

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

3
4 JOSEPH SCHAEFER, CITY OF AURORA,
5 CITY OF WILSONVILLE,
6 1000 FRIENDS OF OREGON, and
7 FRIENDS OF FRENCH PRAIRIE,
8 *Petitioners,*

9
10 and

11
12 CLACKAMAS COUNTY,
13 *Intervenor-Petitioner,*

14
15 vs.

16
17 OREGON STATE AVIATION BOARD and
18 OREGON DEPARTMENT OF AVIATION,
19 *Respondents,*

20
21 and

22
23 AURORA AIRPORT IMPROVEMENT
24 ASSOCIATION, BRUCE BENNETT,
25 WILSON CONSTRUCTION COMPANY, INC.,
26 TED MILLAR, TLM HOLDINGS, LLC,
27 ANTHONY ALAN HELBLING and
28 WILSONVILLE CHAMBER OF COMMERCE,
29 *Intervenors-Respondents.*

30
31 LUBA Nos. 2019-123/127/129/130

32 ORDER

1 **MOTIONS TO INTERVENE**

2 Clackamas County moves to intervene on the side of petitioner City of
3 Wilsonville in LUBA No. 2019-130. There is no opposition to the motion and it
4 is granted.

5 Aurora Airport Improvement Association, Bruce Bennett, Wilson
6 Construction Company, Inc., Ted Millar, TLM Holdings, LLC, and Anthony
7 Alan Helbling (together, AAIA) move to intervene on the side of respondent.
8 Wilsonville Chamber of Commerce (WCOC) separately moves to intervene on
9 the side of respondent. There is no opposition to the motions and they are granted.

10 **MOTION TO APPEAR AS *AMICUS***

11 Marion County moves for permission to file an *amicus* brief. OAR 661-
12 010-0052(1) provides:

13 “A person or organization may appear as amicus only by permission
14 of the Board on written motion. The motion shall set forth the
15 interest of the movant and state reasons why a review of relevant
16 issues would be significantly aided by participation of the amicus.
17 A copy of the motion shall be served on all parties to the
18 proceeding.”

19 The motion explains:

20 “Marion County is the jurisdiction with land use authority over the
21 Aurora Airport property, because the Aurora Airport is located in
22 unincorporated Marion County.

23 “Marion County seeks permission to appear in these consolidated
24 cases as amicus to discuss two topics: 1. The history of the
25 development of the Aurora Airport Master Plan; and 2. The role of
26 Marion County as the jurisdiction with land use authority over land

1 use decisions which may spring from the Aurora Airport Master
2 Plan. This discussion should provide relevant context to [LUBA] in
3 analyzing the issues raised by the parties to these consolidated
4 cases.” Motion to Appear as *Amicus* 2-3.

5 We have explained that the typical *amicus* is a person or organization that has no
6 direct interest in the matter, but is in possession of views or perspectives that may
7 assist LUBA to correctly decide the legal issues. *Central Oregon Landwatch v.*
8 *Jefferson County*, 62 Or LUBA 530, 533 (2010). While we question whether
9 Marion County, as the jurisdiction with land use approval authority over the
10 airport, qualifies as an entity that has no direct interest in the matter, no party
11 objects to the motion, and AAIA supports the motion. Because no party objects
12 to the motion, it is granted.

13 OAR 661-010-0052(2) provides:

14 “Appearance as amicus shall be by brief only, unless the Board
15 specifically authorizes or requests oral argument. An amicus brief
16 shall be subject to the same rules as those governing briefs of parties
17 to the appeal, and shall be filed together with four copies. *Where*
18 *amicus is aligned with the interests of the petitioner(s), the amicus*
19 *brief is due seven days after the date the petition for review is due.*
20 *In all other circumstances, the amicus brief is due within the time*
21 *required for filing respondent’s brief.* No filing fee is required. An
22 amicus brief shall have green front and back covers.” (Emphasis
23 added.)

