

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

4 HAL OIEN, D.M.D., OPUS NORTHWEST,
5 FIVE OAKS/TRIPLE CREEK NEIGHBORHOOD
6 ASSOCIATION and CONCERNED CITIZENS OF
7 BEAVERTON,
8 *Petitioners,*
9

10 vs.

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12 CITY OF BEAVERTON,
13 *Respondent,*
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15 and

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17 HENRY KANE
18 *Intervenor-Respondent.*
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20 LUBA No. 2002-075

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22 BEAVERTON SCHOOL DISTRICT
23 NO. 48J
24 *Petitioner,*
25

26 vs.

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28 CITY OF BEAVERTON,
29 *Respondent,*
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31 and

32
33 HENRY KANE
34 *Intervenor-Respondent.*
35

36 LUBA No. 2002-076

37 ORDER ON RECORD OBJECTIONS
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39 Under OAR 661-010-0026(1) parties in a LUBA appeal must attempt to resolve
40 record objections with respondent's legal counsel before they file record objections with
41 LUBA. In a July 24, 2003 letter to the city attorney, intervenor-respondent (intervenor) Kane
42 asked the city attorney to include three letters in the record. In a July 25, 2003 letter to the

1 city attorney, intervenor asked the city attorney to separately identify certain record
2 documents in the record table of contents. After he received no response to those letters,
3 intervenor sent the city attorney a third letter in which he raises 95 record objections. On
4 August 5, 2003, intervenor filed the same objections with LUBA.¹ In view of the number of
5 objections, and the technical nature of most of those objections, a detailed discussion of each
6 objection is not warranted.² We specifically address each objection only where we believe
7 the basis for our ruling is not reasonably obvious from the record objection, the city's
8 response and petitioner Oien's 26-page single-spaced reply to the city's response.

9 **A. Intervenor's July 24, 2003 Letter**

10 Intervenor objects that the record should be supplemented to include three letters that
11 he sent to the mayor and city council in this matter. The city responds that the letters were
12 sent after the period for public testimony expired on June 3, 2003. The city contends that the
13 record shows that evidence that was received from the public after that date was not provided
14 to the city council. Record 66.

15 The objections in intervenor's July 24, 2003 letter are denied.

¹ Petitioner Oien joins in those record objections, but for ease of reference we refer to the objections as intervenor's objections.

² A number of intervenor's record objections fall into one of the following categories.

1. **Failure to separately identify documents in the table of contents.** The table of contents is already five single-spaced pages long. Sustaining these objections would produce a much longer and much more detailed table of contents. We might sustain some of these objections if intervenor made some attempt to show that the additional detail is needed for intervenor and other parties to locate material documents in the record. There is no such showing, and we deny all the objections that fall into this category. These objections are marked with an asterisk (*).
2. **Illegible date received stamp or illegible written comments.** Intervenor identifies a number of documents with faint or missing date received stamps and some documents with faint handwritten comments. In some cases the date received or the comment is not readable. Intervenor makes no attempt to explain why this information has any bearing on this case. These objections are noted with the pound symbol (#).

1 **B. Intervenor’s July 25, 2003 Letter**

2 In this letter, petitioner complains that the hundreds of pages at Record 1310 through
3 1751 are not adequately identified in the record table of contents.

4 Record item 110 is located at Record 1310 to 1424 and is described as “[l]etters and
5 materials received *prior to* deeming application complete (Ex 9)[.]” Record v (emphasis in
6 original). While the record table of contents does not separately identify each of those letters
7 and other materials, a summary document that appears at Record 1311-12 apparently does.

8 Record item 111 appears at Record 1425 through 1700 and is identified as “[l]etters
9 and materials received *after* application deemed complete and *prior to* Facilities Review
10 Committee conditions of approval (Ex 10)[.]” (Emphases in original.) Record pages 1426-
11 29 separately list and identify the 48 documents that appear between pages 1425 and 1700 of
12 the record and assign a number to each of those documents and identify them by date.³

13 Record item 112 appears at Record 1701 to 1751 and is made up of three documents.
14 Those documents are identified by date received and are each assigned a number in a
15 summary sheet that appears at Record 1702.

