

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

3
4 ANNUNZIATA GOULD,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 and

13
14 THORNBURGH RESORT COMPANY, LLC and
15 CENTRAL OREGON IRRIGATION DISTRICT,
16 *Intervenor-Respondents.*

17
18 LUBA No. 2006-100

19
20 STEVE MUNSON,
21 *Petitioner,*

22
23 vs.

24
25 DESCHUTES COUNTY,
26 *Respondent,*

27
28 and

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30 THORNBURGH RESORT COMPANY, LLC and
31 CENTRAL OREGON IRRIGATION DISTRICT,
32 *Intervenor-Respondents.*

33
34 LUBA No. 2006-101

35 ORDER ON RECORD OBJECTIONS

36 **INTRODUCTION**

37 Not counting the compact disks on which the hearings in this matter were recorded or
38 the oversized exhibits, the 13-volume record that was submitted by the county in this
39 consolidated appeal includes 5,997 pages. Petitioner Gould (Gould), petitioner Munson
40 (Munson) and intervenor-respondent Thornburgh Resort Company, LLC (Thornburgh) filed

1 objections to that record. The county has responded to the objections, and we now resolve
2 those objections as described below.

3 **MUNSON’S OBJECTIONS**

4 **A. Record Omissions**

5 Munson argues that a number of items that should be included in the record are
6 missing from the record.

7 **1. Missing Notices, Agendas, and Minutes**

8 **a. August 17, 2005 Public Hearing Minutes**

9 This objection is denied, for the reasons explained on pages 1 and 2 of the county’s
10 September 5, 2006 response to Munson’s record objections.

11 **b. Notice, Agenda and Minutes of the November 21, 2005**
12 **Board of County Commissioners (BOCC) Meeting**

13 This record objection is denied, because the BOCC did not meet on November 21,
14 2005. However, the county agrees to include in a Supplemental Record (1) notice of a
15 November 17, 2005 executive session and (2) the minutes of a public meeting that followed
16 that executive session.

17 **c. Notice, Agenda and Minutes of the December 12, 2005**
18 **BOCC Meeting**

19 This record objection is sustained. The county agrees to include in a Supplemental
20 Record the notice, agenda and minutes of the December 12, 2005 BOCC meeting.

21 **d. Notice, Agenda and Minutes of the January 4, 2006 BOCC**
22 **Meeting**

23 This record objection is sustained. The county agrees to include in a Supplemental
24 Record the notice, agenda and minutes of the January 4, 2006 BOCC meeting.

25 **e. Additional Meetings**

26 In its September 5, 2006 response to Munson’s record objections, the county takes
27 the position that the notice and minutes of December 5, 2005 and December 28, 2005 BOCC

1 public meetings should be included in a Supplemental Record. No party has objected to that
2 position. The county will include these documents in a Supplemental Record.

3 **2. Completeness Letter**

4 Munson objects that the record does not include a “completeness” letter that specifies
5 the date the application that led to the decision at issue in this appeal was deemed complete.
6 The county agrees to include the “completeness” letter in the record if it can find it, although
7 at the time of the county’s September 5, 2006 response, the county stated it had been unable
8 to find such a letter.

9 This objection is sustained. The county will either include the “completeness” letter
10 in the Supplemental Record or indicate in its transmittal letter that it was unable to locate a
11 “completeness” letter.

12 **3. Catherine Morrow Memo Dated January 26, 2006.**

13 This objection is denied, for the reasons explained on page 4 of the county’s
14 September 5, 2006 response to Munson’s record objections.

15 **4. U.S. Department of Interior Letter to Patricia Kliever**

16 Munson objects that the first page of a U.S. Department of Interior letter to Patricia
17 Kliever appears at Record 3456, but the rest of the letter is missing. The county agrees to
18 include the other pages of the letter in the Supplemental Record, “if they can be found.”
19 With the understanding that the county will ask the U.S. Department of the Interior to supply
20 another copy of the letter if the complete letter cannot be located some other way, the
21 county’s response is adequate.

