

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

3  
4 **Michael L. Walker, Hal Anthony,** )  
5 **Steve Liebenberg, Susan Liebenberg,** )  
6 **Wayne McKy, Madelyn Readmond,** )  
7 **Bob Rotach, James Sargent, Patricia** )  
8 **Sargent, and William Stein,** )  
9 **Petitioners,** )  
10 **and** )  
11 **Holger Sommer,** )  
12 **Intervenor-Petitioner** )  
13 **v.** )  
14 **Josephine County,** )  
15 **Respondent,** )  
16 **and** )  
17 **Ward Ockenden,** )  
18 **Intervenor-Respondent.** )

**LUBA No. 2008-224**

**OBJECTION TO THE RESPONDENT'S  
SUPPLEMENT TO RECORD OF  
PROCEEDING and  
RESPONSE TO RESPONDENT'S  
RESPONSE TO PETITIONERS'  
OBJECTION TO THE RECORD**

18 Petitioners, Michael L. Walker, Hal Anthony, Steve Liebenberg, Susan Liebenberg, Wayne  
19 McKy, Bob Rotach, James Sargent, Patricia Sargent, and William Stein file this Objection to the  
20 Respondent's Supplement to the Record and Response To Petitioners' Objection to the Record as  
21 the record does not include all materials included as part of the record during the proceedings before  
22 the final decision maker.

23 Lead-Petitioner Michael L. Walker received the record of the proceedings for LUBA No.  
24 2008-224 April 23, 2009. The record was also dated April 23, 2009.

25 Steve Rich, Josephine County Legal Counsel, and Michael L. Walker, Lead Petitioner, meet  
26 April 30, 2009 and attempted to resolve the Petitioners' objections to the record per OAR 661-010-  
27 0026(1). Tentative agreement was made to supplement the record with Omitted Item  
28 1 for Item 16.

1 Agreement could not be reached on the Petitioners' other objections and the Petitioners filed  
2 an Objection to the Record on May 4, 2009. Respondent filed a Supplement to the Record of  
3 Proceedings and Response to Petitioner's Objection to the Record May 18, 2009.

4 Without agreeing to any of the Respondent's remaining disagreements to Petitioners'  
5 Objection to the Record, this Objection to the May 18, 2009 Supplement to the Record is filed  
6 because Respondent's Supplement to the Record of Proceedings and Response to Petitioner's  
7 Objection to the Record was not responsive to Petitioners' objections.

8 **Objection 1.** An objection to the total record of proceedings is that it did not conform to  
9 the requirements of OAR 661-010-0025(4)(a)(A). Except for colored copies, Petitioners agree with  
10 the Respondent that "*The fact is that the content of the copy provided to Petitioner is the same as*  
11 *the content of the documents provided to LUBA; . . .*" However, the objection is not about the  
12 content of the copy. It is about the content of the copy being filed in a suitable folder. Petitioners  
13 believe that it is a manageability and efficiency issue partially related to efficient scheduling under  
14 the law.

15 **Objection 2.** An objection to the total record of proceedings is that it did not conform to  
16 the requirements of OAR 661-010-0025(4)(a)(C). Petitioners disagree with Respondent that  
17 "*Petitioner has not shown that Petitioner's ability to review the record and prepare the petition for*  
18 *review is in any way impaired by the fact that the copy of the record provided by the County was not*  
19 *bound.*" Like Objection 1 this objection is a manageability and efficiency issue partially related to  
20 scheduling under the law. Petitioners believe they have shown that the large 2,495 page record was  
21 just not manageable as provided and that they lost valuable time in preparing the petition for review  
22 as they first had to create a record environment that resembled the requirements of OAR 661-010-  
23 0025(4)(a)(C)

24 **Objection 3., Omitted Item 1.** Petitioners thank the county for supplementing the record  
25 for this item and curing that part of Petitioners' objection.

