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

OREGON DEPARTMENT OF TRANSPORTATION,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 99-183

GLENWOOD STAR INC. and DENNY’S INC.,
Petitioners,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 99-185

LAUREL HILL VALLEY CITIZENS ASSOCIATION,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 99-186

ORDER ON RECORD OBJECTIONS

Petitioner Laurel Hill Valley Citizens Association (LHVCA) and petitioner Oregon Department of Transportation (ODOT) separately filed objections to the record submitted by the city in this consolidated appeal. Petitioner LHVCA and the city separately notified the Board that they are working to resolve LHVCA’s objection. We therefore limit our consideration in this order to ODOT’s record objections.

The record in an appeal to LUBA is limited to the evidence that was before the local

1 decision maker when it rendered the decision challenged in the appeal. It is the petitioner's
2 burden to establish that disputed items were placed before the local decision maker.¹ *Weeks*
3 *v. City of Tillamook*, 23 Or LUBA 662, 662-63 (1992).

4 Pursuant to OAR 661-010-0026(2)(a), ODOT objects that the record filed by the city
5 does not contain all of the items included as part of the record during the proceedings before
6 the city.² ODOT identifies the following three items as being omitted from the record:

7 “1. Written testimony submitted by Mr. Erik Havig, Professional Engineer
8 with ODOT on October 19, 1999 to the Eugene Planning Commission
9 at the public hearing.

10 “2. The complete letter submitted by Ms. Kathryn Lincoln, Assistant
11 Attorney General on October 19, 1999 at the public hearing before the
12 Eugene Planning Commission. Pages 5 and 6 have been eliminated
13 and are not in the Record.

14 “3. The complete letter submitted by Ms. Kathryn Lincoln, Assistant
15 Attorney General on October 20, 1999 addressed to the Eugene
16 Planning Commission. Portions of page 3 and pages 4 and 5 have
17 been eliminated.” ODOT Record Objection 2.

¹ OAR 661-010-0025 provides in part:

“(1) Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

“* * * * *

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

²OAR 661-010-0026 provides in part:

“(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. Objections may be made on the following grounds:

“(a) The record does not include all materials included as part of the record during the proceedings before the final decision maker. The omitted item(s) shall be specified, as well as the basis for the claim that the item(s) are part of the record.”

1 **HAVIG DOCUMENT**

2 Petitioner argues that Mr. Havig distributed the document at issue to the planning
3 commission at the October 19, 1999 public hearing. Petitioner argues that the planning
4 commission did not reject this document, and it should be included in the record.

5 “* * * After some discussion, Ms. Childs, the Planning Director, ‘indicated
6 that she would take the letter under advisement and provide further direction
7 to the Commission at its October 25 meeting.’ (Record at 329). The minutes
8 from the October 25 meeting state that Ms. Beery, counsel to the City of
9 Eugene, identified four items that were not in the record. (Record at 120).
10 The four items identified do not include the Havig document. Further, Ms.
11 Childs, who is reported to have attended the October 25 meeting, did not
12 report back to the commission regarding the admissibility of this document at
13 that meeting. (Record at 120-128). Further, neither Ms. Levis, the president
14 of the Planning Commission nor any member of the Planning Commission
15 moved to reject the document at that meeting or in the subsequent meetings on
16 October 26, November 1 and 15, 1999, prior to making the final decision.
17 (Record at 76-77, 85-88, 97-113, 120-133).” ODOT Record Objection 3.

18 The city responds that: (1) petitioner has failed to establish that the Havig document
19 was “placed before” the final decision maker; (2) the Havig document was “rejected by” the
20 planning commission; and (3) petitioner failed to satisfy city code provisions that require that
21 issues and evidence be part of the record before the hearings official.

22 The minutes of the planning commission meeting state:

23 “At this point, ODOT staff distributed a letter from Mr. Havig to the
24 commission responding to the traffic impact study submitted by the applicant.
25 [Commissioner] Bishow asked Mr. Havig to confirm that the evidence in the
26 letter was already in the record since it appeared to be new analysis.
27 [Planning staff] Childs indicated that she would take the letter under
28 advisement and provide further direction to the commission at its October 25
29 meeting.

30 “Responding to a question from [presiding commissioner] Levis, Mr. Havig
31 indicated his intent was to address errors in the applicant’s traffic analysis on
32 page I-227 of the public record. [Commissioner] Bishow asked if ODOT’s
33 analysis of that traffic analysis was on the record. Mr. Havig believed it was.
34 Continuing, he said that the study did not identify the impact from the
35 development on the transportation study. It could not, because the study was
36 flawed; the consultant did not address the preapproved RAM development
37 site, and the study addressed only phases 1, 2, and 3 of the development. At
38 this point, Mr. Havig was interrupted by [presiding commissioner] Levis, who

1 indicated that the testimony being offered by ODOT was not directed toward
2 the record. She said that legal counsel would review the materials previously
3 submitted by ODOT and its relationship to the information being submitted to
4 ensure that the material was not new to the record. The commission agreed
5 that it would not hear Mr. Havig's testimony as it was not available to the
6 Hearings Official." Record 329.

