

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

3
4 COLUMBIA RIVERKEEPER, COLUMBIA
5 RIVER BUSINESS ALLIANCE, OREGON
6 CHAPTER SIERRA CLUB, COLUMBIA RIVER
7 CLEAN ENERGY COALITION, JACK MARINCOVICH;
8 AND PETER HUHTALA,
9 *Petitioners,*

DEC29'09 PM12:26 LUBA

10
11 vs.

12
13 CLATSOP COUNTY,
14 *Respondent,*

15
16 and

17
18 BRADWOOD LANDING LLC, AND
19 NORTHERNSTAR ENERGY, LLC,
20 *Intervenors-Respondents.*

21
22 LUBA No. 2009-100

23 ORDER SETTLING RECORD

24 **MOTION TO INTERVENE**

25 Bradwood Landing LLC and Northernstar Energy, LLC move to intervene on the side
26 of the respondent in this appeal. There is no opposition to the motion and it is granted.

27 **RECORD OBJECTIONS**

28 Petitioners and intervenors filed objections to the record filed in this appeal, and
29 respondent filed a response to petitioners' and intervenors' record objections. We now
30 resolve the objections.

31 **A. Introduction**

32 The challenged decision is the county's decision on remand from *Columbia*
33 *Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009). On remand, the county adopted a
34 procedure that prohibited new evidence from being introduced during the proceedings. The
35 county explains in its letter accompanying the record transmitted in the present appeal:

1 “The Board adopted a remand procedure and did not permit any new evidence.
2 In an effort to implement these requirements, County Counsel redacted what it
3 considered to be ‘new evidence’ from submittals received by staff forwarding
4 documents to the Board for remand consideration.”

5 The minutes from the July 16, 2009 public hearing before the Board of County
6 Commissioners (BCC) include the following discussion:

7 “[County] Counsel said before deliberations take place, he recommends the
8 [BCC] make a decision as to which oral or written testimony would be
9 considered. Counsel explained [that] on June 24, 2009 the [BCC] determined
10 that no new evidence would be considered on remand, all new submittals
11 would be for argument only and addressed toward the two issues identified by
12 the LUBA remand and that all written arguments be submitted by twelve
13 o’clock noon on Monday, July 6, 2009. Counsel said legal review of
14 submittals is completed and he has three general background observations. He
15 said that first the [BCC] closed the record after its initial review of the
16 Bradwood Landing application December 3, 2007, which was the date used to
17 determine if submittals contained evidence inside or outside of the record.
18 Secondly the written arguments submitted July 6 and oral argument received
19 on July 8 do become part of the record if it is not evidence consistent with the
20 June 24 determination, it is argument and argument only. Counsel said to the
21 extent written or oral argument contains new evidence it is not to be
22 considered by the [BCC] in making its decision. Third, they have concluded
23 that the redactions made by staff on July 6 do meet the [BCC’s] direction of
24 June 24. First, the written submittals timely received by the County on July 6
25 as redacted by staff and submitted to you [BCC] on July 6 as redacted by staff
26 and submitted to your [BCC] on July 8 be accepted into the record as
27 argument only and written submittals that include evidence that were not part
28 of the record on December 3, 2007 be rejected. Secondly, that the oral
29 testimony received by the [BCC] on July 8 be considered in the record as
30 argument only and new evidence will not be considered as part of the
31 evidentiary record of this proceeding. Finally, to the extent that the [BCC] has
32 received timely objections to the written submittals as redacted by staff that to
33 the extent that such objections are inconsistent with the foregoing and with
34 what the [BCC] received on July 6 that the objections be denied.” Record 227.

35 The BCC then adopted county counsel’s recommendations.

36 The record transmitted to LUBA by the county includes an Appendix that includes all
37 written testimony submitted during the remand proceedings in its original, unredacted form,
38 which the county explains it included for the limited purpose of reviewing the correctness of
39 the county’s decision to redact certain parts of the documents if any party assigns error to that

1 decision.

2 **B. Petitioners' Objection**

3 Petitioners set forth one objection:

4 “* * * that written public testimony underwent ‘redacting’ by county staff
5 between being submitted and being reviewed by the county commissioners
6 and thus the record does not, in fact, contain everything ‘placed before, and
7 not rejected by, the final decision-maker.’* * *”

8 We understand petitioners to argue that the unredacted documents in Appendix A must be
9 considered part of the record. OAR 661-010-0025(1)(b) provides that the record includes:

10 “All written testimony and all exhibits, maps, documents or other written
11 materials specifically incorporated into the record or placed before, and not
12 rejected by, the final decision maker, during the course of the proceedings
13 before the final decision maker.”

14 The county and intervenors respond that the original materials in the Appendix were
15 “rejected by” the board of commissioners in the final public hearing on July 16, 2009 where
16 the BCC adopted the motion quoted above, and therefore are not properly part of the record.