16 The OAR 661-010-0025(4)(a)(B) requirement that a record that is filed with LUBA
17 must include a table of contents is to allow the parties to identify and locate documents in the
18 record. The city’s approach with Record items 110, 111, and 112 to group a large numbers
19 of documents under each of those record items and then simply list those three record items
20 in the table of contents would not be sufficient, by itself, to comply with OAR 661-010-
21 0025(4)(a)(B). However, the city goes further and includes a list of those documents in each
22 grouping so that the individual documents can be located with reasonable effort. That
23 approach is somewhat awkward, but it serves essentially the same purpose that a more
24 detailed table of contents would serve.

³ Many of the dates that are given for the documents in the list at Record 1425-29 do not seem to match the dates on the documents themselves, but the document numbers on the list do seem to match the documents that follow that list in the record.

1 The objections in intervenor's July 25, 2003 letter are denied.

2 **C. August 4, 2003 Letter With 95 Objections**

3 **1. Objections 36 and 37**

4 The 17 pages of the record that are the target of objection 36 are included in the more
5 expansive objection 37. Objection 37 is directed at the following pages of the record:

- 6 a. Opus Northwest Submittal. Record 164-169.
- 7 b. Talbot Associates Power Point Presentation. Record 172-230.
- 8 c. EHHI Report (Children's Exposure to Diesel Exhaust on School
9 Buses). Record 370-444.⁴
- 10 d. Concerned Citizens of Beaverton PowerPoint Presentation. Record
11 750-821.
- 12 e. November 29, 2001 letter. Record 1313.
- 13 f. September 28, 2001 Comments. Record 1355-1371.
- 14 g. February 14, 2002 letter. Record 1524-1561.⁵
- 15 h. Miscellaneous Pages. Record 1688, 1691, 1692, 1709, 1727, 1731,
16 1734-1736, 1738, 1740, 1746-1750.⁶

17 With regard to the identified pages of the record, intervenor argues:

18 "All of our documents listed were submitted in color and as PowerPoint
19 Presentations on computer disc. All of our documents in the official record
20 should be in color so that LUBA can actually understand the information
21 being presented." Objections to Record on Appeal 4.

⁴ Intervenor's objection is limited to the pages of the report that appear at the following pages of the record: 385, 388, 390, 392, 394, 399, 400, 401, 403, 405, 407-435. These same pages appear later in the record between pages 1580 and 1623 and intervenor repeats his objection to the lack of color copies as well. The duplicate objection is rejected.

⁵ Intervenor's objection is limited to the pages of the letter that appear at the following pages of the record: 1530, 1531, 1533-1535, 1549, 1552, 1553. Intervenor also identifies pages 1555-1559, but those pages are not photographs or graphs. Intervenor's objection concerning those pages is rejected.

⁶ Intervenor also identifies Record 1717, but that is a page of text with no photograph or graph. Intervenor's objection concerning that page is rejected.

1 The city’s entire response is that OAR 661-010-0026(2)(a), which intervenor cites in
2 support of these objections, “does not prescribe the copy quality of photographic images.”
3 Respondent’s Response to Record Objections 5.

4 Intervenor’s objection appears to be unnecessarily broad. It does not appear that
5 color copies of some of the pages of the record that they cite are necessary for our review.⁷
6 On the other hand, some of the graphs and photographs are of poor quality and the black and
7 white copies do not convey some color-coded information.⁸

8 Our rules require that the city file a “certified copy of the record.” OAR 661-010-
9 0025(2). When the original record includes color photographs or other color documents, it is
10 preferable that the local government include color copies of those pages in the copy of the
11 record that is filed with LUBA. However, including color copies of all color originals in the
12 copy of the record that is filed with LUBA may involve significant expense and may be
13 unnecessary, depending on the nature of the color original. In that circumstance, it is entirely
14 appropriate for the local government to file a black and white copy of the record and provide
15 some or all of the color originals at oral argument.⁹

16 Where the record filed with LUBA includes black and white copies of color originals
17 and the city does not indicate that it will provide the color originals at oral argument, which
18 appears to be the case here, parties are free to object. However, such objections should be
19 limited to the color documents in the original record where material information is actually
20 lost in the black and white copy that is provided to LUBA and the parties. As we have
21 already noted, intervenor appears to indiscriminately object to a large number of black and

⁷ The nondescript picture of a school bus at Record 399 is one example.

