

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WITHAM PARTS AND EQUIPMENT
5 COMPANY, INC., ROGUE REGENCY INC.,
6 ROGUE VALLEY CENTER LLC,
7 ROGUE CORNER PROPERTY LLC and
8 SONMAR INN OF MEDFORD, INC.,
9 *Petitioners,*

10
11 vs.

12
13 OREGON DEPARTMENT of
14 TRANSPORTATION,
15 *Respondent.*

16
17 LUBA Nos. 2001-176, 2001-177 and 2001-178

18
19 ORDER

20 Before us are petitioners' motion to take evidence outside the record and objections to
21 the record. The challenged decision involves ODOT's design approval of proposed highway
22 improvements for the Interstate Highway 5/State Highway 62 interchange in the City of
23 Medford (North Medford Interchange). That design approval was granted as part of a larger
24 integrated state and federal approval process. *See generally* Order on Motion to Dismiss,
25 LUBA Nos. 2001-176/177/178, January 17, 2002. The present order involves questions
26 concerning the identity of the decision maker for design approval and the scope of the record
27 for that decision.

28 **MOTION TO TAKE EVIDENCE**

29 Petitioners move to take evidence outside of the record to (1) establish the identity of
30 the decision maker and (2) identify items that were placed before the decision maker or
31 specifically incorporated into the record.¹ OAR 661-010-0045(2)(a) provides:

¹OAR 661-010-0045(1) provides that LUBA may "take evidence to resolve disputes regarding the content of the record * * *."

1 “A motion to take evidence shall contain a statement explaining with
2 particularity what facts the moving party seeks to establish, how those facts
3 pertain to the grounds to take evidence specified in section (1) of this rule, and
4 how those facts will affect the outcome of the review proceeding.”

5 **A. Identity of the Decision Maker**

6 Generally, the identity of the decision maker in a LUBA appeal is readily apparent.
7 In the present case, however, because the land use decision at issue in this case is only a
8 small part of a larger approval process, there is some confusion about which ODOT
9 employees or delegates actually made the final decision approving the design review.²
10 Petitioners’ attorney’s affidavit states that ODOT’s attorney identified different decision
11 makers at different times during the proceedings. However, we now understand ODOT to
12 identify the three ODOT employees who signed the October 5, 2001 decision statement
13 approving the selected design review as the decision makers.

14 Apparently, under relevant statutes, final decision making authority for such projects
15 nominally lies with the Oregon Transportation Commission (OTC). ORS 366.205.³ The
16 OTC has expressly delegated authority to “carry out design and construction, right-of-way
17 acquisition, and traffic management on behalf of the Department” to the “Director and
18 Executive Deputy Director/Chief Engineer.” Response to Motion to Take Evidence, Exhibit
19 A. We understand ODOT to take the position that that authority was further delegated to
20 Frank Stevens (Solutions Team Leader), Paul Mather (Region Manager), and Cathy Nelson
21 (Acting Manager, Technical Services Branch). *Id.*, Exhibit B.⁴

²We are aware of only one other LUBA case involving a similar decision, *Eugeneans for a Livable Future v. Dep’t of Transportation*, 12 Or LUBA 142 (1984).

³ORS 366.205 provides that “[t]he Oregon Transportation Commission has general supervision and control over all matters pertaining to the selection, establishment, location, construction, improvement, maintenance, operation and administration of state highways, the letting of contracts therefor, the selection of materials to be used therein and all other matters and things considered necessary or proper by the commission for the accomplishment of the purposes of this Act.”

⁴As petitioners note, it is less than clear how the authority of the OTC was delegated to the three signers of the decision statement. We also may be wrong about ODOT’s position concerning Catherine Nelson. According to the affidavit of Catherine Nelson, attached to ODOT’s Response to Motion to Take Evidence,

1 A necessary prerequisite to granting a motion to take evidence outside of the record is
2 a “case of disputed factual allegations in the parties’ briefs.” OAR 661-010-0045(1).
3 Petitioners offer no sufficient reason to question ODOT’s representation concerning who the
4 decision makers were in this matter. Given our understanding of the identity of the decision
5 makers, it is not necessary to take evidence outside of the record to establish the identity of
6 the decision maker.⁵

7 **B. Items Placed Before the Decision Maker**

8 In addition to taking evidence to identify the decision maker, petitioners also move to
9 take evidence outside of the record to identify what items are properly in the record before
10 that decision maker. According to petitioners they are unable to adequately develop specific
11 objections to the record because the record does not provide a clear indication of whether
12 certain documents were placed before and not rejected by the decision maker or specifically
13 incorporated into the record.

