

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PAUL NORMAN

5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,

10 *Respondent,*

11
12 and

13
14 PIONEER DESIGN GROUP, INC.,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-029

18
19 ORDER

20 Petitioner appeals a decision issued by a county hearings officer (1)
21 preliminarily approving a 10-lot subdivision, (2) authorizing an exception to the
22 standards for half-street improvements and (3) approving an accessory dwelling
23 on one of the proposed lots that contains an existing residence. Under the
24 county's type II procedure, the county planning director rendered an initial
25 decision approving the applications with conditions. The director's decision was
26 appealed to the county hearings officer for *de novo* review under Washington
27 County Community Development Code (CDC) 209-5.2. Following a *de novo*
28 hearing, the hearings officer approved the applications with conditions.

1 **MOTION TO INTERVENE**

2 Pioneer Design Group, Inc., (intervenor), the applicant below, moves to
3 intervene on the side of respondent. No party opposes the motion and it is granted.

4 **RECORD OBJECTIONS**

5 On March 19, 2019, the county transmitted its electronic record in this
6 appeal. On April 2, 2019, petitioner filed record objections. On April 16, 2019,
7 the county filed its response to the record objections. On April 24, 2019,
8 petitioner filed a reply to the county's response. We now resolve the record
9 objections.

10 **A. Resolved Objections**

11 Petitioner objects that the documents in the record at pages 69-134 and
12 473-79 are improperly in the record because they were not included as part of the
13 record before the final decision maker. Record Objection 3. The county responds
14 that the documents marked 69-134 and 473-79 are duplicates of other documents
15 in the record. Response 8-9. The county asks that we strike these documents from
16 the record. Petitioner advises in his reply that he agrees with this proposed
17 resolution of this objection. Reply 7.

18 The Board is unable to modify the digital copy of the original record to
19 remove the pages that are requested to be removed, or to make other proposed
20 alterations to the original electronic record. Where the local government proposes
21 to remove, replace and repaginate a significant number of documents in an
22 original electronic record, the far better course is for the local government to

1 submit a new electronic record that incorporates all the proposed insertions,
2 deletions and replacements, as well as consistent pagination, and that is intended
3 to completely replace the original electronic record. *See Neighbors for Smart*
4 *Growth v. Washington County*, __ Or LUBA __ (LUBA No. 2018-059, Order,
5 Aug 31, 2018) (slip op at 7)); *Harra v. City of West Linn*, __ Or LUBA __ (LUBA
6 No. 2017-074, Order, Sept 27, 2017) (slip op at 2) (requiring the city to submit a
7 new electronic record that either does not include the documents that the city has
8 agreed to remove from the original record, or marks them as “stricken” in some
9 way).

10 This objection is sustained. Accordingly, the county shall transmit to the
11 Board and all parties a replacement record consistent with our resolution of
12 petitioner’s record objections in this order.

13 Petitioner also advises in his reply that, based upon the county’s response,
14 he withdraws his objection seeking the addition to the record of a transcript or
15 copy of appeal hearing minutes. Reply 2. This objection is withdrawn by
16 petitioner. Therefore the objection is moot.

17 **B. Resolution of Remaining Objections**

18 **1. OAR 661-010-0025(1)(b)**

19 OAR 661-010-0025(1)(b) provides that the content of the record includes
20 “[a]ll written testimony and all exhibits, maps, documents or other materials
21 specifically incorporated into the record or placed before, and not rejected by, the

1 final decision maker, during the course of proceedings before the final decision
2 maker.”

3 Petitioner asserts that the documents in the record at 67, 236-301, 307-19,
4 325-415, 506-726 and the oversized exhibits are improperly in the record and
5 should be removed because they are not listed in an exhibit list submitted to and
6 not rejected by the hearings officer at the appeal hearing. Record 135. Record
7 Objection 4-5.

8 The county responds, and we agree, that the exhibit list is not a
9 comprehensive list of all documents placed before and not rejected by the
10 decision maker. Response 5. In any event, however, the documents petitioner
11 objects to include the underlying application and oversized exhibits submitted as
12 part of the application. Response 9-10. As the county notes, the application and
13 the oversized exhibits are listed as an exhibit (PH6) to the materials submitted to
14 the hearings officer at the appeal hearing. *Id.*

15 In his reply, petitioner argues that the application is not properly included
16 in the record because it lacks an exhibit stamp or other exhibit marking, and
17 according to petitioner, the county and hearings officer marked exhibits
18 specifically placed before the decision maker or incorporated into the record.
19 Petitioner argues that and “[t]he County does not dispute the fact that the only
20 documents actually provided to the hearings officer for the appeal hearing were
21 those listed in the exhibit list and stamped as an exhibit.” Reply 3.

