

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,
8 PATRICIA SARGENT and WILLIAM STEIN,
9 *Petitioners,*

10 and

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13 HOLGER T. SOMMER,
14 *Intervenor-Petitioner,*

15 vs.

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17
18 JOSEPHINE COUNTY,
19 *Respondent,*

20 and

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22
23 WARD OCKENDEN,
24 *Intervenor-Respondent.*

25
26 LUBA No. 2008-224

27 ORDER

28 **MOTIONS TO INTERVENE**

29 Ward Okenden, the applicant below, moves to intervene on the side of respondent.
30 Holger T. Sommer moves to intervene on the side of petitioner. No party opposes the
31 motions, and they are granted.

32 **RECORD OBJECTIONS**

33 Lead petitioner Walker (petitioner) filed objections to the record that was filed by the
34 county in this appeal, which we address in turn.

35 **A. Record Objections 1 and 2**

36 Petitioner argues that the county failed to provide him with an adequate copy of the
37 record. In particular, petitioner argues that his copy of the record was provided loose leaf in

1 a cardboard box unbound and unsecured. According to petitioner, unlike the copy of the
2 record that was provided to LUBA, his copy does not comply with LUBA's rules. OAR
3 661-010-0025(4) provides the specifications for the record.

4 "(a) The record, including any supplements or amendments, shall:

5 "(A) *Be filed in a suitable folder*; the cover shall bear the title of the
6 case as it appears in the Notice or in the Board's order
7 consolidating multiple appeals, and the Board's numerical
8 designation for the case, and shall indicate the numerical
9 designation given the land use decision or limited land use
10 decision by the governing body; if the record consists of
11 multiple volumes, the cover shall indicate the page numbers
12 contained in each volume;

13 "(B) Begin with a table of contents, listing each item contained
14 therein, and the page of the record where the item begins (see
15 Exhibit 2), and listing each large map, tape, item or document
16 retained by the governing body under section (2) of this rule;

17 "(C) *Be securely fastened on the left side*;

18 "(D) Have pages numbered consecutively, with the page number at
19 the bottom outside corner of each page;

20 "(E) Be arranged in inverse chronological order, with the most
21 recent item first. Upon motion of the governing body, the
22 Board may allow the record to be organized differently."
23 (Emphases added.)

24 Petitioner argues that the specifications that apply to the copy of the record that is
25 transmitted to LUBA apply equally to the copy of the record that must be served on
26 petitioner. The county responds that it is only required to provide petitioner with a record
27 that has the same content as the record that is transmitted to LUBA. According to the
28 county, the copy of the record that is served on petitioner is not required to comply with
29 OAR 661-010-0025(4)(a).

30 We agree with petitioner that both the copy of the record that is transmitted to LUBA
31 and the copies of the record that are served on the parties in an appeal must comply with
32 OAR 661-010-0025(4)(a). LUBA, however, only requires a record to be refiled or corrected

1 when the failures to comply with the specifications in the rule are such that LUBA cannot
2 reasonably use the record. We apply that same standard to the copy of the record that was
3 served on petitioners.

4 Petitioners argue that because the record is approximately 2,500 pages, it cannot be
5 used in its current unbound form and it is unreasonable for the county to shift the burden to
6 them to hole punch and place all 2,500 pages in binders so it can be used in preparing the
7 petition for review. In *Curl v. City of Bend*, 56 Or LUBA 794, 799-800 (2008) and *Curl v.*
8 *City of Bend*, 55 Or LUBA 719, 726-27 (2008), the City of Bend similarly provided 3,171
9 and 4,457 page records to the petitioners in unbound and unfastened form and we required
10 the city to conform the petitioners' records to the records provided to LUBA. While the
11 present record of approximately 2,500 pages is somewhat smaller than the records in *Curl*,
12 we believe placing an unbound 2,500-page record in a box and mailing it to petitioners is a
13 violation of OAR 661-010-0025(4)(a) that cannot be overlooked. Therefore, if petitioner
14 promptly returns the record to the county, the county shall bind petitioner's copy of the
15 record in the same manner as the copy of the record that was transmitted to LUBA.

16 Record objections 1 and 2 are sustained.

17 **B. Record Objection 3**

18 Petitioner's third record objection concerns materials that petitioner believes were
19 improperly omitted from the record or included in the record in a form that does not convey
20 all the information that was included in the original.

21 **1. Walker Testimony**

22 Petitioner argues that 58 pages of testimony from petitioner Walker should be
23 included in the record. The county submitted that document as a supplemental record.
24 LUBA and all parties shall insert supplemental record pages 1251A through 1251FFF after
25 page 1251 in the original record.