22 This objection is sustained. The county will include the complete letter in the
23 Supplemental Record.

24 **B. Record Corrections**

25 Munson asks that the county correct the record, in several particulars.

1 **1. Black and White Copies of Color Originals**

2 The record apparently includes black and white copies of original documents and
3 Munson states that he “will provide color replacement pages, at his own expense.” The
4 county responds:

5 “The County * * * will treat all colored documents as oversized exhibits and
6 provide them at oral argument. The County will revise the Table of Contents
7 accordingly.” Response to Munson’s Objections to the Record 5.

8 We are not sure we understand what Munson or the county proposes to do.
9 Specifically, we are not sure the “replacement pages” that Munson references and the
10 “colored documents” that the county refers to are the same. The county will consult with
11 Munson to ensure that its proposed Oversized Exhibits include, at a minimum, the pages that
12 Munson is referring to.

13 The objection is sustained. The county will submit an amended table of contents that
14 lists all colored original pages of the record that the county is including with the Oversized
15 Exhibits. The county will provide those oversized exhibits to LUBA at the time of oral
16 argument.

17 **2. Tumalo Post Article following the E-mail Message at Record 3456**

18 Munson contends the Tumalo Post Article that follows the E-mail Message at Record
19 3456 is not part of that e-mail message and should be separately listed in the table of
20 contents.

21 This objection is sustained. The county agrees to submit a Revised Table of Contents
22 that separately identifies the Tumalo Post Article that follows the E-mail message that
23 appears at Record 3456.

24 **3. Documents Referenced in the E-mail Message that appears at**
25 **Record 2667-68.**

26 Munson argues the referenced documents are either hard to read or missing.

1 This objection is denied, for the reasons explained on page 5 of the county's
2 September 5, 2006 response to Munson's record objections.

3 **4. Error in the Table of Contents**

4 Two nearly identical letters appear at Record 4674-75 and 4676-77. The first letter is
5 signed by Dagny Marks; the second letter is signed by Sandra Snapp. Munson points out the
6 table of contents incorrectly attributes both letters to Dagny Marks.

7 This objection is denied, for the reasons explained on page 6 of the county's
8 September 5, 2006 response to Munson's record objections.

9 **5. The Documents at 2190-91 and 2192-2216**

10 Munson argues that the documents that appear at Record 2190-91 and 2192-2216 are
11 unrelated and should be separately identified in the table of contents.

12 This objection is sustained. The county agrees to submit a Revised Table of Contents
13 to list those documents separately.

14 **C. Munson Record Objection Summary**

15 The county will submit a Revised Table of Contents in accordance with our rulings
16 under B(1), B(2) and B(5) above.

17 The county will submit a Supplemental Record in accordance with our rulings under
18 A(1)(b), A(1)(c), A(1)(d), A(1)(e), A(2), and A(4) above.

19 The county will include color originals or color copy pages as Oversized Exhibits, in
20 accordance with our ruling under B(1) above.

21 **GOULD'S OBJECTIONS**

22 Gould filed a precautionary record objection on August 23, 2006. Attached to that
23 precautionary record objection is an August 21, 2006 letter to the county's attorney that sets
24 out a large number of record objections under three headings: "Missing Documents,"
25 "Documents That Should Not Be in the Record," and "Changes Needed in the Table of
26 Contents." We address those objections below.

1 **A. Agreed to Objections**

2 In the county’s September 5, 2006 response to Gould’s record objections, the county
3 opposes some objections and agrees with others. On October 7, 2006, Gould filed a motion
4 requesting permission to reply to the county’s response. That motion is allowed. In her
5 reply, Gould indicates that she agrees with the county’s proposed resolution of the following
6 objections:

7 ““Missing Documents’ Objections 1, 2, 4-10, and 12-17.”

8 ““Documents that should not be in the record’ Objections 1 and 2.”

9 ““Changes needed in the table of contents’ Objections 1, 3,-6, 8, and 10-12.”

10 Some of the above objections are complicated, as are some of the county’s responses
11 to those objections. There are ambiguities in some of those objections and there are
12 ambiguities in some of the county’s responses. We do not know if the other parties agree
13 with the county’s proposed resolution of the above-listed Gould objections. However, in
14 general, the county’s responses seem to be reasonable and consistent with this Board’s past
15 rulings on record objections.

