

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NELL LANGE-LUTTIG, THOMAS MARSAL
5 and WALTON R. FISHER,
6 *Petitioners,*

7
8 and

9
10 HENRY KANE,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 CITY OF BEAVERTON,
16 *Respondent.*

17
18 LUBA No. 2000-045

19 ORDER ON RECORD OBJECTIONS

20 Before us are intervenor-petitioner Kane's (intervenor) objections to the record filed
21 by the city. As an initial point, intervenor argues that, in reviewing his objections to the
22 record, we should be guided by the Oregon Supreme Court's decision in *Sizemore v. Myers*,
23 327 Or 71, 957 P2d 577 (1998), where the court dismissed the petitioner's challenge to a
24 ballot measure because it was not filed within the time period specified by statute. Intervenor
25 argues that, in light of this case, we should revisit our policy to accept records despite some
26 errors in the format and organization. Intervenor asserts that the holding in *Sizemore* clearly
27 requires that we strictly adhere to our rules governing the format and content of the record.

28 The deadline in *Sizemore* was established in ORS 250.085(4). Likewise, when
29 statutes governing LUBA's activities establish a deadline, we strictly adhere to them. *See*,
30 *e.g.*, ORS 197.830(3), (4) and (8) (establishing the deadlines for filing an appeal) and ORS
31 197.830(7) (establishing the deadline for filing a motion to intervene). In cases where
32 LUBA's *administrative rules* establish a deadline, we generally follow the policy set forth in
33 OAR 661-010-0005, which provides:

1 “These rules are intended to promote the speediest practicable review of land
2 use decisions and limited land use decisions, in accordance with ORS
3 197.805-197.855, while affording all interested persons reasonable notice and
4 opportunity to intervene, reasonable time to prepare and submit their cases,
5 and a full and fair hearing. The rules shall be interpreted to carry out these
6 objectives and to promote justice. Technical violations not affecting the
7 substantial rights of parties shall not interfere with the review of a land use
8 decision or limited land use decision. * * *”

9 OAR 661-010-0005 allows us the flexibility to determine whether, in the interests of
10 timely review and fairness to the parties, the parties in a particular situation would be better
11 served by permitting technical violations of our rules rather than delaying the appeal to
12 correct the technical violation. We will continue to follow our practice of determining on a
13 case-by-case basis, whether to require that technical violations of our rules be corrected.

14 We now turn to intervenor’s record objections.

15 **RECORD OBJECTIONS**

16 LUBA’s rule regarding the record in LUBA appeals is OAR 661-010-0025.¹
17 Intervenor lists six specific objections to the record. We address each in order.

¹OAR 661-010-0025 provides in relevant 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:
 - “(a) The final decision including any findings of fact and conclusions of law;
 - “(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.
 - “(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. * * *
 - “(d) Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed during the course of the land use proceeding, including affidavits of publication, posting or mailing. * * *

“* * * * *

- “(4) Specifications of Record:

1 **A. Record Cover (Objection 1)**

2 OAR 661-010-0025(4)(a)(A) requires that the cover of the record shall bear the title
3 of the case as it appears in the notice of intent to appeal and the Board’s numerical
4 designation for the case, and shall indicate the numerical designation given the land use
5 decision by the governing body. Intervenor argues that the city’s record cover does not
6 follow this format because it adds his name and designation as intervenor-petitioner just
7 below the names of the petitioners.

8 The city explains that it filed the record after intervenor filed his motion to intervene
9 on the side of petitioner, and it seems logical to include in the caption of the appeal all of the
10 parties and their alignments as they are known as of the time the record is filed. The city

-
- “(a) The record, including any supplements or amendments, shall:
 - “(A) Be filed in a suitable folder; the cover shall bear the title of the case as it appears in the Notice or in the Board’s order consolidating multiple appeals, and the Board’s numerical designation for the case, and shall indicate the numerical designation given the land use decision or limited land use decision by the governing body; if the record consists of multiple volumes, the cover shall indicate the page numbers contained in each volume;
 - “(B) Begin with a table of contents, listing each item contained therein, and the page of the record where the item begins (see Exhibit 2), and listing each large map, tape, item or document retained by the governing body under section (2) of this rule;
 - “(C) Be securely fastened on the left side;
 - “(D) Have pages numbered consecutively, with the page number at the bottom outside corner of each page;
 - “(E) Be arranged in inverse chronological order, with the most recent item first. Upon motion of the governing body, the Board may allow the record to be organized differently.
 - “(b) Where the record includes the record of a prior appeal to this Board, the table of contents shall specify the LUBA number of the prior appeal, and indicate that the record of the prior appeal is incorporated into the record of the current appeal.
 - “(c) A record which does not conform to the preceding requirements shall not be accepted by the Board.”