24 It is not clear from the motion whether Marion County is “aligned with the
25 interests of the petitioner(s),” or whether the “other circumstances” apply, within
26 the meaning of OAR 661-010-0052(2). Accordingly, within 14 days of the date
27 of this order, Marion County shall clarify in writing to LUBA and the parties

1 whether it intends to file its *amicus* brief within seven days after the date the
2 petition for review is due, or within the time required for filing respondent’s brief.

3 **RECORD OBJECTIONS**

4 The challenged decision is an October 31, 2019 decision of the Oregon
5 Aviation Board (OAB) voting to adopt findings (2019 Findings) in support of
6 an October 27, 2011 decision by the OAB that adopted the Aurora State Airport
7 Master Plan (Airport Master Plan). Petitioners timely appealed the OAB’s
8 October 31, 2019 decision, and OAB transmitted the record.

9 All four sets of petitioners then filed separate objections to the record,
10 which include many overlapping objections. In addition, AAIA and WCOC
11 each filed separate objections to the record.¹

12 OAB then transmitted a supplemental record, together with responses to
13 each individual record objection filed by petitioners, AAIA and WCOC. AAIA
14 also filed responses to each record objection.

15 Petitioners Schaefer, 1000 Friends and the City of Wilsonville then filed
16 replies to OAB’s and AAIA’s responses to their original record objections.
17 AAIA and petitioner the City of Wilsonville also filed objections to the

¹ Some of the record objections also include lengthy arguments on the merits of the appeal. Arguments regarding the merits of the appeal are not the proper subject of a record objection. Arguments regarding the merits of an appeal that are included in record objections also distract from the main issues regarding the content of the record, and further delay resolving the record objections and settling the record.

1 supplemental record. OAB then transmitted a second supplemental record, and
2 a consolidated sur-response to all of the replies to its responses to the record
3 objections.

4 Many of the original record objections were resolved by the supplemental
5 record and the second supplemental record. We now resolve the outstanding
6 record objections. However, we begin with a brief description of the October
7 27, 2011 decision adopting the Airport Master Plan and the October 31, 2019
8 decision adopting findings in support of the decision to adopt the Airport
9 Master Plan in order to better frame the parties’ objections to the record.²

10 **A. 2009-2011 Proceedings**

11 Beginning in November 2009, OAB through the Oregon Department of
12 Aviation (ODA) engaged in a public process to update the then-existing master
13 plan for the Aurora Airport. ORS 197.180(1)(b) requires state agencies to
14 “carry out their planning duties, powers and responsibilities and take actions
15 that are authorized by law with respect to programs affecting land use” “[i]n a
16 manner compatible with acknowledged comprehensive plans and land use
17 regulations.” In 2011, the state agency coordination program that applied to

² It is clear from the parties’ pleadings that several underlying facts are in dispute. Any statements in this Order summarizing facts are as we understand them from the record objections and responses, and are not intended to and do not conclusively resolve any disputed factual allegations relating to the merits of the appeals.

1 ODA was the Oregon Department of Transportation's (ODOT's) State Agency
2 Coordination (SAC) program at OAR 731-015-0005 *et seq.*³

3 ODA formed a planning advisory committee (PAC) and its first meeting
4 was held in July 2010. Supplemental Record 4033. Subsequent meetings were
5 also held in 2010 and 2011 through the last meeting in September 2011. On
6 October 27, 2011, OAB voted to adopt the Airport Master Plan. Record 751.
7 The OAB did not, at that time, adopt findings explaining its decision. The
8 adopted version of the Airport Master Plan included two runway extension
9 alternatives.

10 The ODA then submitted the Airport Master Plan to the Federal Aviation
11 Administration (FAA) for FAA approval of one of the two included runway
12 extension alternatives. Sometime in 2012 the FAA approved one of the
13 alternatives. The version of the Airport Master Plan at Supplemental Record
14 4022-4917 identifies the FAA-approved runway alternative.

