

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

3  
4                                   JOHN RYAN NEIL,  
5                                   and CHELSEA STRAUTMAN NEIL,  
6   *Petitioners,*

7  
8   vs.

9  
10                                   COLUMBIA COUNTY,  
11   *Respondent,*

12  
13   and

14  
15                                   DAVID AUSTIN WILSON, JR.,  
16                                   REVOCABLE LIVING TRUST,  
17   *Intervenor-Respondent.*

18  
19   LUBA No. 2016-043

20  
21   ORDER

22   **MOTION TO INTERVENE**

23                   David Austin Wilson Jr., Revocable Living Trust (intervenor) moves to  
24   intervene on the side of the respondent. There is no opposition to the motion  
25   and it is allowed.

26   **RECORD OBJECTIONS**

27                   Petitioners John Ryan Neil and Chelsea Strautman Neil (petitioners)  
28   filed objections to the record on May 20, 2016. On June 3, 2016, the county  
29   filed a response that disputes some objections and concedes others. The county  
30   also filed a supplemental record that includes reproductions of images from the  
31   staff report, a transcription of a portion of the March 16, 2016 board of

1 commissioners' public hearing, and an optical disk containing 10 files of  
2 segments of video recordings with overlaid audio recordings from the public  
3 hearing. On that same day, intervenor filed a brief response to the objection  
4 simply requesting denial of petitioners' objections.

5 **A. Materials Not Included in the Record**

6 Initially, the county requests that LUBA summarily reject four record  
7 objections on the grounds that petitioners did not attempt to resolve those  
8 objections as required by OAR 661-010-0026(1). ("Before filing an objection  
9 to the record, a party shall attempt to resolve the matter with the governing  
10 body's legal counsel.") The county asserts that petitioners' e-mail  
11 communications to the county regarding the record mentioned only one of the  
12 objections that petitioners later advanced to LUBA: the omitted video  
13 recordings of the board of commissioners' hearing. The county has provided  
14 the omitted video recordings in the supplemental record. However, the county  
15 argues that petitioners never mentioned or attempted to resolve objections that  
16 four other items were allegedly omitted from the record.

17 The e-mail chain that represents petitioners' attempt to resolve the  
18 objections as required by OAR 661-010-0026(1) is attached to petitioners'  
19 objection. As the county indicates, petitioners attempted to resolve only the  
20 omitted video recordings, and did not mention any other omissions. Petitioners  
21 fault the county for failing to respond to petitioners' e-mail, but the e-mail  
22 chain attached to the objection indicates that the county did in fact respond,

1 twice, to petitioners’ sole objection. We agree with the county that petitioners  
2 failed to attempt to resolve the four other allegedly omitted items.

3 OAR 661-010-0026(1) provides that LUBA “may deny any objection to  
4 the record that does not comply with this rule.” We need not decide whether  
5 we would exercise our discretion to summarily deny the objections regarding  
6 omitted items that petitioners failed to attempt to resolve, because we agree  
7 with the county that the objections are meritless. We now resolve the  
8 outstanding objections.

9 **1. Missing Video Recordings of Public Hearing**

10 As noted, this objection is resolved by the supplemental record.

11 **2. Missing Power Point**

12 Petitioners object that the record does not include a power point  
13 presentation that was presented by the county planning manager during the  
14 board of commissioners’ public hearing. The county responds that the images  
15 presented at the hearing are found in the staff report at Record 20 and 23.  
16 Accordingly, this objection is denied. However, we note that the county  
17 transmitted enlargements of those images as part of the supplemental record.

18 **3. E-mail Correspondence**

19 Petitioners object that the record does not include e-mail correspondence  
20 between the lead petitioner and the county’s chief planner. OAR 661-010-  
21 0025(1)(b) provides the record shall include “[a]ll written testimony and all  
22 exhibits, maps, documents or other materials specifically incorporated into the

1 record or placed before, and not rejected, by the final decision maker, during  
2 the course of the proceedings[.]” However, petitioners make no effort to  
3 establish that the e-mail correspondence at issue was placed before the board of  
4 commissioners or incorporated otherwise as required by OAR 661-010-0025.  
5 Accordingly, this objection is denied.

6 **4. Copy of Land Dedication**

7 Petitioners object that the record does not include a copy of a 2011 deed  
8 of dedication for property deeded from Petitioner John Ryan Neil to Mr.  
9 Wilson. Petitioners state that a copy of the deed was presented at both planning  
10 commission hearings and to the board of commissioners. The county responds  
11 that there was no evidence that the deed itself was placed before the board of  
12 commissioners or otherwise submitted into the record. The county notes that  
13 merely discussing a document at a hearing does not bring that document into  
14 the record, citing *McKenzie v. Multnomah County*, 30 Or LUBA 461, 462  
15 (1996). We note that the supplemental record video file of the board of  
16 commissioner’s hearing entitled “3.16.16 (5)” includes Petitioner Chelsea  
17 Strautman Neil’s testimony in which she stated “I have the \* \* \* deed of  
18 dedication here, um, actually I think I gave a copy of it last meeting \* \* \*.”  
19 Video Recording at 23:04-13. It is clear that Petitioner Strautman Neil  
20 provided testimony regarding the dedication but it is unclear if the copy of the  
21 deed was ever actually placed before the board of commissioners as required by  
22 OAR 661-010-0025(1)(b). The county states that it possesses no copy of the

