

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 TERRY WOLFGRAM
5 and NANCY WOLFGRAM,
6 *Petitioners,*

7
8 vs.

9
10 DOUGLAS COUNTY,
11 *Respondent,*

12
13 and

14
15 WILDWOOD ESTATES, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2006-073

19 ORDER

20 **MOTION TO INTERVENE**

21 On May 9, 2006, Wildwood Estates, LLC moved to intervene on the side of
22 respondent in this appeal. There is no opposition to the motion and it is allowed.

23 **RECORD OBJECTIONS**

24 **A. Introduction**

25 Intervenor is developing an eight-lot subdivision. Following an August 5, 2005
26 warning letter from the Oregon Department of Environmental Quality (DEQ), intervenor
27 subsequently applied for a National Pollutant Discharge Elimination System (NPDES)
28 Permit. In processing that NPDES Permit application, DEQ sought a Land Use
29 Compatibility Statement (LUCS) from the county. On December 28, 2005, the county
30 planning department completed and signed the requested LUCS. Record 66. That LUCS is
31 the decision that is before LUBA in this appeal.

32 Intervenor separately sought county approval for the eight-lot subdivision. On
33 February 28, 2006, the county administratively approved that subdivision request. While

1 that subdivision approval decision postdates the LUCS decision that is before us in this
2 appeal, a copy of that February 28, 2006 subdivision approval decision is included in the
3 record that the county transmitted to LUBA. Record 1-31.¹ We understand that a local
4 appeal of that subdivision approval decision was filed and that the appeal is currently
5 pending before the county.

6 **B. The Record of the Subdivision Approval Decision**

7 Petitioners object that the record in this appeal should include the entire record of the
8 subdivision approval decision. Unless we are missing something, petitioners' request would
9 require that we suspend this appeal until the local appeal of the subdivision approval decision
10 is complete. Petitioners offer the following reason for their request:

11 "These additional records are necessary in order to establish that Douglas
12 County has improperly issued its LUCS in this matter by referencing a local
13 government land use decision that was (and is) still pending a final
14 determination by Douglas County * * *." Petitioners Objection to Record of
15 the Proceedings 2.

16 Intervenor responds as follows:

17 "*** Since intervenor believes the new evidence would further support[] its
18 position, it has no objection to LUBA allowing new post-decision evidence
19 (from a live proceeding) to be added to the record in this case. The
20 undersigned personally believes such a decision by LUBA would wreak
21 havoc in most other cases and serve as a deplorable precedent, as well as
22 exceeding the jurisdiction and authority granted to LUBA by the legislature,
23 and far expanding the potential scope of review of land use decisions."
24 Intervenor's Response to Record Objections 1-2.

25 While we agree with intervenor that petitioners' record objection appears to seek to
26 supplement the record with documents that clearly go beyond the documents that OAR 661-
27 010-0025(1) requires the county to include in the record, we do not agree with intervenor's
28 suggestion that LUBA lacks authority to defer to agreements by the parties concerning the

¹ That decision is made up of a five-page memorandum, one page of information regarding local appeals and 26 pages of supporting findings and notice information. The record filed by the county only includes pages 1, 3 and 5 of the five-page memorandum.

1 content of the record. The required contents of the record are set out at OAR 661-010-
2 0025(1), but that rule expressly provides that the “parties [may] otherwise agree in
3 writing[.]”² Neither do we agree with intervenors’ apocalyptic description of the
4 consequences of deferring to an agreement by parties to include post-decision evidence.
5 Nevertheless, although LUBA frequently defers to party agreements regarding the content of
6 the record, where LUBA can tell that the parties in fact agree, we do not do so here for
7 several reasons. First, we are not sure that intervenor agrees with petitioners’ proposal to
8 supplement the record in this appeal with the record in the pending subdivision approval
9 decision, and the county has not responded to petitioners’ record objections. Second,
10 sustaining this record objection would require that we delay this appeal for an unspecified
11 period of time to allow the subdivision decision local appeal to be completed and a final
12 decision to be entered by the county. Third, it is undisputed that intervenor’s subdivision
13 application is referenced in the LUCS and the county’s final decision in that subdivision
14 application proceeding had not been rendered when the LUCS decision was rendered.
15 Therefore, the entire record of that proceeding is not necessary to allow petitioners to make
16 the only legal argument they say they want to make in this appeal.

17 Petitioners’ first record objection is denied.

18 **C. DEQ Proceeding Documents**

19 Petitioners next object that the record should not include the documents that appear at
20 Record 32-35, 40-49, 52-64 and 67-70 because “each of these documents appear to be
21 components of the applicant’s NPDES permit administrative record filed with the DEQ, and
22 are not properly components of Douglas County’s land use determination * * * .”
23 Petitioners’ Objections to Record of Proceedings 2.

² Under OAR 661-010-0025(1)(a) and (b) the record includes the appealed decision and “written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker.” OAR 661-010-0025(1)(c) and (d) also require that post-decision minutes of meetings and notices be included.

1 As intervenor notes, petitioners' objection ignores the undisputed connection between
2 the LUCS decision and the DEQ NPDES permit proceedings. Also, as intervenor notes, with
3 the exception of the documents that appear at Record 32-49, there are markings on the
4 disputed documents that indicate that those documents were in fact transmitted to the county
5 planning department before the LUCS was issued and there is no reason to believe they were
6 not considered by the planning department in reaching its decision on the LUCS.
7 Petitioners' objection regarding the documents appearing at Record 52-64 and 67-70 are
8 denied.

9 Turning to petitioners' objection regarding the documents that appears at Record 32-
10 35 and 40-49, that objection is sustained. Record 32-49 is a collection of documents that was
11 transmitted via facsimile to the county planning department after the challenged LUCS
12 decision was rendered. We understand intervenor to concede that the facsimile transmittal
13 itself or copies of that facsimile transmittal could not have been placed before the county
14 decision maker since the facsimile transmittal occurred after the challenged decision. The
15 copies of documents that appear at Record 32-35 and 40-49 will not be considered part of the
16 record in this appeal. We note, however, that other copies of some of those same documents
17 appear elsewhere in the record and appear to have made their way into the record in a
18 different way. Petitioners do not object to those parts of the record.

19 The record is settled as of the date of this order. The petition for review is due 21
20 days from the date of this order. The respondents' briefs are due 42 days from the date of
21 this order. The Board's final opinion and order is due 77 days from the date of this order.

22 Dated this 28th day of June, 2006.
23
24
25
26
27

28 _____
29 Michael A. Holstun
Board Member