

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 OREGON COAST ALLIANCE, BOB FISCHER,
5 CAROL FISCHER, and VICKIE CROWLEY,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF BANDON,
11 *Respondent,*
12

13 and
14

15 STEER BANDON ASSOCIATES,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2019-064
19

ORDER

20 **MOTION TO INTERVENE**

21 Steer Bandon Associates (intervenor) moves to intervene on the side of
22 respondent. No party opposes the motion and the motion is granted.

23 **BACKGROUND**

24 Intervenor sought a conditional use permit (CUP) for a 32-unit hotel with
25 a ground floor café and 60 off-site parking spaces. On February 28, 2019, the
26 planning commission approved the CUP application. Record 178. On March 11,
27 2019, petitioners appealed the planning commission decision approving the CUP
28 and requested that the city council conduct its review *de novo*. Record 100-01.
29 On April 9, 2019, the city council conducted an on the record, public hearing on
30 the appeal. Record 70. On June 3, 2019, the city council denied the appeal and

1 approved intervenor's CUP application. Record 61. On June 24, 2019, petitioners
2 filed their Notice of Intent to Appeal (NITA).

3 **RECORD OBJECTIONS**

4 **A. Timeliness of Objections**

5 On August 16, 2019, LUBA received the paper record and issued a letter
6 indicating that the record was received on that date. On August 30, 2019,
7 petitioners filed their objections to the record. On September 12, 2019, the city
8 filed its response to the record objections. On September 17, 2019, petitioners
9 filed their reply to the response.

10 The city argued that the record was filed on August 15, 2019, objections
11 were due 14 days after the record was filed and that objections filed on August
12 30, 2019 were untimely. Response 1-2. OAR 661-010-0026(2) provides that
13 objections to the record "shall be filed with the Board within 14 days of the date
14 appearing on the notice of record transmittal sent to the parties by the Board."
15 The date appearing on the Board's notice is August 16, 2019 and objections were
16 due no later than August 30, 2019. Petitioners filed their objections on August
17 30, 2019 and they are timely.

18 This objection is denied.

19 **B. Objections Resolved by Party Action**

20 Petitioners object to the table of contents submitted with the record. Record
21 Objection 2. OAR 661-010-0025(4)(a)(B) and (B)(i) provide that the table of
22 contents must list each item in the record, the record page where the item begins

1 and separately identify attached exhibits. As petitioners explain, “[t]he table of
2 contents list simply lists generalized packets and files with nothing more specific,
3 including individualized letters submitted in opposition to the application.”
4 Record Objection 2. The city states in its response that it will submit a revised
5 table of contents. Response 2. Submittal of the revised table of contents
6 identifying the record documents as required by the rule will resolve this
7 objection.

8 This objection is resolved.

9 Petitioners also object that pages 1 through 17 of the record are post-
10 decision documents and not properly included in the record. Record Objection 2.
11 The city states in its response that it will remove pages 1 through 17 from the
12 record. Response 2. Removal of pages 1 through 17 from the record will resolve
13 this objection.

14 This objection is resolved.

15 **C. Objections Not Addressed in City’s Response**

16 Petitioners object that the record improperly omits the January 24, 2019
17 testimony from Bob Fisher and the January 13 and January 24, 2019 emails from
18 Bob Fischer (collectively, the Fisher documents). Generally, the record must
19 include “[a]ll written testimony and all exhibits, maps, documents or other
20 materials specifically incorporated into the record or placed before, and not
21 rejected by, the final decision maker, during the course of the proceedings before
22 the final decision maker.” OAR 661-010-0025(1)(b). OAR 661-020-0026(2)(a)

1 provides that an objection may be made on the grounds that the record does not
2 include all material included as part of the record during the proceedings before
3 the final decision maker, and such an objection must include the basis for the
4 claim that the item is part of the record. Petitioners argue that the record should
5 contain any document submitted into the record and not rejected. Record
6 Objection 3; Reply 2.

7 The Fischer documents are provided as Attachments 8 and 6 to the record
8 objections. Attachment 8 contains two emails from Robert Fischer. The first
9 email is a January 13, 2019 email addressed to, among others, the planning
10 director. The email states that Mr. Fischer would like the attached geotechnical
11 report added to the planning commission packet. The second email is dated
12 January 24, 2019, and addressed to the planning department. It states that it is a
13 copy of Mr. Fischer's January 24, 2019 testimony. Attachment 6 is a statement
14 from Mr. Fischer, dated January 24, 2019, explaining that the author of the
15 geotechnical report is unable to attend "the meeting" before going on to discuss
16 two points from the geotechnical report. The city does not contend that the Fisher
17 documents were not submitted into the record or were rejected. Thus, we
18 conclude that they are properly part of and must be added to the record.

