

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GARY RHINHART,
5 *Petitioner,*

6
7 vs.

8
9 UMATILLA COUNTY,
10 *Respondent,*

11 and

12
13 BRADLEY WHEELER and PAMELA WHEELER,
14 *Intervenor-Respondents.*

15
16 LUBA No. 2006-128

17
18 ORDER SETTLING RECORD

19 Petitioner objected to both the Record and the Supplemental Record that were filed
20 by the county in this appeal. After the county did not respond to those objections, we entered
21 an order on October 17, 2006. In that order we denied Record Objections 3 and 4. However,
22 we sustained Record Objections 1 and 2 and ordered the county to submit a Second
23 Supplemental Record to respond to those Record objections. We also sustained petitioner's
24 objection to the Supplemental Record, which is made up of a comprehensive plan and zoning
25 map amendment decision that is different from the decision that is before us in this appeal.

26 We explained:

27 "We agree with petitioner that absent some showing that the decision that
28 makes up the Supplemental Record was actually placed before the decision
29 maker in this matter, it is not properly included in the record of this appeal."

30 On November 7, 2006, respondent submitted a "Response by Umatilla County For
31 Supplemental Record" (hereafter November 7, 2006 Response). Accompanying the
32 November 7, 2006 Response was a Second Amended Table of Contents that resolves Record
33 Objection 1.

1 With regard to Record Objection 2, instead of submitting a Second Supplemental
2 Record with the list of persons receiving notice referred to in affidavits that appear at Record
3 110 and 123, as our October 17, 2006 Order required, the county instead identified where
4 those lists appear in the record. With regard to the Supplemental Record, the county argued
5 in its November 7, 2006 Response that the decision should be allowed as a Supplemental
6 Record, because the applicant asked that the decision be incorporated into the record during
7 the local proceedings and the county's findings acknowledge that the applicant requested that
8 the decision be incorporated into the record. We allowed petitioner an opportunity to
9 respond to the county's alternative proposal to resolve Record Objection 2 and to the
10 county's belated explanation for the Supplemental Record.

11 Petitioner makes no additional argument regarding Record Objection 2, and we will
12 assume that petitioner accepts the county's response to that part of our October 17, 2006
13 Order. However, with regard to the Supplemental Record, petitioner argues that the decision
14 that is included in the Supplemental Record must have actually been placed before the
15 county decision maker or the county must have specifically incorporated that decision as part
16 of the record. OAR 661-010-0025(1)(b).¹ Petitioner argues that neither of those
17 requirements is met, and the county does not really argue that either requirement is met.

18 We agree with petitioner. Notwithstanding that the county has had several
19 opportunities, it has not alleged that the disputed decision was ever placed before the county
20 decision maker in the proceedings that led to the decision that is before us in this appeal.
21 While OAR 661-010-0025(1)(b) allows the county to specifically incorporate documents into
22 the record, even though those documents are not physically placed before the county in a

¹ OAR 661-010-0025(1)(b) provides that local record of a land use decision 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.”
(Emphasis added.)

1 land use proceeding, the county must actually incorporate such documents. *See Bruce*
2 *Packing Company, Inc. v. City of Silverton*, 44 Or LUBA 836, 838-39 (2003) (parties to local
3 land use proceedings cannot specifically incorporate into the record documents that are not
4 placed before the decision maker; the local government must do so). Acknowledging that a
5 party has requested that a document be incorporated as part of the record is not the same
6 thing as granting that request. The county never granted the applicant's request to
7 incorporate the referenced decision as part of the record.

8 Record Objections 1 and 2 have now been resolved. The county's request that we
9 reconsider our October 17, 2006 Order rejecting the Supplemental Record is denied. The
10 record shall be considered settled as of the date of this order. The petition for review shall be
11 due 21 days from the date of this order. The respondent's and intervenor-respondents' briefs
12 shall be due 42 days from the date of this order. The Board's final opinion and order shall be
13 due 77 days from the date of this order.

14 Dated this 28th day of November, 2006.

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Michael A. Holstun
Board Member