1           **Objection 3., Omitted Item 2.** for which the Finding III.H. Findings of Fact (Rec. 63) for  
2 LUBA No. 2008-224 follows in relevant part:

3           “ \* \* \* The Board takes judicial notice of the documents, studies, testimony and legislative  
4 intent for the Internal Rate of Return System to identify forest lands in Josephine County as  
5 they apply to the subject property. The Board also considered the background documents on  
6 the adoption of the IRR rating system as well as the objections submitted to the adequacy of  
7 the system. \* \* \*”

8           Petitioners agree with Respondent it could have been appropriate, as applicable, to take  
9 judicial notice of the Josephine County Rural Land Development Code and the Soil Survey of  
10 Josephine County. It is unknown to Petitioners the meaning of the Respondent’s reference to generic  
11 Forest Service publications.

12           Respondent took notice that some of the Petitioners were somewhat knowledgeable  
13 concerning the county’s IRR system (i.e, several brochures about the county’s IRR system had been  
14 published on the Hugo Neighborhood Association & Historical Society’s web site). Some of the  
15 Petitioners certainly had tried to education themselves and had published information about their  
16 opinions on a neighborhood web site. However, intense self-educated opinions about a unique and  
17 complex county IRR system (Petitioners are not sure, but assume the IRR system equals the  
18 documents entitled, *Using The Internal Rate of Return To Rate Forest Soils For Applications In  
19 Land Use Planning* by Brown, and *Locational Factors Affecting Woodlot Resource Lands* by Snider.  
20 Rec 53) does not equate to knowledge of documents, studies, testimony and legislative intent records  
21 for the IRR system that the Board took judicial notice of to identify forest lands in Josephine  
22 County as they apply to the subject property. The issue is that the Board took judicial notice of an  
23 unknown list of documents studies, testimony and legislative intent records for the IRR system that  
24 it used in its decision-making process.

25           All Petitioners asked for was a list of the documents, studies, testimony and legislative intent  
26 records for the IRR system that the Board took judicial notice. Petitioners continue to assert the  
27 records are missing until a list of the specific documents, studies, testimony and legislative intent  
28 records for the IRR system are provided with the actual documents available at a known and  
accessible location. Respondent did not attempt to produce such a list during the April 30, 2009

1 meeting per OAR 661-010-0026(1), nor in its May 18, 2009 Supplement to the Record of  
2 Proceedings and Response to Petitioner's Objection to the Record.

3 Petitioners take objection to the Respondent's position that "*The Board of Commissioners*  
4 *was justified in taking judicial notice of the IRR system which is published, well known and is*  
5 *arguably well known even to Petitioners.*" The objection is not to taking judicial notice of the IRR  
6 system even though Petitioners do not know if the IRR system is limited to the Brown and Snider  
7 documents. Rec 53 The objection is to an unknown list of documents, studies, testimony and  
8 legislative intent records for the IRR system that the Board took judicial notice. Petitioners do not  
9 know of any list of the documents, studies, testimony and legislative intent records for the IRR  
10 system.

11 The best Petitioners can ascertain is that the Respondent did not attempt to address  
12 Petitioners' Objection to the Record that "*Missing records include the background documents on*  
13 *the adoption of the IRR rating system as well as the objections submitted to the adequacy of the*  
14 *system that the Board considered. This set of missing records is similar to the documents that the*  
15 *Board took judicial notice of except that the Board considered these documents in its decision-*  
16 *making process. These missing documents are part of the record for which the record needs to be*  
17 *supplemented.*"

18 **Objection 3., Omitted Item 3.** Original submitted colored written testimony should be part  
19 of the original record of proceeding when necessary to understand the submitted testimony. For  
20 example, black and white copies of original colored maps and aerial photographs that are  
21 unintelligible per the meaning of the testimony are valueless and make the items/exhibits act as  
22 omitted items.

23 Respondent appeared to be curing Petitioners' objection for objection 3, omitted item 3 with  
24 the statement. ". . . the County will provide color pages to Petitioner, as listed in Petitioner's  
25 objections, to replace the following Record pages that were provided to Petitioner in black and  
26 white:", but mostly failed as only one supplemental record was obviously provided in its original  
27 colored testimony. Rec 903

1 **Josephine County Board of County Commissioners (BCC) October 6, 2009 Public Land**

2 **Use Hearing**

3

4 Staff reports are professional with staff normally using color copies of original materials for  
5 overhead presentations at public hearing before the BCC. Petitioners continue to believe that  
6 most overheads were in color at the BCC hearings and those should have been in color in the  
7 record.

