

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

3
4 DEPARTMENT OF LAND CONSERVATION
5 AND DEVELOPMENT,
6 *Petitioner,*

7
8 and

9
10 CENTRAL OREGON LANDWATCH,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 KLAMATH COUNTY,
16 *Respondent,*

17
18 and

19
20 TRAIN MOUNTAIN INSTITUTE
21 and JOHN C. BLACK,
22 *Intervenors-Respondents.*

23
24 LUBA No. 2014-037

25 ORDER

26 **MOTIONS TO INTERVENE**

27 Train Mountain Institute, the applicant below, and John C. Black
28 (intervenors) move to intervene on the side of the county. There is no
29 opposition to their motions, and they are allowed.

30 On May 13, 2014, Central Oregon Landwatch (Landwatch) moved to
31 intervene on the side of petitioner under ORS 197.830(7)(b), which authorizes
32 intervention in an appeal to LUBA to persons “who appeared before the local
33 government * * * orally or in writing.” To demonstrate that Landwatch

1 appeared before the county in this matter, Landwatch attached to its motion a
2 March 6, 2014 e-mail from Landwatch to the county planning director Mark
3 Gallagher expressing concerns about the application, asking that the e-mail be
4 entered into the file record, and asking to be advised of further opportunities to
5 comment.

6 Relatedly, on May 23, 2014, Landwatch also filed an objection to the
7 record that the county filed on May 12, 2014, objecting to the omission of the
8 March 6, 2014 e-mail from the record, as well as advancing other objections.

9 On June 17, 2014, intervenors objected to Landwatch's intervention,
10 arguing that the Landwatch failed to appear in the proceedings below and
11 therefore has no standing to intervene under ORS 197.830(7)(b). Attached to
12 the objection is the affidavit of county planning director Mark Gallagher,
13 stating that neither he nor any other county staff placed Landwatch's March 6,
14 2014 e-mail before the final decision maker, the county board of
15 commissioners. Based on the affidavit, intervenors contend that because the
16 March 6, 2014 e-mail was not placed before the final decision maker, or
17 otherwise entered into the record, the March 6, 2014 e-mail is insufficient to
18 establish that Landwatch "appeared" before the county orally or in writing for
19 purposes of ORS 197.830(7)(b).

20 For the above reasons, intervenors also oppose Landwatch's record
21 objection with respect to the March 6, 2014 e-mail.

22 Landwatch responds in part by arguing that intervenors' objection to
23 Landwatch's intervention was filed five weeks after Landwatch filed its motion
24 to intervene, and the objection was therefore untimely. Landwatch notes that
25 OAR 661-010-0065(2) provides 14 days for an opposing party to file a
26 response to a motion.

1 The timing of intervenors' objection violated OAR 661-010-0065(2).
2 Violations of LUBA's procedural rules are typically treated as "technical"
3 violations that do not interfere with the review proceeding, if the violation does
4 not affect the substantial rights of parties. OAR 661-010-0005. Significant
5 delay in objecting to the party status of an opposing party certainly could affect
6 that party's substantial rights. Whether the three week delay in objecting to
7 Landwatch' party status in the present case affected Landwatch's substantial
8 rights is unclear, and neither party provides argument on that point.

9 However, we need not consider this further, because for the reasons
10 below we agree with Landwatch that the March 6, 2014 e-mail to the planning
11 director sufficed to constitute an "appearance" for purposes of ORS
12 197.830(7)(b), at least to the extent necessary for Landwatch to challenge
13 alleged procedural errors related to that appearance.