15 **B. 2019 Proceedings**

16 In 2019, the OAB provided notice that it would consider for adoption
17 findings in support of the Airport Master Plan. The OAB held a meeting on
18 September 24, 2019 and a second meeting on October 31, 2019. At the conclusion

³ The ODA subsequently adopted its own SAC program that was acknowledged in 2017 and that is embodied in OAR 738-130-0005 *et seq.*

1 of the October 31, 2019 meeting, the OAB voted to adopt findings in support of
2 the decision to adopt the Airport Master Plan.

3 **C. Record Objections**

4 **1. “October 27, 2011 Version” of the Airport Master Plan**

5 OAR 661-010-0025(1)(b) provides that the record contains:

6 “All written testimony and all exhibits, maps, documents or other
7 materials specifically incorporated into the record or *placed before,*
8 *and not rejected by,* the final decision maker, during the course of
9 the proceedings before the final decision maker.” (Emphasis added.)

10 We understand petitioners to object that the record fails to include the version
11 of the Airport Master Plan that the OAB adopted on October 27, 2011 and that
12 the version of the Airport Master Plan included in the record, which was printed
13 in 2012 after FAA approval of the runway extension alternative, could not
14 possibly be the version that was before the OAB in October 2011. OAB
15 responds that “what is referred to as the 2012 Master Plan is the final printed
16 version of the 2011 master plan, with the FAA-approved [Airport Layout Plan]
17 ALP.” Response to Record Objection Filed by Schaefer 7. OAB also responds
18 that:

19 “The FAA-approved ALP was accepted by the [ODA] director.
20 This, along with discussion of the process to achieve FAA approval,
21 were added to the plan approved by Board and published in final
22 form in December 2012, *i.e.*, the Aurora State Airport Master Plan
23 Update (2012) which is provided in the Record at 4022-4240.
24 Therefore, the final Master Plan includes the Master Plan that was
25 before and approved by the Board on October 27, 2011, along with
26 these additional materials. There is no separate ‘October 27, 2011’

1 Master Plan.” Consolidated Sur-Response 5.
2 Accordingly, we understand OAB to argue that the version of the Airport
3 Master Plan included in the record at Supplemental Record 4022-4917 includes
4 both of the runway alternatives that were included in the version of the Airport
5 Master Plan that the OAB adopted on October 27, 2011. Petitioners have not
6 challenged OAB’s response or otherwise explained why the version of the
7 Airport Master Plan included in the record does not include the version that the
8 OAB adopted on October 27, 2011. We agree with OAB that the record
9 includes the version of the Airport Master Plan that the OAB adopted on
10 October 27, 2011.

11 This objection is denied.

12 **2. 2009-2011 Proceedings Materials**

13 **a. PAC Materials**

14 As explained above, ODA formed a PAC that held a total of six meetings
15 prior to the OAB’s October 27, 2011 meeting. The record submitted by OAB
16 includes some materials that were part of the 2009-2011 PAC process. These
17 materials were submitted by various parties during the 2019 proceedings that
18 led to the adoption of the 2019 Findings.

19 In these objections, petitioners generally object that the record fails to
20 include all of the materials that were “placed before” the OAB during the
21 proceedings leading to the October 27, 2011 OAB decision to adopt the Airport

1 Master Plan.⁴ OAR 661-010-0025(1)(b). OAB and AAIA take a more
2 circumscribed view of the record.

3 AAIA and OAB respond first that except for the materials included in the
4 record already, the remainder of the materials petitioners seek to include in the
5 record were not “placed before” the OAB during the proceedings leading to the
6 2019 Findings and are therefore not properly included in the record. *Id.* We also
7 understand OAB and AAIA to argue that the two proceedings, one in 2011 and
8 the second in 2019, are not the same proceeding and accordingly the record of
9 the appealed decision (the 2019 Findings), does not automatically include
10 materials from the 2011 proceeding.