1 deed, which suggests that petitioner Strautman Neil mistakenly thought the  
2 deed had been submitted earlier, and failed to submit it to the Board of  
3 Commissioners. Because the county is the custodian of the record, and  
4 petitioners have the burden of demonstrating that the record does not conform  
5 to OAR 661-010-0025(1)(b), we conclude that petitioners have not  
6 demonstrated that the deed was placed before the final decision maker, or  
7 incorporated into the record otherwise, and therefore this objection is denied.

8 **B. Materials Improperly Included in the Record**

9 Petitioners object that the record contains material that was not placed  
10 before the final decision maker. Petitioners object to a findings paragraph in the  
11 board of commissioners’ “Supplemental Findings of Fact and Conclusions of  
12 Law” at Record 13 where the commissioners found that the existence of a  
13 Bonneville Power Administration easement is “unique to the property and is  
14 not generally applicable to other property.” Petitioners argue that at no point in  
15 the public hearing did any of the commissioners make a statement that supports  
16 this particular finding.

17 The county argues, and we agree, that petitioners’ objection is an  
18 argument on the merits regarding whether the county’s findings are supported  
19 by substantial evidence, rather than an objection to a document improperly  
20 included in the record. As the county notes, OAR 661-010-0025(1)(a)  
21 specifies that the contents of the record include “[t]he final decision including  
22 any findings of fact and conclusions of law.” It is clear that Record 13 is part of

1 the board of commissioner’s final decision; hence it is correctly included in the  
2 record. This record objection is denied.

3 **C. Inaccurate Minutes**

4 OAR 661-010-0026(3) provides that “[a]n objection on grounds that the  
5 minutes or transcripts are incomplete or inaccurate shall demonstrate with  
6 particularity how the minutes or transcripts are defective and shall explain with  
7 particularity why the defect is material.” Petitioners argue that the minutes of  
8 the board of commissioners’ public hearing are inadequate, because the  
9 minutes insufficiently paraphrase the testimonies of County Planner Glen  
10 Higgins, Lead Petitioner Strautman Neil, and attorney Steven Liday. Petitioners  
11 also assert that the minutes leave out pertinent discussions regarding the  
12 uniqueness of the BPA easement, financial considerations to justify a variance,  
13 considerations of the size of neighboring parcels as they relate to granting the  
14 variance, and the relevance of a 2011 dedication of petitioners’ property.  
15 Petitioners also take issue with a statement made by Commissioner Hyde  
16 regarding the number of employees petitioners will be hiring for their business.

17 The county argues, and we agree, that petitioners have failed to show  
18 that the minutes of the hearing are defective. *See* ORS 192.650(1)(d); *Mintz v.*  
19 *Washington County*, 34 Or LUBA 781 (1998) (where petitioner objects to the  
20 adequacy of the minutes included in the record but fails to demonstrate that the  
21 minutes are in fact defective or that the defect is material to the appeal, the  
22 objection will be denied); *see also Boyer v. Baker County*, 34 Or LUBA 758

1 (1998) (a summary of testimony necessarily omits details of that testimony).  
2 The minutes attempt to summarize hours of testimony, and that the summary  
3 does not include all the details of the testimony is not, in itself, an indication  
4 that the minutes are defective or inadequate.

5 Petitioners' objection regarding the minutes' paraphrase of  
6 Commissioner Hyde's statement that petitioners will have four additional  
7 employees appears to dispute the accuracy of that statement, not the accuracy  
8 of the minutes. Petitioners argue that they will have only one employee. We  
9 have reviewed the supplemental record's video files, and Commissioner Hyde  
10 stated "\* \* \* I also heard that [petitioner is] going to have four new employees,  
11 one at least, and so you're already talking about impact \* \* \*." Supplemental  
12 Record Video Recording 03.16.16 (1) at 2:32-42. The minutes accurately  
13 summarize Commissioner Hyde's statement that petitioners will hire four  
14 additional employees. Whether that statement is true or not does not indicate  
15 any deficiency in the minutes. This objection is denied.<sup>1</sup>

16 **D. Conclusion**

17 The record is settled as of the date of this order. The petition for review  
18 shall be due 21 days after the date of this order. The response brief shall be due

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<sup>1</sup> We note that because the record as supplemented includes the audio and video recordings of public hearings, either party can transcribe portions of the hearing and attach those transcriptions to their brief as an appendix in support of their arguments. OAR 661-010-0030(5).

1 42 days after the date of this order. The final opinion and order shall be due 77  
2 days after the date of this order.

3 Dated this 13th day of July, 2016.

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Tod A. Bassham

9 Board Member