

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WESTERN STATES DEVELOPMENT
5 CORPORATION, INC.,

6 *Petitioner,*

7
8 vs.

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10 MULTNOMAH COUNTY,

11 *Respondent,*

12 and

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15 ARNOLD ROCHLIN and CHRISTOPHER FOSTER,

16 *Intervenors-Respondent.*

17
18 LUBA No. 99-108

19 ORDER ON OBJECTIONS TO RECORD

20 Petitioner filed a precautionary, three-part objection to the record. The first objection
21 was later withdrawn. We address the remaining two objections.

22 Petitioner first objects that the minutes of the June 10 and June 17, 1999 local
23 hearings in this matter “are defective because they do not accurately reflect the proceedings.”
24 Petitioner’s Precautionary Objections to the Record and Motion to Supplement the Record 2.
25 Petitioner explains that the minutes are short, and the hearings were long, and “[t]herefore it
26 is essential that either a tape or a full transcript of the hearing be included in the record, so
27 that LUBA, Petitioner, and Respondents can accurately refer to what occurred at the
28 hearing[s].” *Id.*

29 Petitioner’s argument that the minutes are too short to accurately reflect the hearings
30 is insufficient to “demonstrate with particularity how the minutes * * * are defective [or]
31 explain with particularity why the defect is material.” OAR 661-010-0026(3). Therefore,
32 petitioner’s objection to the adequacy of the minutes is denied. However, the record does
33 include tapes of the June 10 and June 17, 1999 local hearings, and petitioner may prepare its

1 own transcript of the hearings and attach those transcripts to its brief. *Hammack &*
2 *Associates, Inc. v. Washington County*, 16 Or LUBA 75, 99 n 2, *aff'd* 89 Or App 40 (1987).

3 Petitioner's second objection is that the record should include a June 8, 1999 letter
4 from petitioner's attorney to the county's attorney. Petitioner complains that the board of
5 commissioners was given other letters from petitioner's attorney to the county's attorney and
6 that the June 8, 1999 letter either was also given to the board of commissioners, or should
7 have been. In the event the June 8, 1999 letter was not placed before the board of
8 commissioners, petitioner moves to supplement the record with the June 8, 1999 letter.

9 As intervenors-respondent point out, the notice that was sent out prior to the June 10,
10 1999 hearing explains:

11 "To comment on this proposal, you may write to or call the Planning Division
12 or attend and speak at the hearing. All interested parties may appeal and
13 testify or submit written comment to the Board [of Commissioners]." Record
14 138.

15 Although it could be clearer, we agree with intervenors-respondent that the above notice is
16 sufficient to explain that written material may be submitted to the board of commissioners at
17 the hearing or to the Planning Division before the hearing. Intervenors-respondent also note
18 that petitioner's attorney utilized the procedure outlined in the notice when it forwarded
19 documents to the Planning Division in advance of the hearings and requested that they be
20 included in the record. Record 55.

21 The June 8, 1999 letter was not sent to the Planning Division and does not include a
22 request that the county attorney include the letter as part of the record or provide a copy of
23 the letter to the board of county commissioners. We understand the county to argue that the
24 June 8, 1999 letter was not provided to the board of commissioners.

25 The three ways documents typically become part of a local record are described in
26 *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 600, 601 (1995):

27 "* * * With the exception of the challenged decision itself, the minutes and
28 tapes of the proceedings below, and the notices of local government hearings

1 and decisions, an item becomes part of the record in one or more of three
2 ways. First, it can be physically placed before (and not rejected by) the
3 decision maker prior to the adoption of the final decision (the first way).
4 Second, it can be submitted to the decision maker through means specified in
5 local regulations or through appropriate means in response to a request by the
6 decision maker for submittal of additional evidence (the second way) Third,
7 local regulations can require that the item be placed before the decision maker
8 (the third way). *ONRC v. City of Oregon City*, 28 Or LUBA 775, 778,
9 (1994).”

10 The June 8, 1999 letter was not placed before the board of commissioners. Neither
11 was the letter submitted for inclusion in the record through a means specified by the county
12 during the proceedings. Finally, the county’s land use regulations do not make
13 communications between parties and the county’s attorney part of the record as a matter of
14 law. Therefore, it is proper that the June 8, 1999 letter is not included in the record.

15 We reject petitioner’s suggestion that the June 8, 1999 letter should be included in the
16 record simply because other letters exchanged by petitioner’s and the county’s attorney were
17 provided to the board of commissioners. Record 123-26. The county’s attorney’s decision to
18 provide those letters to the board of commissioners is not sufficient to establish a common
19 practice of including letters to the county’s attorney in the record. Neither does the county’s
20 attorney’s decision to forward some letters to the board of commissioners create a reasonable
21 expectation on the part of petitioner that all letters that are sent to the county’s attorney
22 would be provided to the board of commissioners.

23 In *Wade v. Lane County*, 20 Or LUBA 499 (1990), we concluded that delivery of
24 letters to the county attorney was sufficient, in the circumstances presented in that case, to
25 include the letters in the local record. However, the circumstances in *Wade* were quite
26 different. In *Wade*, the county had not explained how to submit documents for the record; in
27 this appeal the county’s notice of hearing does so. In *Wade*, the petitioners’ attorney had
28 requested information from the county on how to submit documents for the record and had
29 received no answer from the county. *Id.* at 500. No such exchange is alleged to have
30 occurred in this appeal. In *Wade*, the petitioners’ attorney sent the disputed letter to the

1 county's attorney, specifically asked that the letter be included in the record, and again asked
2 for information concerning how the record was being compiled. *Id.* at 503. In this case,
3 petitioner's attorney's letter makes no such requests.

4 Petitioner's objection concerning the June 8, 1999 letter and its motion to supplement
5 the record with that letter is denied.

6 The record shall be considered settled as of the date of this order. OAR 661-010-
7 0026. The petition for review shall be due 21 days from the date of this order. The response
8 briefs shall be due 42 days from the date of this order.

9 Dated this 17th day of November, 1999.

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Michael A. Holstun
Board Chair