11 Defining the scope of a local government’s record in adopting a
12 legislative land use decision is frequently more difficult than defining the scope
13 of the record in a quasi-judicial land use decision making process. The

⁴ Although other petitioners do not provide any detailed description of the items from “2009 to 2011” that they think are properly included in the record, petitioner Schaefer argues that these materials include:

“[T]he respondents’ official copies of Planning Advisory Committee meeting materials, written comments from the interested parties, ODA staff and consultant reports and PowerPoint slides, agenda packets from [OAB] hearings and meetings on the Master Plan, the minutes and audio files of those meetings, and public notices both the meetings and the purported decision” and “[a]ll ODA Communications on this topic.” Schaefer Record Objection 5-6.

1 beginning point is generally easier to identify in the quasi-judicial context, and
2 the procedures for compiling the record tend to be better defined.

3 The term “placed before” in OAR 661-010-0025(1)(b) is a term of art,
4 and does not merely describe the act of setting documents in front of the
5 decision maker. *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 784-
6 85 (1999). That term may mean something different in the context of a
7 legislative decision versus a quasi-judicial decision. *Witham Parts and*
8 *Equipment Co. v. ODOT*, 42 Or LUBA 589, 593 (2002). In the absence of a
9 specific procedure governing the formation of the record in a legislative
10 decision making process, whether items are “placed before” the decision maker
11 in the context of a legislative decision turns on “whether the decision maker’s
12 conduct regarding those items is such that participants in the proceedings
13 should reasonably expect those items be included in the record.” *Id.* It also
14 turns on whether the decision maker’s conduct indicated that it considered the
15 items to be part of the record. *Naumes Properties LLC v. City of Central Point*,
16 45 Or LUBA 708, 710 (2003).

17 *Witham Parts* involved an appeal of an ODOT decision approving the
18 design of interchange improvements. In *Witham Parts*, we concluded that the
19 process ODOT employed to solicit public input and participation by a broad
20 range of interested parties, a process that was intended to satisfy a number of
21 overlapping state and federal requirements, meant that the entirety of an
22 environmental assessment prepared by ODOT as the culmination of that

1 process was “placed before” the ODOT decision maker and properly included
2 in the record. We based that conclusion on ODOT’s conduct maintaining the
3 documents included with the environmental assessment in such a manner so
4 that a reasonable person would expect those documents to be available to the
5 state and federal decision makers that must ultimately approve the project and
6 that they were in fact available to the final decision makers. *Id* at 595-96.

7 Like ODOT in *Witham Parts*, here, the OAB was required to satisfy
8 overlapping state and federal requirements that required stakeholder and public
9 participation in the adoption of an airport master plan.⁵ That tips in favor of a
10 conclusion that documents and materials related to the PAC, the OAB’s
11 designated method for satisfying public participation requirements, were
12 “placed before” the OAB. OAB’s conduct in (1) giving an update on the sixth
13 and final PAC meeting during the OAB’s October 27, 2011 meeting (Record
14 756-65), and (2) including as “PAC Meeting Summaries” as Appendix E

⁵ As we understand it, in 2011 the ODA and the OAB were a division of ODOT. The applicable ODOT SAC program at OAR 731-015-0065 required OAB to involve “DLCD and affected metropolitan planning organizations, cities, counties, state and federal agencies, special districts and other interested parties in the development or amendment of a facility plan.” OAR 731-015-0065(1).

The FAA also requires involvement of the public in developing an airport master plan. FAA Advisory Circular No. 150/5070-6B, Chapter 4, Public Involvement Program.

1 (Supplemental Record 4292-4455), to the Airport Master Plan, would lead a
2 reasonable person to believe that documents and materials generated by the
3 PAC were placed before the OAB.

4 We reject OAB's premise that the 2011 and 2019 proceedings are not the
5 same proceeding for purposes of determining the content of the record. The
6 2019 Findings take the position that the requirements of the SAC were met "in
7 2009-2013 when preparing and adopting the Master Plan." Supplemental
8 Record 4932. The 2019 Findings also describe "the extensive public process in
9 2009-2011" that included:

10 "six Planning Advisory Committee (PAC) meetings, which were
11 open to the public, five open houses, and regular updates to the
12 project website. The composition of the PAC, along with PAC
13 meeting summaries, can be found in Appendix E of the Master Plan.
14 Input on the preferred alternative can be found in Appendix K of the
15 Master Plan and a compilation of PAC comments can be found in
16 Appendix G of the Master Plan." Supplemental Record 4935.

