

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

JIM VAN DYKE, JULIE VAN DYKE,
MARK VAN DYKE, VELMA VAN DYKE,
RIVERVIEW FARMS INC., BEN VAN DYKE,
BEN VAN DYKE FARMS INC., BRIAN SCHMIDT,
SCOTT BERNARDS, LESTER SITTON,
BROOK SITTON, ALLEN SITTON,
TIM PFEIFFER, MARYALICE PFEIFFER,
RICHARD CLOEPFIL, CHRISTY CLOEPFIL,
TOM HAMMER, KELSEY FREESE,
HAROLD KUEHNE, JOLENE KUEHNE,
ERIC HUEHNE, MARK GAIBLER,
GREG MCCARTHY, DARREN SUTHERLAND,
and B.J. MATTHEWS,
Petitioners,

and

KRIS WEINBENDER,
Intervenor-Petitioner,

VS.

YAMHILL COUNTY,
Respondent.

LUBA No. 2018-061

ORDER

The challenged decision in this appeal is Ordinance 904, a county board of commissioners' decision that amends the county's Transportation System Plan (TSP) in order to acknowledge (1) the county's purchase of a railroad right-of-way from the railroad, and (2) the county's "immediate plans" to

1 develop several miles of that right-of-way as a multi-model trail between the
2 City of Yamhill and the City of Carlton. Record 9 (preamble to Ordinance
3 904). Petitioners own and farm property on either side of the right-of-way, and
4 during the proceedings below took the position that the right-of-way reverted
5 to the adjoining property owners when the railroad ceased to function, and that
6 the quitclaim deed the railroad granted the county therefore conveyed no
7 ownership in the right-of-way.

8 Before the Board are several motions and petitioners' objections to the
9 record.

10 **MOTION TO INTERVENE**

11 Kris Weinbender moves to intervene on the side of petitioners. There is
12 no opposition to the motion and it is allowed.

13 **DISMISSAL OF PETITIONERS**

14 Petitioner Chris Mattson voluntarily withdraws from this appeal.

15 The county moves to dismiss petitioner Rudis Lac, LLC, the corporate
16 name for a dairy farm owned by petitioner Bryan Schmidt, on the grounds that
17 no representative appeared on behalf of Rudis Lac, LLC, during the
18 proceedings below. ORS 197.830(2)(a). Petitioners respond that they believe
19 the audio record would demonstrate that Bryan Schmidt appeared on behalf of
20 Rudis Lac, LLC. However, petitioners state that given difficulties with the
21 audio record, discussed below, they will voluntarily withdraw Rudis Lac, LLC,

1 rather than attempt to locate evidence that the appearance requirement was met.
2 Accordingly, Rudis Lac, LCC, is dismissed from this appeal.

3 **MOTION TO STRIKE**

4 The county moves to strike the introduction section at pages two to nine
5 of petitioners' record objections, arguing that the introduction consists of legal
6 argument and background that have nothing to do with the record objections.
7 Petitioners argue that the county cites no provision in our rules that the
8 introduction section violates. Petitioners also argue that the introduction
9 section provides important background for the issues raised in the objections,
10 including the materiality of alleged defects in the minutes. We agree with
11 petitioners that there is no basis for striking the introduction. The county's
12 motion is denied.

13 **MOTION FOR EVIDENTIARY HEARING**

14 On April 3, 2018, an assistant county counsel filed the application on
15 behalf of the county to amend the county TSP. The county processed the
16 application under procedures applicable to a legislative, rather than quasi-
17 judicial, proceeding. On May 3, 2018, the county planning commission held a
18 public hearing on the application and voted to forward the application to the
19 board of commissioners without a recommendation. On May 15, 2018, the
20 board of commissioners held a public hearing on the application. The same
21 assistant county counsel who signed the application appeared at the hearing as
22 the main advocate, presenting the proposed ordinance and supporting findings,

1 and providing rebuttal to opponent testimony. At the conclusion of the
2 hearing, a commissioner made a motion to accept the findings and mitigation
3 proposed by the assistant county counsel/applicant and to move forward with
4 developing a master plan for the trail. After deliberations, the motion failed by
5 a vote of two to one, with Commissioners Starrett and Olson voting against it.

