

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

3
4 SUSAN CLAUS, ROBERT JAMES CLAUS,
5 and SANFORD M. ROME,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF SHERWOOD,
11 *Respondent,*

12
13 and

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15 CAPSTONE PARTNERS, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2010-017

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20 SUSAN CLAUS, ROBERT JAMES CLAUS,
21 and SANFORD M. ROME,
22 *Petitioners,*

23
24 vs.

25
26 CITY OF SHERWOOD,
27 *Respondent.*

28
29 LUBA No. 2010-023

30 ORDER ON RECORD OBJECTIONS

31 The city filed the two-volume record in these consolidated appeals on March 22,
32 2010, which by order of the Board was deemed to be transmitted on March 31, 2010. On
33 April 13, 2010, petitioners filed objections to the record. On April 14, 2010, the city filed a
34 second supplemental record, followed by a response to petitioners' objections to the original
35 record. On April 22, 2010, petitioners filed a second set of objections to the original record.
36 The city then filed a response arguing that the second set of objections was not timely filed,
37 and also that the objections should be denied on the merits. On May 5, 2010, petitioners
38 filed a 14-page rebuttal to the city's response, with seven attached exhibits. We now resolve

1 the objections.

2 **A. First Set of Objections**

3 Petitioners object that the minutes of three city council hearings, on February 2 and
4 16, 2010, and March 2, 2010, are incomplete, and request that the city provide a transcript of
5 those hearings.

6 OAR 661-010-0025(1)(c) requires that the record include the “[m]inutes and tape
7 recordings of the meetings conducted by the final decision maker as required by law, or
8 incorporated into the record by the final decision maker.” However, a verbatim transcript of
9 audiotape or videotape recordings is not required. OAR 661-010-0026(1)(c) provides that a
10 party may object to the record if the minutes of meetings or hearings are “incomplete or do
11 not accurately reflect the proceedings.” Under OAR 661-010-0026(3):

12 “An objection on grounds that the minutes or transcripts are incomplete or
13 inaccurate shall demonstrate with particularity how the minutes or transcripts
14 are defective and shall explain with particularity why the defect is material.
15 Upon such demonstration regarding contested minutes, the Board shall require
16 the governing body to produce a transcript of the relevant portion of the
17 proceeding, if an audiotape recording or other type of recording is available.
18 * * *.”

19 We turn to petitioners’ specific challenges to the minutes.

20 **1. Requests to Re-Open the Record**

21 The city council apparently closed the record to new evidence at the February 2, 2010
22 hearing. Petitioners first argue that the minutes of the February 2, February 16 and March 2,
23 2010 hearings do not reflect requests by petitioners that the record be kept open or re-opened
24 after it was closed to accept additional written testimony. Petitioners argue that the minutes
25 are materially defective in that regard, because a transcript is necessary to demonstrate that
26 petitioners made timely requests to re-open the record, presumably in furtherance of an
27 assignment of error alleging procedural error.

28 The city responds that the minutes are not materially defective in this regard, and no
29 transcripts of the hearings are warranted, because the city does not dispute that petitioners

1 made timely requests to re-open the record, although the city intends to dispute any
2 allegation of procedural error regarding re-opening the record. We agree with the city that
3 petitioners have not demonstrated that the minutes are materially defective in failing to
4 reflect petitioners' requests to re-open the record. The only apparent purpose of a transcript
5 reflecting those requests would be to avoid a dispute over whether timely requests to re-open
6 the record were made below. But the city does not dispute that the requests were made.
7 Further, the requests were presumably very brief statements, so even if some dispute arose on
8 that point, it would be a simple matter for the parties to attach partial transcripts to their
9 briefs if necessary. Pursuant to OAR 661-010-0030(5), petitioners may include as an
10 appendix to their petition for review verbatim transcripts of relevant portions of the
11 audiotapes in the record.

12 **2. Petitioner Robert Claus' Oral Testimony**

13 Second, petitioners argue that the minutes of the February 2, 2010 hearing are
14 incomplete or inaccurate, because they do not reflect the fact that the Mayor stopped
15 petitioner Robert Claus' oral testimony after approximately one minute and 38 seconds and
16 did not allow him the same amount of time allocated to other participants.¹ Petitioners argue
17 that an unequal allocation of time to present oral testimony may constitute procedural error,
18 and request that the city provide a transcript to establish the fact that the Mayor did not allow
19 petitioner time to complete his oral testimony.

20 The city does not dispute that the Mayor stopped petitioner Claus' oral testimony
21 approximately one and one-half minutes after he began speaking, although the city disputes
22 that doing so was procedural error.² We agree with the city that petitioners have not
23 demonstrated that the minutes of the February 2, 2010 hearing are materially defective or

¹ According to the minutes, public testimony was limited to three minutes. Record 127.

² According to the city, Claus spent the first minutes of his allotted time handing out copies of his written testimony, and did not begin speaking until approximately one and one-half minutes remained.

