

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

3
4 DEBRAH J. CURL and JERRY L. CURL,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF BEND,
10 *Respondent,*

11
12 and

13
14 CELLCO PARTNERSHIP,
15 DBA VERIZON WIRELESS,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2020-103

19
20 ORDER

21 **MOTION TO INTERVENE**

22 Cellco Partnership (intervenor), the applicant below, moves to intervene
23 on the side of the city. The motion is unopposed and is granted.

24 **RECORD OBJECTIONS**

25 The challenged decision is a hearings officer decision approving a
26 conditional use permit (CUP), site plan, and site plan alteration for a wireless
27 communication facility. On November 2, 2020, LUBA received the original
28 record in this appeal in an electronic format. On November 9, 2020, LUBA
29 received a courtesy copy of a November 6, 2020 letter from petitioners to the
30 city’s attorney. In the letter, petitioners state that they did not agree to service of

1 the record in an electronic format instead of a paper copy, which prior agreement
2 is required by our rule at OAR 661-010-0025(3)(b) in order for the city to serve
3 an electronic record on a party. Petitioners therefore requested that the city
4 provide them with a paper copy of the record.

5 On November 12, 2020, LUBA received an amended record in this appeal,
6 also in an electronic format. On November 30, 2020, the Board received
7 petitioners' objections to the amended record. On December 9, 2020, the city
8 filed a response to the record objections. On December 21, 2020, petitioners filed
9 a reply to the city's response to the record objections.

10 **FORMAT OF RECORD**

11 Petitioners have yet to receive a paper copy of the original record.¹
12 Petitioners argue that, because our rules do not state whether an “amendment to
13 the record” *supplements* an original record or *replaces* an original record, and
14 because the city did not explain its intentions in that respect in filing the amended
15 record, the city should be required to provide petitioners with a paper copy of the
16 original record so that petitioners can compare the two records to “determine if
17 the 100+ pages of additions and/or deletions made to the Amended Record were
18 appropriate or inappropriate.” Record Objections 3. The city does not respond to
19 petitioners' argument or otherwise explain the differences between the original
20 record and the amended record.

¹ Petitioners received the amended record in paper format.

1 We agree with petitioners. OAR 661-010-0025(3)(b) provides that “by
2 prior agreement of the party to be served, service of the record * * * may be in
3 an electronic format instead of a paper copy.” Petitioners did not agree to service
4 of the original record in electronic format, and are entitled to a paper copy of the
5 original record pursuant to OAR 661-010-0025(3)(a).

6 Within 14 days of the date of this order, the city shall either (1) provide
7 petitioners with a paper copy of the original record, or (2) provide the parties and
8 LUBA with a detailed explanation of all of the differences between the original
9 record and the amended record.

10 Because petitioners never received a service copy of the original record
11 transmittal, petitioners shall have 14 days from the date of service of the original
12 record or the detailed explanation described above to file any objections to the
13 original record. Any such objections shall comply with OAR 661-010-0026.

14 **RECORD OBJECTIONS**

15 **A. Resolved Objections**

16 **1. Improperly Omitted Items**

17 Petitioners argue that, while the minutes for the September 16, 2020 city
18 council meeting are included in the amended record, the amended record
19 improperly omits the public notice or agenda for the meeting. Petitioners also
20 argue that the amended record improperly omits the “Notice of Public Meeting
21 for PZ 20-0181 – Site Plan Alteration.” In addition, petitioners argue that the
22 amended record improperly omits the public notice of the hearings officer’s

1 decision and the list of parties who received such notice. Our rules provide that
2 the record must include “[n]otices of proposed action, public hearing and
3 adoption of a final decision, if any, published, posted or mailed during the course
4 of the land use proceeding, including affidavits of publication, posting or
5 mailing.” OAR 661-010-0025(1)(d).

6 The city responds that “[t]he parties were able to resolve” these objections.
7 With that response, we understand the city to concede that the omitted items
8 should be included in the record. These objections are sustained.

9 **2. Improperly Included Items**

10 The amended record includes a “Notice of Permit Decision” for project
11 number “PZ 20-0180 Conditional Use Permit.” Petitioners argue that, because
12 the hearings officer made one, consolidated decision on intervenor’s CUP, site
13 plan review, and site plan alteration applications, any public notice for the CUP
14 decision alone is improperly included in the record. In addition, the amended
15 record includes a completed but unsigned “Site Plan and Design Review
16 Application” for “New Development.” Petitioners argue that, because the
17 hearings officer’s decision concerns a “wireless communications facility,” any
18 application for “new development” is improperly included in the record. We
19 understand petitioners to argue that these items were “not included as part of the
20 record during the proceedings before the final decision maker.” OAR 661-010-
21 0026(2)(b).

