

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION
5 AND DEVELOPMENT, 1000 FRIENDS OF OREGON,
6 FRIENDS OF DOUGLAS COUNTY, and OREGON
7 DEPARTMENT OF FISH AND WILDLIFE,
8 *Petitioners,*

9
10 and

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12 1000 FRIENDS OF OREGON,
13 and FRIENDS OF DOUGLAS COUNTY,
14 *Intervenors-Petitioners,*

15
16 vs.

17
18 DOUGLAS COUNTY,
19 *Respondent.*

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21 LUBA Nos. 2018-039, 2018-040, 2018-041,
22 2018-048, 2018-049 and 2018-051.

23
24 ORDER

25 **RECORD OBJECTIONS**

26 On December 18, 2018, the county transmitted to LUBA the replacement
27 consolidated record (RCR) in these appeals. The RCR is a revision of an earlier
28 record that the county transmitted in an earlier phase of this appeal, before
29 withdrawing the challenged legislative decision for reconsideration and then re-
30 adopting the decision. In compiling the RCR, the county considered and

1 attempted to resolve objections to its original consolidated record (OCR). We
2 issued an Order settling the RCR on December 20, 2018.

3 On December 24, 2018, petitioners Department of Land Conservation
4 and Development (DLCD) and Oregon Department of Fish and Wildlife
5 (ODFW) filed a motion to extend time to file record objections, which we
6 granted. On December 31, 2018, petitioners 1000 Friends of Oregon and
7 Friends of Douglas County (petitioners) filed objections to the RCR. DLCD
8 and ODFW did not file objections to the RCR. On January 14, 2019, the county
9 filed a response to petitioners' record objections to the RCR. We now resolve
10 the outstanding objections.

11 **A. Inverse Chronological Order**

12 OAR 661-010-0025(4)(a)(E) requires that the items in the record be
13 arranged in inverse chronological order, unless the Board grants permission for
14 a different organization. The consolidated record is organized in three large
15 groupings based on three decisions in the record: (1) the October 24, 2018 Re-
16 Adoption Decision, (2) an April 23, 2018 Corrected Order, and (3) the original
17 March 7, 2018 Ordinance. Each of these three large groupings includes a
18 number of sub-groups. Petitioners argue that within the three large groupings
19 and within some subgroups some documents are not organized in inverse
20 chronological order by document date or date of submission, or any other
21 discernible chronological principle. Petitioners argue that the present

1 organization of the RCR makes it difficult for all parties to locate items in the
2 RCR with reasonable effort.

3 We have considered the parties' arguments regarding the organization of
4 the RCR and agree with the county that, to the extent some items are not
5 located in inverse chronological order, the defects are not material and do not
6 prevent the parties from locating specific items in the RCR with reasonable
7 effort. We conclude that requiring the county to reorganize the RCR to strictly
8 comply with OAR 661-010-0025(4)(a)(E) is not warranted, and in fact might
9 well result in a less accessible record than the present organization.
10 Accordingly, these objections are denied.

11 **B. Documents Not Placed Before the Final Decision Maker**

12 OAR 661-010-0025(1)(b) provides that the content of the record includes
13 “[a]ll written testimony and all exhibits, maps, documents or other materials
14 specifically incorporated into the record or placed before, but not rejected by,
15 the final decision maker, during the course of proceedings before the final
16 decision maker.”

17 Petitioners object to the inclusion in the consolidated record of a 309-
18 page collection of documents related to the Southern Oregon Regional Pilot
19 Project Tasks 2, 5 and 7 (SORPP materials). RCR 129-438. The SORPP
20 materials also appear, in a 305-page version, at RCR 734-1039. Petitioners note
21 that the SORPP materials that were included in the OCR consisted of only 275
22 pages, at OCR 205-480. Petitioners also object to inclusion of any version of

1 the SORPP materials in the RCR, arguing that the SORPP materials were
2 available to the public and the decision-makers only by hyperlink to the
3 county's website, and that no version of those materials were ever "placed
4 before" the decision-makers, within the meaning of OAR 661-010-0025(1)(b).
5 Further, petitioners argue that the proceedings on reconsideration were closed to
6 new evidence, and there is no explanation why the versions of the SORPP
7 materials that appear in the RCR are different than the version that appeared in
8 the OCR.

