

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

3
4 JOSEPH SCHAEFER,
5 *Petitioner,*

6
7 vs.

8
9 MARION COUNTY,
10 *Respondent,*

11 and

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13
14 TLM HOLDINGS LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2020-108

18
19 ORDER

20 The challenged decision is a board of county commissioners decision
21 approving (1) exceptions to Statewide Planning Goal 3 (Agricultural Lands) and
22 Statewide Planning Goal 14 (Urbanization), (2) a comprehensive plan map
23 amendment from Primary Agriculture to Public and Semi-Public, (3) a zoning
24 map amendment from Exclusive Farm Use to Public, and (4) a conditional use
25 permit, to establish airport-related uses on a 16.54-acre parcel. In February 2019,
26 intervenor-respondent (intervenor) applied for the exceptions, comprehensive
27 plan and zoning map amendments, and conditional use permit. The county
28 hearings officer held a public hearing on March 27, 2019. On November 19,
29 2019, the hearings officer recommended that the board of county commissioners
30 approve the application, with certain modifications and conditions. The board of

1 county commissioners held public hearings on June 3, 2020, and June 24, 2020.
2 On October 21, 2020, the board of county commissioners approved the
3 application with conditions.

4 **RECORD OBJECTIONS**

5 LUBA received the record in this appeal on December 30, 2020. On
6 January 13, 2021, LUBA received petitioner’s record objections. On January 22,
7 2021, the county filed a response to petitioner’s record objections.

8 **A. Searchability**

9 The record was transmitted to LUBA in electronic format. Petitioner
10 objects that the electronic record is not searchable, as required by our rules at
11 OAR 661-010-0025(2)(b). The county concedes this objection and offers to
12 transmit an amended record which is searchable. This objection is sustained.

13 **B. Table of Contents**

14 **1. Separate Exhibits**

15 The record table of contents describes each item in the record, identifies
16 the item’s author, and indicates whether exhibits are attached to that item (*e.g.*,
17 “Written testimony and Exhibits 1-23 from Miranda Bateschell, City of
18 Wilsonville to Marion County Board of Commissioners”). However, for some
19 items with exhibits, while the table of contents separately lists each exhibit (*e.g.*,
20 “Exhibit 1,” “Exhibit 2,” “Exhibit 3”) and indicates the page of the record where
21 each exhibit begins, it does not describe each exhibit. Petitioner argues that the
22 record table of contents must describe each separately listed exhibit. The county

1 responds that, while our rules require that each exhibit be separately *listed*, our
2 rules do not require that each exhibit be separately *described*.

3 OAR 661-010-0025(4)(a) provides, in relevant part:

4 “The record, including any supplements or amendments, shall:

5 “* * * * *

6 “(B) Begin with a table of contents, listing each item contained
7 therein, and the page of the record where the item begins.

8 “(i) Where an item listed in the table of contents includes
9 attached exhibits, the exhibits shall be separately listed
10 as an exhibit to the item.”

11 The county is correct that OAR 661-010-0025(4)(a)(B)(i) expressly
12 requires only that exhibits attached to items be separately “listed” and does not
13 expressly require that exhibits be separately described. However, OAR 661-010-
14 0025(4)(a)(B), which applies to the items themselves (*i.e.*, the documents to
15 which the exhibits are attached) also expressly requires only that items be
16 “list[ed]” and does not expressly require that items be separately described. The
17 county’s textual argument, taken to its logical conclusion, would mean that all
18 items in the record table of contents could be simply numbered, with no
19 description of their content.

20 We have interpreted our rules otherwise. As the county points out, “what
21 is essential in organizing and indexing the record is that the parties and LUBA
22 can identify and locate documents with reasonable effort.” *1000 Friends of*
23 *Oregon v. Clackamas County*, 45 Or LUBA 754, 755 (2003) (citing *D.S.*

1 *Parkland v. Metro*, 33 Or LUBA 848, 858 (1997)). To that end, we have
2 interpreted OAR 661-010-0025(4)(a)(B) and (B)(i) to require “a specific or
3 general description” of items and attachments “that is sufficient to allow the
4 parties and LUBA to identify and locate [them] with reasonable effort.”
5 *Fernandez v. City of Portland*, 72 Or LUBA 482, 485 (2015). Accordingly, we
6 disagree with the county that, as a general matter, exhibits need only be numbered
7 and need not be described.

