

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

3
4 PETER O. WATTS,
5 *Petitioner,*

6
7 vs.

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9 METRO,
10 *Respondent,*

11
12 and

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14 WASHINGTON COUNTY, CITY OF
15 TUALATIN and CITY OF WILSONVILLE,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2018-055

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20 SHERMAN LEITGEB,
21 *Petitioner,*

22
23 vs.

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25 METRO,
26 *Respondent,*

27
28 and

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30 WASHINGTON COUNTY, CITY OF
31 TUALATIN and CITY OF WILSONVILLE,
32 *Intervenors-Respondents.*

33
34 LUBA No. 2018-057

35 ORDER
36

1 **MOTIONS TO INTERVENE**

2 Washington County, the City of Tualatin and the City of Wilsonville
3 each separately move to intervene on the side of respondent in these
4 consolidated appeals. No party opposes the motions, and they are granted.

5 **RECORD OBJECTIONS**

6 **A. Background**

7 We set forth a brief procedural background in this matter, to the extent
8 necessary to resolve the record objections. In the underlying decision,
9 respondent Metro was asked to act as an arbitrator to resolve a dispute among
10 the cities of Tualatin and Wilsonville and Washington County concerning the
11 concept plan for the Basalt Creek Planning Area (Planning Area). In 2004,
12 Metro added that planning area to the Urban Growth Boundary (UGB), and
13 since that time the planning area has been the subject of an ongoing land use
14 planning process. Under a 2011 intergovernmental agreement (IGA), the cities,
15 Metro and the county agreed to develop a concept plan for the Planning Area.
16 Record 651. The parties agreed that a concept plan must be approved before the
17 subject property can be annexed and developed by either of the cities.

18 In late 2016 through early 2017, as the concept planning process was
19 nearing completion, the negotiation process for the planning area concept plan
20 broke down, with the Tualatin City Council changing the designation of its
21 portion of a subarea of the planning area (the Central Subarea) from
22 employment use to residential. Record 114. Wilsonville continued to plan its

1 portion of the Central Subarea for employment. To resolve the disagreement
2 between the parties, Tualatin, Wilsonville and Washington County requested
3 that Metro act as arbitrator to issue a decision regarding the planning
4 designation for the Central Subarea. In late 2017 through early 2018, the
5 parties signed another IGA giving Metro sole discretion to create a process for
6 arbitrating the dispute. Record 38. The outcome of the arbitration process was
7 for Metro to issue a final, non-appealable decision, binding on the parties
8 regarding the land use designation for the Central Subarea.

9 As a result, Metro created a process which included two open record
10 periods, allowing the cities and county an opportunity to submit evidence and
11 argument. The first open record period closed on March 7, 2018, and the
12 second open record period closed March 14, 2018. Record 58. The outcome
13 of this process was a recommendation from the Metro Chief Operating Officer
14 (COO) to the Metro Council, which would include an “on the record” hearing
15 by the Metro Council with a review of the materials submitted by the cities and
16 county. Record 649.

17 The review process created by Metro did not contemplate consideration
18 of evidence or argument presented by anyone other than the signatories to the
19 two IGAs (*i.e.*, the cities and county). Nonetheless, Metro accepted written
20 materials submitted by petitioner Peter Watts (Watts) and another interested
21 party, Herb Koss (Koss) on March 7, 2018, and March 8, 2018, respectively
22 (*i.e.*, during the first open record period). As the Metro Council explained in

1 its supplemental findings, attached as Exhibit B to Metro Ordinance No. 18-
2 4885:

3 “The first open record period closed on March 7, 2018; the second
4 (and final) open record period closed on March 14, 2018. As
5 contemplated by the parties to the IGA, Metro received submittals
6 from the two cities and the county during those time periods.
7 Metro also received emails from two property owners, one from
8 Peter Watts dated March 7, 2018[,] and another from Herb Koss
9 dated March 8, 2018. Those emails raised objections to the process
10 and requested that the emails and attached exhibits be included in
11 the record. The email from Mr. Watts included references to 12
12 attached exhibits, but no exhibits were attached. However, the first
13 11 of the 12 referenced exhibits were attached to the email from
14 Mr. Koss, which forwarded an earlier similar version of the email
15 from Mr. Watts. The first 11 exhibits referenced in the email from
16 Mr. Watts were also included in the exhibits attached to the briefs
17 submitted by the cities on March 7, 2018, and those exhibits are
18 therefore part of the record.

