

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 RICKREALL COMMUNITY WATER
5 ASSOCIATION, DAVID SETNIKER,
6 JOAN SETNIKER, LEO MULLER,
7 SARAH MULLER, TOM MULLER,
8 TRACY MULLER, TOM LOWE
9 and JOANNA LOWE,
10 *Petitioners,*

11 and

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14 MADJIC FARMS, INC., MICHAEL S. CALEF
15 and SUSAN D. CALEF,
16 *Intervenors-Petitioner,*

17 vs.

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20 POLK COUNTY,
21 *Respondent,*

22 and

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25 J.C. COMPTON COMPANY
26 and ADRIAN VANDERHAVE,
27 *Intervenors-Respondent.*

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29 LUBA Nos. 2006-028, 2006-029,
30 2006-031 and 2006-032

31 ORDER

32 Before the Board are various record objections and a motion to take evidence.

33 **RECORD OBJECTIONS**

34 Petitioners and intervenors-petitioner (intervenors) objected to the record the county
35 submitted. In an order dated May 30, 2006, we required the county to submit a supplemental
36 record and a revised table of contents. On June 22, 2006, the Board received a three-volume
37 supplemental record. Petitioners and intervenors filed objections to the supplemental record.

1 On July 13, 2006, the county filed a second supplemental record that appears to resolve some
2 of the pending objections. We now resolve the remaining objections.

3 **A. Objections of Petitioner Rickreall Community Water Association**

4 Petitioner Rickreall Community Water Association (RCWA) objects to the omission
5 of two sets of documents from the record and the supplemental record: (1) a letter from
6 David Noren dated November 30, 2005, with an attached letter from Jeff Barry dated
7 November 30, 2005, and (2) a letter from Malia Kupillas dated November 30, 2005, with
8 attachments A, B and C. These documents are also the subject of RCWA's motion to take
9 evidence, discussed below. RCWA asserts that the documents were faxed to the county on
10 November 30, 2005.

11 The county did not respond to these objections until filing the second supplemental
12 record, in which the county takes the position that no such documents were "submitted into
13 the Record." Second Supplemental Record 2. Attached to RCWA's motion to take evidence
14 is the affidavit of RCWA's counsel, describing how the disputed documents were faxed to
15 the county on November 30, 2005, the date they were due. RCWA states that county staff
16 had encouraged the parties to submit material by fax in advance of hearings for inclusion in
17 the record if there was a chance that travel delays might prevent timely delivery. RCWA's
18 attorney states that he called county staff and confirmed that both sets of documents had been
19 received on November 30, 2005.

20 RCWA's motion presumes that the county received the documents by fax, but for
21 some unexplained reason failed to place those documents in the record. It is not clear from
22 the county's response whether the county claims it did not receive the documents by fax or
23 whether it disputes that, having received those documents by fax, the documents were
24 thereby "submitted into the record." The county's terse response suggests that the county
25 counsel did not physically have copies of the documents in front of him when he drafted the
26 response, suggesting that the county believes the documents were never received and are not

1 in the county’s possession, not that their receipt by fax was insufficient to “submit” the
2 documents into the record.

3 Intervenor-respondent J.C. Compton Company and Adrian Vanderhave (together,
4 Compton) filed a response to the motion to take evidence that generally opposes the motion,
5 but that argues in relevant part that RCWA’s complaint is really about the content of the
6 record, not a matter for a motion to take evidence. We agree that this matter is more
7 expeditiously resolved as a record objection than as a motion to take evidence.¹ RCWA
8 twice objected to the omission of the disputed documents. The county finally submitted a
9 response that it believed the documents were not submitted into the record. In response,
10 RCWA presented detailed information supporting its contention that the documents were
11 indeed submitted to the county for inclusion into the record. On the basis of the pleadings
12 before us, we conclude that the disputed documents were submitted to the county for
13 inclusion in the record, using a method that the county apparently allowed and encouraged.
14 *See Wade v. Lane County*, 20 Or LUBA 499, 502-03 (1990) (delivery of documents to the
15 office of county counsel is sufficient to submit evidence in the record, where neither the code
16 nor the county specified how evidence is submitted, the county failed to respond to
17 petitioner’s request for information on the proper method of submitting evidence, and the
18 county had previously accepted evidence submitted to the counsel’s office). Those
19 documents are therefore part of the local record.² This objection is sustained.

