

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NICK LAURANCE and
5 WESTERN OREGON DOOR LLC,
6 *Petitioners,*

7
8 vs.

9
10 DOUGLAS COUNTY,
11 *Respondent,*

12
13 and

14
15 SUNDANCE ROCK INC.,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2003-050

19 ORDER

20 **MOTION TO DISMISS**

21 On April 28, 2003, LUBA received the county's record in this appeal. The next day, LUBA
22 sent a letter to the parties, indicating that LUBA had received the record and pursuant to OAR 661-
23 010-0030(1), the petition for review was due May 19, 2003.¹ On May 12, 2003, LUBA received a
24 copy of a letter that petitioners sent to the county, outlining concerns that petitioners had with the
25 record.² On May 21, 2003, intervenor filed a motion to dismiss, arguing that OAR 661-010-0030(1)

¹ OAR 661-010-0030(1) provides, in relevant part:

"Filing and Service of Petition: The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. * * * The petition shall also be served on the governing body and any party who has filed a motion to intervene. Failure to file a petition for review within the time required by this section, * * * shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body. * * *"

² That letter is dated May 9, 2003 and states, in relevant part:

"This letter is to confirm that the county has agreed to supplement the record with two letters per [a county planner's] memo of May 8th and * * * complete copies of pages 117 and 118 [will be provided to LUBA].

"In the next few days, I will provide you with a supplemental table of contents for pages 140-295 for inclusion in the supplemental record.

1 requires that this appeal be dismissed because petitioners failed to file a timely petition for review. On
2 May 28, 2003, respondent submitted a supplemental record to LUBA and a motion responding to the
3 “record objection.” LUBA received that supplemental record on May 30, 2003.

4 Intervenor argues that the May 9, 2003 letter does not serve as a record objection, which tolls
5 the time for filing a petition for review. OAR 661-010-0026(6). Therefore, because the petition for
6 review was not timely filed on May 19, 2003, intervenor argues that the appeal should be dismissed.
7 Intervenor also argues that the county’s supplemental record, which LUBA received 11 days after the
8 deadline for filing the petition for review had passed, has no bearing on whether this appeal should be
9 dismissed.

10 We disagree with both arguments. As petitioners point out, the May 9, 2003 letter contains
11 the essential elements of a record objection: it lists the items petitioners believe were improperly
12 omitted or included, and copies of the letter were provided to all of the parties and to LUBA. In
13 addition, the letter makes it clear that intervenor’s attorney had an opportunity to work with the

“You indicated that there are several items about which you would like to receive input from
* * * Intervenor’s attorney * * * before deciding on. These items are:

“Whether to include:

“December 18, 2002 letter from Michael and Donna Vanassche, and

“Whether to exclude:

- “Edward Wood letter dated March 21, 2003 * * *;
- “Letter of Tom Karshneski, dated February 3, 2003 * * *;
- “Sundance Submittals dated March, 2003 * * *
- “Michael Winters letter dated January 13, 2003 * * *
- “Jim Lee letter dated January 12, 2003 * * *

“My secretary will schedule a conference call, so the four of us, including [the county
planner] can discuss these items.

* * * * *

“As we discussed, I am sending a copy of this letter to [LUBA] in lieu of a formal record
objection and to notify LUBA that the county intends to file a supplement to the record. * * *”

1 county and petitioners to informally address petitioners’ objections. While the form of the record
2 objection does not precisely follow the format prescribed in our rules, those technical violations do
3 not change the nature of the document or prejudice intervenor.

4 *Pierron v. Eugene*, 7 Or LUBA 421 (1983) involved a similar question, although there were
5 additional filings in that case that make it somewhat different. Rather than discussing those
6 differences, and explaining why we nevertheless believe a similar result is required here, we comment
7 briefly on a relatively common problem that unnecessarily raises questions concerning the deadline
8 for filing a petition for review.

9 Once LUBA receives the local government record, a 21-day deadline for filing the petition
10 for review begins to run. OAR 660-010-0030(1). The deadline for filing the petition for review is a
11 particularly critical deadline at LUBA, and the consequence of missing that deadline is dismissal of
12 the appeal. LUBA’s receipt of the record also starts a 14-day deadline for filing record objections.
13 OAR 661-010-0026(2). The difficulties that may be encountered in complying with both of those
14 deadlines, in even a modestly complicated appeal, are obvious. In the background of these
15 simultaneously running deadlines is another requirement that adds still more difficulty. LUBA’s rules
16 require that the petitioner first attempt to resolve any objections to the record with the “governing
17 body’s legal counsel” before filing a record objection. OAR 660-010-0026(1). Each of these
18 requirements has its own public policy justification, and we do not go into those justifications here.
19 We note them only to highlight the obvious: once the record is filed at LUBA, the petitioner has a
20 number of potentially difficult tasks to perform and not much time to perform them.