6 On May 22, 2018, a local newspaper reported that the county
7 administrator, deputy county administrator, and county counsel met with
8 Commissioner Olson after the May 15, 2018 hearing to discuss the application
9 and review proposed changes to the findings and conditions. Exhibit 1 to
10 Motion for Evidentiary Hearing; *see also* Exhibit 2, an email from
11 Commissioner Olson to one of the petitioners in this appeal, stating that after
12 the May 15, 2018 hearing, “I met with staff and legal counsel for several hours
13 to go over my vote and once again the reasons for my vote.”). As a result of
14 that meeting, Commissioner Olson agreed to change his vote and requested
15 reconsideration of the May 15, 2018 vote. A new hearing was held on May 31,
16 2018, at the conclusion of which the commissioners voted two to one, to
17 reconsider the decision and again by a vote of two to one, to approve the
18 application, with amended findings and conditions, and with Commissioner
19 Olson changing his vote in favor. The two commissioners who voted in favor
20 of the ordinance signed it on that same date, with the assistant county
21 counsel/applicant affixing his signature to approve the form of the ordinance.
22 Record 12.

1 As part of their record objections, petitioners argue that the record of the
2 proceedings on the application should include any documents presented to
3 Commissioner Olson during the meeting between the commissioner, county
4 staff and county counsel, as a result of which the commissioner agreed to
5 change his vote. The county filed a response disputing the objection as
6 “unsupported conjecture.” Response at 11. The county also argues that
7 because the county processed the application under legislative procedures, the
8 statutes at ORS 215.422 governing *ex parte* communications do not apply, and
9 that in any event communications between county staff and the county
10 decision-makers are not subject to the obligations applicable to *ex parte*
11 communications.¹ *Id.* at 11-12.

¹ ORS 215.422 provides, in relevant part:

“(3) No decision or action of a planning commission or county governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

“(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and

“(b) Has a public announcement of the content of the communication and of the parties’ right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

1 Petitioners responded by filing a motion for evidentiary hearing pursuant
2 to OAR 661-010-0045.² In support of the motion, petitioners attach Exhibit 1,

“(4) A communication between county staff and the planning commission or governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section.

“(5) Subsection (3) of this section does not apply to ex parte contact with a hearings officer approved under ORS 215.406 (1).”

² OAR 661-010-0045 provides, in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.

“(2) Motions to Take Evidence:

“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.

“(b) A motion to take evidence shall be accompanied by:

1 a copy of a May 22, 2018 article in the Yamhill Valley News-Register, and
2 Exhibit 2, a copy of an email between Commissioner Olson and one of the
3 petitioners. Petitioners argue that the county erred in processing the
4 application under legislative procedures, and argues that the application is
5 properly viewed as quasi-judicial, and therefore subject to the statutes
6 governing *ex parte* communications. Petitioners seek an evidentiary hearing
7 under OAR 661-010-0045(1) to resolve disputed factual allegations regarding
8 “ex parte contacts” and “other procedural irregularities not shown in the record
9 and which, if proved, would warrant reversal or remand of the decision.”
10 According to petitioners, the evidentiary hearing will elicit evidence outside
11 the record establishing the following:

- 12 “1. The applicant arranged and secured ex parte contacts with
13 Vice Chair Olson lasting for several hours; the applicant’s
14 purpose for which [was] to convince Olson to change his
15 May 15 ‘no’ vote to ‘yes’ at a governing body proceeding to
16 occur on May 31.
- 17 “2. The applicant presented documents during the course of
18 those ex parte contacts and will identify and produce those
19 documents;

“(A) An affidavit or documentation that sets forth
the facts the moving party seeks to establish; or

“(B) An affidavit establishing the need to take
evidence not available to the moving party, in
the form of depositions or documents as
provided in subsection (2)(c) or (d) of this
rule.”

1 “3. The applicant made representations or promises during the
2 course of those contacts that induced Commissioner Olson
3 to change his vote;

4 “4. And the content of those representations or promises.”
5 Motion for Evidentiary Hearing 8.

6 Petitioners’ arguments that the meeting with Commissioner Olson
7 represented an “ex parte contact” or a “procedural irregularity” are based on
8 two grounds. First, petitioners argue that the county’s decision is a quasi-
9 judicial decision under the test set out in *Strawberry Hill 4 Wheelers v. Board*
10 *of Comm.*, 287 Or 591, 601 P2d 769 (1979), and therefore subject to the
11 requirements of ORS 215.422(3). In the alternative, petitioners argue that even
12 if ORS 215.422(3) does not apply, a process whereby a land use applicant
13 (represented by county staff with superior and fiduciary access to a local
14 government decision-maker) engages in closed-door lobbying in order to
15 reverse the decision-maker’s vote on a land use application that purports to
16 deprive petitioners of their property rights is a process that violates the due
17 process clause under the federal constitution.