17 Ultimately, however, we deny petitioners' broad objection that some
18 unidentified PAC materials are missing from the record. As noted, the Airport
19 Master Plan included in the record includes Appendix E, which contains over
20 150 pages of material that includes detailed summaries of all of the PAC
21 meetings, and comments from interested parties submitted at those meetings.
22 Supplemental Record 4292-4455. The Airport Master Plan also includes
23 Appendix G, which is a 33-page compilation of comments provided to the PAC
24 over the course of its meetings. Supplemental Record 4491-4523. Petitioners do

1 not acknowledge those documents in the record or otherwise explain what is
2 missing from those documents. Absent any acknowledgement from petitioners
3 regarding the inclusion of those materials, we think OAB has met its obligation
4 to include in the record materials related to or generated during the PAC
5 process.

6 **b. Other Materials**

7 With respect to other materials that petitioner Schaefer alleges must be
8 included in the record, including “the minutes and audio files of those meetings,
9 and public notices of both of the meetings and the purported decision,” from
10 2009-2011, we agree with petitioner Schaefer that those items are properly
11 included in the record.⁶ Schaefer Record Objection 5. To be sure, the eight year
12 lapse between OAB’s adoption of the Airport Master Plan and the adoption of
13 findings in support of its adoption of the Airport Master Plan may make it

⁶ OAR 661-010-0025(1)(c) and (d) provide in relevant part that the record includes:

“(c) Minutes and tape, CD, DVD or other media recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. * * *

“(d) 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.”

1 challenging for OAB to locate and provide those items.⁷ However, pursuant to
2 OAR 661-010-0025(1)(c) and (d), the record includes minutes and audio files
3 of the OAB meetings leading up to the adoption of the Airport Master Plan “as
4 required by law,” and includes notices of those meetings.

5 Petitioner Schaefer’s other objection is that the record fails to include
6 “ODA staff and consultant reports and PowerPoint slides, agenda packets from
7 [OAB] hearings and meetings on the Master Plan.” Schaefer Record Objection
8 5. However, petitioner Schaefer does not explain in any detail why LUBA
9 should conclude that these items actually exist, or identify with any precision
10 any meetings at which such items were placed before the OAB. Accordingly,
11 this part of the objection is denied.

12 These objections are sustained, in part.

13 **3. Wilsonville Chamber of Commerce Objection**

14 WCOC objects that a document that WCOC alleges was submitted at the
15 September 24, 2019 OAB hearing is missing from the record. OAB responds
16 that it has no record of the document WCOC claims was submitted into the
17 record. Absent reason to question OAB’s representation, LUBA defers to the

⁷ If OAB is unable to locate the missing items with reasonable investigative effort, then there is no remedy we can order for purposes of settling the record. *Hal’s Construction, Inc. v. Clackamas County*, 37 Or LUBA 1037, 1038 (2000); *Friends of Neabeack Hill v. City of Portland*, 29 Or LUBA 557, 557-58 (1995).

1 local government (or state agency, in this case) as custodian of the record. *Curl*
2 *v. City of Bend*, 55 Or LUBA 719, 725 (2008).

3 WCOC's objection is denied.

4 **CONCLUSION**

5 Within 21 days of the date of this order, OAB shall provide either (1) a
6 Third Supplemental Record that includes audio files, minutes and meeting
7 notices of OAB meetings held between 2009 and 2011 in connection with the
8 adoption of the Airport Master Plan, if those materials are locatable with
9 reasonable investigative effort by OAB; or (2) an affidavit describing its
10 ultimately unsuccessful efforts to locate those items.

11 Thereafter, the Board will issue an order settling the record and
12 establishing the briefing schedule.

13 Dated this 12th day of May 2020.

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Melissa M. Ryan
Board Member