

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 TAMMERA WALKER and CLAY WALKER,  
5 *Petitioners,*

6  
7 vs.

8  
9 DESCHUTES COUNTY,  
10 *Respondent,*

11  
12 and

13  
14 4-R EQUIPMENT, LLC,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2007-013

18 ORDER ON RECORD OBJECTIONS

19 On March 16, 2007, petitioners filed nine objections to the record that was filed by  
20 the county in this matter. There are two objections numbered 5. We refer to the first record  
21 objection number 5 as record objection 5A and we refer to the second record objection  
22 number 5 as record objection 5B. We now turn to those record objections.

23 **A. Resolved Record Objections**

24 The county has agreed to submit a supplemental record in response to record  
25 objections 1-4, and 6 through 7. We sustain those record objections, and the county shall  
26 include the documents that are the subject of those record objections in a Supplemental  
27 Record.

28 **B. Record Objection 5A**

29 In record objection 5A, petitioners object that the record does not include 17  
30 separately identified e-mail messages. In its March 26, 2007 response to petitioners' record  
31 objections, the county stated that it agreed that the record should be supplemented with those  
32 e-mail messages. The county agreed to include them in the supplemental record if petitioners

1 would provide copies of those e-mail messages. The petitioners have provided copies of the  
2 e-mail messages to the county.

3 In response to record objection 5A, intervenor-respondent argues:

4 “In Objection No. 5[A], as originally filed, the Petitioners are requesting that  
5 the record include certain e-mails showing correspondence with Paul Blikstad,  
6 a planner with Deschutes County. Intervenor-Respondent objects to the  
7 inclusion of those e-mails in the record. In reviewing this matter, those e-  
8 mails were never printed and never made a part of the record. Those e-mails  
9 were not presented to the Hearings Officer or the Deschutes County  
10 Commissioners before their respective Decisions were made. Since those  
11 matters were not before either one of the decision-makers in this matter, those  
12 e-mails should not be included as part of the record.” Intervenor-  
13 Respondent’s Objection to the Record 1.

14 In an April 3, 2007 letter, we provided petitioners and the county an opportunity to respond  
15 to intervenor-respondent’s argument concerning record objection 5A. Neither the county nor  
16 petitioners have done so. Without some response to intervenor-respondent’s contention that  
17 the disputed e-mail messages were not placed before the county decision makers for  
18 inclusion in the record, we deny record objection 5A.

19 **C. Record Objection 5B**

20 In a letter to the county dated March 29, 2007, petitioners withdrew record objection  
21 5B. We do not consider that record objection further.

22 **D. Record Objection 8**

23 In this objection, petitioners object to the county’s failure to provide them with a copy  
24 of what the county has designated the “Confidential Record.” The county offered the  
25 following response to record objection 8:

26 “Because Petitioners are seeking federal historical site registration of the  
27 historic and archeological site located on their property, Respondent is  
28 required by federal law to prevent public disclosure of the location of those  
29 sites. Thus, Respondent created a separate Confidential Record of any  
30 document that gives any indication of the location of the historic and  
31 archeological site. \* \* \*” Response to Petitioners’ Objections to the Record 3.

1 We understand the county to take the position that the Confidential Record will be held at the  
2 county's offices and will be provided to LUBA at the time and date set for oral argument.  
3 We also understand the county to take the position that petitioners may have access to that  
4 Confidential Record at county offices prior to oral argument in this matter.

5 In our April 3, 2007 letter, we gave petitioners seven days to reply to the county's  
6 response to petitioners' record objection. Petitioners did not do so. Because petitioners have  
7 not responded to the county's contention that its proposal regarding the Confidential Record  
8 is required to comply with federal law, record objection 8 is denied.

9 **E. Record Objection 9**

10 OAR 661-010-0025(2) provides that local governments may "retain any large maps,  
11 tapes, or difficult-to-duplicate documents and items" and submit those documents to LUBA  
12 separately at the time of oral argument. As a consequence of that rule, the parties do not  
13 receive copies of these documents in their copy of the record. In record objection 9,  
14 petitioners contend the county has retained documents under OAR 661-010-0025(2) that it  
15 could have copied and included in the record.

16 OAR 661-010-0025(2) attempts to strike a balance between the parties' need to have  
17 easy and convenient access to the record to prepare their briefs and the difficult and costly  
18 burden a local government may face in making the required number of copies of a record that  
19 includes documents that for some reason cannot be duplicated or cannot easily be duplicated  
20 using standard office copying equipment. The documents that the county has retained appear  
21 to fall into one or more of three categories: (1) "documents in or on a medium other than  
22 plain printer paper," (2) large documents, some of which are color and some of which are  
23 black and white, and (3) standard sized documents that are wholly or partially in color.

24 Any documents that the county has retained that are on a medium other than plain  
25 printer paper, such that they are not easily copied on a standard office black and white copier

1 are properly retained under OAR 661-010-0025(2), and we do not understand petitioners to  
2 argue otherwise.

3 Similarly, any documents that are oddly shaped or sufficiently large that they cannot  
4 be easily reduced and printed on a standard 8 ½ by 11 inch page by a standard office copier,  
5 are properly retained by the county. However, we agree with petitioners that standard office  
6 copiers have no difficulty making reduced copies of black and white documents that are 8 ½  
7 by 14 or 11 by 17 inches. Petitioners' record objections that concern documents that are  
8 black and white and 8 ½ by 14 or 11 by 17 inches or smaller are sustained. Petitioners'  
9 record objections that concern documents that are larger than 8 ½ by 14 or 11 by 17 inches  
10 are denied.

11 That leaves any color documents that are on 8 ½ by 11 inch pages or on pages that are  
12 easily reduced to 8 ½ by 11 inch pages by standard office copiers. Consistent with our  
13 decision in *Oien v. City of Beaverton*, 45 Or LUBA 722, 727 (2003), we agree with  
14 petitioners that the county should either submit a supplemental record with color copies of  
15 those pages or submit a supplemental record that includes black and white copies of those  
16 color pages. If the county takes the second option, it must submit the color originals at the  
17 time of oral argument. We can appreciate that this requirement places a burden and expense  
18 on the county and that the black and white copies may provide little useful information.  
19 However, we must balance the other parties' need to have at least some idea what those color  
20 originals show so appropriate steps can be taken to travel to the county to view or obtain  
21 copies of the color originals at the same time those parties are preparing their briefs.

## 22 **F. Summary**

23 The county will submit a supplemental record to respond to record objections 1-4 and  
24 6-7. If the county exercises the second option discussed above, the county shall include in  
25 that supplemental record a section entitled "Black and White copies of Retained Color  
26 Originals." In that section of the supplemental record, the county shall include black and

1 white copies of all of the color documents listed as retained "Oversize Exhibits," which can  
2 be easily reduced and printed on an 8 ½ by 11 inch page by a standard office copier.

3 The county shall have 21 days from the date of this order to compile and submit the  
4 supplemental record. If it requires additional time, the county may request additional time.

5 Dated this 4<sup>th</sup> day of May, 2007.  
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Michael A. Holstun  
Board Chair