

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

3
4 LEE SCHREPEL, BEN VAN DYKE, BJ MATTHEWS,
5 GORDON DROMGOOLE, JIM VAN DYKE, JULIE
6 VAN DYKE, JOHN VAN DYKE, ALICE PATRIDGE,
7 CELINE MCCARTHY, GREG MCCARTHY, CHRIS
8 MATTSON, CORY VAN DYKE, and TOM HAMMER,
9 *Petitioners,*

10
11 vs.

12
13 YAMHILL COUNTY,
14 *Respondent.*

15
16 LUBA No. 2020-066

17
18 JIM VAN DYKE, JULIE VAN DYKE, BEN VAN DYKE,
19 MARK VAN DYKE, VELMA VAN DYKE, JOHN WISER,
20 LYNNE WISER, JOHN VAN DYKE, SCOTT BERNARDS,
21 RICHARD CLOEPFIL, CHRISTY CLOEPFIL, TOM HAMMER,
22 CHRIS MATTSON, KELSEY FREESE, MARK GAIBLER,
23 ERIC KUEHNE, HAROLD KUEHNE, JOLENE KUEHNE, B.J.
24 MATTHEWS, GORDON DROMGOOLE, GREG MCCARTHY,
25 CELINE MCCARTHY, MARYALICE PFEIFFER, TIM PFEIFFER,
26 BRYAN SCHMIDT, RUDIS LAC, LLC, LEE SCHREPEL,
27 ALLEN SITTON, BROOK SITTON, LESTER SITTON,
28 DARREN SUTHERLAND, KRIS WEINBENDER,
29 BRIAN COUSSENS, ROXANNE COUSSENS,
30 FRUITHILL, INC., and BEN VANDYKE FARMS, INC.,
31 *Petitioners,*

32
33 vs.

34
35 YAMHILL COUNTY,
36 *Respondent.*

37
38 LUBA No. 2020-067

1 ORDER

2 **BACKGROUND**

3 This dispute involves county land use approval to develop a recreation trail
4 (Yamhelas Westsider Trail or Trail) between the cities of Yamhill and Carlton,
5 within a former railroad right of way. County action related to the Trail has been
6 the subject of four prior LUBA decisions: *Van Dyke v. Yamhill County*, 78 Or
7 LUBA 530 (2018) (*Van Dyke I*); *Van Dyke v. Yamhill County*, ___ Or LUBA ___
8 (LUBA No 2019-047, Oct 11, 2019) (*Van Dyke II*); *Van Dyke v. Yamhill County*,
9 ___ Or LUBA ___ (LUBA Nos 2019-038/040, Oct 11, 2019) (*Van Dyke III*);
10 *Van Dyke v. Yamhill County*, ___ Or LUBA ___ (LUBA Nos 2020-032/033, June
11 1, 2020) (*Van Dyke IV*).

12 On May 28, 2020, the county issued Board Order 20-164, approving a
13 conditional use permit (CUP) for the Trail. Petitioners challenge the CUP in
14 LUBA No. 2020-067.

15 In *Van Dyke IV*, we remanded Board Order 20-25, which authorized the
16 county to enter into a construction agreement, and the construction agreement,
17 for the construction of a bridge over Stag Hollow Creek (Stag Hollow Bridge)
18 and related approaches on county-owned property zoned EFU. We concluded
19 that the bridge construction is development that requires land use review as a
20 conditional use in the EFU zone. ___ Or LUBA at ___ (LUBA Nos 2020-
21 032/033, June 1, 2020) (slip op at 10–15). On June 11, 2020, the county issued
22 Board Order 20-178, which “rescind[s]” Board Order 20-25 and reauthorizes the

1 contract for the construction of the Stag Hollow Bridge (Bridge Decision). The
2 Bridge Decision relies on the CUP for land use review and approval. Petitioners
3 challenge the Bridge Decision in LUBA No. 2020-066.

4 In an order issued June 19, 2020, we consolidated these appeals, granted
5 petitioners' motion to stay the Bridge Decision, and established an expedited
6 record procedure. *Schrepel v. Yamhill County*, ___ Or LUBA ___ (LUBA Nos
7 2020-066/067, Order, June 19, 2020).