1 The city responds that the parties were able to resolve these objections.
2 With that response, we understand the city to concede that these items are not
3 properly part of the record. Accordingly, these objections are sustained.

4 **3. Unpaginated Record Pages**

5 Petitioners argue that a number of pages in the amended record do not
6 include page numbers. Our rule provides that the record shall “[h]ave page
7 numbers consecutively, with the page number at the bottom outside corner of
8 each page.” OAR 661-010-0025(4)(a)(D). We note that the pages to which
9 petitioners refer are in fact numbered in the bottom right-hand corner of each
10 page. However, many of those page numbers are illegible because they are
11 printed over existing text or imagery or are small in comparison to the size of the
12 page on which they are printed. Nevertheless, the city responds that the parties
13 were able to resolve these objections, which we understand to mean that the city
14 concedes these objections and that the record should include clearer paginated
15 record pages. Accordingly, these objections are sustained.

16 **4. Inaccurate Table of Contents**

17 Item 6 in the table of contents for the amended record shows Item 6
18 beginning on page 87. Petitioners argue that Item 6 actually begins on page 14.
19 The table of contents also lists testimony that was emailed to the city. Petitioners
20 argue that the table of contents improperly identifies some of those authors using
21 the names indicated by their email addresses, rather than the names in the body
22 of the testimony, and that the table of contents omits some of these authors

1 entirely. In addition, Item 82 in the table of contents is titled “Verizon
2 Conditional Use Permit.” Petitioners argue that the title for Item 82 should be
3 changed to “Conditional Use Permit *Application*.”

4 The city responds that the parties were able to resolve these objections,
5 which we understand to mean that the city concedes these objections and will
6 correct the table of contents. Accordingly, these objections are sustained.

7 **B. Unresolved Objections**

8 **1. Objection 1A**

9 Petitioners object that the amended record improperly omits the public
10 notice for the hearings officer’s July 14, 2020 public hearing. The city responds
11 that no such document was published in the local newspaper of general
12 circulation and that the public notice was posted to the city’s website and mailed
13 to nearby property owners. Our rule at OAR 661-010-0025(1)(d) provides that
14 the record must include “[n]otices of proposed action, public hearing and
15 adoption of a final decision, if any, published, posted or mailed during the course
16 of the land use proceeding, including affidavits of publication, posting or
17 mailing.” Our rule does not provide that the record need only include public
18 notices that were published in newspapers of general circulation, and the city
19 does not explain why it was not required to include the public notice that was
20 mailed to nearby property owners. This objection is sustained.

1 **2. Objection 1B**

2 Petitioners object that the amended record improperly omits the list of
3 parties appearing at the hearings officer’s July 14, 2020 public hearing. The city
4 responds that, because the hearing was held virtually through a web-based
5 platform, no such document exists. The city points out that a recording of the
6 hearing is included in the amended record. The city is the custodian of the record.
7 Absent some reason to question its representation, which petitioners do not offer
8 here, we generally defer to the custodian of the record. *Curl v. City of Bend*, 55
9 Or LUBA 719, 725 (2008). This objection is denied.

10 **3. Objection 1D**

11 The minutes for the September 16, 2020 city council meeting state that
12 staff presented a “staff report” on whether the city council should hear an appeal
13 of the hearings officer’s decision. While petitioners acknowledge that the
14 amended record includes an “issue summary” for the same meeting, petitioners
15 argue that the amended record improperly omits the “staff report” referenced in
16 the minutes. The city responds that the “issue summary” *is* the “staff report”
17 referenced in the minutes. Petitioners offer no reason to question the city’s
18 representations. This objection is denied.

19 **4. Objection 1E**

20 Petitioners argue that, while the amended record includes the narratives for
21 intervenor’s CUP and site plan review applications, it improperly omits the
22 narrative for intervenor’s site plan alteration application. The city concedes this

1 objection and responds that the narrative is properly part of the record. This
2 objection is sustained.

3 **5. Objection 1I**

4 Petitioners argue that the amended record improperly omits intervenor’s
5 site plan alteration application form. The city responds that no such document
6 exists. Petitioners offer no reason to question the city’s representations. This
7 objection is denied.