19 Petitioners also object that the record does not include an April 6, 2019
20 letter from Nancy Evans to the city council (Evans letter), included as Objection
21 Attachment 7, asserting that she reviewed the appeal record and found that it
22 failed to include a copy of a document "known as the CCP" that she submitted

1 on January 31, 2019, with the permission of the applicant and planning
2 department, “for inclusion into the Record.” Record Objection 3; Reply 2. The
3 April 6, 2019 letter requests that the copy of the CCP document she states she
4 submitted on January 31, 2019 be added to the appeal record as a corrective
5 action. Given the lack of a response from the city, we conclude that the city does
6 not object to inclusion of the Evans letter and that it is properly included in the
7 amended record.

8 These objections are sustained.

9 **D. Contested Objections**

10 Petitioners object to the city’s failure to include in the record certain
11 documents petitioner Oregon Coast Alliance’s counsel included with the notice
12 of appeal he submitted to the city on its behalf. Record Objection 3; Reply 3. The
13 omitted items are identified as a U.S. Fish and Wildlife Service (USFWS) Oregon
14 Islands Flyer and Chapters 2, 3, 4 and 5 of the “Comprehensive Conservation
15 Plan.” Record Objection 3. The city responds that these documents are post-
16 hearing matters and were not accepted into the record, explaining:

17 “This was not a normal hearing where people are allowed to add
18 items into the record and then Respondent has to deny or accept
19 them. Respondent simply was not accepting anything in the record
20 as additional exhibits and that was the ruling that Respondent made
21 which was in the findings.” Response 2.

22 As noted, the record must include “[a]ll written testimony and all exhibits,
23 maps, documents or other materials specifically incorporated into the record or

1 placed before, and not rejected by, the final decision maker, during the course of
2 the proceedings before the final decision maker.” OAR 661-010-0025(1)(b).
3 Although the city does not direct us to a record page or explain the posture of the
4 application at the time the disputed materials were submitted, the findings explain
5 that the petitioners requested a *de novo* appeal but the city council decided to
6 review the appeal on the record. Record 23. As the findings explain, “[n]o new
7 evidence was allowed in the appeal statement or at the appeal hearing.” Record
8 23. We understand from petitioners’ reply that the disputed documents were
9 attached to its appeal submittal. Reply 3; Record 137. The city findings are clear
10 that the city was not accepting new evidence from the appeal statement and the
11 findings are consistent with the minutes of appeal hearing, which include the
12 statement: “The Council has determined that no new matters of evidence will be
13 allowed pursuant to [Bandon Municipal Code] 17.124.020 (D).” Record 70. We
14 therefore conclude that the USFWS Oregon Islands Flyer and Comprehensive
15 Conservation Plan Chapters 2, 3, 4 and 5 are properly excluded from the record
16 because, although they may have been placed before the city council as
17 attachments to the notice of local appeal, they were “rejected by[] the final
18 decision maker.”

19 This objection is denied.

20 **DISPOSITION**

21 The record transmitted by the city is in paper format. In accordance with
22 this order, the city shall send LUBA and the parties an amended record table of

1 contents that deletes reference to pages 1 through 17 of the prior record and that
2 otherwise complies with OAR 661-010-0025(4)(a)(B) and (B)(i). LUBA shall
3 mark pages 1 through 17 of its copy of the record as “stricken,” and the parties
4 shall do the same.

5 The city shall also transmit a supplemental record that is separately
6 paginated that includes the January 24, 2019 testimony from Bob Fischer,
7 January 13 and January 24, 2019 emails from Bob Fischer and the April 6, 2019
8 letter from Nancy Evans. The supplemental record shall include a separate table
9 of contents for the supplemental record.

10 The city shall transmit the above items within 14 days of the date of this
11 order. After receipt of these items, LUBA will issue an order settling the record
12 and establishing the briefing schedule.

13 Dated this 31th day of October, 2019.
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18 _____
19 Michelle Gates Rudd
Board Member