8 However, we agree with the county that, in this case, petitioner has not
9 established that the table of contents must be amended in order for the parties to
10 be able to locate individual documents with reasonable effort. As the county
11 points out, each of the items to which the exhibits are attached contains an internal
12 list of the attachments. We have held that, while it is somewhat awkward, a record
13 table of contents need not necessarily be amended where an item or attachment
14 includes an internal table of contents or list of attachments to which the parties
15 and LUBA can refer. *Kane v. City of Beaverton*, 60 Or LUBA 497, 503 (2010);
16 *1000 Friends*, 45 Or LUBA 755. Here, petitioner has not demonstrated that the
17 lack of a description for each exhibit prevents the parties and LUBA from
18 locating individual documents with reasonable effort, given the list of
19 attachments in each item. Accordingly, this objection is denied.

20 **2. Separate Items**

21 The record table of contents describes the item at Record 727 to 784 as
22 “[w]ritten testimony, maps, documents from City of Aurora.” Petitioner argues

1 that the record table of contents must separately list and describe each document
2 within this item.

3 We agree with the county that, under the present circumstances, the fact
4 that the record table of contents does not separately list and describe each
5 document in this particular item does not prevent the parties and LUBA from
6 locating individual documents with reasonable effort. While some documents in
7 this item are clearly labeled and discrete, such as the transcript of the June 24,
8 2020 public hearing at Record 727 to 753, other documents are not clearly labeled
9 or their text begins mid-sentence. It is to some extent understandable that, absent
10 a more clear delineation of the documents comprising the item—for example,
11 through a cover letter describing each of them separately—the county was
12 hesitant to hazard a guess at describing each of the documents separately and
13 instead chose to combine all of them into one item. This objection is denied.

14 The record table of contents describes another item as a “[l]etter, list and
15 attached documents from Joseph Schaefer, City of Aurora to Marion County
16 Board of Commissioners.” Petitioner argues that the record table of contents must
17 separately list and describe each document in this item, as well. However, this
18 item appears to be a single document with an internal list of attachments. Those
19 attachments appear to be already separately listed and described in the record
20 table of contents at Record 885 to 4387. Accordingly, this objection is denied.

1 **C. Omitted Items**

2 **1. Oversize Panoramic Photograph**

3 OAR 661-010-0025(1)(b) provides that, unless LUBA otherwise orders or
4 the parties otherwise agree in writing, the record shall include “[a]ll written
5 testimony and all exhibits, maps, documents or other materials specifically
6 incorporated into the record or placed before, and not rejected by, the final
7 decision maker, during the course of the proceedings before the final decision
8 maker.” During the proceeding before the hearings officer, a participant emailed
9 an oversize panoramic photograph to a county planner and requested that the
10 photograph be included in the record. Petitioner objects that the record
11 improperly omits that photograph.

12 We stated the three most common ways to place documents before a
13 decision maker in *ONRC v. City of Oregon City*:

14 “Items are placed before the local decision maker if (1) they are
15 physically placed before the decision maker prior to the adoption of
16 the final decision; (2) they are submitted to the decision maker
17 through means specified in local regulations or through appropriate
18 means in response to a request by the decision maker for submittal
19 of additional evidence; or (3) local regulations require that the item
20 (*e.g.*, record of a lower level decision maker’s proceeding) be placed
21 before the decision maker.” 28 Or LUBA 775, 778 (1994).

22 The county responds that the photograph is not included in the list of exhibits
23 which were placed before the hearings officer and takes the position that the
24 photograph was not placed before the hearings officer. We agree with the county
25 that petitioner has not established that the photograph was placed before the

1 hearings officer. We have held that, in general, sending documents to local
2 government staff is not by itself sufficient to place those documents before a
3 decision maker. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or
4 LUBA 600, 601 (1995). However, sending documents to local government staff
5 might be sufficient to place those documents before a decision maker where local
6 regulations or public notices specifically require that documents be submitted
7 that way. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745,
8 754 (2005).