16 The county will submit an Amended Table of Contents, Supplemental Record and
17 Oversized Exhibits in accordance with its September 5, 2006 responses to the above-listed
18 objections. If any party objects to the County’s proposed resolution of the above-listed
19 objections or to the Amended Table of Contents, Supplemental Record or Oversized Exhibits
20 that the county submits in accordance with its September 5, 2006 response, that party may
21 file an appropriate record objection at that time.

22 **B. Missing Documents**

23 Gould and the county do not agree how objections 3, 11 and 18 should be resolved
24 under the “Missing Documents” category of record objections. We resolve those objections
25 below.

1 **1. (Objection 3) - Oversize Exhibits P-2 through P-25 and Documents**
2 **at Record 4728 through 4732.**

3 This objection is actually two objections. Page 17 of the Table of Contents
4 erroneously indicates that Oversized Exhibits P-2 through P-25 were submitted to the county
5 on August 17, 2005. Those Oversized Exhibits were actually submitted on July 14, 2005.
6 We understand Gould to argue the Table of Contents should be corrected to reflect the July
7 14, 2005 date those documents were actually submitted.

8 The county responds that the record in this case is sufficient to show the correct date
9 those documents were submitted, and we understand the county to object to correcting the
10 table of contents. While the county is probably correct that it is unlikely that the error in the
11 Table of Contents will mislead anyone or complicate our review, an Amended Table of
12 Contents will be required in any event to respond to other record objections. The County
13 will correct this error in the Amended Record Table of Contents. This objection is sustained.

14 The documents at Record 4728 through 4732 are difficult to read black and white
15 copies of color originals. Gould objects that the color originals should be included in the
16 record.

17 This objection is sustained. The county agrees in its September 5, 2006 response to
18 Gould's record objections to submit an Amended Record Table of Contents to indicate that
19 each of these documents is an Oversized Exhibit. The county also agrees to provide the
20 color original or a color copy of the original of each of those documents to LUBA at oral
21 argument.

22 **2. (Objection 11) – Displaced and Missing Exhibits to the August 17,**
23 **2005 Memorandum at Record 4636-51**

24 The memorandum that Gould submitted on August 17, 2005 appears at Record 4636-
25 51. That memorandum was submitted with a number of exhibits attached. The exhibits
26 apparently were separated from that memorandum when the county prepared the record, and
27 some of those documents appear elsewhere in the record, but some of the exhibits are not

1 included in the record at all. Gould objects that all of the exhibits should be included in the
2 record and the record table of contents should be amended to clearly connect the exhibits
3 with the August 17, 2005 memorandum that they were attached to.

4 This objection is sustained.¹ The county indicates that it has located all of the
5 memorandum exhibits. A complete set of those exhibits shall be included in a Supplemental
6 Record. The Table of Contents for the Supplemental Record shall indicate that the exhibits
7 were submitted as an attachment to the Memorandum that appears at pages 4636-51 of the
8 Record. The county shall amend Page 12 of the Record Table of Contents to indicate that the
9 exhibits that were attached to the August 17, 2005 memorandum (Exhibit O-35) appear in the
10 Supplemental Record.

11 **3. (Objection 18) - Unreadable Record Pages**

12 Gould objects that Record pages 400, 3118, 4258, 4259 and 5743 are not readable.
13 The county did not respond to this objection.

14 This objection is sustained. The county shall include in a Supplemental Record
15 readable copies of Record pages 400, 3118, 4258, 4259 and 5743. The entry in the Table of
16 Contents for the Supplemental Record for these more readable pages shall cross-reference
17 the page number of the unreadable pages in the Record. If the county cannot make those
18 pages more readable, it may so indicate when it submits the Supplemental Record.

19 **C. Changes Needed in the Table of Contents**

20 **1. (Objection 2) - Difficulty in Correlating Oversized Exhibits with** 21 **Documents Included in the Record in Chronological Order**

22 Restating Gould's Objection 2 slightly, she complains that it is difficult to locate the
23 place in the chronologically arranged part of the Record where the Oversized Exhibits that

¹ OAR 661-010-0025(4)(a)(E) can be read to require that exhibits that are attached to a document that is submitted for the record in a land use proceeding should be detached and included in the record according to the dates of the exhibits rather than included in the record with the document the exhibits were attached to. LUBA plans to correct this unfortunate ambiguity in its next administrative rule amendments.