8 **RECORD OBJECTIONS**

9 On June 26, 2020, the county transmitted the record. On July 1, 2020,
10 petitioners filed record objections. On July 6, 2020, the county filed a response
11 to those record objections, conceding some of the objections, and submitted a
12 supplemental record. On July 8, 2020, petitioners filed objections to the
13 supplemental record. On July 15, the county filed a response to those objections,
14 conceding some of the objections, and submitted a second supplemental record.
15 On July 27, 2020, petitioners filed objections to the second supplemental record.
16 On July 29, the county filed a response to those objections. Due to the expedited
17 nature of this proceeding, we do not describe those record objections that the
18 parties have resolved; instead, we describe and resolve only the remaining
19 unresolved record objections.¹

¹ If our resolution of the record objections in this order mistakes any unresolved record objection as resolved, we give the parties leave to move for

1 **A. Hearing Recordings**

2 Unless LUBA otherwise orders, or the parties otherwise agree in writing,
3 the city must include in the record:

4 “Minutes and tape, CD, DVD or other media recordings of the
5 meetings conducted by the final decision maker as required by law,
6 or incorporated into the record by the final decision maker. A
7 verbatim transcript of media recordings shall not be required, but if
8 a transcript has been prepared by the governing body, it shall be
9 included. If a verbatim transcript is included in the record, the media
10 recordings from which that transcript was prepared need not be
11 included in the record, unless the accuracy of the transcript is
12 challenged.” OAR 661-010-0025(1)(c).

13 In the initial record transmittal, the county included digital audio
14 recordings of three board of commissioners’ meetings: (1) the May 21, 2020
15 public hearing in the CUP proceeding on remand from *Van Dyke II*; (2) the May
16 28, 2020 meeting at which the board adopted the CUP decision; and (3) the June
17 11, 2020 meeting at which the board adopted the Bridge Decision on remand
18 from *Van Dyke IV*. In the first round of record objections, petitioners objected
19 that those audio recordings are all inaudible because the volume is so low. The
20 county responded and disputed that the transmitted audio recordings are
21 inaudible. The county also responded that audio *and video* recordings of the
22 meetings are available online, via hyperlinks on the county’s website.

reconsideration of this order. Such motion shall explain with particularity the unresolved objection and the parties’ positions by reference to prior pleadings.

1 In the second round of record objections, petitioners renewed their
2 objection that the audio recordings are inaudible. In response, in the second
3 supplemental record, the county provided the same three digital audio recordings
4 and stated that those recordings are the best quality audio recordings in the
5 county’s possession. The county also repeated its response that audio *and video*
6 recordings of the relevant hearings are available online via hyperlinks on the
7 county’s website.

8 We have reviewed samples of the three digital audio recordings in the
9 record. Some portions of those audio recordings are technically audible, but other
10 portions are so quiet that it is very difficult or impossible to decipher what is
11 being said, even with the volume at full capacity. In their current form, they are
12 not reasonably usable because they are largely inaudible. Our rules require the
13 local government to provide a record that is reasonably usable by LUBA and the
14 parties. *Mar-Dene Corp. v. City of Woodburn*, 32 Or LUBA 481, 483 (1997).

15 We also reject the county’s contention that petitioners and LUBA should
16 reference video recordings that are found online but not included in the record.
17 We have explained that identifying where a video may be accessed online is
18 insufficient to include that video in the record. *Dodds v. City of West Linn*, LUBA
19 No 2016-071, 2016 WL 5899381 (Or LUBA Sept 27, 2016); *Nicita v. City of*
20 *Oregon City*, 71 Or LUBA 633, 635 (2016) (citing *Terra Hydr Inc. v. City of*
21 *Tualatin*, 68 Or LUBA 511, 513 (2013)). The county is required to take
22 reasonable steps to include in the record audible recording of the proceedings.

1 *Paterson v. City of Bend*, 48 Or LUBA 614, 617 (2004). According to the
2 county's responses to the record objections, the county has access to audible
3 video recordings of the hearings. Thus, it is the county's duty to include those
4 audible video recordings in the record.