1 This record objection is sustained and is resolved by the county’s supplemental
2 record.

3 **2. Internal Rate of Return Documents**

4 Petitioner argues that the board of county commissioners improperly took notice of
5 various documents relating to the internal rate of return (IRR) rating system used by the
6 county for evaluating forestland. In support of his argument, petitioner points to the
7 following finding from the decision:

8 “* * * The Board takes judicial notice of the documents, studies, testimony
9 and legislative intent for the Internal Rate of Return System to identify forest
10 lands in Josephine County as they apply to the subject property. The Board
11 also considered the background documents on the adoption of the IRR rating
12 system as well as the objections submitted to the adequacy of the system.
13 * * *” Record 63.

14 According to petitioner, the various “documents, studies, testimony, and legislative
15 intent” regarding the IRR were not properly identified and therefore the county cannot take
16 judicial notice of them. Apparently, petitioner believes the county must identify those
17 documents, studies, etc. and include them in the record that is filed with LUBA.

18 Petitioner misunderstands the nature of judicial notice. If we correctly understand the
19 nature of the documents for which the county appears to have taken official notice, the
20 county may also misunderstand the nature of judicial notice. Judicial notice allows a
21 decision maker to consider certain undisputed facts that are not found in the record.¹ If the

¹ OEC 201(b) provides as follows:

“A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

“(1) Generally known within the territorial jurisdiction of the trial court; or

“(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

Josephine Rural Land Development Code 31.110.C is consistent with OEC 201(b) and provides that stipulated facts and judicially noticed facts need not be included in the evidentiary record:

1 county took judicial notice of facts that are not the proper subject of judicial notice, and the
2 county relied on those facts in making its decision in this matter, it may be that the county
3 committed error in taking judicial notice of disputed facts. It may also be, as petitioner
4 suggests, that the county's decision to take judicial notice inadequately identified the
5 officially noticed documents. That also may have been error. If there were timely objections
6 to those actions, petitioner may assign error to those actions in the petition for review. But
7 even if the county committed legal error by taking judicial notice of disputed facts or
8 inadequately identifying the judicially noticed facts, those errors do not have the legal effect
9 of making the documents part of the county record that must be filed with LUBA.

10 Finally, petitioner makes one more argument regarding the IRR documents that we do
11 not understand.² Petitioner seems to suggest that certain unidentified IRR related documents
12 were submitted during the local proceedings that led to the decision at issue in this appeal
13 and that those documents have not been included in the record. If petitioner's objection were
14 stated a little more clearly and made some attempt to identify the documents he refers to, we
15 might sustain the objection. However, the argument is not stated clearly enough, and we
16 reject it for that reason.

17 This record objection is denied.

"All evidence received by the hearing body shall be made part of the record of the case,
except for matters stipulated to and matters judicially noticeable."

² That argument is set out below:

"Missing records include the background documents on the adoption of the IRR rating system
as well as the objections submitted to the adequacy of the system **that the Board considered**.
This set of missing records is similar to the documents that the Board took judicial notice of
except that the Board considered these documents in its decision-making process. These
missing documents are part of the record for which the record needs to be supplemented."
Objection to the Record, Exhibit A, page 4, lines 6-9 (bold type in original).

1 **3. Color Documents**

2 Petitioner argues that certain documents were submitted to the county in color, but
3 the record filed with LUBA only contains black and white copies of those documents.
4 According to petitioner, the color copies are necessary for LUBA to properly understand the
5 documents. As we explained in *Walker v. Deschutes County*, 54 Or LUBA 752, 756 (2007),
6 when original documents are submitted for the record in color and color is necessary to
7 convey pertinent information, a local government may either: (1) include color copies of
8 those documents in the records that are transmitted to LUBA and served on the parties or (2)
9 include black and white copies in the records that are transmitted to LUBA and served on the
10 parties and transmit the color originals to LUBA at the time of oral argument as “difficult to
11 duplicate documents.” OAR 661-010-0025(2).³

12 In response to petitioner’s record objection, the county submitted a supplemental
13 record containing a number of black and white copies with color highlighting. The county
14 also apparently provided petitioner with some color copies of pages in the record, but did not
15 provide color copies of those pages to LUBA. Petitioner continues to object arguing that the
16 black and white color copies with highlighting, with one exception, are not adequate to
17 convey the information contained in the original documents. Petitioner further argues that
18 the county has not provided petitioner with all the color copies requested.

19 It is difficult to tell from the pleadings exactly what documents are still in dispute.
20 However, it is reasonably clear that some color documents remain in the possession of the
21 county, and the county has neither given LUBA color copies of those documents nor stated

³ OAR 661-010-0025(2) provides:

“Transmittal of Record: The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board a certified copy of the record of the proceeding under review. The governing body may, however, retain any large maps, tapes, or *difficult-to-duplicate documents and items* until the date of oral argument. Transmittal of the record is accomplished by delivery of the record to the Board, or by receipt of the record by the Board, on or before the due date.” (Emphasis added.)

