

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

3
4 CENTRAL OREGON LANDWATCH
5 *Petitioner,*

6
7 vs.

8
9 JEFFERSON COUNTY,
10 *Respondent.*

11
12 LUBA No. 2025-023

13
14 ORDER

15 Petitioner appeals a board of commissioners decision after remand
16 approving a comprehensive plan and zoning map designation change for the
17 subject property from rural to rural residential. *Central Oregon Landwatch v.*
18 *Jefferson County*, LUBA No 2023-026 (July 25, 2024).

19 **MOTION TO INTERVENE**

20 Petitioner filed and served their notice of intent to appeal (NITA) on March
21 19, 2025. OAR 661-010-0050(2) and ORS 197.830(7)(a) require that a motion to
22 intervene (MTI) be filed within 21 days after a NITA has been filed. An MTI in
23 this appeal was required to be filed no later than April 9, 2025.

24 On May 8, 2025, we received an MTI in this appeal from MAC
25 Investments, Inc (MAC), the applicant below, moving to intervene on the side of
26 the county. Also on May 8, 2025, LUBA received from MAC a “Motion for
27 Leave to Amend and/or Motion for Extension of Time” (MTI MOET). The MTI
28 MOET states that MAC mailed their MTI on April 8, 2025, (April MTI) and that

1 the certificate of filing and service for the April MTI listed LUBA's correct and
2 current address. However, MAC addressed and mailed the April MTI to LUBA's
3 former address.

4 At all material times, LUBA's mailing address for receiving filings has
5 been 201 High Street SE, Suite 600, Salem, Oregon 97301-3398, as set out in
6 OAR 661-010-0075(7). Prior to November 1, 2024, LUBA's mailing address for
7 receiving filings was 775 Summer Street NE, Suite 330, Salem, Oregon 97301-
8 1283. Effective November 1, 2024, LUBA amended its rules to reflect the
9 changed filing address and provided that LUBA would accept documents filed
10 by mail at either address until December 31, 2024. On January 15, 2025, LUBA
11 amended its rules to remove the grace period language. *See* Permanent
12 Administrative Order LUBA 1-2025 (Jan 15, 2025).

13 LUBA did not receive the April MTI that MAC had mailed to LUBA's
14 prior address. On May 5, 2025, MAC received the April MTI, returned as
15 undeliverable. On May 7, 2025, MAC filed its MTI and MTI MOET.

16 OAR 661-010-0075(2)(a) is the general rule for filing documents at LUBA
17 and it provides, in part:

18 “(B) Except as provided in OAR 661-010-0015(1)(b) with regard to
19 the [NITA], filing a document with the Board is accomplished by:

20 “(i) Mailing by first class or priority mail with the United States
21 Postal Service on or before the due date. If the date of mailing
22 is relied upon as the date of filing, the date of the postmark is
23 the date of filing.

1 “(ii) Depositing with or dispatching for delivery by a commercial
2 delivery service on or before the due date. Proof of such
3 deposit or dispatch date includes a receipt from the
4 commercial delivery service showing the date the filing is
5 deposited with the commercial delivery service or a receipt
6 from the commercial delivery service’s online tracking
7 service showing the date the filing is dispatched for delivery
8 by the commercial delivery service.

9 “(C) Documents filed with the Board shall contain a statement
10 certified by the person who made the filing of the date and manner
11 of document delivery.”

