

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

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4                                   THOMAS M. BURKE, TERRY DORVINEN,  
5                                   DWAIN C. LUNDY, WILSON CULWELL and  
6                                   LAURIE J. MONICAL,  
7   *Petitioners,*

8  
9   vs.

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11   CROOK COUNTY,  
12   *Respondent,*

13  
14   and

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16   EAGLE CREST, INC.,  
17   *Intervenor-Respondent.*

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19   LUBA No. 2003-104

20   ORDER

21   **MOTION TO INTERVENE**

22                   Eagle Crest, Inc., the applicant below, moves to intervene on the side of respondent.

23   There is no opposition to the motion, and it is allowed.

24   **MOTION TO TAKE EVIDENCE AND ORDER DEPOSITION**

25                   **A.     Introduction**

26                   This appeal concerns a county court decision that dismisses a local appeal of a  
27   planning commission decision that grants conditional use approval for a destination resort.<sup>1</sup>  
28   That local appeal was filed by the five petitioners in this LUBA appeal. The county found  
29   that petitioners Monical, Burke, Lundy and Culwell failed to “indicate” their standing and,  
30   for that reason, dismissed the local appeal as to those petitioners.<sup>2</sup> Record 1. With regard to

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<sup>1</sup> That planning commission decision is the subject of a separate appeal, LUBA No. 2003-100. Petitioners move to consolidate this appeal with that appeal. In a final opinion and order issued this date, we dismiss LUBA No. 2003-100. Petitioners’ motion to consolidate this appeal with LUBA No. 2003-100 is denied.

<sup>2</sup> Petitioners request that we take official notice of Crook County Zoning Ordinance (CCZO) 9.110 and attach a copy of that section of the CCZO. The version of CCZO 9.110 for which petitioners request official

1 petitioner Dorvinen, the county found that he failed to set forth the “specific grounds for the  
2 appeal,” as required by Crook County Zoning Ordinance (CCZO) 9.110(9)(A)(1)(d). *See* n 2.  
3 Based on that finding, the county court dismissed the appeal as to petitioner Dorvinen. In a  
4 June 18, 2003 letter, the county court notified all petitioners that their appeal was dismissed.

5 In concluding that petitioner Dorvinen inadequately set forth the grounds for appeal,  
6 the county court reviewed a one-page statement that is signed by petitioner Dorvinen, which  
7 appears at Record 23. The county read that one-page statement also to adopt the one-page  
8 statement that appears at Record 20, which is signed by petitioner Burke. Therefore,  
9 although the county dismissed the local appeal as to petitioner Burke, based on its conclusion  
10 that petitioner Burke failed to “indicate” his standing, the county court nevertheless reviewed  
11 the one-page letter signed by petitioner Burke in considering whether petitioner Dorvinen  
12 adequately stated his grounds for appeal. Petitioners contend that petitioner Burke’s  
13 statement in support of the local appeal also includes the two pages at Record 21-22 which  
14 immediately follow that letter and that the county should have considered those pages in  
15 determining whether petitioner Burke (and by his adoption of that statement petitioner  
16 Dorvinen) adequately set forth the grounds for appeal. The county did not consider the  
17 document at Record 21-22 in addressing that question.

18 Petitioners request that we consider evidence outside the record that has been filed by

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notice differs from the version of CCZO 9.110 that is included in the copy of the CCZO on file at LUBA. No party objects to petitioners’ request and it is granted. The version of CCZO 9.110(9)(A)(1) provided by petitioners, the same version of CCZO 9.110 that the county court apparently applied in this case, sets out the following requirements for a local appeal under the CCZO:

“The appeal shall be in writing and shall contain:

- “(a) Name and address of the appellant(s);
- “(b) A reference to the application title and case number, if any;
- “(c) A statement of the nature of the decision;
- “(d) A statement of the specific grounds for the appeal, setting forth the error(s) and the basis of the error(s) sought to be reviewed; and
- “(e) A statement as to the appellant’s standing to appeal as an affected party[.]”

1 the county in this appeal.<sup>3</sup> Petitioners seek to establish that the following county court  
2 findings are erroneous: “(1) that petitioner Lundy made no submission in support of the  
3 appeal; (2) that the two pages of text were submitted by a non-appellant; and (3) that no  
4 appellant associated himself or herself with the assertions contained in those two pages.”  
5 Motion to Take Evidence and Order Deposition (hereafter Petitioners’ Motion) 3. Attached  
6 to petitioners’ motion are affidavits signed by petitioners Burke and Culwell. The county  
7 and intervenor agree that the parties have a factual dispute that warrants consideration of  
8 extra-record evidence. Attached to the county’s response is an affidavit signed by the county  
9 planning director, who disputes certain allegations of fact in the Burke and Culwell affidavits  
10 and provides a somewhat different account of petitioners’ efforts to file their local appeal on  
11 June 16, 2003.

