

- 1 “[1] Copy of Emails Confirming Use Can be Allowed [Supplemental
2 Record (SR) 30-32]
- 3 “[2] Copy of Listed Uses on Agricultural Land [Not included in SR]
- 4 “[3] Copy of Expenses from Vested Rights Hearing. [SR 9-10]
- 5 “[4] Copy of Clackamas County Counter Receipt Dated Dec 3 2007 [SR
6 11-12]
- 7 “[5] Copy of Clackamas County Vested Rights Hearing [SR 33-41]
- 8 “[6] Copy of Original Letter of Alleged Violation [SR 115-116]
- 9 “[7] Copy of Clackamas County Zoning 1302.01 [SR 1-3]
- 10 “[8] Copy of Health Inspection of Concession Trailer [SR 106-110]
- 11 “[9] Copy of North Clackamas Aquatic Park Fees [SR 104-105]
- 12 “[10] Copy of Purchase Contract of Trees [SR 91-92]
- 13 “[11] Copy of Ground Water Report [SR 117-135]
- 14 “[12] Copy of Appeal Hearing Transcript [SR 54-90]
- 15 “[13] Copy of Unzoned Area Development Permit demonstrating bias [SR
16 14-16]
- 17 “[14] Copy of letter requiring a Vested Rights Hearing [SR 27-29]
- 18 “[15] Copy of response to code violation letter dated 12-01-2010 [SR 4-8]
- 19 “[16] Land Lease contract with Bob Bany dated 01-27-2001 [SR 93-95]
- 20 “[17] Copy of field identification used in land leases [SR 96-97]
- 21 “[18] Copy of transfer of lease to Wayne Bany dated 04-20-2005 [SR 98-
22 103]” Objection to the Record 1-2.
- 23 * “Copy of application submitted to Rick McIntire on 09-09-98 for
24 Nonconforming use of auto repair shop” SR 17-26.
- 25 * “Copy of final order of 1st Vested Rights appeal” SR 42-53.
- 26 * “Copy of Tax Records” SR 111-114.
- 27 * “Copy of emails from Suzanne Webber in response to Gary Hewitt’s
28 request” SR 136-40.

1 From the above, it appears to LUBA that the Supplemental Record included four
2 documents that petitioners had not requested, and all the documents that petitioners
3 requested, with the exception of item number 2, “Copy of Listed Uses on Agricultural Land.”

4 On July 27, 2011, LUBA entered an order settling the Record and establishing a
5 briefing schedule.

6 **B. Petitioners’ Second Record Objection**

7 On July 29, 2011, petitioner submitted additional objections to the Record.
8 Petitioners objected that the Record does not include two things that petitioners contended it
9 should include: “a copy of page 119 from the soil atlas book” and “audio recording of
10 hearing.” Petitioners also objected that pages 126-132 and 135 of the Supplemental Record
11 were not placed before the hearings officer and should not be included in the Supplemental
12 Record.

13 In an August 16, 2011 Order, we concluded that the objection concerning page 119 of
14 the soil atlas book and the audio recording appeared to be new objections concerning the
15 Record, rather than objections to the Supplemental Record, and we rejected them as untimely
16 filed. We also agreed with the county that the objection concerning page 119 of the soil atlas
17 book was so vague and undeveloped it would have to be denied for that reason as well, even
18 if the objection had been timely filed. Regarding the audio recording, since petitioners had
19 already been given a copy of a recording of the only hearing in this matter at the time the
20 original Record was filed, we agreed with the county that that objection would also have to
21 be denied on the merits, even if it had been timely filed. Finally, based on an affidavit
22 submitted by the county, in which a county planner took the position that all the pages
23 included in the Supplemental Record were placed before the hearings officer, we denied
24 petitioners’ objections concerning Supplemental Record 126-132 and 135.

