

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 COLUMBIA RIVERKEEPER and  
4 NW PROPERTY RIGHTS COALITION,  
5  
6 *Petitioners,*

7  
8 vs.

9  
10 CLATSOP COUNTY,  
11 *Respondent,*

12 and

13  
14 OREGON PIPELINE COMPANY, LLC.,  
15  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2010-109

19 ORDER

20 **MOTION TO INTERVENE**

21 Oregon Pipeline Company, LLC (intervenor), the applicant below, moves to  
22 intervene on the side of respondent. There is no opposition to the motion, and it is granted.

23 **NOTICE OF WITHDRAWAL OF DECISION FOR RECONSIDERATION**

24 This appeal concerns a November 8, 2010 county decision that authorizes a 41-mile  
25 natural gas pipeline. On November 24, 2010, petitioners filed a notice of intent to appeal  
26 that decision to LUBA, and on that same date petitioners served a copy of the notice of intent  
27 to appeal on the county. At the time the notice of intent to appeal was filed and served on the  
28 county, under OAR 661-010-0025(2), the deadline for the county to transmit the record to  
29 LUBA was December 15, 2010.<sup>1</sup> On December 13, 2010, the county filed a request for a  
30 thirty-day extension of time to transmit the record from December 15, 2010 to January 14,

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<sup>1</sup> As relevant, OAR 661-010-0025(2) provides “[t]he governing body shall, within 21 days after service of the Notice [of Intent to Appeal] on the governing body, transmit to the Board a certified copy of the record of the proceeding under review.”

1 2011. The county represented in that request that no party objected to the request, and  
2 LUBA issued an order granting the request on December 14, 2010.

3 The county elected three new members to the five-member board of county  
4 commissioners in November 2010. Those three new members were sworn in and took office  
5 on January 12, 2011, two days before the deadline for transmitting the record expired. At the  
6 same January 12, 2011 meeting at which the three new members of the board of county  
7 commissioners were sworn in, the newly constituted board of county commissioners voted 4-  
8 1 in favor of a motion to direct the county attorney to withdraw the county's November 8,  
9 2010 decision for reconsideration by the county. All three of the new members of the board  
10 of county commissioners voted in favor of the motion. On January 13, 2011, the county gave  
11 notice pursuant to ORS 197.830(13)(b) that it was withdrawing its November 8, 2010  
12 decision for reconsideration. As relevant, ORS 197.830(13)(b) provides "[a]t any time  
13 subsequent to the filing of a notice of intent and *prior to the date set for filing the record*  
14 \* \* \*, the local government or state agency may withdraw its decision for purposes of  
15 reconsideration." (Emphasis added).<sup>2</sup>

16 Intervenor (the successful permit applicant below) objects to the withdrawal.  
17 Intervenor first argues that the "date set for filing the record" in ORS 197.830(13)(b) is the  
18 date set by OAR 661-010-0025, which is "21 days after service of the Notice [of Intent to  
19 Appeal] on the governing body." We understand intervenor to argue that any extensions of  
20 the deadline for filing the record do not alter the "date set for filing the record," for purposes  
21 of withdrawing a decision for reconsideration under ORS 197.830(13)(b). Intervenor also  
22 argues that even if extensions of the deadline for filing the record could extend the date by  
23 which a local government may unilaterally withdraw a decision for reconsideration under

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<sup>2</sup>OAR 661-010-0021(1) also provides that a notice of withdrawal under ORS 197.830(13)(b) must be filed  
"on or before the date the record is due." (Emphasis added.) Although the wording in LUBA's rule is slightly  
different from the statutory wording, we do not understand our rule to add to or detract from ORS  
197.830(13)(b), and we limit our discussion in this order to the statute.

1 ORS 197.830(13)(d), such an extension should not be recognized here because the real  
2 reason the county requested the extension of the record transmittal deadline was to give the  
3 newly elected county commissioners, who oppose the pipeline, an opportunity to vote to  
4 withdraw the decision for reconsideration. We consider both of those arguments below.