1 are to be separately transmitted to LUBA would appear, if they were included in the
2 chronologically arranged portion of the record. Gould also cites examples where blank pages
3 have been included in the chronologically arranged portion of the record to cross reference
4 the Oversized Documents that will be transmitted separately to LUBA (Record 1243, 1637,
5 and 1902-05). Gould complains that the cross references in these blank pages are unclear.²

6 This objection is sustained in part and rejected in part. As we have already noted,
7 page 17 of the Table of Contents erroneously indicates that Oversized Exhibits P-2 through
8 P-25 were received on August 17, 2005, because they actually were received on July 14,
9 2005. Apparently Oversized Exhibits P-2 through P-25 would appear in the chronologically
10 arranged portion of the record after the Hearings Officer's July 14, 2005 Exhibit List that
11 appears at Record 4864-65. Record 4869 appears to be the blank page place-holder for these
12 exhibits. We have already agreed with Gould in B(1) above that the county must submit an
13 Amended Table of Contents to state the correct date Oversized Exhibits P-2 through P-25
14 were submitted to the county. The county shall also amend the Record Table of Contents to
15 add the following parenthetical to the entry for Oversized Exhibit P-2 "(Exhibits P-2 through
16 P-25 – See Record 4864-65, 4869)."

17 For the reasons explained on page 6 of the county's September 5, 2006 response to
18 Gould's record objections, we conclude that the cross-references at Record 1243, 1637, and
19 1902-05 are sufficient to allow the parties to find the cross referenced Oversized Exhibits.
20 However, the county's Amended Table of Contents must add cross references to the entries

² Our administrative rules do not clearly identify how a local government should go about cross-referencing the Oversized Exhibits in the chronologically arranged portion of the record or the table of contents, if it elects or is ordered to do so. The county appears to have generally taken the approach of including a blank page in the record where the Oversized Exhibits would have been located if they had been included in the chronologically arranged portion of the record and then separately listing the Oversized Exhibits in the Table of Contents with the date the Oversized Exhibits were received. That approach seems about as good as any. It would be a little clearer if the listing for each Oversized Exhibit in the Table of Contents provided a cross-reference to a particular page or pages in the chronologically arranged portion of the record, where possible.

1 for Oversized Exhibits H (page 82), K (page 244), R (page 55), R (page 56), R (page 57), and
2 R (page 58) to the corresponding blank page in the chronologically arranged portion of the
3 record.

4 In responding to the record objections in this appeal, the county has agreed to provide
5 LUBA a large number of color originals as Oversized Exhibits, at oral argument. The
6 Amended Table of Contents shall list each of these Oversized Exhibits separately and
7 identify the page number in the chronologically arranged portion of the record that
8 corresponds with each Oversized Exhibit.

9 **2. (Objection 7) – Gould’s Appeal Notice**

10 The entry in the Record Table of Contents that lists her notice of local appeal is as
11 follows: “Appeal Application with attached Notice of Appeal.” Record 9. Gould objects
12 that the county should be required to amend that entry to specifically refer to her by name.

13 We agree with the county that the entry is adequate. This objection is denied.

14 **3. (Objection 9) –Table of Contents Entries for Oversized Exhibits P-**
15 **2 through P-25 Erroneously State the Oversized Exhibits Were**
16 **Received on August 17, 2005.**

17 We have already agreed with Gould in B(1) above that the county should be required
18 to submit an Amended Table of Contents to correct this error. This objection adds nothing to
19 the objection that has already been sustained.

20 **D. Gould Objections Summary**

21 The county will submit an Amended Table of Contents, Supplemental Record and
22 Oversized Exhibits in accordance with its responses to the Gould objections listed in A
23 above.