18 The county responds that the motion to take evidence should be denied,
19 because it is premised on the incorrect view that the county’s decision is a
20 quasi-judicial decision subject to the requirements of ORS 215.422. On the
21 contrary, the county argues, the decision is a legislative decision under
22 *Strawberry Hills 4-Wheelers*, 287 Or 591. In any case, the county argues, even
23 if ORS 215.422 applies, ORS 215.422(4) provides that communication
24 between county staff and the governing body shall not be considered an *ex*

1 *parte* contact for purposes of ORS 215.422(3). *See* n 1. According to the
2 county, the county counsel, administrator and deputy administrator all qualify
3 as “county staff” for purposes of ORS 215.422(3), and thus as a matter of law
4 their communications with Commissioner Olson do not constitute *ex parte*
5 contacts. With respect to petitioners’ constitutional arguments, the county
6 argues that a due process clause violation is only possible in the context of an
7 adjudication, and that the present legislative proceeding to amend the county’s
8 TSP does not constitute an adjudication of any kind.

9 The parties’ primary disputes surround whether the county’s decision is a
10 legislative, quasi-judicial or adjudicative decision, whether ORS 215.422(3)
11 applies, and whether the meeting between county staff and Commissioner
12 Olson violated due process. These disputes are primarily legal ones that will
13 presumably be briefed and argued in the merits of this appeal, and need not be
14 resolved at this juncture. An evidentiary hearing under OAR 661-010-0045(1)
15 is warranted only when there are *factual* disputes regarding *ex parte* contacts or
16 procedural irregularities, etc. *See* n 2. For purposes of this motion to take
17 evidence, there do not appear to be any *factual* disputes that require resolution
18 in order to address the merits of the assignments of error that may arise from
19 that meeting. The county does not dispute that the meeting occurred, who was
20 present, or that the intent and the actual result of the meeting was to persuade
21 Commissioner Olson to reverse his vote, based on proposed new findings and

1 conditions that were intended to address the commissioner's concerns
2 regarding the application.

3 The new findings and conditions that Commissioner Olson presumably
4 found persuasive are reflected in the county's final decision that was adopted
5 on May 31, 2018. Those findings and conditions are already in the record.
6 Petitioners have not cited any basis to believe that the meeting involved other
7 written documents. The specific content of the *verbal* communications that
8 occurred at the meeting do not seem necessary to resolve the legal issues that
9 will likely be presented in the petition for review. For example, if petitioners
10 succeed in establishing that ORS 215.422(3) applies, the result would be that
11 the decision would be remanded for the commissioner to disclose the substance
12 of the communication at a public hearing, and allow the parties an opportunity
13 to rebut the disclosed communications. It is unlikely that LUBA will need to
14 know the specific content of those verbal communications in order to resolve
15 the legal issue of whether ORS 215.422(3) applies. Similarly, if petitioners
16 succeed in establishing that the proceeding was an adjudication or otherwise
17 subject to review under the due process clause, and that a violation of that
18 clause occurred, the result would be remand to correct any constitutional
19 violation. In either case, petitioners have not demonstrated that either
20 petitioners or LUBA require the specific content of verbal communications that
21 occurred at the meeting, discovered via an evidentiary hearing under OAR 661-

1 010-0045, in order to adequately present or resolve the legal issues likely to be
2 raised in this appeal concerning the meeting.³

3 For the foregoing reasons, petitioners have not demonstrated that there
4 are factual disputes that would warrant granting a motion to conduct an
5 evidentiary hearing. The request for an evidentiary hearing is denied.
6 However, the Board will grant the motion to take evidence outside the record
7 with respect to Exhibits 1 and 2, attached to the motion. In briefing, the parties
8 may if they wish, cite to those exhibits to the extent necessary to establish the
9 existence of the meeting, its participants, and its purpose and outcome. In all
10 other respects, the motion to take evidence is denied.

11 **RECORD OBJECTIONS**

12 In response to petitioners' record objections, the county submitted a
13 supplemental record and a revised table of contents that are intended to resolve
14 some objections. The supplemental record consists of several emails and
15 documents that are attached to the revised table of contents. The county
16 disputes other objections. Petitioners filed a reply that withdraws some
17 objections, continues to maintain others that are in dispute, and objects in part

³ In the event that petitioners, in preparing the petition for review, or preparing responses to arguments in the response brief, conclude that adequate briefing of the legal issues requires evidence of the specific content of verbal communications at the meeting, petitioners may renew their motion for an evidentiary hearing.