14 Although exceptions are possible, we prefer to resolve motions to take evidence after
15 the parties have submitted briefs challenging and defending the decision. *Citizens*
16 *Concerned v. City of Sherwood*, 20 Or LUBA 550, 561 (1991). In most cases, the
17 appropriate posture in which to file a motion to take evidence is after the briefs have been
18 filed, when the respective parties’ legal contentions are presented in sufficient detail and any
19 disputed allegations of fact are more clearly identified. While motions to take evidence
20 regarding the contents of the record would likely constitute an exception to that general
21 approach, in the present case petitioners have not shown that an exception is warranted.
22 Petitioners’ record objections are based in part on a misunderstanding of the identity of the
23 decision makers. As discussed more fully below, petitioners’ record objections are also

Catherine Nelson is the “Technical Services Manager and Chief Engineer.” *Id.*, Exhibit E. As Chief Engineer, Catherine Nelson may be within the OTC’s express delegation of authority at Exhibit A.

⁵No question is presented in the present posture of the case concerning whether those decision makers were properly authorized to render the final decision in this matter.

1 based in part on a misunderstanding concerning what it means in a multi-purpose, legislative
2 proceeding, such as the proceeding at issue here, for documents to be “placed before” the
3 final decision maker. In view of our resolution of those misunderstandings, petitioners fail to
4 demonstrate that it is necessary to consider evidence outside the record and, accordingly,
5 their motion is denied.

6 **RECORD OBJECTIONS**

7 In addition to their motion to take evidence, petitioners also assert four objections to
8 the record. The parties have subsequently resolved all but the first record objection, and
9 ODOT has filed a supplemental record addressing those concerns. Petitioners continue to
10 assert their first objection to the record, contemplate further objections depending upon the
11 identity of the decision maker, and reserve the right to object to the supplemental record.
12 ODOT moves us to deny all petitioners’ objections and declare the record settled.

13 OAR 661-010-0025(1)(b) provides that the record contains:

14 “All written testimony and all exhibits, maps, documents or other written
15 materials specifically incorporated into the record or placed before, and not
16 rejected by, the final decision maker, during the course of the proceedings
17 before the final decision maker.”

18 Our rule recognizes two categories of items that are included in the record: those materials
19 specifically incorporated into the record and those items placed before, and not rejected by,
20 the final decision maker.

21 A land use decision granting design approval to a proposed interchange improvement
22 as part of a larger state and federal approval process poses obvious problems in determining
23 what documents produced for the entire approval process are properly part of the land use
24 decision record before LUBA. The term “placed before” is a term of art and does not merely
25 describe the act of setting documents in front of the decision maker. *Home Depot, Inc. v.*
26 *City of Portland*, 36 Or LUBA 783, 784-85 (1999). Legislative decisions, like the present
27 case, often involve less precisely defined procedures for compiling an evidentiary record, as

1 compared to quasi-judicial decision making procedures. In a recent case that involved a
2 legislative proceeding that culminated in a hearing before a city council we concluded that, in
3 the absence of established procedures governing how items are submitted into the record,
4 whether items were “placed before” the decision maker turns on whether the decision
5 maker’s conduct regarding those items is such that participants in the proceedings should
6 reasonably expect those items to be included in the record. *Home Depot, Inc.*, 36 Or LUBA
7 at 785; citing *Redland/Viola/Fischer’s Mill CPO v. Clackamas County*, 27 Or LUBA 645,
8 647 (1994).

9 The current appeal does not involve the more typical city or county legislative land
10 use proceeding that will generally end with one or more public hearings before the city or
11 county legislative body and an enacting ordinance.⁶ We therefore believe it is the nature of
12 the environmental assessment process itself and the reasonable expectations of the parties to
13 that process, rather than the conduct of the decision makers in this matter, that is critical in
14 determining the scope of the record in this matter, *i.e.*, whether documents are properly
15 viewed as having been placed before the final decision makers.

16 ODOT explains that the North Medford Interchange Project is a \$35,077,000 project
17 that involved a large number of ODOT staff, local officials and interested property owners,
18 affected citizens and others. Funding for the environmental analysis was approved by the
19 Oregon Transportation Commission in 1997. The project was added to the Statewide
20 Transportation Improvement Plan (STIP) on August 15, 2000. The Revised Environmental

⁶Even in that more usual type of appeal, on several occasions we have taken a broader view of the record in legislative proceedings than in quasi-judicial proceedings. See *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798, 804 (1993) (documents generated during citizen involvement and prioritization proceedings are properly included as part of the legislative record of subsequent proceedings adopting an ordinance where those earlier proceedings are referenced in the ordinance findings); *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 500, 501-02 (1990) (record of county code update proceedings includes task force proceedings that predated filing of ordinances and proceedings on those ordinances); *Davis v. City of Bandon*, 19 Or LUBA 493, 494-95 (1990) (minutes of city council meeting where city council directed staff to investigate moratorium are properly included in the record of subsequent proceedings where city council adopted a moratorium).