21 Where there are defects in the record that will interfere with preparation of the petition for
22 review, the petitioner must discover that fact in fewer than 14 days and take appropriate action to
23 have the record corrected and suspend the deadline for filing the petition for review while that record
24 correction is made. The *only action* concerning the record that is certain to suspend the deadline for
25 filing the petition for review is a record objection. OAR 660-010-0026(6). The only document that
26 will clearly perform that critical function is an “objection to the record” or a “precautionary record

1 objection.” OAR 661-010-0026(2). Given the severe consequence of missing the deadline for filing
2 the petition for review, it is difficult to understand why a petitioner, who intends to delay filing the
3 petition for review until record corrections are made, would fail to file a record objection or
4 precautionary record objection. Filing a letter that documents continuing efforts with local legal
5 counsel to resolve objections with the record satisfies the OAR 660-010-0026(1) requirement for
6 consultation with the local government’s legal counsel. However, unless it also constitutes a *de facto*
7 record objection it does not suspend the deadline for filing the petition for review. Similarly, a motion
8 to extend the deadline for filing record objections which does not include a precautionary record
9 objection or a stipulation to extend the deadline for filing the petition for review runs the risk that the
10 deadline for filing the petition for review will expire while the petitioner is reviewing the record. Both
11 courses of action are dangerous and run the risk that another party will file a motion to dismiss and
12 that LUBA will rule that the letter or motion does not amount to a *de facto* record objection and
13 dismiss the appeal. Given the severe consequence that dismissal of the appeal represents, and the ease
14 with which the risk of that consequence can be avoided by filing a record objection or precautionary
15 record objection while record disputes are resolved, a prudent petitioner who is delaying the
16 preparation of the petition for review while record disputes can be resolved will *always* include a
17 record objection or a precautionary record with any other documents that may be filed to provide
18 notice of the current status of negotiations among the parties concerning the content of the record.

19 Intervenor’s motion to dismiss is denied.

20 **RECORD OBJECTIONS**

21 Intervenor filed an objection to the supplemental record on June 3, 2004. Petitioners filed an
22 objection to the supplemental record on June 11, 2003. We now resolve those record objections.

23 **A. Petitioners’ Record Objections**

24 **1. Objection 1**

25 Petitioners argue that two items should be excluded from the record because they were
26 received after the local evidentiary record closed. Intervenor argues that those items are properly

1 included in the record because they were placed before the planning commission during the
2 proceedings that led to the challenged decision and were not rejected. OAR 661-010-0025(1).³

3 The final decision maker in this matter was the county planning commission. The minutes of
4 the January 16, 2003 planning commission meeting reflect that intervenor provided copies of the two
5 disputed documents to the planning commission during its final rebuttal. Those documents were not
6 rejected. Accordingly, even if those items were received after the period provided for evidentiary
7 submittals, those items are properly included in the record before LUBA.

8 Petitioners' objection 1 is denied.

9 **2. Objection 2**

10 Petitioners contend that the record improperly excludes a December 18, 2003 letter from
11 Michael Vanassche and Donna Vanassche. Respondent and intervenor cite to planning commission
12 minutes found at Record 90 that indicate that the December 18, 2003 letter was rejected by the
13 planning commission. Therefore, that item is not part of the record. OAR 661-010-0025(1)(b).

14 Petitioners' objection 2 is denied.

15 **B. Intervenor's Record Objection**

16 Intervenor argues that the supplemental record includes items that were included in the initial
17 record. According to intervenor, the item found at Supplemental Record 668 through 669 can be
18 found at Record 638-639 and the item found at Supplemental Record 670-671 can be found at Record
19 295-296.

20 OAR 661-010-0026(2) provides that record objections may be made on the following
21 grounds:

22 "(a) The record does not include all materials included as part of the record
23 during the proceedings before the final decision maker. The omitted item(s)

³ OAR 661-010-0025(1)(b) sets out the minimum contents of a local record and provides, in relevant part, that the record includes:

"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 shall be specified, as well as the basis for the claim that the item(s) are part of
2 the record.

3 “(b) The record contains material not included as part of the record during the
4 proceedings before the final decision maker. The item(s) not included as part
5 of the record during the proceedings before the final decision maker shall be
6 specified, as well as the bases for the claim that the item(s) are not part of the
7 record.

8 “(c) The minutes or transcripts of meetings or hearings are incomplete or do not
9 accurately reflect the proceedings.

10 “(d) The record does not conform to the requirements of OAR 661-010-0025(4).”

11 Duplication of items properly included in the record does not provide a basis for sustaining a record
12 objection. Accordingly, intervenor’s record objection is denied.

13 The record is settled as of the date of this order. The petition for review is due 21 days from
14 the date of this order. Response briefs are due 42 days from the date of this order. The Board’s final
15 opinion is due 77 days from the date of this order.

16 Dated this 26th day of June, 2003.

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Anne Corcoran Briggs
Board Member