

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

4 WALTER MINER, DEBRA MINER,
5 TIMOTHY J. BISH, STEVE McGRORTY, CINDY
6 McGRORTY, NANCY BREWER, JAMES LINDROS,
7 MARION LINDROS, JEANNE TUCKER, KEN YEAGER,
8 ROBERT H. TIKKALA, CAROL J. TIKKALA, NORMAN L.
9 SHATTO, JUDITH ANN SHATTO, WADE GUSTAFSON,
10 MARY ELLEN GUSTAFSON, F. ANDREW BURNS,
11 ANGEL BURNS, MARVIN HUGHES
12 and DORIS HUGHES,
13 *Petitioners,*
14

15 vs.

16 CLATSOP COUNTY,
17 *Respondent,*
18

19 and
20

21 MILES CROSSING
22 SANITARY SEWER DISTRICT,
23 *Intervenor-Respondent.*
24

25 LUBA No. 2003-127
26

27 ORDER

28 In this appeal, petitioners challenge a March 12, 2003 resolution and order approving
29 the annexation of territory to the Miles Crossing Sanitary Sewer District.

30 **MOTION TO INTERVENE**

31 Miles Crossing Sanitary Sewer District (sewer district or intervenor) moves to
32 intervene on the side of respondent. There is no opposition to the motion and it is allowed.

33 **RECORD OBJECTION**

34 Petitioners object to the record the county filed in this appeal. The county has elected
35 not to appear in this appeal, and intervenor has filed a response to petitioners' record
36 objection. We resolve petitioners' objections as follows.

1 **A. Item 3**

2 Item 3 is a September 9, 2003 letter from petitioners’ attorney to the board of county
3 commissioners, requesting that the county consent to a voluntary remand of the decision
4 challenged in this appeal. Petitioners argue that the letter was created after the county’s
5 March 12, 2003 decision approving the annexation and, therefore, it is not properly included
6 in the county’s record.

7 Intervenor responds that the letter is “directly related to the challenged decision,” but
8 concedes that the item was not placed before the decision maker during the course of the
9 proceedings leading to the challenged decision. Response to Record Objections 2. We
10 understand intervenor to concede that Item 3 is not properly included in the record.

11 Petitioners’ objection is sustained.

12 **B. Item 4**

13 Item 4 is a letter from LUBA to the county dated August 28, 2003, with two
14 attachments. The letter informs the county that an appeal had been filed at LUBA, and the
15 attachments provide specifications regarding the filing of the county’s record and
16 information regarding mediation assistance. Intervenor responds that while Item 4 was not
17 placed before the board of county commissioners, Item 4 is part of LUBA’s record.

18 Item 4 postdates the adoption of the appealed decision and, therefore, should not be
19 part of the local record submitted to LUBA. However, we agree with intervenor that Item 4 is
20 part of LUBA’s record and may be cited by the parties and considered by the Board. *Tylka v.*
21 *Clackamas County*, 28 Or LUBA 712, 715 (1994).

22 Petitioners’ objection is sustained.

23 **C. Items 5, 10, and 11**

24 Items 5, 10 and 11 include documents pertaining to a petition to withdraw from the
25 sewer district. Petitioners argue that those items are not properly included in this record, as
26 they do not pertain to the decision challenged in this appeal.

1 Intervenor concedes that those items were not placed before the decision maker
2 during the proceedings leading to the challenged decision, but argues that those items may be
3 relevant to the present appeal and may be considered a proper subject for a motion to take
4 evidence not in the record pursuant to OAR 661-010-0045.¹

5 We do not consider intervenor’s response as a motion to take evidence not in the
6 record. Intervenor concedes Items 5, 10 and 11 were not placed before the decision maker
7 during the proceedings that led to the challenged decision. Accordingly, they are not properly
8 part of the county’s record before LUBA.

9 Petitioners’ objection is sustained.

10 **D. Items 6, 7, 8, 9, 12 and Oversized Exhibit A**

11 Items 6, 7, 8, 9, 12 and Oversized Exhibit A pertain to corrections that were made to
12 the legal description of one of the territories annexed by the challenged decision. Petitioners
13 argue that those items are not part of the record, as they were not created until after the
14 county adopted the decision that is challenged in this appeal.

15 Intervenor responds that Item 9, the resolution and order correcting the legal
16 description for the territory annexed by the challenged decision, is the decision of the board
17 of county commissioners that effects the annexation challenged in this appeal. According to
18 intervenor, Item 9 “is more appropriately the final decision for purposes of any appeal.”
19 Response to Record Objection 2. Intervenor also argues that the items may be considered if a
20 motion to take evidence not in the record is granted with respect to those items.

