

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

3  
4                                   ROGUE ADVOCATES,  
5                                   WILLIAM M. CORCORAN II  
6                                   and ELIZABETH A. CORCORAN,  
7   *Petitioners,*

8  
9   vs.

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11                                   JOSEPHINE COUNTY,  
12   *Respondent,*

13  
14   and

15  
16                                   SUNNY VALLEY SAND AND GRAVEL, INC.  
17   *Intervenor-Respondent.*

18  
19   LUBA Nos. 2014-095/096

20   **MOTION FOR STAY**

21                   The challenged decision in these consolidated appeals is a county  
22   decision that grants comprehensive plan text, zoning map, and site plan review  
23   approval to allow aggregate mining of a site.

24                   William M. Corcoran II and Elizabeth A. Corcoran (petitioners  
25   Corcoran) are the petitioners in LUBA No. 2014-096. On May 4, 2015,  
26   petitioners Corcoran served on the other parties a copy of a motion to stay the  
27   challenged decision. Petitioners Corcoran apparently failed to file the motion  
28   with LUBA, or, if they did, LUBA did not receive it. Petitioners did attach a  
29   copy of the motion to an e-mail sent to LUBA staff, but that is not sufficient to  
30   file the motion. *See* OAR 661-010-0075(2)(a)(B) (filing a document with  
31   LUBA is accomplished either by delivery to the Board or mailing it to the  
32   Board by first class mail). On May 18, 2015, LUBA received intervenor-

1 respondent's response to the motion for stay. LUBA then contacted petitioners  
2 Corcoran, who mailed a copy of the motion for stay to LUBA. LUBA received  
3 that mailed copy on May 21, 2015. We now address and deny the motion.

4 OAR 661-010-0068(1) provides, in relevant part:

5 "A motion for a stay of a land use decision or limited land use  
6 decision shall include:

7 "(a) A statement setting forth movant's right to standing to  
8 appeal the decision;

9 "(b) A statement explaining why the challenged decision is  
10 subject to the Board's jurisdiction;

11 "(c) A statement of facts and reasons for issuing a stay,  
12 demonstrating a colorable claim of error in the decision and  
13 specifying how the movant will suffer irreparable injury if a  
14 stay is not granted;

15 "(d) A suggested expedited briefing schedule;

16 "(e) A copy of the decision under review and copies of all  
17 ordinances, resolutions, plans or other documents necessary  
18 to show the standards applicable to the decision under  
19 review."

20 The motion for stay includes none of the statements and other elements  
21 required by OAR 661-010-0068(1). In particular, the motion includes no  
22 "statement of facts and reasons for issuing a stay, demonstrating a colorable  
23 claim of error and specifying how the movant will suffer irreparable injury if a  
24 stay is not granted." The motion for stay is denied.

## 25 **RECORD OBJECTIONS**

26 Rogue Advocates, the petitioner in LUBA No. 2014-095, filed  
27 objections to the record, as did intervenor-respondent (intervenor) and the  
28 petitioners Corcoran in LUBA No. 2014-096. Petitioners Corcoran

1 subsequently amended their objections. Intervenor filed a response to  
2 petitioners Corcoran’s amended objections.

3 On May 18, 2015, the county transmitted to LUBA a supplemental  
4 record that resolves some of the objections, and a response that disputes other  
5 objections. On May 29, 2015, petitioners Corcoran submitted a reply. We now  
6 resolve the outstanding objections.

7 **A. Rogue Advocates’ Objection**

8 The supplemental record resolves Rogue Advocates’ objection.

9 **B. Petitioners Corcoran’s Objections**

10 **1. Searchability**

11 OAR 661-010-0025(2)(b) authorizes a local government to transmit the  
12 record to LUBA in electronic instead of paper format, and further provides that  
13 if the record exceeds 100 pages, the electronic copy transmitted to LUBA shall  
14 be “searchable.”<sup>1</sup> The county opted to transmit an electronic record to LUBA  
15 in Portable Document Format (PDF) files. That transmitted record is  
16 searchable, and readily locates printed text.

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<sup>1</sup> OAR 661-010-0025(2)(b) provides:

“As an alternative to transmitting a certified paper copy of the record, a local government may transmit the record to the Board in electronic format. Transmittal of an electronic copy is accomplished by delivery of two complete copies of the record on optical disks, with documents recorded in a PDF format. If the record exceeds 100 pages, the electronic copy shall be searchable. A local government may transmit the record in electronic form, and also retain items until oral argument as described in OAR 661-010-0025(2)(a).”