19 “The process created by Metro calls for an ‘on the record’ review
20 of the COO Recommendation by the Metro Council. Accordingly,
21 any evidence or other testimony that was not provided to the
22 Metro COO during the open record period prior to the issuance of
23 her recommendation is not properly before the Metro Council in
24 this proceeding, and is expressly rejected.” Record 58-59.

25 **B. Record Objections**

26 Petitioners Watts and Sherman Leitgeb (Leitgeb) (jointly, petitioners)
27 object to the record filed by Metro. We now resolve the objections.

28 **A. Omitted Records**

29 Watts objects to Metro’s omission of certain materials from the record.
30 These materials include a letter marked as “Exhibit 12” and an additional seven
31 pages, not marked as an exhibit, both of which Watts hand-delivered to Metro

1 on April 11, 2018. According to Watts, Metro erred in omitting these materials
2 because without these materials the record “does not meet the specifications of
3 OAR 661-010-0025(1)(b). OAR 661-010-0026(2)(a).”¹

4 As outlined above, the first open record period closed March 7, 2018,
5 and the second, and final, open record period closed March 14, 2018. As we

¹ OAR 661-010-0025(1)(b) provides:

“(1) Contents of Record: Unless [LUBA] 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.”

OAR 661-010-0026(2)(a) provides:

“(2) 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 understand it, the March 7, 2018 email submittal from Watts to Metro included
2 no attached exhibits. However, that March 7, 2017 email included a “nearly
3 verbatim” version of an email submitted by Watts to the city of Tualatin on
4 February 12, 2017, that referenced and included 11 marked exhibits. Metro’s
5 Response to Record Objections 3. These exhibits were also submitted to Metro
6 by Koss in his March 8, 2018 email to Metro, which forwarded the February
7 12, 2017 email from Watts to the city of Tualatin with the 11 exhibits attached.
8 All of Watts’ 11 exhibits were included as exhibits to the arbitration briefs
9 submitted to Metro by Tualatin and Wilsonville.

10 Apparently on April 11, 2018, for the first time, counsel for Metro
11 recognized that Watts’ “Exhibit 12” was never actually received by Metro.
12 Counsel for Metro notified Watts on April 11, 2018 via email that his March 7,
13 2018 email had not included any attachments and therefore Metro had never
14 received “Exhibit 12.” Watts hand-delivered an envelope to the Office of the
15 Metro Attorney on April 11, 2018. The envelope contained not only “Exhibit
16 12,” but also seven additional pages that were never specifically identified as
17 exhibits to Watt’s March 7, 2018 email. Metro’s Counsel reviewed the
18 materials and determined that because “Exhibit 12” and the additional seven
19 pages were not provided to Metro until April 11, 2018, after the close of the
20 final March 14, 2018 open record period, these materials should not be
21 provided to the Metro Council for consideration as part of their final decision.
22 Therefore, the materials were not forwarded to the Metro Council, and the

1 Council adopted the supplemental findings quoted above, specifically rejecting
2 “Exhibit 12” and all other materials not submitted to Metro by the close of the
3 final open record period (March 14, 2018). OAR 661-010-0026(2)(b)²; *Von*
4 *Lubken v. Hood River County*, 19 Or LUBA 548, 550 (1990).

5 We agree with Metro that “Exhibit 12” and the additional pages provided
6 by Watts on April 11, 2018, after the close of the open record period, and
7 specifically rejected by the Metro Council, are not part of the record.

8 This objection is denied.

9 **B. Metro’s Arbitration Process**

10 In his second record objection, Watts argues that Metro’s process leading
11 to the challenged decision was “insufficient to create a record” because the
12 process did not provide an opportunity for public participation. Watts’ Record
13 Objections 3 (citing to *Fasano v. Board of County Commissioners of*
14 *Washington County*, 264 Or 574, 507 P2d 23 (1973)). Leitgeb joins in this
15 objection.

16 We agree with Metro that this objection is not cognizable as a record
17 objection because it does not identify any specific documents that petitioners
18 believe should or should not have been included in the record, or argue that the

² OAR 661-010-0026(2)(b) provides a basis for a record objection is that “[t]he record contains material not included as part of the record during the proceedings before the decision maker.”

1 record does not otherwise conform with the rules pertaining to records
2 submitted to LUBA. *See* OAR 661-010-0026(2).

3 This record objection is denied.

4 **BRIEFING SCHEDULE**

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

9 Dated this 30th day of August, 2018.

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Tod A. Bassham
Board Member