9 The county responds that the challenged legislative decision implements
10 the SORPP materials and those materials were "placed before" the
11 commissioners in several ways. The county attaches to its response the
12 affidavit of the county planning director, stating that staff provided the
13 commissioners with packets that included paper copies of some SORPP
14 materials and advised the county commissioners that (1) the full SORPP
15 materials related to Tasks 2, 5 and 7 are "[i]ncluded in the record," and (2) the
16 full SORPP materials are also available on-line. Affidavit of Keith Cubic, 3.
17 The affidavit also states that, at all times during the course of the local
18 proceedings, staff kept a hardcopy of the SORPP materials available in the
19 planning department offices. *Id.*

20 The term "placed before" is a term of art, and that term may mean
21 something different in the context of a legislative decision versus a quasi-
22 judicial decision. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA

1 589, 593 (2002). In the absence of a specific procedure, whether items are
2 “placed before” the decision maker in the context of a legislative decision turns
3 on “whether the decision maker’s conduct regarding those items is such that
4 participants in the proceeding should reasonably expect those items be included
5 in the record.” *Id.* We agree with the county that where staff in a proceeding
6 on a legislative decision (1) provide to the final decision maker hard copies of
7 selected portions of a document, (2) advise the decision-maker that the full
8 hardcopy version of the document is in, or was previously placed in, the record,
9 and (3) the final decision maker does not thereafter reject or limit the staff offer,
10 that a reasonable person would understand that staff has thereby successfully
11 “placed before” the final decision maker the full hardcopy version of the
12 document. Accordingly, petitioners’ objection to inclusion of the full version of
13 the SORPP materials in the RCR is denied.

14 **C. Items Missing from the Record**

15 Petitioners argue that seven items in the record reference attachments, but
16 that the referenced attachments are not included in the record. The county
17 responds that the referenced attachments are found elsewhere in the record,
18 attached to duplicate copies of the parent documents. The county explains that
19 the RCR includes a number of duplicates of the same parent documents, and the
20 county chose not to provide attachments to each duplicate copy. We agree with
21 the county that, to the extent the record does not comply with our rules with

1 respect to the attachments, that the violation does not warrant remedial action.
2 Accordingly, petitioners' record objection regarding missing items is denied.

3 **D. Table of Contents Fails to List All Retained Items**

4 OAR 661-010-0025(4)(a)(B)(ii) allows the county to retain large maps
5 and other difficult to duplicate items until oral argument, as long as such items
6 are listed at the end of the table of contents. Petitioners state that they are aware
7 of at least one large map that was presented to the board of commissioners that
8 is not listed in the table of contents as a retained item.

9 The county responds that all large maps displayed during the hearing are
10 enlargements of maps already in the record. The county offers to bring to oral
11 argument copies of the enlarged maps displayed during the hearings, but argues
12 that its failure to list those maps in the table of contents as retained items does
13 not warrant remedial action. We disagree with the county. An accurate listing
14 of retained items in the table of contents is potentially important for several
15 reasons, including preparation for oral argument and an accurate accounting of
16 what is in the local record that is transmitted to LUBA and potentially to the
17 Court of Appeals. We agree with petitioners that a revised table of contents is
18 necessary. Petitioners' record objection is sustained.

19 **E. Table of Contents Fails to List Exhibits Separately**

20 OAR 661-010-0025(4)(a)(B)(i) provides that "[w]here an item listed in
21 the [Table of Contents] includes attached exhibits, the exhibits shall be
22 separately listed as an exhibit to the item." Petitioners identify eight items that

1 have attached exhibits, but the attached exhibits are not separately listed as an
2 exhibit to the item in the table of contents.

3 The county responds that its failure to list each exhibit separately in the
4 eight identified examples is a minor violation of OAR 661-010-0025(4)(a)(B)(i)
5 that does not warrant remedial action. The county argues that in six of the eight
6 identified items, the attachment is less than three pages long. The principle
7 exception is petitioner Friends of Douglas County's February 7, 2018 written
8 submission, starting at Record 1124, which has nine attachments. However, the
9 county argues that the table of contents notes the existence of the attachments,
10 and that there is an internal listing of attachments at Record 1129. Further, the
11 county argues that because petitioner is presumably familiar with its own
12 testimony, the county's failure to list the nine documents as separate
13 attachments should not make it difficult for petitioner to locate those
14 attachments in the record.

15 Because the county must revise the table of contents in any event, we
16 agree with petitioners that the county should also revise the table of contents to
17 list the identified exhibits as separate items. Petitioners' record objection
18 regarding separately listing exhibits is sustained.

19 **REVISED TABLE OF CONTENTS**

20 The county shall submit a revised table of contents consistent with this
21 order. On receipt, the Board will issue an order settling the replacement
22 consolidated record and setting out a briefing schedule.

1 Dated this 28th day of February, 2019.

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Tod A. Bassham

7 Board Member