

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 COLUMBIA PACIFIC BUILDING TRADES
5 COUNCIL, PORTLAND BUSINESS ALLIANCE,
6 WESTERN STATES PETROLEUM ASSOCIATION,
7 *Petitioners,*
8
9 and
10
11 WORKING WATERFRONT COALITION,
12 *Intervenor-Petitioner,*
13
14 vs.
15
16 CITY OF PORTLAND,
17 *Respondent,*
18
19 and
20
21 COLUMBIA RIVERKEEPER, OREGON
22 PHYSICIANS FOR SOCIAL RESPONSIBILITY,
23 PORTLAND AUDUBON SOCIETY and CENTER
24 FOR SUSTAINABLE ECONOMY,
25 *Intervenors-Respondents.*

26
27 LUBA No. 2017-001

28 ORDER
29

30 Before the Board is intervenors-respondents’ (hereafter, Riverkeeper’s)
31 motion to strike the petitions for review filed by petitioners and intervenor-
32 petitioner Working Waterfront Coalition (WWC). In an order dated May 2,
33 2017, the Board canceled oral argument scheduled for May 18, 2017, and took
34 the motion under advisement, to allow petitioners and WWC an opportunity to

1 respond. LUBA received their responses on May 11, 2017, and now resolves
2 the motion.

3 **MOTION TO STRIKE PETITIONS FOR REVIEW**

4 The decision challenged in this appeal is Ordinance 188142, which as
5 relevant here amends the city zoning code to restrict new fossil fuel terminals.
6 The two petitions for review were accompanied by a four-volume, 1,295-page
7 Appendix that includes a number of documents, including (1) copies of
8 selected city comprehensive plan goals, (2) other adopted city plans,
9 specifically the Guild’s Lake Industrial Sanctuary Plan, the city’s
10 Transportation System Plan, and city’s Freight Master Plan, (3) the Metro
11 Regional Framework Plan and Metro Regional Transportation Plan, and (4) the
12 Oregon Transportation Plan and Oregon Freight Plan. The foregoing
13 documents or plans are not part of the local evidentiary record.

14 Riverkeeper argues that the petitions impermissibly cite and rely heavily
15 upon extra-record “adjudicative facts” found in the foregoing plans, in support
16 of the assignments of error. Petitioners and WWC respond that all of the plans
17 included in the Appendix are subject to judicial notice, under ORS 40.090 and
18 Oregon Evidence Code 202.¹ Further, petitioners and WWC argue that the

¹ ORS 40.090 provides in relevant part:

“Law judicially noticed is defined as:

“* * * * *

1 language cited in these plans is not cited for evidentiary or adjudicatory
2 purposes, but only to support arguments that the challenged ordinance is
3 inconsistent with applicable comprehensive plan provisions and other
4 applicable law, contrary to the requirements of Statewide Planning Goal 2
5 (Land Use Planning).

6 We agree with petitioners and WWC that the plans included in the
7 Appendix are subject to judicial notice under ORS 40.090(4) or (7). LUBA has
8 held that even where a document is subject to judicial notice, LUBA will
9 decline to take notice of “adjudicative facts,” or facts found within judicially
10 cognizable documents that are asserted for an “adjudicative” purpose, *i.e.*, to
11 provide evidentiary support or countervailing evidence with respect to an
12 applicable approval criterion. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA
13 688, 692 (2007). In the present case, the challenged ordinance is a legislative
14 zoning code text amendment, which is subject to review for consistency with
15 statewide planning goals and applicable comprehensive plan provisions, but is

“(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States, any federally recognized American Indian tribal government or any state, territory or possession of the United States.

“* * * * *

“(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, ‘comprehensive plan’ has the meaning given that term by ORS 197.015.”

1 not generally subject to approval criteria, at least the kind that require fact-
2 finding in an adjudicatory setting. In this context, it is not clear to us that a
3 factual statement in a comprehensive plan goal or policy that is cited in support
4 of an argument that the text amendment is inconsistent with applicable
5 comprehensive plan goals or policy, or other applicable law is cited for an
6 “adjudicative purpose.” In any case, Riverkeeper has not attempted to
7 demonstrate that any citations to facts stated in the documents included in the
8 Appendix are for an adjudicative, or otherwise impermissible, purpose. Absent
9 such a demonstration, Riverkeeper has not provided a basis to strike or require
10 amendment to the petitions.

11 Riverkeeper also argues that the petitions fail to include a complete copy
12 of the challenged decision, with findings, as required by ORS 197.830(12) and
13 OAR 661-010-0030(4)(e). However, Appendix 1211 includes a copy of the
14 challenged ordinance, with the adopted findings. If there are other adopted or
15 incorporated elements of the challenged decision that are missing, Riverkeeper
16 does not identify them.

17 Riverkeeper also objects that each petition incorporates by reference the
18 assignments of error in the other petition, and thereby exceeds the permissible
19 14,000-word length of the petition, under OAR 661-010-0030(2)(b) (2017).
20 However, we agree with petitioners and WWC that such incorporation does not
21 necessarily cause each petition to violate OAR 661-010-0030(2)(b) (2017). It
22 is true that if one of the petitions were withdrawn, LUBA might decline to

1 consider the incorporated portions of the withdrawn brief if that would cause
2 the incorporating brief to exceed the permissible length. But that risk aside,
3 nothing in LUBA’s rules prohibit incorporation of arguments from another
4 brief in the appeal.

5 Finally, Riverkeeper argues that WWC’s second assignment of error
6 does not include a statement of the standard of review, as required by OAR
7 661-010-0030(4)(d). WWC replies that the violation of OAR 661-010-
8 0030(4)(d) does not prejudice any parties’ substantial rights in this review
9 proceeding, and should be treated as a “technical violation” of LUBA’s rules.
10 OAR 661-010-0005. We agree with WWC.

11 In sum, Riverkeeper has not demonstrated any basis to strike or require
12 the modification of the petitions for review. Accordingly, Riverkeeper’s
13 motion is denied.

14 **BRIEFING SCHEDULE**

15 The next event in this review proceeding is the filing of the response
16 briefs. The response briefs are due 21 days from the date of this order. Oral
17 argument is rescheduled to June 15, 2017, at 11:00 a.m.

18 Dated this 12th day of May, 2017.

19
20
21
22
23
24

Tod A. Bassham
Board Member