

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

3
4 JOYCE JACOBUS, PEGGY SUE JACOBUS,
5 JUDY DAHL, ANN FELBER,
6 and KURT KNABKE,
7 *Petitioners,*

8
9 vs.

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11 KLAMATH COUNTY,
12 *Respondent,*

13
14 and

15
16 CITY OF CHILOQUIN,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2020-054

20
21 ORDER

22 **BACKGROUND**

23 Petitioners appeal the county board of commissioners' approval of an
24 exception to Statewide Planning Goal 4 (Forest Lands) and a limited use overlay
25 to allow a wastewater treatment facility, lagoon storage and land application of
26 effluent.

27 **MOTION TO INTERVENE**

28 City of Chiloquin (intervenor) moves to intervene on the side of
29 respondent. The motion is unopposed and is granted.

1 **RECORD OBJECTIONS**

2 Petitioners filed their record objections on July 2, 2020. OAR 661-010-
3 0026(4) requires respondent to respond to the record objections within 14 days
4 of the date they are filed. The county has not responded to the objections. We
5 resolve them below.

6 **A. OAR 661-010-0025(1)(b)**

7 OAR 661-010-0025(1)(b) provides that the record shall include “[a]ll
8 written testimony and all exhibits, maps, documents or other materials
9 specifically incorporated into the record or placed before, and not rejected by, the
10 final decision maker, during the course of the proceedings before the final
11 decision maker.” Petitioners object to the inclusion of the following items in the
12 record because they were generated after the final decision was issued and were
13 therefore not placed before the final decision maker during the course of the
14 proceedings:

- 15 (1) A June 8, 2020 letter from county counsel to LUBA;
16 (2) LUBA’s acknowledgment of receipt of the Notice of Intent to
17 Appeal (NITA);
18 (3) The NITA itself, along with petitioners’ transmittal letter and
19 attachments; and
20 (4) An email from petitioners’ counsel to the county requesting a
21 copy of the final decision.

1 We agree with petitioners that these items were generated after issuance of the
2 final decision and are therefore not properly included in the record. This objection
3 is sustained.

4 **B. OAR 661-010-0025(4)**

5 OAR 661-010-0025(4)(a)(E) requires that the record be arranged in
6 inverse chronological order, with the most recent item listed first. Petitioners
7 object that the record improperly places a meeting’s agenda at Record 25, ahead
8 of that meeting’s minutes at Record 26. We agree that the agenda precedes the
9 minutes in time. The objection is sustained. However, this defect is so minor that
10 we will not require the county to correct it in a supplemental record.

11 **C. OAR 661-010-0026(2)(a)**

12 Petitioners object that the DVD included with the record omits part of the
13 April 28, 2020 public hearing. Petitioners cite OAR 661-010-0026(2)(a) as
14 authorizing a record objection where “[t]he record does not include all materials
15 included as part of the record during the proceedings before the final decision
16 maker.” We cannot tell what portion of OAR 661-010-0026(2)(a) petitioners rely
17 upon as support for their objection. However, OAR 661-010-0025(1)(c) provides
18 that the record shall include “media recordings of the meetings conducted by the
19 final decision maker as required by law, or incorporated into the record by the
20 final decision maker.” Petitioners object that the hearing video that was available
21 on the county’s website on the date they filed their record objection included
22 preliminary comments related to the hearing, which was held using “WebEx” in

1 order to allow for social distancing during the COVID-19 pandemic, but that
2 those comments are not included on the DVD provided with the record. The
3 county has included the DVD in the record and therefore should include a
4 complete copy of the hearing video. This part of the objection is sustained.

5 Petitioners also argue that the record is incomplete because it does not
6 contain a list of those who attended the public hearing by WebEx. Petitioners
7 explain:

8 “The record indicates that eleven people were on the WebEx but
9 only six testified on the record. Because of the confusion resulting
10 from the WebEx format and the poor quality of the audio, a complete
11 list of those on the call is appropriate in order to ensure that all who
12 sought to participate were heard.” Petitioners’ Record Objection 7.

13 Petitioners do not cite any authority requiring a list of all attendees at a public
14 meeting and we are aware of none. This part of the objection is denied.

15 **D. OAR 661-010-0026(3)**

16 OAR 661-010-0026(3) provides, in part:

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

25 Petitioners object that the minutes are incomplete and do not accurately reflect
26 the proceedings. Petitioners maintain that the minutes do not reflect the fact that,

1 due to COVID-19, public testimony was received only via WebEx and telephone,
2 and argue that the minutes should reflect issues with the ability of the public to
3 convey their comments using this technology. Petitioners identify the following
4 as deficiencies in the minutes:

5 (1) Failure to reflect the planning director’s discussion of a
6 petitioner’s request for a continuance;

7 (2) Failure to reflect a planning commissioner’s question
8 concerning whether the commission could grant a
9 continuance and still remain within its statutory deadline for
10 issuing a decision, the planning director’s response, and a
11 second planning commissioner’s question about the format of
12 the hearing and the issue of a continuance;

13 (3) Failure to reflect the lack of a systematic methodology for
14 receiving testimony through WebEx, and the resulting
15 confusion;

16 (4) Failure to reflect that a caller stated, “You are really breaking
17 up, we can’t hear anything”;

18 (5) Failure to reflect that a petitioner continued to speak after
19 being asked to pause, indicating that they could not hear the
20 proceedings;

21 (6) Failure to reflect a participant’s concerns related to drawdown
22 of neighbor’s aquifers;¹

23 (7) Failure to reflect a petitioner’s request to reserve their time
24 while their materials were being reviewed by the planning
25 commission, the planning commission’s failure to do so, and

¹ The objection identifies the participant as “Petitioner Stanley Bennett,” but Bennett is not a party in this appeal. Petitioners’ Record Objection 4.

1 that the petitioner’s testimony was cut off and they were
2 muted; and

3 (8) Failure to reflect confusion at one point regarding whether the
4 planning commission chair had accepted testimony from
5 participants whose last names began with the letters M
6 through Z. Petitioners’ Record Objection 3-5.

7 While petitioners have identified places where the minutes fail to reflect
8 their attempts to participate in the proceedings, they have not demonstrated that
9 the minutes are “incomplete” or “inaccurate.” *See Port of Umatilla v. Umatilla*
10 *County*, 70 Or LUBA 527, 530 (2014) (“Minutes of a proceeding are necessarily
11 summary, and are not expected to include specific arguments or details of oral
12 statements.”) Further, even if the minutes could be considered incomplete or
13 inaccurate for these reasons, petitioners have not explained why such defects are
14 “material.”

15 This objection is denied. However, petitioners may, under OAR 661-010-
16 0030(5), attach as appendices to their petition for review “verbatim transcripts of
17 relevant portions of media recordings that are part of the record.”

18 **CONCLUSION**

19 Within 21 days of the date of this order, the county shall file with LUBA
20 and serve on the parties an amended record omitting the four items generated
21 after issuance of the final decision, located at Record 1 through 15, and shall
22 include in a supplemental record the full hearing video on a DVD. Thereafter, the
23 Board will issue an order settling the record and establishing a briefing schedule.

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1 Dated this 25th day of August 2020.

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Michelle Gates Rudd

7 Board Chair