirely and the parties shall cite to that Final
25 Supplemental Record rather than the Supplemental Record or Second
26 Supplemental Record when preparing their briefs.

1 The Final Supplemental Record shall include a copy of the TFP.
2 Alternatively, if the TFP is lengthy or includes difficult to duplicate color
3 graphics, the TFP may be identified in the Final Supplemental Record table of
4 contents as a document that the county will retain until oral argument under
5 OAR 661-010-0025(2)(a). The Final Supplemental Record shall be transmitted
6 to the Board and the parties within 14 days from the date of this order.

7 Dated this 23rd day of May, 2017.
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13 Michael A. Holstun
 Board Chair