9 Here, the public notice for the March 27, 2019 public hearing provided an
10 email address to which items should be sent in order to submit documents into
11 the record. That email address is different from the one to which the photograph
12 was sent which, as noted, was a specific county planner’s email address. Record
13 6420-21. Petitioner identifies no local regulation which requires that documents
14 sent to individual planners are thereby submitted into the record, where public
15 notice provides a different email address through which participants can submit
16 documents into the record. Accordingly, petitioner has not demonstrated that the
17 photograph was placed before the hearings officer.¹

¹ Further, the county responds that, even if the photograph was placed before the hearings officer, it was not placed before the “final decision maker” which, in this case, was the board of county commissioners. Because we conclude the photograph was not placed before the hearings officer, we need not address that argument.

1 Petitioner also asserts that the photograph was discussed at the March 27,
2 2019 public hearing, “including questions about it from the hearings officer,” and
3 was thereby “specifically incorporated” into the record. OAR 661-010-
4 0025(1)(b); Record Objections 1. The county disagrees and notes that petitioner
5 does not identify with reference to the audio recording for the March 27, 2019
6 public hearing—which is included in the record—where the photograph was
7 discussed. Because petitioner does not identify with reference to the audio
8 recording of the March 27, 2019 public hearing where the photograph was
9 allegedly discussed, petitioner has not established that that discussion took place.

10 In addition, and more importantly, only the final decision maker can
11 “specifically incorporate” documents into the record by reference, within the
12 meaning of OAR 661-010-0025(1). *Bruce Packing Company, Inc. v. City of*
13 *Silverton*, 44 Or LUBA 836 (2003). The hearings officer was not the final
14 decision maker in this proceeding. This objection is denied.

15 **2. Hearings Officer Exhibits**

16 Petitioner argues that, while a list of the exhibits which were placed before
17 the hearings officer is included in the record, the record improperly omits the
18 exhibits themselves. The county responds that the exhibits are in fact included in
19 the record but, because they are arranged in inverse chronological order, as
20 required by our rules at OAR 661-010-0025(4)(a)(E), they do not appear
21 immediately after the list of exhibits. The county points out that each exhibit is
22 identified with an exhibit sticker and a number corresponding to its place in the

1 list. We agree with the county that LUBA and the parties will be able to locate
2 these exhibits with reasonable effort and that there is no need for the record to
3 include the exhibits twice. This objection is denied.

4 **D. Legibility**

5 During the proceeding before the board of commissioners, a participant
6 submitted a number of maps and related graphics into the record. That participant
7 offered to submit electronic copies of those documents. However, the county has
8 adopted a policy that all testimony exceeding 25 pages must be submitted in
9 paper form. As a result, the participant submitted paper copies of the documents.

10 Petitioner objects that many of those documents as reproduced in the
11 record are illegible. Petitioner asserts that, while the paper copies submitted by
12 the participant were legible, they became illegible when the county scanned them
13 in order to compile the electronic record that was transmitted to LUBA. Petitioner
14 argues that the illegible copies in the record should be substituted with the
15 allegedly legible copies that the participant offered to submit electronically and
16 which are apparently in petitioner's possession.

17 The county responds that the documents in the record are faithful
18 reproductions of the paper copies submitted by the participant, that the reason
19 they are illegible is because the paper copies contained very small print which
20 was itself illegible, and that substituting the illegible copies in the record with
21 what petitioner asserts are legible copies of the same documents would be
22 improper because the *illegible* copies were "placed before, and not rejected by,

1 the final decision maker, during the course of the proceedings before the final
2 decision maker,” and are therefore required to be included in the record. OAR
3 661-010-0025(1)(b).

4 Petitioner has given us no reason to question the county’s representation
5 that the record is a faithful reproduction of the paper copies submitted by the
6 participant. We also agree with the county that, because the electronic copies that
7 the participant offered to submit were not actually “placed before, and not
8 rejected by, the final decision maker,” they are not properly part of the record and
9 may not be substituted for the illegible copies. This objection is denied.

10 **CONCLUSION**

11 Within 14 days of the date of this order, the county shall transmit to LUBA
12 and petitioner an amended record that is searchable. After LUBA receives the
13 amended, searchable record, the Board will issue an order settling the record and
14 establishing a briefing schedule.

15 Dated this 12th day of March 2021.

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Melissa M. Ryan
Board Member