1 OAR 661-010-0025(3)(b) provides that, by prior agreement, the local  
2 government may serve an electronic copy of the record on the parties.<sup>2</sup>  
3 Petitioners Corcoran complain that the electronic copy served on them is not  
4 consistently searchable. Petitioners state that they conducted test searches for  
5 unspecified words that are visible on a number of pages, but that the search  
6 function of their electronic reader could not locate the words. Petitioners also  
7 argue that the searchability requirement of OAR 661-010-0025(2)(b) is not  
8 limited to text, and fault the county for failing to serve them with an electronic  
9 record that provides searchable descriptions of images and tables.

10 The county responds that its ability to make the record searchable is  
11 limited by technology, and provides the affidavit of its information technology  
12 director to explain how the electronic record was generated and the inherent  
13 limits on searchability with the technology the county used. The affidavit  
14 explains that the technology is not perfect, and that unusual fonts or formatting,  
15 handwritten text, images, etc., may not be searchable.

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<sup>2</sup> OAR 661-010-0025(3) provides, in relevant part:

“Service of Record:

“(a) Contemporaneously with transmittal, the governing body shall serve a paper copy of the record, exclusive of large maps, media recordings, and difficult-to-duplicate documents and items, on the petitioner or the lead petitioner, if one is designated. \* \* \*

“(b) By prior agreement of the party to be served, service of the record as described in OAR 661-010-0025(3)(a) may be in an electronic format instead of a paper copy.”

1 Nothing in our rules require the local government to go beyond using  
2 standard, readily available technology to produce searchable PDF documents,  
3 where searchability is required. An electronic record that allows clearly printed  
4 text to be located with reasonable effort is sufficient to comply with OAR 661-  
5 010-0025(2)(b). The local government is not required to produce a record that  
6 allows searching for obscured, unusual or handwritten text, or to format and  
7 index images and tables for searchability.

8 LUBA has searched for printed words on the pages that petitioners cite  
9 to, and the search function on LUBA's off-the shelf version of Adobe Reader  
10 has no trouble locating the search terms. Petitioners do not identify what  
11 search terms they used, and have not demonstrated that printed words in the  
12 record served on them are not searchable, or that any deficiency in searchability  
13 significantly affects the usability of the record. This objection is denied.

## 14 **2. Scanned Images**

15 Petitioners argue that scanned images at Record 4271, 4275, 4276, 4277,  
16 and 4273-74 are blurry, unclear or missing information. The county responds  
17 that it has compared the scanned images to the originals and the originals have  
18 the same asserted defects as the scanned images. Based on that representation,  
19 no remedial action is possible. This objection is denied.

## 20 **3. Missing or Mislabeled Items**

21 Petitioners argue that seven items are missing entirely from the record,  
22 missing pages, or mislabeled.

23 The county responds that three of the four documents allegedly missing  
24 entirely or missing pages are in fact in the record and include the same number  
25 of pages as the originals submitted to the county. As far as we can tell, the  
26 county is correct. Objections 3a, 3c and 3d are denied.

1 With respect to the fourth allegedly missing document, petitioners argue  
2 that on June 23, 2014, and June 27, 2014, a person named Robert Loper  
3 submitted unspecified “documentation” but that that documentation is missing  
4 from the record. The county responds that it cannot find any documentation  
5 submitted by Robert Loper on those dates, and no indication in the minutes or  
6 other records that Loper submitted any documentation on those dates.  
7 Petitioners’ mere assertion that Loper submitted documentation is not sufficient  
8 to overcome the county’s contrary representation. Objection 3e is denied.

9 Objection 3b concerns a document that petitioners argue is misattributed  
10 in the table of contents. The county states that the revised table of contents  
11 corrects the attribution. Objection 3b is resolved.

12 Objection 3f concerns Exhibit HHHHH#8, which is a compact disk  
13 submitted to the county, containing documents that total approximately 1000  
14 pages. The county retained the disk until the time of oral argument, pursuant to  
15 OAR 661-010-0025(2)(a). Petitioners object that the documents on the  
16 compact disk should not be retained, but should be included in the record  
17 transmitted and served on the parties. The county agrees, and has transmitted  
18 and served a copy of the compact disk as part of the supplemental record.  
19 Objection 3f is resolved.

20 Objection 3g concerns two cumulative “tally lists” of items submitted  
21 during the proceedings below, as of two dates, July 9, 2014 and July 22, 2014.  
22 Petitioners argue that the tally lists current on those two dates should be  
23 included in the record. The county responds that the final tally list is in the  
24 record, and that the county does not retain or possess the intermediate tally lists  
25 generated on given dates. With that representation, Objection 3g is denied.

1           Based on the foregoing, petitioners’ objections regarding missing or  
2 mislabeled items are either resolved or denied.