5 **A. The Date Set for Filing the Record**

6 Our cases concerning ORS 197.830(13)(b) are clear. That statute grants local  
7 governments a unilateral right to withdraw a decision that has been appealed to LUBA, and  
8 LUBA may not deny a timely request to withdraw a decision for reconsideration. *Fraser v.*  
9 *Wallowa County*, 25 Or LUBA 788 (1993). In addition, the scope of any proceedings on  
10 reconsideration is not proscribed or limited by statute. *Tylka v. Clackamas County*, 28 Or  
11 LUBA 417, 426 (1994); *ONRC v. City of Seaside*, 26 Or LUBA 645 (1994). At the  
12 conclusion of its reconsideration proceedings, a local government is required to “affirm,  
13 modify or reverse its decision.” But the right to withdraw a decision for reconsideration  
14 must be exercised before the deadline for transmitting the record to LUBA expires, and a  
15 request under ORS 197.830(13)(b) to withdraw a decision for reconsideration that is filed  
16 after the date set for transmitting the record must be denied. *Bates v. City of Cascade Locks*,  
17 37 Or LUBA 993 (1999). Therefore, the dispositive question under ORS 197.830(13)(b) in  
18 this case is whether the county’s January 13, 2011 notice of withdrawal of its November 8,  
19 2010 decision was filed “prior to the date set for filing the record.”

20 Until the county filed its December 13, 2010 request for a thirty day extension to  
21 transmit the record to January 14, 2011, the “date set for filing the record” was December 15,  
22 2010. After the county filed that December 13, 2010 request and that request was granted by  
23 LUBA on December 14, 2010, January 14, 2011 became the “date set for filing the record,”  
24 within the meaning of ORS 197.830(13)(b). And because the county filed its notice of  
25 withdrawal for reconsideration before January 14, 2011, it was timely filed. As we explained  
26 in *South v. City of Portland*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2004-062, November 16, 2004):

1       “The reconsideration option that ORS 197.830(13)(b) provides must be  
2       exercised before the deadline for filing the record expires. If requests to  
3       extend the deadline for filing the record are filed before the deadline expires  
4       and such requests are granted, a local government retains the right to file a  
5       request to withdraw its decision for reconsideration, provided that request is  
6       filed before the extended deadlines expire. \* \* \*” Slip op at 2.

7       As intervenor correctly points out, since the request to extend the deadline for filing the  
8       record in *South* was filed after the deadline for filing the record had already expired and  
9       LUBA ultimately denied the request to withdraw the decision for reconsideration as untimely  
10      filed, the above reasoning in *South* is technically *dicta*. Nevertheless, we find that *dicta* to be  
11      a correct interpretation of ORS 197.830(13)(b) and adopt it here. We reject intervenor’s  
12      argument that the “date set for filing the record,” within the meaning of ORS 197.830(13)(b),  
13      must be limited to the *original* date set for filing the record under OAR 661-010-0025. ORS  
14      197.830(13)(b) does not limit the date set for filing the record to the *original* date set for  
15      filing the record. Just as December 15, 2010 was the date set for filing the record before the  
16      county’s December 13, 2010 request for an extension, January 14, 2011 was the date set for  
17      filing the record after the requested extension was granted. If LUBA grants an uncontested  
18      request to extend the deadline for filing the record, the extended deadline for filing the record  
19      becomes the “date set for filing the record,” within the meaning of ORS 197.830(13)(b).

20       The county’s January 13, 2011 notice of withdrawal of the decision in this matter for  
21      reconsideration under ORS 197.830(13)(b) was timely filed before the date set for filling the  
22      record passed.

23       **B.       Intervenor’s Argument Regarding the County’s Motives for Seeking the**  
24       **Extension of the Deadline for Filing the Record**

25       The county’s December 13, 2010 request that the deadline for filing the record be  
26      extended to January 14, 2011 states that the “request is due to an unusually large and  
27      voluminous compilation of the Record.” That apparently was also the reason for the request  
28      that was given to attorneys for petitioners and intervenor. According to the county the record  
29      in this appeal is 11,754 pages long, and no party disputes that page count.