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Item 6, Rec 135 - Supplemental Record cures objection as it now shows tax lots for granitic  
soil color

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Item 6, Rec 136 - Supplement Record failed to cures objection as vegetation green indicator  
does not show

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Item 6, Recs 151- 154 are part of the staff presentation to BCC.as overhead presentation  
documents. Nowhere in the Respondent's Supplement to the Record and Response to  
9 Petitioners' Objection to the Record is it stated that the overheads were black and white.

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**BCC March 12, 2008 Public Land Use Hearing**

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Item 12, Rec 679 - Supplemental Record cures objection

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Item 12, Recs 680 - 681 not in Supplemental Record. These two documents are GIS  
generated planning aerial photographs normally in color. Respondent's Supplement to the  
Record and Response to Petitioners' Objection to the Record states that these two documents  
13 were submitted to LUBA as black and white documents, but nowhere in the Supplement is  
14 it stated the originals were black and white copies.

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**BCC February 20, 2008 Public Land Use Hearing**

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Item 13, Rec 903 - Supplemental Record cures objection

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Item 13, Rec 862 - Supplemental Record same as colored Rec 903

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Item 13, Recs 871, 872, 886, 892 not in Supplemental Record. Three of these documents are  
GIS planning aerial photographs and a map normally in color and normally used in color for  
overhead presentations at public hearings. The third one (Rec 886) is from applicant's expert  
18 witness and the original was in color regardless that it might have been a black and white  
19 copy in a staff report. Respondent's Supplement to the Record and Response to Petitioners'  
20 Objection to the Record states that these documents were submitted to LUBA as black and  
white documents, but nowhere in the Supplement is it stated the originals were black and  
white.

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**Josephine County Rural Planning Commission December 18, 2006 Public Land Use**

22

**Hearing**

23

Most of the supplemental record for Item 18 fails as the copies are not replicates of the  
original submitted colored written testimony, especially for records showing the lush richness  
24 of the local forests through colored aerial photographs. Instead of colored copies being part  
of the supplemental record, black and white copies were provided with color highlighting.  
25 This highlighting method worked for one record, Rec 2,117.

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1. Item 18, Rec 2,112, Aerial Photo - Supplement failed to cure objection

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2. Item 18, Rec 2,113, Aerial Photo - Supplement failed to cure objection

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3. Item 18, Rec 2,114 - Supplement Record failed to cure objection as vegetation green  
indicator does not show

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- 4. Item 18, Rec 2,116, Zoning - Supplement failed to cure objection as zoning allocations do not show
- 5. Item 18, Rec 2,117, Zoning: - Supplemental highlighted Record cures objection
- 6. Item 18, Rec 2,118, Aerial Photo - Supplement failed to cure objection
- 7. Item 18, Rec 2,126 - Supplement failed to cure objection as tax lots do not show
- 8. Item 18, Rec 2,127, Aerial Photo - Supplement failed to cure objection

DATE: May 28, 2009

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Michael L. Walker, Lead Petitioner  
3388B Merlin Rd #195  
Grants Pass, Oregon 97526  
Telephone: 541-471-8271  
Representing himself

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**CERTIFICATE OF SERVICE AND FILING**

I hereby certify that on May 28, 2009, I filed the original of this Objection to the Respondent’s May 18, 2009 Supplement to the Record of Proceedings and Response to Petitioner’s Objection to the Record with the Oregon Land Use Board of Appeals, Suite 235, 550 Capitol Street NE, Salem, OR 97301-2552, by first class mail. I also certify that on May 28, 2009, I served a true and correct copy of this objection to the record on the persons listed below by first class mail.

Respondent:

Steven E. Rich, County Legal Counsel  
Attorney for Respondent Josephine County  
500 NW 6<sup>th</sup> Street Room 152  
Grants Pass, Oregon 97526

Intervenor-Respondent:

Ward Ockenden  
932 SE “M” Street  
Grants Pass, Oregon 97526

Intervenor-Petitioner:

Holger T. Sommer  
P.O. Box 367  
Merlin, Oregon 97532

DATE: May 28, 2009

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