#### 3                           **4. Table of Contents**

4           Petitioners object that the table of contents erroneously or insufficiently  
5 describes several exhibits in the record. Petitioners contend that the table of  
6 contents has pervasive flaws, but provides only two specific examples. The  
7 first is that the name of an opponent, Kalin, is misspelled. Petitioners do not  
8 identify where in the table of contents the misspelling occurred, and fail to  
9 demonstrate that the misspelling of a name is a defect that warrants remedial  
10 action.

11           The second specific objection is to Item 16, Staff Report Exhibit 1,  
12 Attachment E, described as “Procedural Challenges, Applicant Rebuttal, Legal  
13 Counsel Rulings.” Attachment E appears to be a 50-page collection of several  
14 documents, submitted as an attachment to the staff report to the county  
15 commissioners. Petitioners argue that the table of contents description is too  
16 general, and ignores many specific challenges and arguments contained in that  
17 50-page exhibit. We understand petitioners to argue that the table of contents  
18 description is inadequate, because it does not list or describe the numerous  
19 individual documents that are collected in Exhibit 1, Attachment E. We  
20 generally agree with petitioners. *See Rogue Advocates v. Josephine County*, 65  
21 Or LUBA 479, 481-82 (2012) (documents independently submitted during the  
22 proceedings below should be separately listed in the table of contents, not  
23 collected together and collectively described as a single “item”). However, as  
24 in *Rogue Advocates*, petitioners have not established that any deficiency in the  
25 table of contents warrants remedial action in order for the parties to locate  
26 items in the record with reasonable effort. *Id.* at 482. Attachment E is only 50

1 pages long, and consists of a handful of documents that can be located with  
2 reasonable effort. This objection is denied.

3 **5. Minutes of Hearings**

4 Petitioners argue that the minutes of the June 23, 2014 hearing are  
5 materially defective, and request that LUBA order the county to provide a  
6 transcript of the hearing, pursuant to OAR 661-010-0026(3).<sup>3</sup>

7 Petitioners cite several examples of allegedly incomplete or inaccurate  
8 portions of the minutes of the June 23, 2014 hearing. However, petitioners  
9 merely assert that the summary of testimony in these portions of the minutes is  
10 incomplete or inaccurate, without setting out the differences between that  
11 summary and what a partial transcript of the testimony made from the audio  
12 recording of the hearing would show. Without some comparison of that kind,  
13 or at least a description on the testimony that is allegedly incomplete or  
14 inaccurately summarized in the minutes, LUBA is in no position to agree with  
15 petitioners that the summary of testimony in the minutes is materially  
16 incomplete or inaccurate. This objection is denied.

17 **C. Intervenor’s Objections**

18 The supplemental record resolves intervenor’s objections 5, 6, and 7.

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<sup>3</sup> OAR 661-010-0026(2)(c) provides that a party may object to the record on the grounds that the minutes of a hearing are incomplete or do not accurately reflect the proceedings. OAR 661-010-0026(3) provides:

“An objection on grounds that the minutes or transcripts are incomplete or inaccurate shall demonstrate with particularity how the minutes or transcripts are defective and shall explain with particularity why the defect is material. \* \* \*”

1                   **1. Objections 1, 3, 4, 6 and 8: Black and White Documents**

2                   These objections concern black and white copies of photographs and  
3                   graphs that intervenor argues are unclear. Intervenor requests that the county  
4                   provide color originals or color copies. The county responds that the disputed  
5                   black and white copies were placed before the final decision maker in that  
6                   format, not as color copies.<sup>4</sup> Based on that response, these objections are  
7                   denied.

8                   **2. Objection 2: Table of Contents**

9                   Intervenor objects that an opponent letter at Record 1089-90 is attached  
10                  to a staff report as part of Attachment B, which is supposed to include only  
11                  agency comments. Intervenor requests that the opponent letter be relocated  
12                  elsewhere in the record.

13                  The county agrees that the opponent letter should not have been included  
14                  in Attachment B, which was intended for agency comments, but argues that the  
15                  letter was placed before the final decision maker as part of Attachment B, in the  
16                  same location it now appears in the record. We agree with the county  
17                  intervenor has not established a basis to relocate the letter elsewhere in the  
18                  record on appeal. This objection is denied.

19                  **D. Conclusion**

20                  For the foregoing reasons, all objections are either denied or resolved by  
21                  the supplemental record. Accordingly, the record is settled as of the date of  
22                  this order. The petitions for review are due 21 days, and the response briefs

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<sup>4</sup> The county also notes that color copies of what appear to be the same photographs and graphs were submitted at other times during the proceedings below and appear elsewhere in the record.

1 due 42 days, from the date of this order. The Board's final opinion and order  
2 are due 77 days from the date of this order.

3 Dated this 10th day of June, 2015.  
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Tod A. Bassham  
11 Board Chair