

1 **RECORD OBJECTIONS**

2 **A. Uncontested Record Objections**

3 Petitioner objects to the record filed by the county in this appeal. Two of
4 petitioner’s record objections are not contested. The county shall submit a First
5 Supplemental Record, with a table of contents, that includes the following:

- 6 1. A complete copy of the December 4, 2003 Kittelson &
7 Associates, Inc.’s Traffic Access Management Analysis that
8 was submitted into the record at the February 1, 2014
9 hearing in this matter.
- 10 2. Copies of the audio recordings for the February 19, 2014
11 and March 19, 2014 board of county commissioners
12 meetings in this matter.

13 **B. Contested Record Objection**

14 Petitioner contends the record that the county compiled in *Western*
15 *Express* should be included in the record in this appeal. We do not understand
16 petitioner to take the position that the record in *Western Express* was placed
17 before the board of commissioners, and therefore should be included in the
18 record of this appeal under OAR 661-010-0025(1)(b).¹ Rather, petitioner
19 contends the decision approving the development agreement, which is the
20 subject of the current appeal, is a decision that the county adopted to respond to
21 LUBA’s remand decision in *Western Express*. In *Friends of the Metolius v.*
22 *Jefferson County*, 48 Or LUBA 611, 612-13 (2004), and *Murphy Citizens*
23 *Advisory Comm. v. Josephine County*, 33 Or LUBA 882, 889 (1997), we held
24 that the local record of a decision that is adopted to respond to a LUBA remand

¹ As relevant, OAR 661-010-0025(1)(b) requires that the record in a local appeal include “documents or other materials * * * placed before, and not rejected by the final decision maker.”

1 is presumed to include the local record of the initial decision that led to the
2 LUBA remand, unless the record of the initial, remanded decision is expressly
3 excluded from the record of the decision that is adopted to respond to that
4 remand. Because the development agreement was adopted to respond to
5 LUBA’s remand in *Western Express*, and the city did not expressly exclude
6 that record, petitioner contends the record in *Western Express* should have been
7 included in the record of this appeal.

8 We understand intervenor to contend that the county proceedings to
9 respond to LUBA’s remand of the conditional use permit have not yet been
10 initiated. We understand intervenor to argue that while the development
11 agreement needed to be executed before the county could initiate additional
12 proceedings regarding the conditional use permit to respond to LUBA’s
13 remand of the conditional use permit in *Western Express*, the development
14 agreement decision is technically not part of the remand proceedings, and
15 therefore the record in *Western Express* is not part of the record in this appeal.

16 Because this appeal concerns the development agreement that we
17 concluded was necessary to approve the conditional use permit, which we
18 remanded in *Western Express*, and not the conditional use permit itself, this
19 case is potentially distinguishable from the “scope of the record on remand
20 principle” we articulated in *Friends of the Metolius* and *Murphy Citizens*
21 *Advisory Comm.* However, it is simply not possible for us, based on the current
22 state of the briefing, to be sure that the record in *Western Express* will not be
23 necessary to allow us to review petitioner’s challenges to the development
24 agreement in this appeal. If it is necessary, most of the rationale that led us to
25 conclude as we did in *Friends of the Metolius* and *Murphy Citizens Advisory*

1 *Comm.* would apply equally here. Therefore, the county shall submit the
2 record in *Western Express* as a Second Supplemental Record.

3 **C. Conclusion**

4 Within 21 days of the date of this order, the county shall transmit to
5 LUBA and the parties a First Supplemental Record, with a table of contents,
6 that includes Items 1 and 2 described in paragraph A, above. The county shall
7 also transmit as a Second Supplemental Record, the record in *Western Express*.
8 Upon receipt of the First and Second Supplemental Record, the Board shall
9 issue an order settling the record and establishing a briefing schedule.

10 Dated this 5th day of February, 2015.

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Michael A. Holstun
Board Member