

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 MARK YEAGER, JANICE RUSSNOGLE, M.D.,
5 PEGGY LYNCH, TIM BOYD, CAT NEWSHELLER,
6 KIM GOLLETZ, DAN GOLLETZ, LINDA HARDISON,
7 SCOTT SUNDBERG, MIKE LAHR, ANN LAHR,
8 JANET OHMANN, JOE CROCKETT, DOUG
9 POLLOCK, DARCIE HAMEL, KERRY SCHONING,
10 JEAN TOWNES, DAVE VESELY and JOAN HAGAR,
11 *Petitioners,*

12
13 vs.

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15 BENTON COUNTY,
16 *Respondent,*

17
18 and

19
20 PATRICK O'DELL and MARTI O'DELL,
21 *Intervenors-Respondent.*

22
23 LUBA No. 2001-185

24 ORDER

25 This matter is before us on the applicant's motion to intervene and petitioners'
26 objections to the record.

27 **MOTION TO INTERVENE**

28 Patrick O'Dell and Marti O'Dell (intervenors), the applicants below, move to
29 intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

30 **RECORD OBJECTIONS**

31 Pursuant to OAR 661-010-0026(2)(a), petitioners argue that the record does not
32 include all materials included as part of the record during the proceedings before the final
33 decision maker. According to petitioners, the county failed to include the entirety of
34 planning file number I-01-01, an official interpretation of the Benton County Code (BCC)
35 made by the planning official. Intervenors respond that the entire file was neither placed

1 before the final decision maker, nor incorporated into the record, and is therefore not part of
2 the record.

3 The challenged decision approves a conditional use permit to operate a horse training
4 and boarding facility and education program for children as a recreational facility. Record 1.
5 In file number I-01-01, a separate, earlier application, intervenors requested an ordinance
6 interpretation regarding whether a horse boarding operation and riding arena is an outright
7 permitted use or a conditional use in a rural residential zone.¹ The planning official's
8 interpretation of the BCC was that in the rural residential zone a horse facility exceeding
9 personal use is a recreational facility that requires a conditional use permit. The planning
10 official's decision is part of the record in this appeal. Record 283-285. However, the
11 remainder of the planning file is not part of the record in this appeal.

12 An item becomes part of the local record when it is placed before, and not specifically
13 rejected by, the local decision maker during the course of the proceedings. OAR 661-010-
14 0025(1)(b). A party objecting to the absence of material from the record must demonstrate
15 that the material is part of the record as defined in OAR 661-010-0025(1). Petitioners simply
16 assert that other portions of planning file number I-01-01 besides the decision "were clearly
17 before the local decision maker." Objections to the Record 3.

18 An unsubstantiated assertion that a disputed item was part of the record below does
19 not meet the burden required under OAR 661-010-0026(2)(a), where, as here, the respondent
20 disputes that the challenged material was placed before the decision maker or otherwise
21 made part of the record. *Boyer v. Baker County*, 34 Or LUBA 758, 759 (1998). Petitioners
22 provide no basis for their assertion that all of planning file I-01-01 was before the board of
23 commissioners other than that the commissioners had some knowledge of the matters
24 involved in the planning official's decision. Knowledge of particular information by a local

¹ Pursuant to BCC 51.205, one of the duties of the planning official is to provide official interpretations of the comprehensive plan and development code.

1 decision maker, even if relevant, does not make such information part of the record. *Adkins*
2 *v. Heceta Water District*, 22 Or LUBA 826, 828 (1991); *Hoffman v. City of Lake Oswego*, 19
3 Or LUBA 607, 610 (1990). The mere inclusion of a written decision from another planning
4 action in the record of a different decision is not sufficient in itself to incorporate the entire
5 planning file from the earlier decision into the record of the later appeal.

6 Petitioners also assert that the notices of hearing from planning file I-01-01 must be
7 included in the record, citing *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000). In
8 *Hubenthal*, we stated:

9 “Unlike OAR 661-010-0025(1)(b) and (c), OAR 661-010-0025(1)(d) requires
10 that the record include all *notices of hearing*, whether those hearings were
11 conducted by the final decision maker or by lower-level decision makers.” *Id.*
12 at 917 (emphasis in original, footnote omitted).

13 Petitioners are correct that OAR 661-010-0025(1)(d) applies to notices provided throughout
14 “the course of the land use proceeding.” However, the rule does not require that notices from
15 a separate planning action be included in the record of this appeal, even if that separate
16 planning action is relevant. Because the disputed file is from a separate planning action,
17 neither OAR 661-010-0025(1)(d) nor *Hubenthal* requires that file to be included in the record
18 of this appeal.

19 Petitioners also assert that file number I-01-01 should be included in the record of the
20 challenged decision as an attachment to the planning official’s decision, citing *Farrell v.*
21 *Jackson County*, ___ Or LUBA ___ (LUBA No. 2000-081, Order on Record Objections,
22 August 9, 2000). In *Farrell*, however, a letter submitted into the record specifically listed the
23 disputed documents as attachments. The listing of the disputed documents as attachments in
24 the letter created a “presumption, albeit a weak one, that those documents were in fact
25 attached to the letter when delivered to the county.” Slip op 3. In the present case, the
26 planning official’s decision does not list any other documents as attachments, and there is no
27 indication that any other part of the file was submitted to the board of commissioners along

1 with the decision. Therefore, petitioners have not demonstrated that the disputed items are
2 part of the record.

3 Petitioners' objections to the record are denied. The record in this appeal is settled as
4 of the date of this order. The petition for review is due 21 days, and the response briefs are
5 due 42 days, from the date of this order.

6 Dated this 18th day of January, 2002.

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Tod A. Bassham
Board Member