⁸ For example the color-coded percentile information at Record 413.

⁹ OAR 661-010-0025(2) specifically provides that “large maps, tapes, or difficult-to-duplicate documents and items” may be submitted separately at oral argument. The record table of contents indicates that the city will provide certain color and difficult to duplicate items at oral argument in accordance with OAR 661-010-0025(2). Record v. The pages of the record that are the subject of intervenor’s objections 36 and 37 do not appear to be included in the list of oversize exhibits at Record v.

1 white copies of color graphs and photographs without regard to whether the addition of color
2 will convey additional useful information. However, rather than point out to LUBA those
3 instances where color copies would serve no useful purpose, the city simply says that
4 LUBA's rules do not require color copies or copies of any particular quality. That is not an
5 adequate response to intervenor's objection, even if his objection is unnecessarily broad.
6 Although our rules do not expressly require color copies of color originals or copies of any
7 particular quality, they implicitly require that the certified copy of the record that is filed with
8 LUBA must be of a kind and quality that captures and conveys the material information that
9 resides in the original record.¹⁰

10 Because the city does not dispute intervenor's argument that the original copy of the
11 record retained by the city includes color copies of the pages listed in objections 36 and 37,
12 we assume that is the case. To resolve objections 36 and 37, the city shall submit the color
13 copies of each of the pages of the record identified by intervenor or a compact disk with the
14 PowerPoint presentation that includes those pages. Where the pages that petitioners object to
15 are included in a larger document, the city may simply submit the larger document if it
16 wishes. The color originals and any documents containing color originals shall be submitted
17 at the date of oral argument in this matter, in accordance with OAR 661-010-0025(2).

18 **2. Remaining Objections.**

19 **a. Objections that are Denied Without Comment**

20 Objections 2*, 3*, 4*, 5*, 6-16*, 17-35#, 38-39#, 41#, 42*, 44*, 45-48#, 49*, 52*, 56#,
21 60-73#, 75 (4-page list with one page out of order), 76*, 78-82*.

¹⁰ As we have already noted, where providing such a copy is difficult or expensive, the original documents may be submitted at oral argument and recovered after the LUBA appeal is complete.

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b. Discussion of Remaining Objections

1. Objection 1

Record 153 is a letter to the applicant opposing the application that led to the decision challenged in this appeal. That letter is signed by a large number of health care providers. Intervenor believes some signatures were cut off in copying the letter and on that basis objects to the record and also objects that the letter is not separately identified in the table of contents.

Requiring the city to separately list the letter in the table of contents is not warranted. The disputed letter is addressed to the applicant, not the decision maker. By our count, the letter to the applicant is signed by 33 health care professionals. Petitioners make no attempt to explain how correcting the record to show that additional health care professionals signed the letter could possibly have any significance in this appeal. We decline to order the city to provide another copy of that letter for the record.

2. Objection 40

Intervenor’s objection to the document at Record 839 appears to be an argument on the merits rather than an objection that the document should not be included in the record. Objection 40 is denied.

3. Objection 43

Intervenor objects that the computer file path footer is not completely copied on the document that appears at Record 879-904. Intervenor makes no attempt to explain how that information could have any possible bearing on this appeal. Objection 43 is denied.

4. Objections 49 and 50

Most of objection 49 is an objection that certain documents should be separately identified in the table of contents. That part of the objection is denied for the same reason we deny intervenor’s other objections of this type. Objections 49 and 50 also include objections that maps at Record 983 and 996 are “in error” and “incorrect” and state that intervenor has

1 attached corrected maps to his record objections, which he wants added to the record in place
2 of the current maps. Objection to the Record 5. Intervenor (1) does not explain what the
3 alleged error in the map at Record 983 is, (2) does not explain how an error in the maps could
4 provide a basis for a record objection, and (3) does not attach corrected maps to the record
5 objections. Objections 49 and 50 are denied.

