

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

3  
4                                 DAVID BOGAN and  
5   SARAH BOGAN,  
6   *Petitioners,*

7  
8   vs.

9  
10   COOS COUNTY,  
11   *Respondent.*

12  
13   LUBA No. 99-177

14                                 ORDER ON OBJECTIONS TO THE RECORD

15                 On December 16, 1999, petitioners filed a precautionary record objection.<sup>1</sup> On  
16 December 23, 1999, the county responded by letter to that precautionary record objection.  
17 On December 27, 1999, petitioners filed with LUBA a response to the county’s December  
18 23, 1999 letter. Two more letters from the county, dated January 31, 2000, and February 4,  
19 2000, set out the parties’ unsuccessful efforts to resolve all of the objections noted in the  
20 December 16, 1999 precautionary record objection.

21                 Petitioners now withdraw two of the four objections noted in the December 16, 1999  
22 precautionary record objection and request that the other two objections be resolved in their  
23 favor. We address those objections separately below.

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<sup>1</sup>OAR 661-010-0026 provides in part:

- “(1) Before filing an objection to the record, a party shall attempt to resolve the matter with the governing body's legal counsel. The objecting party shall include a statement of compliance with this section at the same time the objection is filed. The Board may deny any objection to the record that does not comply with this rule.
- “(2) An objection to the record or an objection to an amendment or supplement to the record shall be filed with the Board within 14 days of the date appearing on the notice of record transmittal sent to the parties by the Board. A party may file a *precautionary record objection* while continuing to resolve objections with the governing body's legal counsel. \* \* \*” (Emphasis added.)

1           **A.     Original Photographs**

2           Petitioners object that the photographs at pages 78-82 of the record are black and  
3 white photocopies of the color photographs that were submitted by petitioners during the  
4 proceedings below. Petitioners argue that the record should be supplemented to include the  
5 color originals. Petitioners state that if the county no longer has those color photographs,  
6 petitioners can supply additional copies.

7           Respondent explains that the record that was filed with LUBA includes the color  
8 photographs and that the copy of that record that was served on petitioners includes black  
9 and white copies of those color photographs. Respondent is correct. The record filed with  
10 LUBA does include color photographs at pages 78-82 of the record. We do not understand  
11 petitioners to dispute that fact. Accordingly, petitioners’ first record objection is denied.

12           **B.     Documents in the Official Planning Department File**

13           Under OAR 661-010-0025(1)(b) the record must include all “documents or other  
14 written materials \* \* \* placed before, and not rejected by, the final decision maker, during  
15 the course of the proceedings before the final decision maker.” OAR 661-010-0025(1)(b)  
16 codifies this Board’s longstanding practice of requiring that such documents be included in  
17 the local record. *Bloomer v. Baker County*, 19 Or LUBA 482 (1990).

18           Under this objection, petitioners argue that nine letters were physically present before  
19 the decision maker in this matter because they were included in the official planning  
20 department files and those files were placed before the decision maker.<sup>2</sup> We do not

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<sup>2</sup>According to petitioners, these letters include:

- “a.     One page April 9, 1999 letter from Brandon Beams to Michael C. Robinson.
- “b.     Five page April 16, 1999 letter from Michael C. Robinson to Brandon Beams.
- “c.     One page April 21, 1999 letter from Brandon Beams to Michael C. Robinson.
- “d.     Three page May 7, 1999 letter from Michael C. Robinson to Brandon Beams.

1 understand the county to dispute that the cited letters were included in the official planning  
2 department files or that those planning department files were physically present in the room  
3 where the decision makers rendered the challenged decision. However, the county does  
4 dispute that those official planning department files were “placed before” the decision maker  
5 so as to make the letters part of the record in this matter.

6 In general, the procedures that are followed in local government quasi-judicial land  
7 use proceedings are much less formal than the procedures that are observed in judicial  
8 proceedings. *See Boldt v. Clackamas County*, 107 Or App 619, 623-24, 813 P2d 1078 (1991)  
9 (comparing “raise it or waive it” rule in local land use hearings with judicial preservation  
10 concepts). The procedures for submitting documents for the record during local quasi-  
11 judicial proceedings are no exception. In *Home Depot, Inc. v. City of Portland*, \_\_\_ Or  
12 LUBA \_\_\_ (LUBA No. 99-078, Order on Record Objections, July 29, 1999) slip op 2-3, we  
13 discussed the difficulty of determining whether particular actions during local land use  
14 proceedings are sufficient to place documents before the local decision maker:

