

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

3
4 PAUL CONTE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent,*

11
12 and

13
14 OAKLEIGH MEADOW CO-HOUSING,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-042

18
19 ORDER

20 **MOTION TO INTERVENE**

21 Oakleigh Meadow Co-Housing moves to intervene on the side of the
22 respondent in this appeal. No party opposes the motion and it is allowed.

23 **RECORD OBJECTIONS**

24 The original record was received on May 14, 2018. On May 24, 2018, a
25 supplemental record that consists of a revised table of contents to the original
26 record was received. On May 25, 2018, petitioner filed objections to the
27 original record and a Motion to Take Evidence Not in the Record (Motion). On
28 June 11, 2018, LUBA received a second revised table of contents to the
29 original record, together with the city's response to petitioner's record
30 objections and Motion. We now resolve the record objections and the Motion.

1 **A. Objection 1**

2 In his first objection, petitioner objects that the materials identified in the
3 table of contents as “Item No. 10.j. - Disc delivered by Paul Conte on February
4 21, 2018” are not properly retained by the city as “RE-B.” Petitioner argues the
5 documents on the disk that he submitted should be provided to him in printed
6 form, or in the alternative, that the city should be required to file and serve
7 copies of the disc on LUBA and all parties. According to petitioner, in order to
8 comply with OAR 661-010-0025(1)(b) and (2)(a)-(b), the city must transmit a
9 paper copy of the entire record because it submitted the remainder of the record
10 on paper, and therefore it cannot retain a portion of the record on disk, because
11 it is not difficult to duplicate.¹

¹ OAR 661-010-0025 provides, in relevant part:

“(1) Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

“* * * * *

“(b) 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.

“* * * * *

“(2) Transmittal of Record:

1 In response, the city argues the materials identified in “Item No. 10.j.”
2 and RE-B include 1,612 pages of the record submitted by LUBA to the Oregon
3 Court of Appeals in *Conte v. City of Eugene* (CA A166896), to which all the
4 parties in the present appeal are also parties. As the city correctly points out, as
5 parties to that appeal, LUBA has provided petitioner, the city and intervenor
6 with a copy of that record, so LUBA and all parties in the present appeal

“(a) The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board a certified paper copy of the record of the proceeding under review. *The governing body may, however, retain any large maps, media recordings, or difficult-to-duplicate documents and items until the date of oral argument. Where documents are retained until the date of oral argument, those retained documents shall be identified in the table of contents, as provided in OAR 661-010-0025(4)(B).* Transmittal of the record is accomplished by delivery of the record to the Board, or by receipt of the record by the Board, on or before the due date.

“(b) As an alternative to transmitting a certified paper copy of the record, a local government may transmit the record to the Board in electronic format. Transmittal of an electronic copy is accomplished by delivery of two complete copies of the record on optical disks, with documents recorded in a PDF format. If the record exceeds 100 pages, the electronic copy shall be searchable. A local government may transmit the record in electronic form, and also retain items until oral argument as described in OAR 661-010-0025(2)(a).” (Emphasis added.)

1 presumably, in fact, do have access to the documents. In addition, the city
2 responds that the public may examine the disk as a retained exhibit at the city
3 manager's office or request a copy of the disk from the city for a reasonable
4 copying fee. Further, the city responds, as the party who submitted the disk,
5 petitioner presumably also has a copy of what he submitted to the city.

6 We agree with the city on all points. A local government may
7 appropriately designate compact discs and other voluminous submissions
8 including incorporated records of prior appeals, as retained exhibits pursuant to
9 OAR 661-01-0025(2)(a). *See* n 1; *Maguire v. Clackamas County*, 64 Or LUBA
10 445, 447 (2011); *Gunderson LLC v. City of Portland*, 62 Or LUBA 505, 514
11 (2010).

12 Petitioner's first record objection is denied.

13 **B. Objection 2**

14 In his second objection, petitioner objects that the mailing list for the
15 Notice of Decision at Record 1-7 is "not accurate." Petitioner's Record
16 Objection and Motion to Take Evidence 3. Petitioner argues that the city did
17 not mail the Notice of Decision to all parties on the mailing list. According to
18 petitioner, Exhibit A to his Motion to Take Evidence Not in the Record
19 "provides compelling evidence that the city did not actually mail the required
20 notice to all parties listed on the mailing list." *Id.*²

² Exhibit A to Petitioner's Record Objection and Motion to Take Evidence includes a copy of an envelope that was returned to the city that contained the

1 The city responds that pursuant to OAR 661-010-0025(1)(d), the city
2 included in the record: 1) a copy of the notice of the hearings official's
3 decision; 2) the mailing list that the city actually used to mail the notice; and 3)
4 the affidavit of mailing signed by a city staff person certifying that the notice
5 was mailed to each of the addressees on the mailing list. Therefore, the city
6 contends, the city has complied with OAR 661-010-0025(1)(d).³