12 We have held that a NITA is considered filed on the date it is mailed by
13 certified mail to LUBA, “if it is placed in an envelope that is addressed to LUBA
14 at the address set forth in LUBA’s rules and mailed to that address.” *Bartlett v.*
15 *City of Portland*, 72 Or LUBA 408, 410 (2015), *aff’d*, 276 Or App 919, 370 P3d
16 565 (2016). Similarly, we have held that a petition for review is filed on the date
17 that it is mailed to LUBA only if it is placed in an envelope that is addressed to
18 LUBA at the address set forth in LUBA’s rules and mailed to that address. *See*
19 *Kennon v. City of Union*, LUBA No 2024-095 (Mar 25, 2025) (dismissing an
20 appeal for a late-filed petition for review that was initially incorrectly mailed to
21 LUBA’s former address); *Conte v. City of Eugene*, LUBA No 2024-096 (Mar 19,
22 2025) (same). Consistent with the reasoning in those cases, in this case, we
23 conclude that an MTI is filed on the date that it is mailed or dispatched to LUBA
24 only if it is placed in an envelope that is addressed to LUBA at the address set
25 forth in LUBA’s rules and mailed or dispatched to that address. Thus, MAC’s
26 MTI was filed on May 7, 2025.

1 MAC request that we issue an order allowing its intervention and granting
2 it leave to amend the April MTI with a corrected certificate of filing and service.
3 MAC argues that not all online sources have updated the current mailing address
4 for LUBA and points to a website maintained by the Oregon Secretary of State
5 that listed LUBA's former mailing address. MTI MOET 3. LUBA appeals are
6 governed by LUBA's procedural rules at OAR chapter 661. OAR 661-010-
7 0075(7) sets out LUBA's mailing address. As explained above, we have
8 consistently held that filing is accomplished by placing a document in an
9 envelope that is addressed to LUBA at the address set forth in LUBA's rules and
10 mailed or dispatched to that address. MAC's motion to amend its MTI certificate
11 of filing and service is denied.

12 In addition, and in the alternative, MAC moves for an extension of time to
13 file their MTI under OAR 661-010-0067(3), which allows for an extension time
14 under certain circumstances "upon oral or written consent of all parties,
15 [LUBA's] motion or motion of a party." Petitioner objects to the requested
16 extension of time arguing, *inter alia*, that ORS 197.830(7), the statute that allows
17 for intervention in a LUBA appeal, requires that we deny MAC's MTI. We agree.

18 When filing a NITA, a petitioner is required to contemporaneously serve
19 a copy of the NITA on the applicant and other persons to whom the local
20 government sent written notice of the land use decision. OAR 661-010-0015(2),
21 (3)(f). The NITA must also include "[a] statement advising all persons, other than
22 the governing body, that in order to participate in the review proceeding a person

1 must file a motion to intervene pursuant to OAR 661-010-0050.” OAR 661-010-
2 0015(3)(g). ORS 197.830(7) provides, in part:

3 “(a) Within 21 days after a [NITA] has been filed with [LUBA]
4 under subsection (1) of this section, any person described in
5 paragraph (b) of this subsection may intervene in and be made a
6 party to the review proceeding by filing a motion to intervene and
7 by paying a filing fee of \$100.

8 “* * * * *

9 “(c) Failure to comply with the deadline or to pay the filing fee set
10 forth in paragraph (a) of this subsection *shall* result in denial of a
11 motion to intervene.” (Emphasis added.)

12 While LUBA has general statutory authority under ORS 197.820(4) and
13 ORS 197.830(13)(a) to adopt rules governing its review proceedings, “LUBA is
14 not at liberty to apply its rules in a manner that contravenes a state statute.” *Rose*
15 *v. City of Corvallis*, 49 Or LUBA 260, 264 (2005). Absent late service of the
16 NITA, the 21-day intervention filing deadline in ORS 197.830(7)(c) is strictly
17 enforced. *See Grahn v. City of Newberg*, 49 Or LUBA 762, 767 (2005) (“The
18 fact that the legislature carefully dictated the consequences for failure to comply
19 with the 21-day deadline for filing the motion to intervene suggests that the
20 legislature regards that deadline as a particularly important one.”); *Rose*, 49 Or
21 LUBA at 265 (explaining that, absent circumstances where delay in filing the
22 motion to intervene is caused by the party objecting to intervention, ORS
23 197.830(7)(c) mandates that an untimely motion to intervene be denied).