1 contends that no one is confused by the caption—it is clear which city decision is being
2 appealed, and which LUBA case number is assigned to the appeal.

3 If the addition of intervenor’s name to the caption of the record is a violation of
4 OAR 661-010-0025(1)(a), it is a technical violation that does not affect the substantial rights
5 of the parties.

6 Intervenor’s first record objection is denied.

7 **B. Table of Contents (Objection 2)**

8 OAR 661-010-0025(4)(a)(B) requires that “each item” in the record be listed in the
9 table of contents. Intervenor argues that the table of contents inadequately describes the
10 contents of Item 5 of the record.

11 The city agrees to submit a revised table of contents more completely describing the
12 contents of Item 5.

13 Because the city agrees to submit a more detailed table of contents, we sustain
14 intervenor’s second record objection.

15 **C. Inverse Chronological Order (Objections 3 and 4)**

16 Intervenor argues that the city violated OAR 661-010-0025(4)(a)(E), which requires
17 that items in the record be arranged in inverse chronological order. The documents are
18 arranged in the order in which they were received by the city council, rather than according
19 to the dates of the documents themselves. Further, intervenor contends that the minutes of the
20 city council were adopted after the meeting and, therefore, OAR 661-010-0025(4)(a)(E)
21 requires that the documents and evidence submitted during the appeal hearing should follow
22 the minutes in the record.

23 The city responds that the record is structured in such a way that a party is able to
24 understand where and how certain documents were presented to the city council and shows
25 how the issues underlying this case were developed and processed. The city contends that it
26 used the same format uniformly throughout the record, and that once the parties are familiar

1 with the structure and organization of the record, that format facilitates, rather than
2 complicates, review.

3 As we have stated before,

4 “The purpose of OAR 661-010-0025(4) is to facilitate review by requiring
5 that the record be arranged in a coherent order reflecting the chronological
6 progress of the application or proceedings. In the usual course of events,
7 document date and date of entry into the record will generally coincide,
8 allowing organization by document date to fulfill the purpose of OAR 661-
9 010-0025 to facilitate review. Our rule does not require that a local
10 government blindly apply a document date principle of organization when
11 doing so requires separation of documents that were submitted together.
12 Where document date and date of entry into the record conflict as
13 organizational principles, the purpose of OAR 661-010-0025(4) is better
14 served by organizing the record in the order in which documents were
15 received in the proceedings below. Kane has not demonstrated that the current
16 organization of the record prejudices his ability to prepare his petition for
17 review or our ability to review the record, or any other basis to require the city
18 to reorganize the record.” *Sequoia Park Condo Assoc. v. City of Beaverton*, 34
19 Or LUBA 808, 812 (1998); *Kane v. City of Beaverton*, ___ Or LUBA ___
20 (Order on Record Objections, January 25, 2000) slip op 2.

21 Intervenor’s third and fourth record objections are denied.

22 **D. Missing Items (Objection 5, Part A)**

23 Intervenor argued in his record objection that seven items are missing from the
24 record. The city responded with (1) page references for five of the disputed items, (2) an
25 agreement to supply one item in a supplemental record, and (3) a contention that one of the
26 items disputed is more properly considered an assignment of error to be included in
27 intervenor’s petition for review. Intervenor filed a reply to the city’s response, indicating that,
28 provided the city submits a supplemental record including the contents of files referenced by
29 the city’s senior planner, as agreed to by the city, he is satisfied that the remaining documents
30 are in the record as noted.

31 Intervenor’s record objection regarding items missing from the record is sustained, in
32 part.

1 **E. Oversized Exhibits and Organic Legislation (Objection 5, Part B)**

2 Intervenor argues that the record should also include the full-sized architectural
3 drawings submitted during the course of the proceedings below, and that the city should be
4 ordered to submit the 1999 revision of the city’s comprehensive plan and the city’s traffic
5 plan.

6 The city responds that the architectural drawings are oversized and, as allowed by our
7 rules, are being retained by the city until oral argument. The city points to the portion of the
8 table of contents that shows that the drawings are part of the record. As for the traffic plan
9 and the 1999 revision of the city’s comprehensive plan, the city agrees to submit those
10 documents to LUBA “should the Board so require.” Respondent’s Answer to Record
11 Objections 6.

12 Our rules do not require that the record contain copies of the governing body’s
13 legislation involved in the challenged decision.² Intervenor’s record objection 5B is denied.

14 **CONCLUSION**

15 The record will be settled upon receipt of the revised table of contents and a
16 supplemental record including those files incorporated by reference by the city’s senior
17 planner.

18 Dated this 26th day of May, 2000.

19
20
21
22
23
24

Anne Corcoran Briggs
Board Member

²We do request that, prior to the time of oral argument, the local government call LUBA to confirm that pertinent copies of the comprehensive plan and land use regulations are on file with the Board.