12 **B. Petitioners’ Version of the Facts**

13 On June 16, 2003, petitioners Burke and Culwell went to the county planning  
14 department and attempted to file the disputed local appeal. The written materials that they  
15 attempted to file included the following:

- 16 1. A two-page appeal form signed by all five petitioners. Record 18-19.
- 17 2. A one-page letter, dated June 15, 2003, signed by petitioner Burke.  
18 Record 20.
- 19 3. Two pages of text that are not signed and have a facsimile header that  
20 indicates the text was transmitted by 1000 Friends of Oregon on June  
21 16, 2003. Record 21-22.

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<sup>3</sup> As relevant, ORS 197.835(2)(b) provides:

“In the case of disputed allegations of standing, \* \* \* or \* \* \* procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record.”

OAR 661-010-0045 elaborates on ORS 197.835(2).

- 1           4.     A one-page letter, dated June 16, 2003, signed by petitioner Dorvinen.  
2                     Record 23.
- 3           5.     A three-page memorandum, dated June 4, 2003, signed by petitioner  
4                     Culwell. Record 24-26.
- 5           6.     A two-page letter, dated June 12, 2003, signed by petitioner Lundy.  
6                     Petitioners' Motion Exhibit B.

7           In their affidavits, both petitioner Burke and petitioner Culwell allege that petitioner  
8 Burke specifically told the planning director that petitioner Burke's appeal statement  
9 included the two attached pages which were prepared for petitioner Burke by 1000 Friends of  
10 Oregon. Petitioners allege that the planning director accepted items 1 through 4 above, "but  
11 refused to accept the statements from Lundy and Culwell, stating that the Lundy and Culwell  
12 statements did not comply with the requirements of the zoning ordinance." Burke Affidavit  
13 2. Petitioner Culwell took his statement and revised it to incorporate text from the two-page  
14 document (item 3 above) and returned to the planning department later that day and  
15 submitted it to the planning director who reviewed the revised Culwell statement and  
16 accepted it.

17           **C.     The County's and Intervenor's Version of the Facts**

18           The county contends that petitioners Burke and Culwell attempted to file their appeal  
19 in the morning of June 16, 2003. The planning director states in his affidavit that he  
20 reviewed their submittal, and "advised them that the letters in support of the appeal were  
21 insufficient because they failed to cite the applicable Zoning Ordinances and Comprehensive  
22 Plan Policies alleged to be violated as required by County Ordinance." Zelenka Affidavit  
23 1-2.<sup>4</sup> The planning director disputes petitioners Burke's and Culwell's claim that petitioner  
24 Burke specifically stated that his appeal statement included the two pages with the 1000  
25 Friends of Oregon fax header at the top. The planning director alleges that "[a]t the

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<sup>4</sup> The Zelenka affidavit does not specify which letters were reviewed by the planning director on the morning of June 16, 2003.

1 conclusion of our conversation, Mr. Burke and Mr. Culwell retrieved all their documents and  
2 left.” *Id.* The planning director alleges that “[l]ater that afternoon [Mr.] Culwell returned to  
3 the Planning Department without Mr. Burke and filed the following documents attached as  
4 Exhibit ‘A’:

5 “A. Appeal Petition to County Court;

6 “B. Letter from Thomas Burke dated June 15, 2003;

7 “C. Letter from Terry Dorvinen dated June 16, 2003;

8 “D. Memorandum in Support of Appeal from Wilson Culwell; and

9 “E. Personal Check No. 3516 in the amount of \$1,000.00 from Wilson  
10 Culwell.” *Id.*<sup>5</sup>

11 The planning director further alleges that the materials that petitioner Culwell filed on the  
12 afternoon of June 16, 2003 did not include a statement signed by petitioner Lundy.<sup>6</sup>

13 **D. Resolution of Petitioners’ Motion**

14 We only see one potentially material fact that may be in dispute. The parties  
15 characterize the conclusion of the initial meeting between petitioners Burke and Culwell and  
16 the planning director somewhat differently. Petitioners clearly take the position that the  
17 planning director *rejected* petitioner Lundy’s statement. As we noted earlier, the county does  
18 not expressly dispute that the Lundy statement was included in the documents that petitioners

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<sup>5</sup> Although the two-page unsigned document with the 1000 Friends of Oregon fax header is not specifically mentioned in the Zelenka affidavit or intervenor’s and respondent’s arguments, intervenor and respondent do not dispute that those pages were attached to Burke’s June 15, 2003 letter. The fact that those two pages appear in the record immediately after petitioner Burke’s June 15, 2003 letter is consistent with petitioners’ allegation that the two pages were attached to the letter and intervenor and respondent offer no other explanation for how pages 21 and 22 of the record came to be part of the record.

<sup>6</sup> It is not clear that intervenor and respondent dispute that the Lundy letter was included in the documents that petitioner Culwell filed in the afternoon of June 16, 2003. We also do not understand petitioners to allege that the Lundy statement was filed in the afternoon by petitioner Culwell. Although the county and intervenor may have intended to dispute that petitioner Lundy’s statement was included in the appeal documents that petitioners Burke and Culwell first attempted to file in the morning of June 16, 2003, neither their responses nor the Zelenka affidavit clearly take that position. Based on the parties’ arguments and the attached affidavits, we conclude the Lundy letter *was* among the documents that petitioners Burke and Culwell attempted to file on the morning of June 16, 2003 and *was not* included with the document or documents that petitioner Culwell filed in the afternoon.

