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

PAUL E. FOLAND and CONSTANCE J. FOLAND,  
*Petitioners,*

vs.

JACKSON COUNTY,  
*Respondent,*

JAN25'10 AM 9:03 LUBA

and

OREGON DEPARTMENT OF TRANSPORTATION,  
*Intervenor-Respondent.*

LUBA No. 2009-109

DANIEL FOLLIARD, JAMES McINTOSH, LOIS LANGLOIS,  
DAN BATY, JOHN EASTER and MICHAEL BIANCO,  
*Petitioners,*

vs.

JACKSON COUNTY,  
*Respondent,*

and

OREGON DEPARTMENT OF TRANSPORTATION,  
*Intervenor-Respondent.*

LUBA No. 2009-112

ALLEN BAKER, JOHN WEISINGER,  
STEVEN STOLZER, JEAN MORGAN, MICHAEL MORGAN,  
SUZANNE FREY and GAIL ZARO,  
*Petitioners,*

vs.

JACKSON COUNTY,  
*Respondent,*

and

1  
2 OREGON DEPARTMENT OF TRANSPORTATION,  
3 *Intervenor-Respondent.*

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5 LUBA No. 2009-113

6 ORDER

7 **MOTION TO INTERVENE**

8 The Oregon Department of Transportation, the applicant below, moves to intervene  
9 on the side of the respondent in these appeals. There is no opposition to the motion and it is  
10 granted.

11 **RECORD OBJECTIONS**

12 On November 6, 2009, petitioners filed objections to the record filed by the county in  
13 this appeal. On November 18, 2009, the county filed a response to the record objections. On  
14 December 1, 2009, petitioners filed a response to the county's response to petitioners' record  
15 objections. On December 11, 2009, the Oregon Department of Transportation (intervenor)  
16 filed a "Motion to Settle Record" that included responses to petitioners' objections. On  
17 December 28, 2009, petitioners filed a response to intervenor's motion.

18 In their December 1, 2009 response to the county's response, petitioners either  
19 accepted the county's response or withdrew Record Objections 4, 7, 9, and 10. We now  
20 resolve Record Objections 1, 2, 3, 5, 6, 8, and 11.

21 **A. Record Objection 1**

22 Petitioners argue that a portion of the record is not assembled in reverse chronological  
23 order in violation of OAR 661-010-0025(4)(a)(E).<sup>1</sup> The county and intervenor (respondents)  
24 respond that petitioners' objection refers to Exhibit 18 of the record, which appears at Record  
25 pages 1175 to 3977. Exhibit 18 is the entire record of the proceedings before the planning

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<sup>1</sup> OAR 661-010-0025(4)(a)(E) provides that the record shall:

"Be arranged in inverse chronological order, with the most recent item first. \* \* \*"

1 commission on intervenor’s application. Respondents explain that that because the record of  
2 the planning commission proceedings is a single exhibit, it should not be required to re-sort  
3 the pages from the planning commission record into inverse chronological order.  
4 Respondents also point out that the exhibit is presented in the record in the same format that  
5 it was presented to the board of county commissioners during the proceedings below. We  
6 agree with respondent.

7 Record objection 1 is denied.

8 **B. Record Objections 2 and 8**

9 In these objections, petitioners argue that documents that were submitted in color are  
10 reproduced in black and white. Petitioners argue that the original documents that are found at  
11 record pages 2418 through 2425 contained colored highlighted text and that the county  
12 should reproduce those documents in color. The county responds that it will provide the  
13 original color documents at oral argument.

14 In cases where the original record includes color documents, it is preferable that the  
15 local government include color copies of those documents in the record that is transmitted to  
16 LUBA and the parties. *Oien v. City of Beaverton*, 45 Or LUBA 722, 726-27 (2003). If the  
17 record includes black and white copies of color originals, and material information may be  
18 lost in black and white copies, the local government may retain the color originals until the  
19 time set for oral argument, in accordance with OAR 661-010-0025(2).<sup>2</sup> *Walker v. Deschutes*  
20 *County*, 54 Or LUBA 752, 756 (2007).

21 As far as we can tell, the original color documents found at Record pages 2418  
22 through 2425 are not listed in the table of contents to the record as documents that will be  
23 retained by the county until oral argument under OAR 661-010-0025(2), as required by OAR

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

“\* \* \* The governing body may, however, retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument.”

1 661-010-0025(4)(a)(B).