¹ Compton goes on to argue that RCWA “waived” any further record objection with respect to the disputed documents by failing to file a third record objection within 14 days of the date the county submitted the second supplemental record. Therefore, Compton argues, the record is settled as to those documents. We disagree that the record is settled with respect to the disputed documents. RCWA’s record objection is outstanding until LUBA issues an order settling the record. RCWA was not required to file a third objection in response to the second supplemental record in order to preserve that objection, although in light of the county’s (belated) response failure to provide LUBA with more information supporting RCWA’s belief that the documents were submitted probably would have resulted in summary denial of the record objection. RCWA did provide that additional information, albeit as part of a motion to take evidence, and we deem it appropriate to use that information to resolve the record objection.

² If the county intended to dispute RCWA’s detailed position that the disputed documents were in fact faxed to and received by county staff, it has not stated its position with sufficient clarity.

1 **B. Other Petitioners' Record Objections**

2 Petitioners David Setniker, Joan Setniker, Leo Muller, Sarah Muller, Tom Muller,
3 Tracy Muller, Tom Lowe and Joanna Lowe (petitioners) filed a number of objections, all but
4 one of which are resolved by the supplemental records.

5 Unresolved is a letter from Elmer and Geraldine Stoller dated November 20, 2001.
6 The county responds that the Stoller letter was not submitted into the record. Petitioners
7 have not replied or explained why they believe the letter was submitted or is otherwise in the
8 record. Accordingly, this objection is denied.

9 **C. Intervenors' Record Objections**

10 Intervenors filed a number of record objections, most of which the supplemental and
11 second supplemental record appear to resolve. We now address the remaining disputed
12 items.

13 **1. Aerial Location Map**

14 Intervenors objected to the quality of the map at Record 2436, requesting that a better
15 copy or the original be included in the record. The county states that the quality of the map
16 in its file is no better than the one at Record 2436. This objection is denied.

17 **2. Agronomy Journal**

18 Intervenors objected that three pages were missing from an article submitted into the
19 record. The supplemental record includes the three pages. Intervenors objected that unless
20 the three pages are labeled 3310A, 3311A, and 3312A, and inserted into the original record,
21 the article would be split up into separate halves. The second supplemental record includes
22 the pages labeled as intervenors requested. The Board will insert the labeled pages into the
23 correct places in the original record and the parties shall do the same.

24 **3. Revised Table of Contents**

25 Intervenors object to the revised table of contents, stating that it lists a 251-page
26 submittal consisting of a cover page and a 14-page letter with attached exhibits A through N

1 as simply “missing binder submitted at October 23, 2001 Hearing.” According to
2 intervenors, the revised table of contents should identify the letter as well as each of the
3 exhibits that are attached to that letter.

4 The county responds that “it has revised the Table of Contents to the most detailed
5 extent it can.” Second Supplemental Record 3. OAR 661-010-0025(4)(a)(B) requires that
6 the table of contents “list[] each item contained therein[.]” The revised table of contents’
7 listing for the 251-page binder of documents certainly could have been more detailed, but our
8 rules neither define the precise degree of detail required, nor expressly require that exhibits
9 attached to listed items be separately listed.

10 A table of contents complies with OAR 661-010-0025(4)(a)(B) if it is specific
11 enough to enable the parties to locate individual documents in the record with reasonable
12 effort. If the table of contents required revision for other reasons, we might well require the
13 city to also revise the listing for the 251-page binder of documents. However, we see little
14 gain in requiring the county to revise the table of contents solely to make the listing for the
15 251-page binder of documents more detailed. Intervenors presumably are familiar with the
16 documents, having submitted them. While locating particular exhibits in the 251-page set of
17 documents may require some effort, having to search that relatively small portion of the
18 record for a particular set of documents known to be there is not overly burdensome. This
19 objection is denied.