1 MAC argues that ORS 197.830(7)(c) does not prohibit an extension of
2 time to file an MTI, relying on *Oakleigh-McClure Neighbors v. City of Eugene*,
3 269 Or App 176, 344 P3d 503 (2015) and *Mountain West Investment Corp. v.*
4 *City of Silverton*, 38 Or LUBA 932 (2000). Petitioner responds, and we agree,
5 that those cases stand only for the narrow proposition that when a petitioner fails
6 to timely serve a copy of the NITA on a party entitled to service the 21-day
7 deadline for intervention is tolled and starts from the date of late service.
8 *Oakleigh-McClure Neighbors*, 269 Or App at 188. In this appeal, MAC does not
9 dispute that it was timely served a copy of the NITA. Instead, the late MTI filing
10 was due to MAC's own error. Under these facts, tolling of the 21-day MTI filing
11 deadline does not apply.

12 Finally, MAC argues that no party is prejudiced by MAC's late-filed MTI,
13 because MAC served petitioner and the county with its MTI on April 8, 2025.
14 While we agree that there appears to be no prejudice to petitioner, the party
15 objecting to the MTI, or the county, which does not object to the MTI, ORS
16 197.830(7)(c) does not require any demonstration of prejudice. We cannot
17 construe our rules in a manner that conflicts with controlling statute.

18 MAC's MTI MOET and late-filed MTI are denied.

19 **RECORD OBJECTIONS**

20 Petitioner objects to (1) the omission of portions of petitioner's written
21 testimony dated November 26, 2024, (2) the county labeling petitioner's written
22 testimony dated November 26, 2024, with a January 15, 2025, date, (3) the

1 omission of the entirety of petitioner’s written testimony dated January 15, 2025,
2 and (4) the labeling of media recordings.

3 **A. Conceded Objection**

4 The county concedes the fourth objection and transmitted an amended
5 record to correct the media recording labels. Thus, that objection is conceded and
6 resolved.

7 **B. Failure to Confer**

8 With respect to the remaining unresolved objections, the county initially
9 responds that we should summarily reject them because petitioner failed to confer
10 in good faith before filing its record objections, as required by OAR 661-010-
11 0026(1), which provides that “[b]efore filing an objection to the record, a party
12 shall attempt to resolve the matter with the governing body’s legal counsel.” That
13 rule requires the objecting party to include a statement of compliance with the
14 conferral requirement at the same time the objection is filed. *Id.*

15 The record was transmitted to LUBA on May 5, 2025. Thus, May 19, 2025
16 was the deadline for filing record objections. OAR 661-010-0026(2). In its record
17 objection, petitioner states that petitioner’s attorney “attempted to resolve this
18 matter with the [county’s] legal counsel before filing this motion.” Record
19 Objection 1. Attached to petitioner’s record objection as Exhibit A is an email
20 dated May 13, 2025, from petitioner to the county’s legal counsel outlining
21 petitioner’s objections and requesting that counsel “let [petitioner] know what
22 might be the [c]ounty’s plans to address these deficiencies at [their] earliest

1 convenience.” Two days later, on May 15, 2025, without receiving a response
2 from the county and without further attempts to confer, petitioner filed their
3 record objections.

4 The county states that they were unaware that petitioner had filed their
5 record objection until they received their service copy in the mail, on May 20,
6 2025. Response to Record Objection Ex A, at 3. In response to the county’s email
7 regarding the receipt of the service copies, counsel for petitioner stated that they
8 were “on a short vacation * * * and with the LUBA deadlines for such motions
9 being what they are, [they] had to get those motion in the mail before [they] left.”
10 *Id.* at 2. The county argues that these actions by petitioner fall short of the
11 conferral requirement and that the May 13, 2025, email “was intended to ‘check
12 the box’ prior to filing” the record objection. Response to Record Objection 11.