1 Burke and Culwell attempted to submit in the morning. It is not clear to us that intervenor  
2 and the county dispute that the planning director initially *rejected* the Lundy statement and  
3 the other statements that petitioners attempted to file in the morning of June 16, 2003.  
4 However, the intervenor's and the county's response and the affidavit can be read to say that  
5 petitioners' decision to take the documents and revise and resubmit them later that day was  
6 voluntary. If, as petitioners argue, the planning director does not have authority to reject a  
7 local appeal for the reasons he gave, it could be important whether the planning director  
8 *rejected* the Lundy statement or whether the petitioners took the Lundy statement with them  
9 *voluntarily* and simply failed to include the Lundy statement with the document or  
10 documents that were filed in the afternoon. However, given the current lack of clarity over  
11 whether the parties dispute that the Lundy statement was rejected by the planning director in  
12 the morning of June 16, 2003, we do not believe an order allowing petitioners Burke and  
13 Culwell and the planning director to be deposed or an order allowing an evidentiary hearing  
14 to receive those depositions or testimony from those parties is warranted.

15 A second alleged fact, which clearly is in dispute, is petitioners' allegation that  
16 petitioner Burke expressly stated to the planning director that his appeal statement included  
17 the two pages of text that were attached to June 15, 2003 letter. However, resolving that  
18 factual dispute would only be necessary if we agreed with the parties' apparent  
19 understanding that the disputed express statement was necessary to incorporate those pages  
20 as part of petitioner Burke's statement. In that event, it would be a material disputed fact.

21 At the outset, we question the county's approach of separately reading the statements  
22 of each petitioner in isolation to determine whether each petitioner (individually) satisfied the  
23 requirement of CCZO 9.110(9)(A)(1)(d) that the appeal include "[a] statement of the specific  
24 grounds for the appeal \* \* \*." All five petitioners signed the appeal form. Record 19. In the  
25 place on that form where the appellants are instructed to specify their reasons for appeal, the  
26 appellants indicate "(SEE ATTACHED)." Record 19. The county treated the attached

1 statements as the individual statements of the person who signed the statement only, rather  
2 than as a collection of statements of reasons for appeal that was adopted by all petitioners by  
3 virtue of the above-quoted notation. We need not and do not consider here whether the  
4 county erred in analyzing the requested local appeal in that manner. However, there is  
5 certainly no hint in the appeal form itself that the county would analyze the adequacy of the  
6 reasons given for a local appeal filed by multiple appellants in that manner.

7 We turn to the more limited question that we must answer to resolve petitioners'  
8 motion. Was it necessary for petitioner Burke to inform the county verbally that the two-  
9 page document that was attached to his one-page June 15, 2003 letter was part of his  
10 statement in support of the appeal? If so, intervenor and respondent dispute that Burke made  
11 such a verbal statement, and depositions and an evidentiary hearing might be warranted so  
12 that we could be provided with additional evidence so that we could make a finding  
13 regarding that disputed fact. However, we conclude that the disputed verbal statement was  
14 not necessary. The record includes no reasonable basis for the county to conclude that the  
15 two pages that were attached to petitioner Burke's June 15, 2003 letter were unrelated to  
16 Burke's statement in support of the appeal and to ignore those pages.<sup>7</sup> To the contrary, it was  
17 entirely reasonable for petitioner Burke to assume the county would view those attached  
18 pages as part of his statement and it was entirely unreasonable for the county to ignore those  
19 pages simply because they are unsigned and have a 1000 Friends of Oregon fax header.<sup>8</sup> At  
20 the very most, given the way the county scrutinizes statements that are attached to local  
21 appeal forms, the county might have reason to inquire of petitioner Burke whether those two

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<sup>7</sup> It is clear from the arguments presented in those two pages that those arguments are directed at the appealed planning commission decision.

<sup>8</sup> A 1000 Friends of Oregon fax header also appears at the bottom of the two-page appeal form. Record 18-19. The county did not assume from that fax header that the appeal form was submitted by 1000 Friends of Oregon.

1 pages were part of his appeal statement only or whether they were intended to constitute an  
2 appeal statement that was adopted by all five petitioners.

3 Pursuant to OAR 661-010-0045(4), we grant the parties' request that we consider the  
4 affidavits submitted by the parties in considering the parties' arguments concerning whether  
5 depositions and an evidentiary hearing are warranted. However, we conclude that no party  
6 has demonstrated that depositions or an evidentiary hearing are warranted.

7 A motion to consider extra-record evidence suspends a LUBA appeal. OAR 661-  
8 010-0045(9). With this order we reactive this appeal. The petition for review shall be due 21  
9 days from the date of this order. The respondent's and intervenor-respondent's briefs shall  
10 be due 42 days from the date of this order. The Board's final opinion and order shall be due  
11 77 days from the date of this order.

12 Dated this 16<sup>th</sup> day of October, 2003.

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Michael A. Holstun  
Board Member