1 that it plans to provide those color documents to LUBA at oral argument. Petitioner has
2 withdrawn some record objections but continues to assert most of his record objections. To
3 bring this matter to conclusion as quickly as possible, we will assume the county has color
4 copies of each of the pages of the record that were identified in petitioner's original record
5 objection, because the county does not argue that it does not have color copies of those
6 pages. If that assumption is not correct with regard to any of the disputed documents, the
7 county shall immediately advise us of that fact and the county will not be required to provide
8 the color original at oral argument.

9 **a. Record 2112, 2113, 2114, 2116, 2117, 2118, 2126, 2127**

10 We understand the county to argue that the originals of these pages in the county's
11 record are black and white copies with color highlighting. We also understand the county to
12 take the position that the supplemental record includes copies of these pages with the same
13 color highlighting.

14 Petitioner's objection concerning Record pages 2112, 2113, 2114, 2116, 2117, 2118
15 is denied. We will rely on the pages that are included in the supplemental record that was
16 received by LUBA on May 20, 2009. However, that supplemental record did not include
17 copies of Record pages 2126 and 2127 with color highlighting, and the copies of those pages
18 in the original record are black and white. Petitioner's objections concerning those pages is
19 sustained.

20 Petitioner's objection concerning Record pages 2112, 2113, 2114, 2116, 2117, 2118
21 is denied. Petitioner's objections concerning Record pages 2126 and 2127 is sustained. The
22 county shall include those pages or color copies of those pages in the second supplemental
23 record that will be required pursuant to this order. Alternatively, the county may provide
24 those color originals or color copies at the time of oral argument.

1 **b. Record 135, 136, 151, 152, 153, 154**

2 Petitioner withdrew his objection concerning Record 135. We do not consider that
3 objection further.

4 Petitioner contends that the copy of Record 136 that the county provided to petitioner
5 fails to show vegetation in green. The county failed to provide a copy of that page in the
6 supplemental record that was transmitted to LUBA. This objection is sustained.

7 Record pages 151-54 are black and white copies of portions of a single larger color
8 document. The county agrees to provide the color original at the time of oral argument.
9 With that agreement, petitioner’s objection is denied.

10 The county will provide the color original of the document that now appears in black
11 and white form at Record 151-54 at the time of oral argument. Petitioner’s objection
12 regarding Record 135 was withdrawn. The county shall include the color original of Record
13 136, or a color copy, in the second supplemental record. Alternatively, the county may
14 provide that color original or a color copy at the time of oral argument.

15 **c. Record 679, 680, 681**

16 Record page 679 in the original record that was received by LUBA on April 27, 2009
17 is a color copy. For that reason, petitioner’s objection concerning that page is denied.
18 Petitioner’s objection concerning Record 680 and 681 is sustained.

19 Petitioner’s objection concerning Record 679 is denied. The county shall include the
20 color originals of Record 680-81, or color copies of those pages, in the second supplemental
21 record. Alternatively, the county may provide those color originals or color copies at the
22 time of oral argument.

23 **d. Record 862, 871, 872, 886, 892, 903**

24 Record 903 and 862 are the same document. Record page 903 was a color copy in
25 the original record. Petitioner’s objections concerning these pages are denied. Petitioner’s
26 objection concerning the remaining pages is sustained.

1 Petitioner’s objections concerning Record 862 and 903 are denied. The county shall
2 include the color originals of Record 871, 872, 886 and 892, or color copies of those pages,
3 in the second supplemental record. Alternatively, the county may provide those color
4 originals or color copies at the time of oral argument.

5 **CONCLUSION**

6 We sustained petitioner’s first and second record objections requiring the county to
7 bind petitioner’s copy of the record. We partially sustained petitioner’s objections regarding
8 color documents in the record. The county will need to transmit a second supplemental
9 record that includes those documents or provide those color documents at the time of oral
10 argument in this appeal.

11 Within 21 days of the date of this order, the county shall (1) conform petitioner’s
12 copy of the record to that of the record filed at LUBA and (2) transmit a second supplemental
13 record that includes color documents or color copies of documents in accordance with this
14 order. As an alternative to transmitting a second supplemental record, the county may
15 transmit the required color documents to LUBA at the time set for oral argument. If the
16 county selects this alternative, it must within 21 days of the date of this order transmit a
17 revised table of contents that identifies the color document that will be provided at the time
18 of oral argument, pursuant to OAR 661-010-0025(2) and 661-010-0025(4)(a)(B).

19 Dated this 27th day of July, 2009.
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26 _____
27 Michael A. Holstun
 Board Member