13 We have previously held:

14 “The intent of the relevant provisions of OAR 661-010-0026(1), (2)
15 and (4) is to encourage the parties to resolve record objections,
16 where that is possible, without LUBA’s involvement. This process
17 of attempting to resolve objections prior to invoking LUBA’s
18 involvement is not an empty procedural exercise, but is an important
19 means to prevent [LUBA] from being overwhelmed by disputes
20 over record objections, and consequently missing important
21 statutory deadlines.” *Bishop v. Deschutes County*, 79 Or LUBA
22 1007, 1012 (2019).

23 Where, under the totality of the circumstances, it appears that a party failed to
24 make a good faith effort to resolve objections prior to filing them with LUBA,
25 LUBA may summarily deny the objections, as authorized by OAR 661-010-

1 0026(1). *Id.* at 1013 (citing *Sommer v. City of Cave Junction*, 55 Or LUBA 665,
2 667 (2007)). OAR 661-010-0026(1) and (2) impose an expectation that the
3 parties will continue good faith efforts to resolve objections, even if it is
4 necessary to file objections with LUBA as a precaution to preserve the right to
5 object. *Id.* at 1013-14.

6 Here, petitioner sent a single email and then filed their record objections
7 two days later and did not continue to attempt to resolve the objections before or
8 after filing the objections. Petitioner stated their objections via email on May 13,
9 2025, and requested a response at the county's "earliest convenience." However,
10 petitioner did not provide a deadline for the county's response or inform the
11 county that petitioner planned to file their "precautionary record objections" on
12 May 15, 2025, to accommodate their vacation plans. Petitioner also did not send
13 the county a contemporaneous email courtesy copy of the record objections. The
14 county learned that the objections were filed when it received mailed service hard
15 copies on May 20, 2025. In a May 20, 2025, email to the county petitioner
16 provided requested electronic copies of the objections and explained that they
17 were on vacation from May 15 to May 19. Viewed in their totality, petitioner's
18 actions before, at, and after filing its objections are inconsistent with the
19 requirements and purposes of OAR 661-010-0026(1) and (2), and support denial
20 of their objections. Accordingly, petitioner's objections are denied for failure to
21 confer in good faith.

1 **C. Items Rejected by the Final Decision Maker**

2 In addition, and in the alternative, we agree with the county on the merits
3 that we must deny the objections regarding omitted written testimony because
4 petitioner does not dispute that those materials were expressly rejected by the
5 final decision maker, the board of commissioners. OAR 661-010-0025(1)(b)
6 requires the record to include “[a]ll written testimony and all exhibits, maps,
7 documents or other materials specifically incorporated into the record or placed
8 before, *and not rejected by*, the final decision maker, during the course of the
9 proceedings before the final decision maker.” (Emphasis added.) Where an item
10 is placed before and rejected by the decision maker, that item is not a part of the
11 record.

12 “Whether the county erred in rejecting those items, or whether the
13 county committed some procedural error in how it dealt with the
14 disputed documents, may be the subject of an assignment of error in
15 this appeal, but that has no bearing on whether the items are part of
16 the record on appeal.” *Neighbors for Smart Growth v. Washington*
17 *County*, 78 Or LUBA 1026, 1028 (2018).

18 Petitioner does not dispute that the board of commissioners rejected the
19 entirety of petitioner’s written testimony dated January 15, 2025, and redacted
20 portions of petitioner’s written testimony dated November 26, 2024. Petitioner
21 argues that the rejection and redaction were prejudicial procedural errors.
22 However, petitioner acknowledges that the board of commissioners expressly
23 rejected those items. Thus, there is no merit in petitioner’s objection to their
24 omission from the record.