2 Record Objections 2 and 8 are sustained. The county shall either submit color copies  
3 of the original documents found at Record pages 2418 through 2425 as part of the  
4 supplemental record, or list the color originals in the record table of contents as items that  
5 will be retained until oral argument, in accordance with OAR 661-010-0025(4)(a)(B).

6 **C. Record Objection 3**

7 In this objection, petitioners argue that Record pages 401 through 404 have cut off  
8 margins, making the text in the margins unreadable. Petitioners request that these pages in  
9 their entirety be included in a supplemental record. The county agrees to provide these pages  
10 in a supplemental record.

11 Record Objection 3 is sustained. The county shall include legible copies of Record  
12 pages 401 through 404 in the supplemental record it transmits to the Board and the parties.

13 **D. Record Objection 5**

14 Petitioners object that Record page 2557 appears as an “orphaned page.” The county  
15 responds that Record page 2557 is a schedule of irrigation time submitted by petitioner  
16 Foland and is part of Exhibit 18, the record of the proceedings before the planning  
17 commission, where it was numbered page 1292. The county responds that Record page 2557  
18 is located in the proper place in the record transmitted to LUBA. We agree with the county.

19 Record Objection 5 is denied.

20 **E. Record Objection 6**

21 Petitioners object that Record page 3906 is illegible and seek a legible reproduction.  
22 The county responds that Record page 3906 a large site plan map submitted by intervenor  
23 that is being retained until oral argument. Intervenor responds that Record page 3906 is in  
24 fact an aerial photo of the subject site, and attaches a color copy of that aerial photo to its  
25 motion.

1           The county’s and intervenor’s responses to Record Objection 6 are inconsistent.  
2 Record page 3906 is illegible, but a tab on the page identifies it as “Exhibit 241” submitted to  
3 the planning commission on June 27, 2008. That exhibit number corresponds to a schedule  
4 of exhibits found at Record page 1187 that identifies the disputed page as a “Site Plan Map  
5 submitted by ODOT.” The county has offered to provide a copy of the site plan map it  
6 maintains is found at Record page 3906 to petitioner, albeit at petitioners’ cost.

7           Unfortunately, the list of oversized exhibits found in the record table of contents  
8 beginning on page 10 does not specifically identify each oversized exhibit that was submitted  
9 during the proceedings before the planning commission; rather, it identifies “Exhibits 1-252”  
10 and dates these exhibits “December 24, 2008.” It is not possible to confirm whether the  
11 county is correct that the illegible document found at Record page 3906 is in fact a large site  
12 plan map and whether it is actually included in the list of oversized exhibits to be retained  
13 until oral argument, or whether intervenor is correct that Record page 3906 is the aerial photo  
14 that it attaches to its motion.

15           Record Objection 6 is sustained. Given the uncertainty surrounding the identity of  
16 Record page 3906, the county shall provide at its own cost as part of the supplemental record  
17 it transmits to the Board and the parties both (1) a legible, and if necessary full size, copy of  
18 the site plan map it thinks Record page 3906 depicts, and (2) a color copy of the aerial photo  
19 that is attached to intervenor’s motion.

20           **F.       Record Objection 11**

21           Petitioners’ final record objection is found on the third page of their original record  
22 objection beginning on line 30. For convenience, we have numbered it “Record Objection  
23 11.” Petitioners object that Record pages 2369, 1735 through 1738, and 2872 should be  
24 provided in “grayscale” to preserve the original detail found in the documents that were  
25 submitted in black and white.

1           The county responds that the county has duplicated the black and white originals of  
2 Record pages 2369, 1735, and 2872 “in the best quality possible” and attached the new  
3 duplicates to its response. However, the copies of those record pages that are attached to the  
4 county’s response appear to be of the same quality as the copies included in the record  
5 transmitted to LUBA. Because it is apparently not possible to produce better copies of black  
6 and white originals than were submitted into the record, this objection is denied.

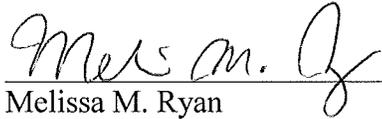
7           Record Objection 11 is denied.

8           **SUPPLEMENTAL RECORD**

9           Within 14 days of the date of this order, the county shall transmit a paginated  
10 supplemental record that contains the above-described documents. Thereafter, the Board will  
11 issue an order settling the record.

12           Dated this 25<sup>th</sup> day of January, 2010.

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Melissa M. Ryan  
Board Member