1 to the supplemental record and revised table of contents. We now resolve the
2 objections.

3 **1. DLCD Notices**

4 OAR 661-010-0025(1)(d) requires that the record include:

5 “Notices of proposed action, public hearing and adoption of a final
6 decision, if any, published, posted or mailed during the course of
7 the land use proceeding, including affidavits of publication,
8 posting or mailing. Such notices shall include any notices
9 concerning amendments to acknowledged comprehensive plans or
10 land use regulations given pursuant to ORS 197.610(1) or
11 197.615(1) and (2).”

12 ORS 197.610(1) requires local governments to provide information specified in
13 ORS 197.610(3), including a copy of proposed amendments, to the Department
14 of Land Conservation and Development (DLCD) before the hearing on the
15 amendment, based on which DLCD provides notice of the proposal to persons
16 requesting such notice. ORS 197.615(1) and (2) require local governments,
17 after adopting the amendment, to submit certain information, including a copy
18 of the amendments, to DLCD, based on which DLCD provides notice of
19 adoption to persons requesting such notice. Petitioners argue that the record as
20 supplemented includes four pages of documents identified as “DLCD Notices,”
21 but the record does not include all the pre-and post-decisional information that
22 the statutes require the county to provide to DLCD.

23 The county responds that the pre-decisional information sent to DLCD is
24 found at Record 443-613, consisting apparently of the application and
25 supporting materials. The county explains that DLCD now allows on-line

1 submittal of information required by ORS 197.610 and 197.615, and the county
2 has included in a supplemental record, copies of emails between county staff
3 and DLCD evidencing these on-line submittals. These emails are apparently
4 what the revised table of contents describes as “DLCD Notices,” starting at
5 what is designated Item .5 at Record .5.⁴

6 In reply, petitioners argue that, while the application materials at Record
7 443-613 might have been sent to DLCD, those materials do not constitute the
8 “notice” to DLCD that must be included in the record under OAR 661-010-
9 0025(1)(d). We understand petitioners to argue that DLCD requires local
10 governments to submit specific forms, either on paper or electronically, which
11 constitute the notice of proposed change and notice of adoption of changes to
12 an acknowledged comprehensive plan or land use regulation, and that those
13 forms must be included in the record under OAR 661-010-0025(2)(d). We
14 agree with that argument. If the record includes the specific forms that DLCD
15 requires local governments to send to DLCD, *i.e.*, notice of proposed change
16 and notice of adoption, the county has not identified their location in the
17 record.

18 Petitioners also dispute that the application materials at Record 443-613
19 include all the content required by ORS 197.610(3). We agree with petitioners

⁴ The decimal item and page numbers (.5) are not typos. The revised table of contents inserts the “DLCD notices” as Item .5 at the beginning of the record, before Item 1 located at Record 1.

1 that if documents with the content required by ORS 197.610(3) exist and were
2 sent to DLCD as part of the county's notice of proposed change, and are not
3 already in the record, the county must include those documents in a
4 supplemental record.

5 Further, petitioners argue that the application materials at Record 443-
6 613 do not constitute the *post-decisional* notice and information required by
7 ORS 197.615(1) and (2). We agree with petitioners that if the county sent to
8 DLCD the post-decisional notice and information required by ORS 197.615(1)
9 and (2), the county must either identify their location in the present record or
10 submit them as part of a supplemental record. This objection is sustained.

11 **2. DLCD Response**

12 Petitioners object to the omission of DLCD's response to any notice of
13 proposed change sent by the county. The county responded by including in the
14 supplemental record a copy of an email from DLCD staff acknowledging
15 receipt of information regarding the proposed and adopted amendments.
16 Petitioners clarify that they meant a substantive response from DLCD
17 regarding the proposed amendments, similar to a 2015 DLCD memorandum
18 mentioned in the county's decision. We agree with petitioners that if DLCD
19 submitted to the county a substantive response to the information the county
20 sent to DLCD, the response should be included in the record. If no such
21 response was received, then the county should so advise. This objection is
22 sustained.