24 The county will submit an Amended Table of Contents to respond to our rulings in
25 B(1), B(2), and C(1).

26 The county will submit a Supplemental Record to respond to our rulings in B(1),
27 B(2), and B(3).

1 **THORNBURGH OBJECTIONS**

2 **A. Metzker Maps**

3 Thornburgh objects that 1935 and 1972 Metzker Maps that were submitted below are
4 not included in the Record and that the Record should be supplemented to include them. The
5 county agrees.

6 This objection is sustained. The county will submit a Supplemental Record that
7 includes the maps.

8 **B. Record Pages 133-147, 212-14, 219-31 and 235-65**

9 Relying on a conversation with the county's attorney, Thornburgh contends that
10 Record Pages 133-47, 212-14, 219-31 and 235-65 were not placed before the BOCC and
11 should not be included as part of the Record in this appeal.

12 It appears that all parties agree that the documents that appear at Record 133-47, 212-
13 14, 219-22, 243-44 and 262-65 were not placed before the BOCC and should not be
14 considered part of the record. Accordingly, we sustain that part of Thornburgh's objection.

15 The county's attorney subsequently changed her position and now contends that the
16 documents that appear at Record 223-31 and 234-40 were placed before the BOCC and for
17 that reason are properly included in the record. Because Thornburgh's original objection
18 relied on the county's attorney's position regarding whether these documents were placed
19 before the BOCC, and Thornburgh offers no reason to question the county's attorney's
20 changed position, Thornburgh's objection concerning Record 223-31 and 234-40 is denied.

21 **C. Table of Contents**

22 Thornburgh identifies eight documents that it contends should be separately listed in
23 the table of contents with their initial page number. Thornburgh also identifies 11 sections in
24 the Table of Contents that include many documents under a single entry. Thornburgh objects
25 that the Table of Contents should be amended to identify each document in those sections

1 and to provide the initial page number of each document. The county agrees to make the
2 requested amendments to the Table of Contents.

3 This objection is sustained.

4 **D. Oversized Exhibits Mounted on Foam Board**

5 Thornburgh objects that five large oversized exhibits that were submitted to the
6 county have been reduced and included in reduced format in the record. Thornburgh objects
7 that the originals should be listed as Oversized Exhibits in an Amended Table of Contents
8 and the county should provide those Oversized Exhibits to LUBA at oral argument. The
9 county agrees with Thornburgh.

10 This objection is sustained.

11 **E. Other Oversized and Color Exhibits**

12 Thornburgh also identifies a large number of additional documents that were
13 submitted to the county in color in an oversized format. With two exceptions, those
14 documents have been copied in a reduced format in black and white and are included in the
15 record.³ Thornburgh objects that all of the original documents should be included in the
16 record.

17 This objection is sustained. The county will submit an Amended Table of Contents to
18 identify the original documents as Oversized Exhibits. The county will provide those
19 Oversized Exhibits to LUBA at oral argument.

20 **F. Thornburgh Summary**

21 In accordance with our ruling under B above, the documents that appear at Record
22 133-47, 212-14, 219-22, 243-44 and 262-65 shall not be considered part of the record in this
23 appeal, but the documents that appear at Record 223-31 and 234-40 shall be considered part
24 of the record.

³ The exceptions are the Metzker maps discussed in A above.

1 The county will submit an Amended Table of Contents to respond to our rulings in C,
2 D and E above.

3 The county will submit a Supplemental Record to respond to our ruling in A above.

4 The county will deliver Oversized Exhibits to LUBA at oral argument to respond to
5 our rulings in D and E above.

6 **CONCLUSION**

7 The negotiations between the county and the parties regarding the record have
8 avoided the much more substantial delay in this appeal that almost certainly would have
9 occurred if the parties had not proceeded in that manner and resolved many of those
10 objections themselves. In its September 5, 2006 responses, the county indicates that it
11 believes it can file the Amended Table of Contents and Supplemental Record that will be
12 required by our order within 14 days. Given the complexity of the objections and county's
13 proposals to respond to those objections, we think that may be somewhat optimistic. The
14 county shall have 21 days from the date of this order to submit the Amended Table of
15 Contents and Supplemental Record that will be required to respond to this order. If the
16 county is able to do so more quickly, it need not use all 21 days.

17 Dated this 19th day of October, 2006.

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Michael A. Holstun
Board Member