20 **D. Conclusion**

21 The record will be settled when the county submits a third supplemental record
22 including (1) the letter by David Noren dated November 30, 2005, with an attached letter
23 from Jeff Barry dated November 30, 2005, and (2) the letter from Malia Kupillas dated
24 November 30, 2005, with attachments A, B and C.

25 **MOTION TO TAKE EVIDENCE**

26 Our disposition of RCWA’s record objections also resolves a portion of RCWA’s

1 motion to take evidence involving the two sets of omitted documents. That portion of the
2 motion to take evidence is denied as moot.

3 The motion to take evidence also requests that the Board consider an attached
4 newspaper article that attributes to one of the county commissioners a statement responding
5 to a question regarding what the county would do if the mining pit authorized by the
6 challenged decision pollutes RCWA's wells. The commissioner is purported to answer that
7 an "emergency intertie system that exists between Dallas and other Polk County cities would
8 supply Rickreall users with water." Motion to Take Evidence, Exhibit 4, 2-3. RCWA argues
9 that the record before the county commissioners included no information about an intertie
10 system, and that the newspaper article is evidence that the commissioner must have gained
11 such information by means of an undisclosed ex parte contact. RCWA argues that, had it
12 known the commissioner possessed and might rely on such information, it would have
13 rebutted it with information indicating that the City of Dallas is suffering from a water
14 shortage and has no water available to share with Rickreall users in the event of well failure.

15 Compton argues that RCWA has not demonstrated a sufficient basis to consider the
16 extra-record newspaper article under OAR 661-010-0045, and that in any case the motion is
17 premature.³ According to Compton, assuming the statement attributed to the commissioner

³ OAR 661-010-0045 provides, in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * ex parte contacts, * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *

“(2) Motions to Take Evidence:

“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.

“(b) A motion to take evidence shall be accompanied by:

1 is accurate, RCWA provides no evidence that the commissioner obtained information about
2 an intertie system by means of an undisclosed ex parte contact, or that the commissioner used
3 such information in deliberating on the decision, or that evidence of an intertie system has
4 anything to do with any approval criteria. Compton argues that RCWA has failed to explain
5 with particularity how the facts RCWA seeks to establish “will affect the outcome of the
6 review proceeding.” In any case, Compton argues, RCWA’s motion is premature, as no
7 briefs have been filed and there are no “disputed factual allegations in the parties’ briefs
8 concerning * * * ex parte contacts[.]”

9 We agree with Compton that RCWA’s motion is premature. The Board’s practice
10 and preference in most cases is to address motions under OAR 661-010-0045 after the parties
11 have submitted briefs on the merits. *Horizon Construction, Inc. v. City of Newberg*, 25 Or
12 LUBA 656, 662 (1993); *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550, 555-56
13 (1991). In that posture, the parties’ legal contentions are generally presented in better detail,
14 disputed allegations of fact are more clearly identified, and the Board is in a better position to
15 resolve a motion under OAR 661-010-0045 consistently with the statutory mandate for
16 timely resolution of land use disputes. At present, the state of the parties’ legal and factual
17 contentions regarding the alleged ex parte contact are sketchy, at best.⁴ Resolution of the

“(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or

“(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.”

⁴ We also question whether RCWA has established or can establish that the commissioner gained information regarding the intertie system by means of an undisclosed “ex parte contact.” As Compton points out, the commissioner has been in office for years and has wide experience with public facility infrastructure in the county. It may be that the commissioner learned of the intertie system years before, by reading a staff report or intergovernmental agreements relating to the intertie system. If so, and assuming that the commissioner relied on that information to decide the present application under the applicable criteria (a point RCWA makes no effort to establish), it may be that the commissioner (and through him, the commission) erred in relying on evidence that was not in the record. However, in such circumstances it seems doubtful to characterize such information as being gained by means of an “ex parte contact.”

1 parties' dispute regarding the alleged ex parte contacts will be significantly facilitated when
2 and if that dispute is fleshed out in the parties' briefs.

3 The motion to take evidence is denied.

4 Dated this 29th day of August, 2006.

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Tod A. Bassham
Board Chair