6 **5. Objection 51**

7 Intervenor objects that the technical report that begins at Record 1022 should be
8 stricken from the record because the data upon which it is based is not included to allow the
9 results to be verified. Intervenor's challenge appears to be a challenge to the evidentiary
10 value of the report. Whatever the nature of intervenor's challenge, he does not contend that
11 the report was not placed before the city during the local proceedings and offers no basis
12 under OAR 661-010-0025(1) for concluding that the report is not properly included in the
13 record. Objection 51 is denied.

14 **6. Objections 53-55**

15 Intervenor objects that drawings that appear at Record 1148-50 should be stricken
16 from the record because they have "hand written changes that are undated and unsigned."
17 Objections to Record on Appeal 6. That those pages have undated and unsigned handwritten
18 changes provides no basis for striking those documents from the record. It may be that
19 intervenor believes those handwritten changes were made after the record closed below.
20 However, he does not make that argument. Objections 53-55 are denied.

21 **7. Objection 57, 58, 74**

22 Record 1290 is an example of a form letter opposing the application that led to the
23 decision in this appeal. Intervenor objects that all of the form letters should be included in
24 the record and separately identified in the table of contents.

25 Record 1292-94 gives the names and addresses of 35 persons who signed the form
26 letter at Record 1290. The city explains that the example letter at Record 1290 and list of

1 names and addresses at Record 1292-94 was provided to the city council, but the 35 letters
2 themselves were not provided to the city council. We have no reason to question the city's
3 explanation. Objections 57, 58 and 74 are denied.¹¹

4 **8. Objection 59**

5 Objection 59 is similar to Objections 57 and 58, only it is directed at a form letter that
6 appears at Record 1298-99 and a list of names and addresses of 141 persons, which appears
7 at Record 1300-09. Objection 59 is denied for the same reason objections 57 and 58 were
8 denied.

9 **9. Objection 77**

10 Intervenor objects that record pages 1624-27 are out of order and that a color copy of
11 those pages should be included in the record. Record 1624-27 is actually a botched attempt
12 to copy page 60 of a report on children's exposure to diesel exhaust on school busses, which
13 appears at Record 370-444. That readable copy of that page is reproduced in black and white
14 at Record 429. In resolving objection 37, we require that the city provide a color copy of that
15 page. Sustaining objection 77 would add nothing to the record that our resolution of
16 objection 37 has not already added. Objection 77 is denied.

17 **10. Objections 83-84**

18 Intervenor objects that the record does not include a transcript of the June 3, 2002 and
19 June 10, 2002 city council meetings in this matter. The record includes minutes of both of
20 those meetings. Record 65-81, 90-125. Intervenor makes no attempt to explain why those
21 minutes are "incomplete or inaccurate." OAR 661-010-0026(3). Objections 83-84 are
22 denied.¹²

¹¹ Objection 74 is identical to objection 58.

¹² Intervenor may obtain tapes of those meeting and prepare his own transcript and attach that transcript to his brief if he wishes. OAR 661-010-0030(5).

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11. Objections 85-95

In these objections, intervenor objects that letters that petitioner Oien wrote to a city planner, the city attorney, the applicant and its attorney are not included in the record.¹³ However, intervenor neither alleges that these letters were placed before the city decision makers in this appeal nor provides any other legal theory for why those letters should be included in the record. Objections 85-95 are denied.

D. Conclusion

The only objections we sustain will be corrected when the city provides original documents at oral argument in this matter. Accordingly, the record is settled as of the date of this order. The petitions for review shall be due 21 days from the date of this order. The respondent’s briefs shall be due 42 days from the date of this order. The Board’s final opinion and order shall be due 77 days from the date of this order.

Dated this 3rd day of October, 2003.

Michael A. Holstun
Board Member

¹³ Intervenor states that he attaches copies of these letters to his record objections, but the record objections filed with LUBA do not have the letters attached.