1 Intervenor contends that it decided not to oppose the requested extension because it  
2 believed that some period of extension was warranted in view of the length of the record and  
3 that it elected not to argue the requested extension should be a week shorter because it took  
4 the county at its word. However, intervenor argues the county's real motive for asking that  
5 the record transmittal deadline be extended to January 14, 2011 was to allow the three newly  
6 elected county commissioners—commissioners that during the election were on record as  
7 opposed to the pipeline that is the subject of this appeal—to take office and vote to withdraw  
8 the decision that grants county approval for the pipeline. Intervenor contends this real  
9 purpose is disclosed by the fact that the county's attorney spoke with one of the petitioner's  
10 attorneys before filing the December 13, 2010 extension request. Intervenor contends the  
11 ORS 197.830(13)(b) right to withdraw a decision for reconsideration should not be  
12 interpreted to allow the county to take advantage of an extended deadline for transmitting the  
13 record that was sought and granted for a stated purpose, when the extension request was  
14 actually for a different and undisclosed purpose.

15 The county disputes intervenor's contentions, and states that there is no credible  
16 evidence that when the county made its request to extend the record transmittal deadline on  
17 December 13, 2010, the request was made for any purpose other than the purpose that was  
18 stated in the request. The county contends that there is plenty of evidence that the extension  
19 was warranted due to the length of the record and a staff shortage at the planning department.  
20 We understand the county to argue that no inference of improper unstated purpose should be  
21 drawn from its phone conference with one of petitioners' attorneys. The county points out  
22 that it also placed telephone calls to petitioners' other attorney and to intervenor's attorney  
23 before filing the December 13, 2010 extension request, and such courtesy telephone calls are  
24 a common practice before requesting deadline extensions at LUBA so that the party  
25 requesting the extension can advise LUBA whether any party opposes the request.

1           The events on January 12, 2011 might allow a reasonable person to question whether  
2     the reason the county stated on December 13, 2010 for the requested 30-day extension was  
3     the real reason for the requested extension. However, based on the parties' arguments and  
4     the affidavits submitted in support of those arguments, we believe a reasonable person could  
5     also conclude that the county did not consider the possibility of withdrawing the decision for  
6     reconsideration until after the December 13, 2010 request for extension was filed and  
7     granted, and that the real reason for the requested extension at the time it was requested is the  
8     reason the county gave in the December 13, 2010 request. We therefore do not have a  
9     sufficient basis to conclude that the county's motivation for requesting an extension to the  
10    deadline for filing the record was the improper motive that intervenor suspects.

11           It is not entirely clear whether intervenor is asking that LUBA now revoke its order  
12    that extended the deadline to January 14, 2011, based on intervenor's suspicion concerning  
13    the true motive for that request, or whether intervenor is asking that LUBA interpret ORS  
14    197.830(13)(b) not to allow the county to take advantage of the extended January 14, 2011  
15    deadline for transmitting the record, because intervenor believes the extension was granted  
16    based on a misrepresentation of the true reason for the requested extension. In either case,  
17    even if we could now revoke our order extending the deadline for transmitting the record or  
18    reject the notice of withdrawal because the extended deadline that permitted the board of  
19    commissioners to vote to withdraw the decision on January 12, 2011 was secured for an  
20    unstated reason, we do not agree that intervenor has provided a sufficient basis for  
21    questioning the county's stated purpose for seeking the extension on December 13, 2010.

### 22           **C.     Conclusion**

23           For the reasons explained above, the county's January 13, 2011 notice of withdrawal  
24    of decision for reconsideration pursuant to ORS 197.830(13)(b) was timely filed and LUBA  
25    has no basis for rejecting that notice.

1 Under OAR 661-010-0021(2), the filing of a notice of withdrawal has the effect of  
2 suspending this LUBA appeal proceeding until a decision on reconsideration is filed with  
3 LUBA by the respondent. Under OAR 661-010-0021(1), a decision on reconsideration is  
4 required to be filed with LUBA, and served on the parties, within 90 days after the date the  
5 notice of withdrawal was filed.

6 Dated this 17<sup>th</sup> day of February, 2011.  
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11 \_\_\_\_\_  
12 Michael A. Holstun  
13 Board Chair