1 The local government is the custodian of the record. Absent reason to
2 conclude otherwise, LUBA will generally accept the custodian of record's
3 position concerning whether documents were placed in the record. *Curl v. City*
4 *of Bend*, 55 Or LUBA 719, 725 (2008). The county states in its response that the
5 application was "submitted to the Hearings Officer as Exhibit PH-6, noted in the
6 List of Exhibits." Response 9. Given petitioner's position that items in the exhibit
7 list are properly in the record and the county's identification of the application on
8 the exhibit list and statement that the application was submitted to the hearings
9 officer, petitioner's objection to inclusion of the application, document numbers
10 507-726 and the oversized exhibits is denied.¹

11 Petitioner also objects to inclusion of an email from a representative of
12 intervenor to a county planner. Record Objection 3. The email includes
13 intervenor's consent to a seven-day extension of time for county processing of
14 the application. Record 67. Petitioner's argument for excluding this document
15 appears to be that it is not included on the list of hearing exhibits. Record
16 Objection 3-4.

17 The county does not state that the challenged email was placed before and
18 not rejected by the county, that the document is included in the record by
19 operation of law, or that the email became part of the record in some other

¹ The county also indicates that the document at Record 506 is part of the application, but review of the record shows it to be the Notice of Application Acceptance. It is addressed below.

1 manner. Instead, the county states that the document is included in the record
2 because LUBA's rules do not require its exclusion. Response 8. "Where a party
3 alleges that certain documents were not 'placed before' the decision maker, the
4 proponent of their inclusion bears some burden to support its contention to the
5 contrary." *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 994, 996 (1999).
6 Where the local government provides an ambiguous response as to whether a
7 disputed document was placed before the decision maker and the petitioner
8 asserts that the document was not and should not have been placed before the
9 decision maker, LUBA will exclude the challenged document from the record.
10 *Curl*, 55 Or LUBA 719, 721-22. LUBA will sustain an objection that certain
11 items were not placed before the decision maker when the custodian of the record
12 fails to demonstrate that the items were available in such a way as to indicate that
13 the items had been placed before the decision maker. *Home Depot*, 37 Or LUBA
14 994, 996. The county has not asserted that the email was placed before the
15 decision maker or otherwise part of the record by law or otherwise made available
16 in a manner indicating it was part of the record. We therefore sustain this
17 objection, and the email at Record 67 is not a part of the record.

18 **2. OAR 661-010-0025(1)(d)**

19 OAR 661-010-0025(1)(d) provides that the record includes:

20 "Notices of proposed action, public hearing and adoption of a final
21 decision, if any, published, posted or mailed during the course of the
22 land use proceeding, including affidavits of publication, posting or
23 mailing. Such notices shall include any notices concerning

1 amendments to acknowledged comprehensive plans or land use
2 regulations given pursuant to ORS 197.610(1) or 197.615(1) and
3 (2).”

4 The county argues that the documents at 506, 236-301, 307-19, and 325-
5 415 are properly in the Record as notices or attachments to notices.

6 Petitioner objects to the inclusion of the document at Record 506, which is
7 the Notice of Application Acceptance that advises the applicant that the county
8 will review and process the application. Petitioner argues that the fact that the
9 document was not included in an exhibit list or individually marked as an exhibit
10 demonstrates that it was not incorporated into the record or placed before the
11 hearings officer. Record Objection 3–5. Petitioner argues that the hearings officer
12 reviewed the director’s decision *de novo* and that the county code does not
13 automatically incorporate items from earlier phases of the application into the
14 appeal record, citing *Aguilar v. Washington County*, ___ Or LUBA ___ (LUBA
15 No 2004-193, Order, Jan 27, 2005).

16 The county first argues that the record before the planning director “would
17 not necessarily be listed as an exhibit to the public hearing, but it would still have
18 been specifically incorporated into the record.” Response 6. However, in the
19 challenged decision, the hearings officer did not specifically incorporate the
20 record before the director into the record before the hearings officer. The county
21 also does not assert that the notice was placed before the hearings officer. We
22 conclude that the notice was not required to be included in the record under OAR
23 661-010-0025(1)(b).