Notice of Decision mailed by the city, with first class postage marked "Return Service Requested." Petitioner apparently received the copy of the returned envelope from the city in response to a public records request from petitioner. Exhibit B to the Motion to Take Evidence includes 13 envelopes that petitioner alleges were service copies of his Notice of Intent to Appeal (NITA) that were returned to him. According to petitioner, because petitioner used the same mailing list for serving copies of his NITA that the city did in mailing the Notice of Decision, this demonstrates the city must have received an additional 12 returned envelopes, but failed to produce them in response to his public records request, or failed to send notices to some of these addresses. Petitioner argues unless the city can explain or provide "additional proof" to confirm that notices to all parties on the mailing list "were actually deposited with USPS, the City's mailing list cannot be considered an accurate record of the parties to whom the Notice of Decision was served. At the least, the mailing list [Record 2-7] must be struck from the record as inaccurate." *Id.* at 3-5. Further, petitioner asserts that ORS 227.173(4) requires the city to re-send the notice and submit new copies of all returned envelopes into the record.

³ OAR 661-010-0025(1)(d) provides:

"Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed during the course of the land use proceeding, including affidavits of publication, posting or mailing. Such notices shall include any notices concerning amendments to acknowledged comprehensive plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1) and (2)."

1 We agree. As we recently explained in *Conte v. City of Eugene*, __ Or
2 LUBA __ (LUBA No. 2017-063, Order, Oct 3, 2017) (slip op at 8), “nothing in
3 our rules requires that returned mail envelopes be included in the record.” *Id.*
4 (citing *Trautman v. City of Eugene*, __ Or LUBA __ (LUBA Nos. 2015-
5 076/077, Order, December 30, 2015) (slip op at 4)). In *Trautman*, we rejected
6 petitioner’s nearly identical argument and concluded that “‘returned mail’
7 documentation does not fall within the description of ‘[n]otices of * * *
8 adoption of a final decision * * * mailed during the course of the land use
9 proceeding’ at OAR 661-010-0025(1)(d).” *Id.* (Footnote omitted).

10 Further, we agree with the city that to the extent petitioner asserts that
11 his own receipt of twelve returned envelopes from his service of the NITA
12 demonstrates that the city’s mailing of the Notice of Decision was deficient,
13 that is not an appropriate basis for a record objection. OAR 661-010-0026(2).⁴

⁴ OAR 661-010-0026(2) provides:

“An objection to the record or an objection to an amendment or supplement to the record shall be filed with the Board within 14 days of the date appearing on the notice of record transmittal sent to the parties by the Board. A party may file a record objection while continuing to resolve objections with the governing body’s legal counsel. Objections may be made on the following grounds:

“(a) The record does not include all materials included as part of the record during the proceedings before the final decision maker. The omitted item(s) shall be specified, as well as the basis for the claim that the item(s) are part of the record.

1 Petitioner’s second record objection is denied.

2 **MOTION TO TAKE EVIDENCE NOT IN THE RECORD**

3 Petitioner argues that the copies of returned envelopes attached as
4 Exhibits A and B to the Motion to Take Evidence Not in the Record are
5 necessary “to resolve disputes regarding the accuracy of the City’s mailing list
6 submitted to the record, as explained [in petitioner’s second record
7 objection].”⁵ Petitioner’s Record Objection and Motion to Take Evidence 6.

“(b) The record contains material not included as part of the record during the proceedings before the final decision maker. The item(s) not included as part of the record during the proceedings before the final decision maker shall be specified, as well as the bases for the claim that the item(s) are not part of the record.

“(c) The minutes or transcripts of meetings or hearings are incomplete or do not accurately reflect the proceedings.

“(d) The record does not conform to the requirements of OAR 661-010-0025(4).”

⁵ OAR 661-010-0045(2) provides, in relevant part:

“Motions to Take Evidence:

“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.

“(b) A motion to take evidence shall be accompanied by:

“(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or

1 The city does not object to LUBA's consideration of the returned mail
2 envelopes attached to petitioner's motion to take evidence. Accordingly,
3 petitioner's motion is granted, and the Board will consider Exhibits A and B.

4 **BRIEFING SCHEDULE**

5 The record is settled as of the date of this order. The petition for review
6 is due 21 days after the date of this order. The response briefs are due 42 days
7 after the date of this order. The final opinion and order is due 77 days after the
8 date of this order.

9 Dated this 23rd day of July, 2018.
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14 _____
15 Melissa M. Ryan
Board Chair

“(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.”