

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 CENTRAL KLAMATH COUNTY  
5 COMMUNITY ACTION TEAM,

6 *Petitioner,*

7  
8 vs.

9  
10 KLAMATH COUNTY,

11 *Respondent,*

12 and

13  
14 MERICOM DEVELOPMENT, INC.,

15 *Intervenors-Respondent.*

16  
17 LUBA No. 2001-167

18  
19 ORDER

20 **MOTION TO INTERVENE**

21 Mericom Development, Inc. (intervenor), the applicant below, moves to intervene on  
22 the side of respondent. There is no opposition to the motion, and it is allowed.

23 **RECORD OBJECTIONS**

24 **A. Objection 1**

25 In *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001), this  
26 Board remanded the county's approval of a conditional use permit for a communication  
27 tower on land zoned exclusive farm use, so that the county could adopt findings addressing  
28 certain conditional use criteria. On remand, the county conducted hearings and again  
29 approved the permit, with findings addressing the conditional use criteria. Petitioner objects  
30 that the record does not include several documents that were submitted to the county in the  
31 course of the proceedings on remand. The documents are attached to petitioner's objection  
32 as exhibits A, B and C, along with the affidavit of Thomas A. Burns (Burns), who is one of  
33 petitioner's members.

1           Petitioner explains that, on remand, the county board of commissioners held a public  
2 hearing on July 24, 2001. The notice provided for the July 24, 2001 hearing stated that “[a]ll  
3 written comments to the record must be received” by 5:00 p.m. the day prior to the hearing.  
4 Record 50. The notice further states that “[o]ral testimony will be accepted at the public  
5 hearing.” *Id.* However, at the planning director’s request, the July 24, 2001 hearing was  
6 continued to September 25, 2001, to allow intervenor to submit written materials and for  
7 planning staff to draft a staff report. The Burns affidavit states that Burns submitted exhibit  
8 A to the county on June 8, 2001, and exhibit B to the county the day before the July 24, 2001  
9 hearing. The affidavit states that Burns submitted exhibit C to the county on the day before  
10 the continued hearing, on September 24, 2001. Petitioner argues that each of the documents  
11 in these exhibits was “placed before, and not rejected by, the final decision maker, during the  
12 course of the proceedings before the final decision maker,” and therefore is properly in the  
13 record. OAR 661-010-0025(1)(b).<sup>1</sup>

14           The county responds that the board of commissioners did not reopen the evidentiary  
15 record on remand and, accordingly, the commissioners properly rejected exhibits A, B and C.  
16 In addition, the county argues that exhibits A, B and C were not “placed before” the board of  
17 commissioners within the meaning of OAR 661-010-0025(1)(b). As for the notice of the  
18 hearing at Record 50, the county argues that its invitation to submit written comments was  
19 simply boilerplate.

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<sup>1</sup>OAR 661-010-0025(1) provides in relevant part:

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

“\* \* \* \* \*

“(b) All written testimony and all exhibits, maps, documents or other written 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 We disagree with the county that exhibits A, B and C were not “placed before” the  
2 board of commissioners, within the meaning of OAR 661-010-0025(1)(b). The county’s  
3 notice of hearing invited written comments, and parties to the case accordingly submitted  
4 written comments in the manner set forth in the notice. The county does not explain what  
5 further step is necessary to “place” those comments before the commissioners, under either  
6 county legislation or our rule. Consequently, those comments are properly included in the  
7 record, unless the final decision maker rejected them during the course of the proceedings  
8 before the final decision maker.

9 The transcript of the September 25, 2001 hearing includes a statement by the county  
10 chair that “this hearing will be limited only to correcting the findings based on the existing  
11 record and thus the record is closed.” Record 9. We understand the county to argue that the  
12 foregoing statement implicitly rejects all submittals from any party since the county’s  
13 original decision, and thus necessarily rejects exhibits A, B and C.

14 If a local government wishes to reject an item and thereby exclude that item from the  
15 local record, it must make it clear during the proceedings below that it rejects that item.  
16 *Bloomer v. Baker County*, 19 Or LUBA 482, 483 (1990). Here, it is unclear whether the  
17 commissioners intended to reject exhibits A, B and C. The above-quoted statement could be  
18 understood to say that the commissioners will render a decision based on the record as it  
19 existed the date of the hearing, September 25, 2001, which would presumably include  
20 exhibits A, B and C as well as the applicant’s submittals. Given the express invitation in the  
21 notice of hearing to submit written comments, and the ambiguity in the county chair’s  
22 statement, it is not clear that the county “rejected” exhibits A, B and C. OAR 661-010-  
23 0025(1)(b). Therefore, exhibits A, B and C are part of the record. This objection is  
24 sustained.

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**B. Objection 2**

Petitioner objects that the record is not “arranged in reverse chronological order, with the most recent item first,” as required by OAR 661-010-0025(4)(a)(E). The county acknowledges that one item is misplaced in the record, but argues that it is a technical violation of our rules that does not affect the parties’ ability to use the record. OAR 661-010-0005. We agree that the single misplaced item does not warrant any remedy under our rules. This objection is denied.

The county shall submit a supplemental record that includes the items discussed in the first objection.

Dated this 3rd day of January, 2002.

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Tod A. Bassham  
Board Member