5 This record objection is sustained.

6 Within seven days of the date of this order, the county shall transmit to
7 LUBA and petitioners a third supplemental record that contains a digital video
8 disc (DVD) containing video recordings, with audible audio, of the three hearings
9 before the board of commissioners.

10 **B. Meeting Minutes**

11 Petitioners object that the minutes of the May 21, 2020 public hearing are
12 inaccurate and do not accurately reflect the proceedings. OAR 661-010-0026(3)
13 provides:

14 "An objection on grounds that the minutes or transcripts are
15 incomplete or inaccurate shall demonstrate with particularity how
16 the minutes or transcripts are defective and shall explain with
17 particularity why the defect is material. Upon such demonstration
18 regarding contested minutes, the Board shall require the governing
19 body to produce a transcript of the relevant portion of the
20 proceeding, if an audiotape recording or other type of recording is
21 available. Upon such demonstration regarding contested transcripts,
22 the Board shall require the governing body to produce a more
23 complete or amended transcript."

24 Petitioners argue that the minutes do not accurately summarize petitioners'
25 attorney Kellington's testimony as the sole representative that the county allowed

1 to present argument on behalf of all petitioners. The minutes provide one
2 paragraph summarizing Kellington’s testimony:

3 “* * * Kellington stated the county did not have jurisdiction to
4 proceed on the remand because of the bridge decision. She said the
5 county is committing a ‘fraud’ with regard to its federal grants for
6 purchase of the trail and construction of the bridge. She repeatedly
7 stated that LUBA is ‘not stupid,’ and that the county should ‘start
8 running.’ She repeatedly mocked Mr. Sadlo, repeatedly referred to
9 him as the ‘applicant,’ (the county is the applicant) and said that he
10 must think everyone is ‘stupid.’ She objected to the process. She
11 stated the impacts to accepted farming practices included preventing
12 farmers from aerial spraying and using certain chemical sprays on
13 land abutting the trail, which are imperative for pest control. Raising
14 her voice repeatedly, she indicated that farmers would be foreclosed
15 from using herbicides. She told the Board, ‘do not be fooled,’ and
16 ‘you’re not stupid.’ Ms. Kellington accused the county of proposing
17 to build two culverts which she claimed would increase the amount
18 and velocity of water in the corridor and ‘dump’ it on the farmers.
19 She said the county must ‘denude’ the entire corridor ‘of all
20 vegetation,’ or risk ‘incinerating’ farmers, trail users, and the cities
21 of Carlton and Yamhill. Doing so will allow poisons from the
22 corridor to flood farmers’ fields. She said fences will not prevent
23 impacts to farmers, and that the trail should be put somewhere else.
24 Ms. Kellington then answered numerous questions from the Board.”
25 Record 197.

26 First, petitioners argue that the minutes do not accurately reflect
27 Kellington’s testimony directed at farm impacts and requirements for public
28 facilities and services. In the record objection, petitioners set out passages from
29 the written record related to fire safety and vegetative screening and summarize
30 Kellington’s testimony related to that evidence. Petitioners argue that the minutes
31 mischaracterize the testimony and take certain arguments out of context. While

1 we understand petitioners to dispute the county’s characterization of Kellington’s
2 testimony in the minutes, the minutes appear to capture and summarize
3 Kellington’s arguments regarding farm impacts and public facilities. That portion
4 of the objection is denied.

5 Second, petitioners argue that the minutes do not accurately reflect the
6 colloquy between the board of commissioners and Kellington. The last sentence
7 in the paragraph from the minutes quoted above states that Kellington “answered
8 numerous questions” from the board, but the minutes do not summarize those
9 questions or Kellington’s responses. Record 197. Petitioners explain that the
10 board’s questions included questions about farm practices elsewhere in the
11 county and whether petitioners could adopt similar practices. Petitioners contend
12 that this defect is material because, according to petitioners, they plan to assign
13 error to the county’s remand procedure and argue that the procedure prejudiced
14 petitioners’ substantial rights because petitioners were not personally permitted
15 to present testimony at the remand hearing. Accordingly, petitioners argue, the
16 minutes should reflect in more detail the substance of the board’s questions and
17 Kellington’s responses.