7 We agree with respondent that the planning commission specifically rejected the
8 Havig document. Eugene Code (EC) 2.399(2) provides that the presiding commissioner has
9 discretion to refuse evidence that the presiding commissioner deems to be incompetent or
10 irrelevant, subject to a vote of the other participating commissioners.³ The minutes quoted
11 above indicate that the presiding commissioner rejected Havig's testimony, and the other
12 commissioners agreed. Under EC 2.399(2), the actions of the presiding commissioner and
13 the commission constitute a rejection of the Havig document and oral testimony.

14 Petitioner's first objection to the record is denied.⁴

15 **LINCOLN DOCUMENTS**

16 The city included portions of two documents that ODOT's attorney (Lincoln
17 documents) submitted for the record. Record 167-178. The document at Record 171 to 178
18 is ODOT's legal argument to the planning commission on October 19, 1999. The document
19 at Record 167-170 is a letter submitted October 20, 1999, before the close of the record.
20 Portions of those documents are deleted. The deleted portion of the October 20, 1999
21 document bears a notice that

22 "Due to the content of the material, the remaining portion of page 3 along
23 with pages 4 and 5 are not being provided to the Planning Commission. The
24 commission may only consider issues raised previously, issues identified in

³ EC 2.399(2) provides in part:

"* * * The presiding officer may in his or her discretion, subject only to a majority vote of the members of the hearing body participating, refuse any evidence which, in his or her judgment, is incompetent or irrelevant."

⁴ We express no view whether the city correctly rejected the Havig document, only that the city's actions were sufficient to reject Mr. Havig's request that it be included in the record.

1 the appeal statement, and evidence submitted to the Hearings Official.”
2 Record 169.

3 The deleted portion of the October 19, 1999 document also bears a notice:

4 “Due to the content of the material, portion of page 5 and a portion of page 6
5 are not being provided to the Planning Commission.” Record 175 and 176.

6 Petitioner argues that both documents were actually placed before and not specifically
7 rejected by the decision maker during the local proceeding and for that reason they should be
8 included in the record. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 23 Or
9 LUBA 723, 724-25 (1992). Petitioner argues that EC 2.399 requires the presiding
10 commissioner, with a majority vote of the commissioners present, to take action to exclude
11 testimony. Petitioner reasons that because the planning commission did not specifically
12 reject the Lincoln documents, in whole or in part, they must be included in the record in their
13 entirety. Petitioner argues that the record does not indicate who determined that the material
14 should not be given to the planning commission. Petitioner contends that under EC 2.399
15 only the planning commission could specifically reject the documents.

16 The city responds that petitioner has not proved the Lincoln documents were “placed
17 before” the decision maker. Alternatively, the city argues that the excluded portions of the
18 Lincoln documents rely on the same new evidence submitted in the Havig document that the
19 planning commission rejected. Because the planning commission excluded the Havig
20 document, the city argues that the Lincoln testimony based on the Havig document must also
21 be excluded. Finally, the city argues that petitioner failed to satisfy city code provisions
22 requiring issues and evidence to be part of the record before the hearings official.

23 It is reasonably clear from the record that both documents were submitted to the
24 planning commission, with the disputed pages included. The notices quoted above state that
25 the disputed pages were deleted from both letters *before* they were provided to the planning
26 commission, and the documents, without the disputed pages, are included in the record. We
27 therefore assume that petitioner did whatever is required by the city to place those documents

1 in the hands of the city staff person who forwards evidence to the planning commission.
2 That is sufficient to place the documents before the final decision maker, within the meaning
3 of OAR 661-010-0025(1)(b). *See* n 1. The only remaining question is whether the city in
4 fact “specifically rejected” the disputed pages as part of the record, within the meaning of
5 OAR 661-010-0025(1)(b).⁵

6 The disputed documents were presented to the planning commission. Under
7 OAR 661-010-0025(1)(b), it is the *planning commission* as the final decision maker that must
8 “specifically reject” evidence that is placed before the city during local hearings. As relevant
9 in this appeal, EC 2.399(2) is consistent with OAR 661-010-0025(1)(b). The identity of the
10 person who wrote the notes that are included at Record 169, 175 and 176 is not disclosed, but
11 from the content of the notes themselves it is clear that it was not the planning commission
12 that specifically rejected the disputed pages. The action of deleting and not providing the
13 disputed pages to the planning commission was not sufficient to “specifically reject” those
14 pages as part of the record, within the meaning of OAR 661-010-0025(1)(b).

15 Finally, we reject the city’s assertion that the planning commission’s rejection of the
16 Havig document was also sufficient to reject the Lincoln documents. The city confuses the
17 issue of whether the planning commission *could have rejected* the Lincoln documents with
18 the issue of whether it *did reject* the Lincoln documents.

19 Petitioner’s objection concerning the disputed pages in the October 19 and October
20 20, 1999 documents is sustained. The city shall submit a supplemental record that includes
21 the complete October 19 and October 20, 1999 documents. Upon receipt of that
22 supplemental record and resolution of LHVCA’s record objections, the Board will issue an
23 order settling the record in this matter.

24 Dated this 29th day of March, 2000.

⁵In this order we need not and do not consider whether the city may have had a proper basis for rejecting the letters or, if so, whether city procedures for rejecting offered evidence were followed in this matter. If these other issues are relevant, they may be addressed in the briefs on the merits.

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Michael A. Holstun
Board Member