8 **6. Objection 4B**

9 Item 7 in the table of contents for the amended record is titled “PZ20-0179
10 Hearings Officer Decision.” Petitioners argue that the title for Item 7 should be
11 changed to “Hearings Officer’s Consolidated Decision for PZ 20-0179, PZ 20-
12 0180, and PZ 20-0181.” The city responds that the title of the document is
13 accurate. While petitioners are correct that Item 7 is the hearings officer’s
14 consolidated decision in city file numbers PZ 20-0179 (site plan), PZ 20-0180
15 (CUP), and PZ 20-0181 (site plan alteration), we conclude that this portion of the
16 table of contents substantially complies with our rules and that petitioner has not
17 established that it renders the record unusable. *See Burness v. Douglas County*,
18 61 Or LUBA 530, 533 (2010) (explaining that record must be “organized in a
19 manner that is reasonably usable by the parties and the Board”). This record
20 objection is denied.

1 **CONCLUSION**

2 **A. Original Record**

3 Within 14 days of the date of this order, the city shall provide petitioners
4 with a paper copy of the original record or a detailed explanation of all of the
5 differences between the original record and the amended record.

6 **B. Replacement Record**

7 Some of the objections conceded or sustained above involve items
8 improperly included in the electronic record, while other objections involve items
9 improperly omitted from the record. Still others involve an inaccurate table of
10 contents and illegible pagination.

11 With an electronic record, there are no practical means for LUBA or the
12 parties to actually remove those items from their copies of the electronic record
13 or insert items into their copies of the electronic record, and in addition, the
14 original table of contents would continue to inaccurately list or fail to list those
15 items. Where the local government proposes to remove, replace or repaginate a
16 significant number of documents in an original electronic record, the far better
17 course is for the local government to submit a new, replacement electronic record
18 and a new, replacement table of contents that incorporates all the proposed
19 insertions, deletions and replacements, as well as consistent pagination, and that
20 completely replaces the original record. *Rogue Advocates v. Josephine County*,
21 ___ Or LUBA ___ (LUBA No. 2016-127, Order, Dec 13, 2017) (slip op at 3); *Harra*
22 *v. City of West Linn*, ___ Or LUBA ___ (LUBA No. 2017-074, Order, Sept 27,

1 2017) (slip op at 2). Such a replacement record, with a single revised table of
2 contents, is far more usable to the parties, LUBA and other review bodies than a
3 combination of a paper supplemental record with a flawed original electronic
4 record and an inaccurate original table of contents. As the name suggests, a
5 supplemental record is best limited to adding new items to the original record.

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:

8 (1) Includes:

- 9 (a) an accurate table of contents reflecting corrections to
10 Items 6 and 82 and correctly identifying the authors of
11 email testimony, and that is accurate in all other
12 respects;
- 13 (b) the public notice or agenda for the September 16, 2020
14 city council meeting, the “Notice of Public Meeting for
15 PZ 20-0181 – Site Plan Alteration;”
- 16 (c) the public notice of the hearings officer’s decision and
17 the list of parties who received such notice;
- 18 (d) the public notice for the hearings officer’s July 14,
19 2020 public hearing, and the narrative for intervenor’s
20 site plan alteration application;
- 21 (e) legible page numbers throughout; and
- 22 (f) the narrative for intervenor’s site plan alteration
23 application.

24 (2) Omits:

- 25 (a) the “Notice of Permit Decision” for project number
26 “PZ 20-0180 Conditional Use Permit;” and

1 (b) the “Site Plan and Design Review Application” for
2 “New Development.”²

3 The Board also wishes to emphasize the parties’ continuing obligation to
4 attempt to resolve objections to the record. OAR 661-010-0026(2) imposes the
5 expectation, if not the obligation, that parties will continue good faith efforts to
6 resolve objections even if it is deemed necessary to file objections with LUBA as
7 a precaution or to preserve the right to object. *See Sommer v. City of Cave*
8 *Junction*, 55 Or LUBA 665, 667 (2007) (the obligation to attempt to resolve
9 record objections is an ongoing obligation that does not cease when one party
10 files record objections or the period for filing expires).

11 Dated this 29th day of January 2021.
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16 _____
17 Melissa M. Ryan
Board Member

² The city shall serve petitioners with a copy of the replacement record in paper format unless, prior to service of the replacement record, petitioners agree to service of the replacement record in electronic format.