18 We agree with petitioners that the minutes are incomplete because they do
19 not reflect the substance of the colloquy between the board of commissioners and
20 Kellington. Petitioners have established that the defect is material to petitioners’
21 planned procedural arguments. This portion of the objection is sustained.

1 Petitioners request that LUBA order the county to produce a full transcript
2 of the May 21, 2020 hearing. However, petitioners concede that a transcript is
3 not necessary if the county includes an audible recording of the May 21, 2020
4 hearing in the record. In our resolution of the objection to the audio recordings,
5 we ordered the county to transmit a third supplemental record that contains a
6 DVD containing video recordings, with audible audio, of the three hearings,
7 including the May 21, 2020 hearing. Accordingly, we need not also order the
8 county to produce a transcript of the May 21, 2020 hearing.

9 **PETITIONERS’ MOTION TO FILE OVERLENGTH BRIEF**

10 In our June 19, 2020 order staying the Bridge Decision, we ordered that
11 “Petitioners shall submit a single petition for review in these consolidated
12 appeals, and respondent shall submit a single response brief in these consolidated
13 appeals.” *Schrepel v. Yamhill County*, ___ Or LUBA ___, ___ (LUBA Nos 2020-
14 066/067, Order, June 19, 2020) (slip op at 14). Petitioners request permission to
15 file an overlength petition for review to exceed the 11,000 word limit in OAR
16 661-010-0030(2)(b), but not to exceed 18,000 words. Petitioners explain that
17 their request for additional briefing is based on the following factors:

- 18 (1) Petitioners’ challenges to the appealed decisions involve the
19 important state-wide land use planning goal of preserving
20 agricultural land and farming practices;
- 21 (2) This appeal involves two different county decisions that
22 respond to two different LUBA remands, which implicates
23 arguments under the law of the case doctrine explained in
24 *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992);

- 1 (3) The challenged CUP decision is relatively long at 78 single-
2 spaced pages and the record is relatively long at 1,847 pages;
- 3 (4) The appeals involve relatively complex jurisdictional
4 disputes;²
- 5 (5) The challenged CUP decision is one of the first to apply the
6 Supreme Court’s analysis of the farm impacts test in *Stop the*
7 *Dump Coalition v. Yamhill County*, 364 Or 432, 435 P3d 698
8 (2019);³ and
- 9 (6) These consolidated cases involve a total of 37 petitioners,
10 nearly all of whom are commercial farmers who anticipate
11 significant farm impacts from development of the challenged
12 Yamhelas Westsider Trail, and many of whom will allege that
13 the county’s remand procedure prejudiced their substantial
14 rights.

15 The county objects to the motion, but provides no argument in support of
16 its objection. In the alternative, the county requests permission for equal
17 overlength briefing in response to the overlength petition for review.

² Petitioners will argue that the county lacked jurisdiction to make the CUP decision while an appeal of the county’s initial bridge construction contract was pending before LUBA and the county will argue that the Bridge Decision is not a land use decision subject to LUBA’s review. In our June 19, 2020 order staying the Bridge Decision, we observed that these consolidated appeals involve “complex and interrelated jurisdictional disputes related to the Bridge Decision and the CUP” that “are obviously intertwined with the parties’ arguments on the merits.” *Schrepel*, ___ Or LUBA at ___ (LUBA Nos 2020-066/067, Order, June 19, 2020) (slip op at 5). We instructed the parties to address jurisdiction in their briefs on the merits. *Id.*

³ Petitioners note that LUBA authorized a 75-page brief in *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341, 345 (2015). *Stop the Dump Coalition v. Yamhill County*, LUBA No 2015-036, 2015 WL 5184598 (Or LUBA Aug 27, 2015).

1 We agree with petitioners that overlength briefing is warranted in these
2 appeals for the reasons stated above. We grant petitioners permission to file an
3 overlength petition for review not to exceed 18,000 words. We also grant the
4 county permission for an overlength response brief not to exceed 18,000 words.

5 After LUBA receives the third supplemental record, the Board will issue
6 an order settling the record and establishing a briefing schedule.

7 Dated this 6th day of August 2020.

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H. M. Zamudio
Board Member