25 In our August 16, 2011 Order, we established a new briefing schedule.

1 **C. Petitioners’ Third Record Objection**

2 **1. Page 119 of the Soil Atlas Book**

3 Petitioners filed their third Record objection on August 19, 2011. In that Record
4 objection, petitioners clarified for the first time that page 119 of the soil atlas book should be
5 included in the Supplemental Record rather than the original Record. We have already
6 denied that objection because the basis for the objection was inadequately developed. The
7 only thing petitioners have added to clarify the basis for this objection is to state the page
8 “should appear after page 18 or pages 128 but is missing.” Pages 18 and 128 do not have
9 any obvious relationship to a single page from a soil atlas, and petitioners make no attempt to
10 explain why a single page from a soil atlas should appear after those pages in the
11 Supplemental Record. This objection is denied for a second time.

12 **2. Recording of the Hearing**

13 As noted above, petitioners first objected that the Record does not include a recording
14 of the hearing in this matter. Petitioners now concede that the original Record included a
15 digital recording of that hearing, but petitioners now argue that the “the recording is not
16 audible and cannot be understood.” Third Record objection 4.

17 The copy of the digital recording that was transmitted to LUBA with the original
18 Record is not audible. LUBA contacted the county for assistance and was told that the
19 original recording in the possession of the county is audible but the copies that the county
20 made from that original recording are not audible. The county has now supplied a second
21 copy of the digital recording to LUBA and petitioners. That copy of the digital recording is
22 very faint, and is only audible if the sound level is turned as high as possible and the listener
23 places his or her ear next to the speaker. A LUBA staff person contacted the county and was
24 told the original digital recording is similarly faint. We decline to order the county to
25 attempt to produce a copy of the digital recording that is of better quality than the original.

1 This objection is resolved by the most recent copy of the digital recording that the county has
2 supplied to LUBA and petitioners.

3 **3. Supplemental Record Pages 126-132 and 135**

4 In support of their position that Supplemental Record Pages 126-132 and 135 were
5 not included in their submittal to the hearings officer and should not be included in the
6 Supplemental Record, petitioners submitted an affidavit signed by petitioner Curtis Gottman
7 in which he takes the position that the disputed pages were not submitted to the hearings
8 officer. We now have competing affidavits—one from the county that takes the position that
9 the pages were part of Exhibit 16 when petitioners submitted it to the hearings officer and
10 one from petitioners that takes the position that the pages were not included in Exhibit 16
11 when it was submitted to the hearings officer. There is nothing about either affidavit that
12 makes it more believable than the other. In that circumstance, we generally defer to the
13 custodian of the record, and we do so here. *Graser-Lindsey v. City of Oregon City*, 55 Or
14 LUBA 715, 716-17 (2008). This objection is denied for a second time.

15 **4. Additional Objections**

16 Although not clear, petitioners may be raising additional objections that go beyond
17 the objections they raised in response to the original Record and the Supplemental Record.
18 To the extent that is the case, those objections are not timely and are rejected for that reason.
19 *See Fraser v. City of Joseph*, 29 Or LUBA 575, 576 (1995) (LUBA will not consider a new
20 and untimely objection to the omission of a letter from the original record that is made in an
21 objection to a supplemental record); *Kane v. City of Beaverton*, 55 Or LUBA 669, 671
22 (2007) (declining to consider new objections filed after the deadline to file objections).

23 **D. Petitioners' Fourth Record Objection**

24 On September 9, 2011, petitioners submitted additional record objections. Those
25 objections largely repeat petitioners' third Record objections and are denied for the same
26 reasons we denied petitioners third record objection. With regard to the "e-mail from

1 Suzanne Webber dated Feb 3, 2011,” which is mentioned in petitioners’ third and fourth
2 Record objections, we note that a copy of that e-mail was included with Exhibit 16 and
3 appears at Supplemental Record 137. If petitioners are objecting that the e-mail message
4 should also appear elsewhere in the Record, they waived that objection by failing to advance
5 it in their first record objections.

6 Petitioners’ fourth Record objections are denied.

7 The Record is settled as of the date of this order. The petition for review shall be due
8 21 days from the date of this order. The response brief shall be due 42 days from the date of
9 this order. The Board’s final opinion and order shall be due 77 days from the date of this
10 order.

11 Dated this 13th day of September, 2011.

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Michael A. Holstun
Board Member