1 **3. Quality of Digital Audio Recording of May 31, 2018 Hearing**

2 Petitioners argue that the digital copy of the audio recording of the May
3 31, 2018 hearing that the county provided includes many gaps or long blank
4 passages, which petitioners suspect is a defect in the copying process rather
5 than a defect in the original recording. The county responds that it has
6 reviewed the original recording, and that the copy sent to petitioners is an
7 accurate copy, which includes what the county characterizes as “small
8 portions” of blanked out or inaudible material in the original. Petitioners reply
9 that the county cannot possibly have compared the original recording with the
10 recording sent to petitioners, and argue that the only way to determine if the
11 defects in petitioners’ audio stem from copying or the original, is to provide
12 another copy to petitioners. We agree with petitioners that an easy solution to
13 this conundrum is for the county to supply petitioners with another digital copy
14 of the original recording. If that copy is no better, then the problem is with the
15 original recording and beyond remedy. This objection is sustained.

16 **4. Minutes of May 15, 2018 and May 31, 2018 Hearings**

17 Under OAR 661-010-0026(3), if a party demonstrates that the minutes of
18 a land use proceeding are materially “defective,” LUBA can require the local
19 government to submit a full or partial verbatim transcript of the proceeding
20 from an audio recording, if one exists and is in the record.⁵ Petitioners argue

⁵ OAR 661-010-0026(3) provides:

1 that the minutes of the May 15, 2018 hearing, at Record 218-24, and the
2 minutes of the May 31, 2018 hearing, at Record 28-29, are materially defective
3 in several ways, by failing to summarize certain testimony or statements.

4 The county responds, and we agree, that petitioners have not
5 demonstrated that the cited omissions in the summaries of testimony and
6 statements in the minutes are material defects that warrant requiring the county
7 to provide a full or partial transcript of the audio recordings of either hearing.
8 For example, petitioners argue that the minutes of the May 31, 2018 hearing
9 fail to summarize statements by Commissioner Olson explaining his reasons for
10 changing his vote. Petitioners contend that having a transcript in the record of
11 the commissioners' words (as opposed to listening to them on the digital audio
12 recording) is essential to demonstrate that the commissioner changed his vote
13 due to lobbying by county staff. However, as explained above, no party
14 disputes that the commissioner changed his vote after a meeting with county
15 staff, and to the extent the exact wording of the commissioners' statements or

“An objection on grounds that the minutes or transcripts are incomplete or inaccurate shall demonstrate with particularity how the minutes or transcripts are defective and shall explain with particularity why the defect is material. Upon such demonstration regarding contested minutes, the Board shall require the governing body to produce a transcript of the relevant portion of the proceeding, if an audiotape recording or other type of recording is available. Upon such demonstration regarding contested transcripts, the Board shall require the governing body to produce a more complete or amended transcript.”

1 reasons for changing his vote have any bearing on any issue in this appeal, the
2 parties can direct LUBA to the relevant portions of the audio recordings, or
3 include in their briefing partial self-prepared transcripts of the pertinent
4 statements. In short, to the extent the minutes are inadequate or defective in
5 summarizing the commissioners' statements, petitioners have not demonstrated
6 that the defect is material. Petitioners' arguments for other material defects
7 also provide no basis to require the county to prepare a full or partial transcript
8 of the May 15 or May 31, 2018 hearings. These objections are denied.

9 **5. Items Omitted from the Record**

10 **a. Kuehne Letter**

11 Petitioners object to the omission of a May 28, 2018 letter submitted by
12 petitioners Harold Kuehne and Jolene Kuehne. The county responds that the
13 letter was never submitted to the county. Petitioners reply that the letter was
14 faxed to the county on May 29, 2018, pursuant to instructions from county
15 staff, as related in the declarations of the Kuehnes, attached to petitioners'
16 reply. We agree with petitioners that, based on the declarations, the letter
17 should be included in a supplemental record. This objection is sustained.

18 **b. DLCD Memorandum**

19 Petitioners object to the omission of a DLCD memorandum dated May
20 19, 2015, which is cited in the findings supporting the decision, at Record 15.
21 The county does not dispute that the memorandum belongs in the record, but
22 argues that memorandum is located at Record 416-17. Petitioners reply that the

1 document at Record 416-17 is dated December 2015, and is clearly not the May
2 19, 2015 memorandum cited, and partially quoted, in the findings, because the
3 quoted language does not appear in the document at Record 416-17. We agree
4 with petitioners. The county shall submit a supplemental record including the
5 May 19, 2015 memorandum cited and partially quoted in the findings. This
6 objection is sustained.