1 Assessment (REA) that represents the product of that environmental analysis is the subject of
2 this appeal. ODOT provides the following detailed explanation of that process:

3 “The REA serves as the means to meet the requirements of several interwoven
4 processes. These processes include federal NEPA requirements, state and
5 federal regulatory decisions, and state engineering requirements and the REA
6 is the means by which ODOT publishes its State Agency Coordination
7 Requirements. The REA contains numerous decisions that were made by
8 federal and state decisionmakers that are not at issue in this LUBA
9 proceeding. They include the Finding of No Significant Impact or FONSI
10 issued by [the Federal Highway Administration], and environmental
11 clearances and concerns raised by other state and federal regulatory agencies
12 regarding this project design and, of course, the REA contains the final ODOT
13 design approval and findings of compatibility with local comprehensive plans.
14 The Supplemental Record reflects the development of the entire REA and the
15 basis for all these decisions. The information, data, reports and meeting
16 minutes support some decisions carried in the REA. As these decisions are
17 interdependent, the portions of the record supporting any one piece of the
18 REA cannot be discretely separated, as Petitioners would propose. The record
19 as a whole is the basis for each of these decisions.

20 “* * * * *

21 “Once a project is approved by the OTC and placed in the STIP, ODOT
22 develops the project design to prepare the project for construction. Design
23 approval and construction preparation includes complying with all local, state
24 and federal regulations and engineering standards. As the scope of this
25 project was large, ODOT established a collaborative process to include the
26 assistance of many individuals, committees and consultants. These
27 committees included the Solutions Team, The Citizens Advisory Committee,
28 the Steering Committee and a myriad of Technical Committees.” Response to
29 Motion to Take Evidence Outside the Record 5-6.

30 Petitioners’ record objection lists numerous portions of the 3,500-page record that
31 they believe were not placed before the decision makers or specifically incorporated into the
32 record. It is perhaps understandable that petitioners are confused about the identity of the
33 decision makers. However, petitioners appear to believe that unless ODOT can prove that
34 each and every document that is included in the record was at some point specifically placed
35 in the hands of the three decision makers in this matter, they are not properly included in the
36 record. That is an unnecessarily rigid view of the much more fluid legislative process that
37 ODOT employs to (1) solicit participation and input by a broad range of interested parties

1 and experts and (2) satisfy a number of overlapping federal, state and local requirements.
2 The multi-purpose, multi-jurisdictional nature of the environmental assessment process
3 makes it somewhat different than the usual land use legislative process. Viewed in that
4 context, we conclude that so long as the documents in the record were created as part of the
5 process that was initiated by the Oregon Transportation Commission to construct the North
6 Medford Interchange or were submitted to ODOT as part of that process, and those
7 documents were maintained in a manner so that a reasonable person would expect those
8 documents to be available to the state and federal decision makers that must ultimately
9 approve the project and they are in fact available to the final decision makers, we believe
10 they are properly viewed as part of the record.⁷

11 Returning to petitioners' record objections, petitioners simply cite to the documents
12 they question and make no attempt to describe those documents. ODOT similarly does not
13 discuss those documents with any specificity. However, we understand ODOT to contend
14 that the documents are properly included in the record under the test we describe above. The
15 arguments that petitioners include in support of their record objections do not establish that
16 any of the documents they dispute fail to meet that test. Because it is petitioners' obligation
17 to demonstrate that the documents they dispute are improperly included in the record, their
18 record objections are denied.

19 **CONCLUSION**

20 We earlier concluded that petitioners' motion to take evidence outside of the record
21 should be denied. ODOT's March 4, 2002 request that we settle the record is premature, and
22 for that reason is denied. LUBA received the two-volume supplemental record on March 1,
23 2002. Petitioners' motion to consider evidence outside the record suspended the deadline for
24 filing objections to that supplemental record. Petitioners shall have seven days from the date

⁷Of course, the parties may agree in writing to limit the scope of the record and exclude items that would otherwise constitute part of the record. OAR 661-010-0025(1).

1 of this order to submit any objections they may have to the supplemental record. We will
2 resolve any such objections before issuing an order settling the record.

3 Dated this 18th day of April, 2002.

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Michael A. Holstun
Board Member