1 **D. Date Label**

2 Petitioner also objects that the county mislabeled petitioner’s written
3 testimony dated November 26, 2024, with a January 15, 2025, date. The county
4 labeled that item as “Remand of LUBA No. 2023-026 Central Oregon
5 LandWatch v. Jefferson County Exhibit C – November 26, 2024 – COLW’s
6 Letter – Redacted to omit Sections II, III, IV and VI Hearing date – 1/15/2025.”
7 Record 445. The county asserts that this label is correct because the board of
8 commissioners “initially rejected LandWatch’s letter at the November 26,
9 2024[,] hearing. Notwithstanding that rejection and after then electing open the
10 record written, the [board of commissioners] then admitted a redacted version of
11 the letter to the record during the January 15, 2025[,] hearing.” Response to
12 Record Objection 13. Our rules require the local government to provide a record
13 that is reasonably usable by LUBA and the parties. *Mar-Dene Corporation v.*
14 *City of Woodburn*, 32 Or LUBA 481, 483 (1997). The disputed document label
15 applied by the county is reasonably usable by the parties. This objection is denied.

16 Petitioner’s record objections concerning petitioner’s written testimony
17 dated November 26, 2024, and January 15, 2025, are denied.

18 **MOTION TO TAKE EVIDENCE OUTSIDE OF THE RECORD**

19 Petitioner filed a motion to take evidence (MTE) contemporaneously with
20 its record objections. In addition to their argument that the redacted portions of
21 the November 26, 2024, written testimony and the entirety of the January 15,
22 2025, written testimony should be included in the record, petitioner moves for us

1 to accept them as extra-record evidence to support petitioner’s argument that the
2 county improperly narrowed the scope of the remand proceeding. Petitioner
3 asserts that we should take the omitted written testimony into evidence to
4 establish a procedural irregularity and/or to resolve a dispute regarding the
5 content of the record. Petitioner requests that, in ruling on the MTE, we decide
6 the scope of the remand proceedings before the county.

7 The county responds that we should deny the MTE because it does not
8 meet the requirements for taking evidence outside the record in OAR 661-010-
9 0045, which provides, in part:

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

21 “(2) Motions to Take Evidence:

22 “(a) A motion to take evidence shall contain a statement
23 explaining with particularity what facts the moving party
24 seeks to establish, how those facts pertain to the grounds to
25 take evidence specified in section (1) of this rule, and how
26 those facts will affect the outcome of the review proceeding.
27 The motion to take evidence shall be filed as a separate
28 document and shall not be contained within a brief or other
29 filing.” (Emphases added.)

1 First, there is no legitimate dispute regarding the contents of the record.
2 The parties agree that petitioner submitted the omitted materials and the board of
3 commissioners rejected them. Thus, we agree with the county that there is no
4 basis for us to consider the omitted materials to resolve a dispute regarding the
5 contents of the record.

6 Second, petitioner argues that the county erred in limiting the scope of the
7 remand and rejecting the omitted materials. Petitioner argues that, in resolving
8 its MTE, we should decide that the county erred in narrowing the scope of the
9 remand proceedings. Petitioner aims for us to define the scope of the issues for
10 briefing on the merits in this appeal. We understand that petitioner is concerned
11 that the county may argue that issues that the board of commissioners rejected as
12 outside the scope of remand are also waived as not raised during the local
13 proceeding. Whether the county committed procedural error in determining the
14 scope of the remand proceeding is an issue that petitioner may present as an
15 assignment of error in the petition for review. It would be premature for us to
16 address and resolve any procedural assignment of error at this stage in the appeal.
17 Without briefing in this appeal before us, we cannot determine whether there is a
18 disputed issue in the parties' briefs concerning procedural irregularities that are
19 "*not shown in the record.*" OAR 661-010-0045(1) (emphasis added).
20 Accordingly, we will take the MTE under advisement and will resolve it in the
21 final opinion and order.

1 **BRIEFING SCHEDULE**

2 The record is settled as of the date of this order. The petition for review
3 shall be due 21 days from the date of this order. The respondent’s brief shall be
4 due 42 days from the date of this order. The final order and opinion shall be due
5 77 days from the date of this order.

6 Dated this 25th day of June 2025.

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11 H. M. Zamudio
12 Board Chair