14 As Landwatch observes, the two-volume record includes hundreds of e-
15 mails that various persons sent to planning director Mark Gallagher
16 commenting on the application, which were submitted prior to the initial
17 hearing on February 25, 2014. Clearly, the county viewed e-mail to the
18 planning director to constitute an acceptable method of submitting testimony or
19 comments into the record regarding intervenors' application. Landwatch's e-
20 mail was submitted March 6, 2014, between the initial hearing and the
21 continued hearing on March 25, 2014. At the March 25, 2014 continued
22 hearing, the commissioners re-opened the record to accept the testimony of two
23 persons, the applicant's representative intervenor-respondent John Black, and a
24 representative from the Department of Land Conservation and Development
25 (DLCD). Landwatch argues that when the county re-opened the record at the
26 continued hearing it should have also accepted written testimony submitted by

1 other persons prior to the continued hearing, such as the March 6, 2014 e-mail.
2 Further, Landwatch contends that even if county staff did not physically place
3 the March 6, 2014 e-mail before the commissioners, the e-mail constitutes an
4 attempt to appear during the proceedings below, and that attempt is sufficient
5 to satisfy the ORS 197.830(7)(b) appearance requirement, at least to allow
6 Landwatch standing to challenge the county's failure to accept and place the e-
7 mail message before the commissioners for consideration.

8 At this juncture, we are unable to resolve the merits of whether the
9 county may have erred in failing to include the March 6, 2014 e-mail into the
10 record, or otherwise erred in failing to accept the e-mail as an appearance, as
11 Landwatch suggests. Those issues have not been briefed, and could be the
12 basis for an assignment of error. As a general principle, we agree with
13 Landwatch that where party status before LUBA may turn on whether the local
14 government committed procedural error, LUBA should not resolve an
15 objection to party status unless the issue of procedural error is adequately
16 briefed, which as a practical matter will usually mean waiting until briefing on
17 the merits of the appeal is complete. Accordingly, intervenors' objection to
18 Landwatch's party status is denied, but intervenors may present additional
19 argument on that issue in their brief.

20 **RECORD OBJECTION**

21 As noted, Landwatch objects to the omission of the March 6, 2014 e-
22 mail from the record. We understand the county to take the position that the e-
23 mail was not placed before the final decision maker or entered into the local
24 record during the proceedings below by any other means, and Landwatch does
25 not contend otherwise. Landwatch instead argues that the county erred in
26 failing to include the e-mail in the record. Landwatch may or may not be

1 correct that the county committed procedural error in that respect, but that
2 argument does not change the fact that the e-mail is not part of the record, and
3 therefore this objection must be denied.¹

4 Finally, Landwatch argues that the record table of contents does not
5 comply with the OAR 661-010-0025(4)(a)(B) requirement to “list each item
6 contained therein,” because the table of contents describes as a single “item”
7 244 letters and e-mails supporting the application, spanning 253 pages.
8 Landwatch argues that each letter and e-mail should be separately listed.

9 Neither the county nor intervenors have responded to this objection, and
10 we agree with Landwatch that the table of contents does not comply with OAR
11 661-010-0025(4)(a)(B). On the other hand, Landwatch has not demonstrated
12 that remedial action is warranted. The 244 letters and e-mails in support of the
13 application appear to be mostly, if not entirely, short expressions of general
14 support for the application, from visitors and volunteers at the existing park
15 operated by Train Mountain Institute. Few if any of the letters or e-mails
16 address the applicable criteria. In this circumstance, the effort and delay to
17 conform the table of contents to OAR 661-010-0025(4)(a)(B) would likely
18 outweigh the benefit to LUBA and the parties from separately listing each letter
19 and e-mail. Accordingly, this objection is denied.

20 **BRIEFING SCHEDULE**

21 The record is settled as of the date of this order. The petition(s) for

¹ OAR 661-010-0045(1) provides that LUBA may consider extra-record documents for various purposes, including resolving disputes about a party’s standing and “other procedural irregularities not shown in the record.” Therefore, we have means if necessary to consider the March 6, 2014 e-mail for those limited purposes, even if the e-mail is not included in the local record.

1 review are due 21 days, and the response brief(s) due 42 days, from the date of
2 this order. The Board's final opinion and order is due 77 days from the date of
3 this order.

4 Dated this 26th day of June, 2014.

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Tod A. Bassham

11 Board Member