21 We agree with petitioners that intervenor has not demonstrated that Items 6, 7, 8, 9,
22 12 and Oversized Exhibit A were placed before the board of county commissioners or

¹ OAR 661-010-0045 provides, in relevant part:

“* * * 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 215.427 or 227.178, or other procedural irregularities not shown in the record and
which, if proved, would warrant reversal or remand of the decision. * * *”

1 otherwise included in the record of proceedings leading to the challenged decision.²
2 Petitioners' record objection is sustained.

3 **E. Item 13**

4 Item 13 is a March 13, 2003 letter from intervenor's attorney to various public
5 agencies, informing them of the county's decision to annex territory to the district and
6 providing copies to those agencies of maps and legal descriptions of the areas annexed.
7 Petitioners argue that, while that letter may be required to be provided by ORS 198.730, it
8 was not created to satisfy any land use notice requirements and, therefore, it is not properly
9 included in the county's record. Intervenor responds that Item 13 is properly part of the
10 record even if it was not placed before the county during the course of the local proceedings,
11 because it demonstrates that the county complied with statutory notice requirements.

12 OAR 661-010-0025(1)(d) provides that the record shall include:

13 "Notices of proposed action, public hearing and adoption of a final decision, if
14 any, published, posted or mailed during the course of the land use proceeding,
15 including affidavits of publication, posting or mailing. Such notices shall
16 include any notices concerning amendments to acknowledged comprehensive
17 plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1)
18 and (2)."

19 OAR 661-010-0025(1)(d) is not limited to land use notices provided by the local
20 government. Petitioners do not dispute that the county and the district were required to send
21 notice of the annexation decision to various state agencies and that the land use decision that
22 was made was the subject of that notice.

23 Petitioners' objection is denied.

24 **F. Item 28**

25 Item 28 is a copy of documents relating to a planned development approval, including
26 comprehensive plan map amendments and exceptions to Statewide Planning Goals 3 and 4

² If it is intervenor's position that this appeal is moot as a result of the decision that is listed as Item 9, that position may be argued in the context of a motion to dismiss. We do not address that argument in resolving record objections.

1 for property located within the sewer district. Petitioners argue that those documents were not
2 placed before the board of county commissioners, and were not otherwise included in the
3 record that led to the decision on appeal. Therefore, petitioners contend that Item 28 is not
4 part of the county’s record.

5 Intervenor responds that Item 28 is an amendment to the County’s comprehensive
6 plan, and may be subject to official notice pursuant to Oregon Evidence Code (OEC) 202.³
7 Intervenor argues that because Item 28 is included in the county’s record, it need not be
8 separately submitted as a document subject to official notice.

9 We agree with intervenor that “comprehensive plan” amendments may be subject to
10 official notice pursuant to OEC 202(7). *Sunburst II Homeowners v. City of West Linn*, 18 Or
11 LUBA 695, 698 (1990). However, that is not relevant to our determination as to whether
12 Item 28 is part of the record in this appeal. Intervenor does not argue that Item 28 was either
13 placed before the decision maker or otherwise incorporated into the record during the city’s
14 proceedings, and we do not see that it was. Therefore, it is not part of the county’s record in
15 this appeal. *Volny v. City of Bend*, 36 Or LUBA 760, 762 (1999).

16 Petitioners’ objection is sustained.

17 **G. Item Improperly Excluded From the Record**

18 Petitioners argue that the record does not include a copy of a color-coded map
19 submitted by the sewer district’s attorney, which depicts the areas to be annexed. Intervenor
20 concedes that the map was submitted into the record, and agrees to provide the map to LUBA
21 at oral argument. Petitioner’s objection is sustained.

22 **H. Conclusion**

23 Petitioners’ objections to Items 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 28 and Oversized Exhibit
24 A are sustained. LUBA will not consider those items. Petitioners’ objection concerning the

³ OEC 202 provides, in relevant part, that official notice may be taken of “[a]n ordinance, comprehensive plan or enactment of any county * * * in this state * * *.” OEC 202(7).

1 color-coded map is also sustained. That map may be retained by the county until oral
2 argument. OAR 661-010-0025(2). Intervenor shall deliver the map to LUBA at that time.
3 Petitioners' objection to Item 13 is denied.

4 The record is settled as of the date of this order. Petitioners shall have 21 days from
5 the date of this order to submit the petition for review. Respondents shall have 42 days from
6 the date of this order to submit response briefs. The Board will issue its final opinion and
7 order 77 days from the date of this order.

8 Dated this 22nd day of October, 2003.
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15 _____
16 Anne Corcoran Briggs
Board Member