17 There appears to be no argument that the disputed documents in the Appendix were
18 not physically placed before the BCC, at least not in their original unredacted form. While
19 the scope of written materials that are “placed before, and not rejected by, the final decision
20 maker,” within the meaning of OAR 661-010-0025(1)(b), is not necessarily limited to
21 materials that are physically placed on a table in front of decision makers, petitioners do not
22 identify with any specificity any documents submitted to planning staff that were improperly
23 redacted by county counsel, and they do not explain why submitting unredacted written
24 testimony to planning staff was sufficient to meet the requirements of OAR 661-010-
25 0025(1)(b) that the documents be “placed before” the final decision-maker, the BCC.

26 Further, it appears based on the motion adopted by the BCC during the final hearing
27 on remand that the county and intervenors are correct that the county specifically rejected the
28 unredacted materials. Thus, they are not properly part of the record.

29 Petitioners' record objection is denied.

1 **B. Intervenors’ Objections**

2 **1. Introduction**

3 Petitioners respond initially to intervenors’ objection by arguing that the objection
4 was not filed within the time set forth in OAR 660-010-0026(2) for filing objections to the
5 record that therefore, the objection should be denied. OAR 660-010-0026(2) provides in
6 relevant part:

7 “An objection to the record or an objection to an amendment or supplement to
8 the record shall be filed with the Board within 14 days of the date appearing
9 on the notice of record transmittal sent to the parties by the Board.* * *”

10 The record was received by LUBA on October 1, 2009. LUBA advised the parties by letter
11 dated October 2, 2009 that the record was received by LUBA on October 1, 2009. The
12 language in the rule referring to the “date appearing on the notice of record transmittal sent to
13 the parties by the Board” is somewhat ambiguous where the notice of record transmittal
14 includes two different dates, as is the case here. Because of that ambiguity, we think that
15 intervenors timely filed their record objection within 14 days of October 2, 2009, one of the
16 dates appearing on the notice of transmittal. Moreover, even if intervenors’ record objection
17 was not timely filed, filing a record objection one day late would at most be a technical
18 violation of our rules. *Schaffer v. City of Turner*, 35 Or LUBA 744, 747 (1998) (filing of a
19 record objection seven days late is not an adequate basis to deny the objection, absent a
20 showing of substantial prejudice).

21 **2. Intervenors’ Objection**

22 Intervenors object that the record improperly includes new written and oral evidence
23 in contravention of the county’s adopted procedure on remand that prohibited new evidence.
24 As explained above, prior to the BCC’s initial hearing on remand, county counsel reviewed
25 documents that had been submitted to planning staff and determined whether those
26 documents included new evidence. Where county counsel determined that those documents
27 contained new evidence, county counsel redacted those documents.

1 At the July 8, 2009 public hearing before the BCC, county counsel presented the BCC
2 with the redacted documents. However, according to intervenors, some of the documents
3 presented to the BCC were not correctly redacted and included new evidence. Intervenors
4 object that the record improperly includes that new evidence, and include a list of those items
5 as Exhibit A to their record objection.

6 Additionally, according to intervenors, oral testimony at the hearing included new
7 evidence. Intervenors allege that the record improperly includes that oral testimony.
8 Intervenors include a description of the oral testimony that intervenors allege includes new
9 evidence as Exhibit A to their record objection. Intervenors argue that in approving the
10 recommendation that is quoted above and found at Record 227, the BCC rejected any
11 documents that contained new evidence and any oral testimony that contained new evidence,
12 and those items should not have been included in the record transmitted to LUBA. The
13 county agrees with intervenors.

14 However, whether the documents include new evidence that should not have been
15 placed before the BCC, or whether those documents should have been rejected by the BCC is
16 not dispositive in answering the question of whether the documents are part of the record
17 transmitted to LUBA. If the documents were placed before and not rejected by the BCC,
18 then they become part of the record, even if they were improperly accepted.

19 Regarding intervenors' argument that the record improperly includes oral testimony
20 that contains new evidence that the BCC should have rejected, OAR 661-010-0025(1)(b)
21 applies to *written* testimony and materials; it does not require a local government to exclude
22 oral testimony from the record transmitted to LUBA by erasing evidentiary testimony from a
23 recording of the hearing. Further, we do not think that the BCC's approval of the broad
24 recommendation quoted above that purported to reject oral testimony that contained new
25 evidence is dispositive of the question, where the recommendation and approval do not
26 identify with any specificity the new evidence contained in oral testimony that the BCC

1 considered to be rejected. Intervenors' argument may be the proper subject of an assignment
2 of error, but it is not a sustainable record objection.

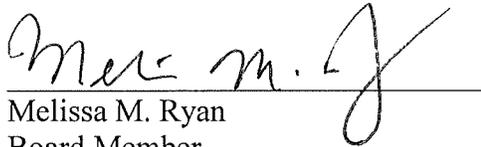
3 Intervenors' record objection is denied.

4 **BRIEFING SCHEDULE**

5 The record is settled as of the date of this order. The petition for review shall be due
6 21 days after the date of this order. The respondents' briefs shall be due 42 days after the
7 date of this order. The final opinion and order shall be due 77 days after the date of this
8 order.

9 Dated this 29th day of December, 2009.

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Melissa M. Ryan
Board Member