1 We also agree with petitioner that the notice was not automatically
2 incorporated into the record by local law. In *Aguilar*, we denied the petitioners’
3 objection that the county improperly omitted certain documents from the record,
4 observing that the code provision for review by the board of county
5 commissioners, CDC 209-5.3(A), provides that the appeal record includes “[a]ll
6 materials received as evidence at any previous stage.” Differently, the code
7 provision governing appeals by the hearings officer or planning commission,
8 CDC 209-5.2, does not contain similar language. *Aguilar* is distinguishable. In
9 that case we observed that the petitioners offered “no other legal theory by which
10 the county could be ordered to include those documents in the record.” *Aguilar*,
11 ___ Or LUBA ___ (LUBA No 2004, 193, Order, Jan 27, 2005) (slip op at 4).
12 Differently, here, we conclude that OAR 661-010-0025(1)(d) requires covered
13 documents be included in the record, regardless of whether they were specifically
14 incorporated into the record. OAR 661-010-0025(1)(d) requires the local
15 government to include in the record “[n]otices of proposed action, public hearing
16 and adoption of a final decision,” that are “published, posted or mailed during the
17 course of the land use proceeding.” The notice at Record 506 is a notice of
18 proposed action and appears to have been mailed to the applicant. Such notices
19 might be required to be included in the record under OAR 661-010-0025(1)(d).

20 We note, however, that the text of OAR 661-010-0025(1)(d) provides
21 examples of the notices within its scope, providing that “[s]uch notices shall
22 include any notices concerning amendments to acknowledged comprehensive

1 plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1)
2 and (2).” In interpreting our administrative rule and considering text and context,
3 we may rely on the statutory interpretation concept of *ejusdem generis*. The
4 concept of *ejusdem generis* is that the use of a list of examples in a law limits the
5 general language of the statute to the types of things enumerated.² *State ex. Rel*
6 *Oregon Health Sciences University v. Haas*, 325 Or 492, 503, 942 P2d 261
7 (1997). OAR 661-010-0025(1)(d) identifies ORS 197.610(1) or 197.615(1) and
8 (2) as examples of the types of actions involving notices properly included in the
9 record. These statutes involve actions related to comprehensive plan and land use
10 regulations and reference broad public notice requirements. We conclude that
11 notices included in the record pursuant to OAR 661-010-0025(1)(d) are public
12 notices and not documents labeled as a notice but directed only to the applicant.

13 Petitioner also objects that the record improperly includes Record pages
14 236-301, 307-19, and 325-415. Record Objection 3. OAR 661-010-0025(1)(d)
15 provides that the record includes affidavits of mailing. The county explains that
16 Record 236-301 contains a staff report and recommendation that is an attachment
17 to an affidavit of mailing at Record 234-35. The county explains that the
18 documents in the record at 307-19 contain the notice of appeal and were attached

² Traditionally, *ejusdem generis* has been used to assist in the interpretation of laws with a list of specific examples of the covered items and a catch-all phrase such as “including but not limited to.” *State v. Hutchins*, 214 Or App 260, 264, 267, 164 P3d 318 (2007). In *OHSU v. Hass*, however, the court applied the concept in circumstances without a catch-all phrase.

1 to an affidavit of mailing at Record 302. Response 8-9. Similarly, the county
2 advises that the Notices of Decision, Staff Report and related documents at
3 Record 325-415 represent attachments to notice mailings. Response 9.

4 Petitioner argues in his reply that OAR 661-010-0025(1)(d) requires the
5 inclusion of notices in a record for the purpose of addressing procedural issues
6 and not for substantive purposes. Reply 6. Petitioner argues that if LUBA
7 intended to include attachments to notices, the rule would expressly provide for
8 the inclusion of attachments. *Id.* In *Heitsch v. City of Salem*, 65 Or LUBA 449,
9 451 (2012), we concluded that a reference to availability of a staff report in a
10 notice was not sufficient to include the staff report in the record. We observed,
11 however, that we might consider a staff report *mailed with* a notice to be part of
12 the notice and properly part of the record. We decide this issue now and agree
13 with the county that attachments to notices that are mailed with the notice are
14 properly part of the record.

15 The objection is denied to the extent the challenged documents are
16 attachments to mailed notices.

17 We note, however, that the documents referenced by county as attachments
18 to the notice appear to include some documents not identified as notice
19 attachments. The county states that documents 311-19 are attachments to an
20 affidavit, but as identified in the table of contents, these documents include
21 emails, letters, the appeal permit and ArcGIS user guides. Record 4. As is the
22 case with respect to the email at Record 67, the county has not provided a basis

1 for us to conclude that the documents in the record at 311-19 are properly in the
2 record.

3 This objection is sustained with respect to documents at 311-19 and Record
4 pages 311-19 are not properly part of the record.

5 **DISPOSITION**

6 Within 14 days of the date of this order, the county shall transmit to the
7 Board and the parties a replacement record that excludes the documents at 67,
8 69–134, 311–19, 473–79, and 506, together with a revised table of contents that
9 reflects their removal from the record. Thereafter, the Board will issue an order
10 settling the record and establishing the briefing schedule.

11 Dated this ____ day of May, 2019.

12

13

14

15

16 _____
Michelle Gates Rudd

17 Board Member