7 **c. May 29, 2018 Session Agenda**

8 The record includes the minutes of a May 29, 2018 meeting of the board
9 of commissioners. Petitioners object to the omission of the agenda and any
10 meeting materials from that meeting related to the proposed trail. The county
11 responds that the meeting minutes are included in the record only because some
12 opponents showed up unannounced and made public comments about the trail
13 proposal, but that nothing about the trail proposal was on the agenda for that
14 meeting, or part of any meeting materials. Petitioners reply that the May 29,
15 2018 meeting was one of the proceedings leading to the adoption of the
16 challenged decision, and therefore the agenda and all meeting materials must
17 be included in the record, even if the agenda and materials say nothing about
18 the proposed trail. We disagree with petitioners. Public hearings and meetings
19 often combine discrete matters, and the county is required to include in the
20 record only those documents related to the decision on appeal. The county is
21 not required to include meeting agendas or meeting materials that do not
22 concern the land use matter on appeal. This objection is denied.

1 **d. Attachment to Public Comment Card**

2 Petitioners withdraw this objection.

3 **6. Documents Placed Before Commissioner Olson**

4 Petitioners object to the omission of any documents that were placed
5 before Commissioner Olson, in his meeting with county counsel and the county
6 administrator and deputy administrator. According to petitioners, any such
7 documents were “placed before” one of the final decision-makers (indeed, the
8 decisive decision-maker as it turned out), and thus should be included in the
9 record under OAR 661-010-0025(1)(b).⁶

10 The county responds that any documents placed before Commissioner
11 Olson were part of staff communications with the commissioners, and thus do
12 not constitute “ex parte contacts” for purposes of ORS 215.422(3). As
13 discussed above with respect to petitioners’ motion to dismiss, we do not

⁶ OAR 661-010-0025(1) provides, in part:

“Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

“(a) The final decision including any findings of fact and conclusions of law.

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

1 resolve at this juncture the parties’ dispute regarding ORS 215.422. The sole
2 question presented here is whether, pursuant to OAR 661-010-0025(1)(b), any
3 documents placed before Commissioner Olson during the meeting should
4 thereby be included in the record submitted on appeal. The county provides no
5 response on that point.

6 However, we reject petitioners’ arguments under OAR 661-010-
7 0025(1)(b), which refers to items placed before the “final decision maker,
8 during the course of the proceedings before the final decision maker.” The
9 final decision maker here is the board of commissioners, not individual
10 commissioners, and the meeting with Commissioner Olson, whatever it was,
11 was not part of the “course of the proceedings before” the board of
12 commissioners.⁷ This objection is denied.

13 **7. Record Organization**

14 Petitioners object that attachments to three documents were separated
15 from their parent documents, but states that no relief is necessary, as long as the
16 county does not dispute the attribution of those attachments. The county’s
17 revised table of contents attempts to link the separated documents. This
18 objection requires no further consideration.

⁷ As discussed above, no party cites us any reason to believe that the documents provided to Commissioner Olson at the meeting were anything other than the additional findings and conditions that were eventually adopted as part of the commissioners’ May 31, 2018 decision.

1 **8. Documents from Earlier Proceedings**

2 The county has been planning to acquire and develop a trail along the
3 railroad right-of-way since 2012, and has conducted various studies, planning
4 efforts, open houses, and meetings regarding the proposal. Petitioners argue
5 that these pre-application proceedings are part of the “proceedings before the
6 final decision maker” for purposes of OAR 661-010-0025(1)(b) and therefore
7 the documents and recordings stemming from these pre-application
8 proceedings should be included in the record on appeal. However, petitioners
9 do not allege that any of the pre-application proceedings were conducted by or
10 before the board of commissioners, who are the final decision-makers, or were
11 incorporated by the commissioners into the record before the commissioners.
12 OAR 661-010-0025(1)(b); *Home Builders Association v. City of Eugene*, 58 Or
13 LUBA 688, 698 (2009); *Gunderson, LLC v. City of Portland*, 62 Or LUBA
14 505, 510 (2010). Accordingly, this objection is denied.

15 **9. Conclusion**

16 The county shall transmit and serve a second supplemental record that
17 responds to the objections sustained above. Thereafter, the Board will issue an
18 order settling the record and establishing a briefing schedule.

19 Dated this 14th day of September, 2018.

20 

21 _____
22 Tod A. Bassham
23 Board Member