

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
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4 BRENDA WILLHOFT, GARY WILLHOFT,
5 TOM McCARTHY and ALICE L. SANDERS,
6 *Petitioners,*
7

8 vs.
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10 CITY OF GOLD BEACH,
11 *Respondent,*
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13 and
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15 TURTLE ROCK LLC,
16 *Intervenor-Respondent.*
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18 LUBA No. 2000-090 and 2000-091
19

ORDER

20 **MOTION TO STRIKE INTERVENOR-RESPONDENT'S BRIEF**

21 Intervenor-respondent (intervenor) was granted two extensions of time to file its brief
22 in this matter. Under the second extension of time, intervenor's brief was due on November
23 27, 2000. The brief was not filed on November 27, 2000. Instead, the brief was filed by mail
24 on December 1, 2000, and received by LUBA on December 4, 2000. The brief was filed
25 with a request for a third extension of time, until December 1, 2000, to file the brief. The
26 third request for an extension of time, like the first two, was not agreed to by petitioners.

27 Petitioners move to strike intervenor's brief in its entirety, because it was not filed in
28 accordance with the second extension of time. We deny the motion to strike, primarily
29 because the oral argument in this matter is scheduled for December 28, 2000, and both the
30 Board and petitioners will have approximately 24 days to review the brief in advance of the
31 oral argument. Were it otherwise, intervenor's unilateral decision to file its brief four days
32 after the deadline specified in the second extension of time would likely have resulted in our
33 granting the motion to strike.

1 Petitioners' motion to strike intervenor's brief is denied.

2 **MOTION TO STRIKE PORTIONS OF INTERVENOR'S BRIEF**

3 Intervenor's brief includes three documents in the appendix that are not included as
4 part of the record and postdate the decisions challenged in this consolidated appeal.
5 Petitioners argue these extra-record documents are improperly relied upon in intervenor's
6 brief for their evidentiary value; and, for that reason, petitioners move to strike intervenor's
7 brief in its entirety.

8 We agree with intervenor that two of the disputed documents may be considered in
9 determining whether LUBA No. 2000-090 is moot. For the reasons explained later in this
10 order, we grant petitioners' motion to strike the other documents. However, intervenor's
11 improper attachment of those documents to the response brief does not warrant striking its
12 entire brief.

13 The motion to strike intervenor's brief is denied.

14 **MOTION TO STRIKE EXTRA-RECORD APPENDICES**

15 **A. November 13, 2000 Planning Commission Hearing Notice and Staff**
16 **Report**

17 The decision challenged in LUBA No. 2000-090 is a letter dated May 31, 2000. That
18 letter concerns a previously issued conditional use permit. In its brief, intervenor argues that
19 subsequent events have rendered LUBA No. 2000-090 moot. One of those events is
20 intervenor's subsequent decision to seek a new conditional use permit. In support of its
21 argument that the application for the new conditional use permit renders LUBA No. 2000-
22 090 moot, intervenor attaches to its brief a copy of a notice of a November 13, 2000 planning
23 commission hearing where that permit was considered and a copy of the planning staff report
24 that was issued in conjunction with that public hearing.

25 Petitioners argue that because these documents clearly postdate the challenged
26 decision they should be stricken. In its response to the motion to strike, intervenor clarifies

1 that those documents are not submitted for their evidentiary value. Rather, intervenor argues,
2 they are simply documents that are properly subject to official notice by LUBA to determine
3 whether LUBA No. 2000-090 is moot.

4 We express no opinion here whether LUBA No. 2000-090 is rendered moot by any of
5 the events identified by intervenor in its brief or whether the attached notice and staff report
6 actually support those arguments. However, we will consider those documents in reviewing
7 intervenor's arguments that LUBA No. 2000-090 is moot. *See Blatt v. City of Portland*, 21
8 Or LUBA 337, 342, *aff'd* 109 Or App 259, 819 P2d 309 (1991), *rev den* 314 Or 727 (1992)
9 (LUBA will consider extra-record documents in determining whether an appeal is moot).

10 **B. Post-Decision Letters**

11 Intervenor attaches two letters to its brief to support its argument that hand-drawn
12 lines that purport to locate the 100-year floodplain boundary on two maps in the record were
13 added by unknown persons and are inaccurate. Record 628, 762. The authors of those letters
14 are the engineers who prepared the disputed maps, and the authors take the position that the
15 100-year floodplain lines on the maps in the record were not drawn by the authors. Both
16 letters postdate the challenged May 31, 2000 decision, and neither letter is part of the record.
17 One letter is dated October 31, 2000, and the other is dated November 2, 2000. Intervenor
18 relies on both letters as evidence that shows the maps at Record 628 and 762 inaccurately
19 depict the location of the 100-year floodplain.

20 Our review of the evidence supporting a land use decision is generally limited to the
21 record. ORS 197.835(2)(a). Because neither letter is in the record, and neither letter is a
22 proper subject of official notice, we may not consider them.¹ Petitioners' motion to strike the
23 disputed letters is granted.

¹We address intervenor's request that we consider the letters as evidence outside the record, pursuant to OAR 661-010-0045, below.

1 **MOTION TO TAKE EVIDENCE NOT IN THE RECORD**

2 Pursuant to OAR 661-010-0045, intervenor moves that we consider two affidavits
3 that generally paraphrase the October 31, 2000 and November 2, 2000 letters discussed
4 above.² Intervenor argues that we should consider those letters because “[t]he content of the
5 record is disputed by the Briefs.” Motion to Take Evidence Not in the Record 1. Intervenor
6 goes on to argue that its motion to take evidence not in the record is filed “since the time
7 limit for objecting to the record has passed.” *Id.* at 2.

8 Intervenor’s motion is denied. The dispute between the parties is not about the
9 “content” of the record. Therefore, even if intervenor had proceeded by way of a timely
10 record objection the objection would not have been well-taken. The parties’ dispute concerns
11 the accuracy or validity of two maps that indisputably were presented to the city and are
12 properly included in the record. If those maps include added information that may not be
13 accurate, the time to have the engineers present their arguments to the city was during the
14 city’s evidentiary proceedings below. Intervenor’s allegations that someone other than the
15 city may have improperly modified those maps before they were submitted to the city could
16 not show error by the *city* and therefore could not provide a basis for us to remand the
17 decision. *See Marshall v. City of Yachats*, 34 Or LUBA 724, 729-30 (1998) (allegations that
18 applicant submitted a forged deed during local proceedings does not demonstrate “procedural
19 irregularities not shown in the record” committed by the local government that would
20 warrant an evidentiary hearing under OAR 661-010-0045(1)). Intervenor’s allegations

²OAR 661-010-0045(1) allows us to consider evidence not in the record in the following circumstances:

“Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.428 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.”

1 provide no basis that would allow LUBA to grant intervenor's motion and consider the
2 affidavits.

3 Intervenor's motion to take evidence not in the record is denied.

4 **CONCLUSION**

5 For the reasons explained above, petitioners' motion to strike the two letters that
6 appear at Appendix B(1) and B(2) of intervenor's brief is granted. Otherwise, petitioners'
7 motion to strike is denied. Intervenor's motion to take evidence not in the record is denied.

8 This case is set for oral argument on December 28, 2000 at 10:00 a.m. That oral
9 argument will be held as scheduled.

10 Dated this 20th day of December, 2000.

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Michael A. Holstun
Board Member-