15 “Determining whether documents have been ‘placed before’ the final decision  
16 maker for purposes of OAR 661-010-0025(1)(b) is often problematic. *Wicks*  
17 *v. City of Reedsport*, 28 Or LUBA 739, 740 (1994). The term ‘placed before’  
18 is a term of art, and describe[s] conduct that is not limited to the act of setting  
19 documents on the desk in front of the final decision maker. *See e.g. DeShazer*  
20 *v. Columbia County*, 30 Or LUBA 472, 473 (1996) (documents discussed at  
21 the hearing, and that the secretary to the board of commissioners indicated she  
22 would copy for the board, are ‘placed before’ the decision maker);

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“e. Two page May 7 1999 letter to Tracy Cordes from Michael C. Robinson with carbon copy to Ms. Patty Evernden.

“f. One page May 10, 1999 letter from Patty Evernden to Michael C. Robinson regarding completeness of application.

“g. Two page May 13, 1999 letter from Michael C. Robinson to Carol Parker with enclosures.

“h. One page May 20, 1999 letter from Carol Parker to Michael C. Robinson with notation of ‘c’ to file regarding completeness of application.

“i. One page August 17, 1999 letter from Michael C. Robinson to Patty Evernden.”  
Precautionary Record Objection 2-3.

1           *Redland/Viola Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 645,  
2           647 (1994) (wetland maps displayed during the hearing and discussed in the  
3           testimony of planning staff were ‘placed before’ the decision maker); *Veatch*  
4           *v. Wasco County*, 23 Or LUBA 676, 677 (1992) (documents that the county  
5           court ‘took notice of’ were properly part of the record, even though not placed  
6           before the court). *In the absence of established procedures governing how*  
7           *items are submitted into the record before the final decision maker, whether*  
8           *items in the planning file are ‘placed before’ the decision maker within the*  
9           *meaning of OAR 661-010-0025(1)(b) turns on whether the decision maker's*  
10           *conduct, or acquiescence in the conduct of staff, regarding those items is such*  
11           *that participants in the proceedings reasonably should expect that those items*  
12           *are part of the local evidentiary record. \* \* \** (Emphasis added.)

13           In our order reconsidering our July 29, 1999 order in Home Depot, we further  
14           explained that

15           “a planning file does not become part of the local record simply because it is  
16           physically present and visible. Something more must be done to place it  
17           before the decision maker.” *Home Depot, Inc. v. City of Portland*, \_\_\_ Or  
18           LUBA \_\_\_ (LUBA No. 99-078, Order on Reconsideration, December 1,  
19           1999) (*Home Depot II*) slip op 3.

20           We also cautioned that “[w]here a party alleges that certain documents were not ‘placed  
21           before’ the decision maker, the proponent of [inclusion of those documents] bears some  
22           burden to support its contention to the contrary.” *Id.* at slip op 2. We turn to petitioners’  
23           arguments that the “something more” that is required under *Home Depot II* to make the  
24           official planning department files part of the record occurred here.

25           Petitioners argue:

26           “‘In this case, [LUBA] should find that the planning department’s files  
27           containing the letters were physically before the decision maker[.] \* \* \*  
28           Petitioners’ affidavit shows that Petitioners’ attorney expressly asked the  
29           Assistant Planning Director, who was in possession of the files, whether they  
30           were the official planning department files and whether they contained all  
31           documents related to this appeal. The Assistant Planning Director told the  
32           Petitioners’ attorney ‘yes’. (Affidavit of Michael Robinson, paragraph 3).  
33           Respondent does not dispute the affidavit.” Petitioners’ Response to  
34           Respondent’s Response to Precautionary Record Objection 4.

35           No one has called our attention to any established procedures that govern how the  
36           county allows documents to be submitted into the record. Therefore the test that this Board

1 applies under *Home Depot II* is whether the conduct of staff and the decision maker could  
2 reasonably lead petitioners' attorney to believe that the documents included in the planning  
3 department's official file were being included as part of the local record. Although it is a  
4 close question, we conclude that the above-described exchange was such that petitioners'  
5 attorney could reasonably expect that the documents in the official planning department files  
6 are part of the record in this matter. The issue would have been resolved beyond all doubt  
7 had petitioners' attorney specifically asked that the files be included in the record and  
8 received the same response. Nevertheless, we conclude that a request that the files be  
9 included in the record can be inferred from the exchange.

10 Petitioners' second record objection is sustained.

11 The county shall file a supplemental record including the nine letters identified at n 2.  
12 The Board will issue an order settling the record after that supplemental record is received.

13 Dated this 18<sup>th</sup> day of February, 2000.

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Michael A. Holstun  
Board Member