1 that a transcript is warranted. We note that the minutes of that hearing summarize petitioner
2 Claus' testimony in some detail, and conclude:

3 "Mayor Mays asked Mr. Claus to conclude his testimony as his time had
4 expired. Mr. Claus provided comments in regards to the amount of testimony
5 time given and commented in regards to appealing to LUBA. Mr. Claus
6 stepped down." Record 141.

7 Petitioners have not explained why the above is either incomplete or inaccurate, or that any
8 defect in the minutes is material. The minutes accurately reflect that the Mayor stopped
9 Claus' testimony because the Mayor believed the allotted time had expired, and Claus
10 objected to the time allotted. The city does not dispute that the Mayor stopped Claus'
11 testimony approximately one and one-half minutes after he started speaking, so there is no
12 need for an official transcript to help petitioners establish that. It is not clear what else is in
13 dispute, why any dispute is material, or why petitioners believe a transcript is necessary to
14 allow the Board to resolve any material dispute. Accordingly, petitioners have not
15 demonstrated a basis to require the city to prepare a transcript of the February 2, 2010
16 hearing.

17 **3. Documents Submitted After the Record Closed**

18 Petitioners request that the record include copies of documents petitioner Susan Claus
19 attempted to submit into the evidentiary record during the February 16, 2010 and March 2,
20 2010 hearings.

21 The city responds that the evidentiary record closed on February 2, 2010, and that the
22 city properly did not include in the record before the city council documents submitted after
23 that date. Petitioners do not dispute that the evidentiary record closed February 2, 2010, or
24 offer any explanation for why they believe the city was required to include the documents
25 submitted during the February 16, 2010 and March 2, 2010 hearings in the record before the
26 city council. This objection is denied.

1 **B. Suitable Folder, Securely Fastened**

2 OAR 661-010-0025(4)(a)(A) and (C) require that the record be “filed in a suitable
3 folder,” and “securely fastened on the left side.” Petitioners complain that they received a
4 box of unbound pages without a folder or binder of any kind. The city responds that the city
5 has subsequently provided petitioners with three-ring binders, similar to those that hold the
6 record transmitted to LUBA. This objection is resolved.

7 **C. Second Set of Objections**

8 As noted, after filing objections to the original record on April 13, 2010, petitioners
9 filed a second set of objections to the original record on April 22, 2010. In the second set of
10 objections, petitioners object to the omission of (1) sign up sheets for the hearings held by
11 the city council, (2) minutes of the hearings before the planning commission, and (3) two e-
12 mail messages sent to the city on February 2, 2010. Petitioners also request confirmation
13 that an original oversize exhibit and original color photographs have been retained until oral
14 argument, pursuant to OAR 661-010-0025(2).

15 The city responds that the second set of objections to the original record is untimely
16 filed. OAR 661-010-0026(2) provides that a party may file an objection to the record or to a
17 record supplement within 14 days of the date that the record or supplement is transmitted to
18 the Board. As noted, the original record and first supplement were filed on April 22, 2010.
19 Although the city later filed a second supplemental record, petitioners’ second set of
20 objections filed April 22, 2010, does not relate to the items in that supplemental record, but
21 instead object to the omission of certain documents from the original record, which was
22 transmitted to LUBA and served on the parties a month earlier. The city argues that, absent
23 an explanation for why the second set of objections to the original record could not have
24 been raised in petitioners’ first set of objections, LUBA should not consider petitioners’
25 second set of objections to the original record. *See Fraser v. City of Joseph*, 29 Or LUBA
26 575, 576 (1995) (LUBA will not consider a new and untimely objection to the omission of a

1 letter from the original record that is made in an objection to a supplemental record); *Kane v.*
2 *City of Beaverton*, 55 Or LUBA 669, 671 (2007) (declining to consider new objections filed
3 after the deadline to file objections).

4 Petitioners reply that if the objections filed April 22, 2010 are untimely, they are a
5 “technical violation” of LUBA’s rules, and therefore the violation is not a basis to disregard
6 the objections unless the delay caused prejudice to the other parties’ substantial rights,
7 pursuant to OAR 661-010-0005.³ Petitioners also argue that their efforts to identify items
8 missing from the record has been hampered by the fact that the city did not supply them with
9 three-ring binders in which to organize the 1,250-page, two-volume record until April 26,
10 2010. Petitioners also complain that the two-page table of contents for the record is
11 abbreviated and does not describe the listed items in sufficient detail, further hampering their
12 review.

13 We generally agree with the city that, absent an adequate explanation for why an
14 untimely new objection to the original record could not have been advanced in the first set of
15 objections, LUBA should not consider the untimely objection. The general policy
16 underlying LUBA’s rules and deadlines is expressed in ORS 197.805, that “time is of the
17 essence in reaching final decisions in matters involving land use[.]” Under OAR 661-010-
18 0026(6), the filing of a record objection suspends all further deadlines in the appeal and
19 therefore has the potential to significantly delay reaching final resolution of the appeal. In

³ OAR 661-010-0005 provides:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under 661-010-0030(1) is not a technical violation.”

1 recognition of that potential for significant delay, ORS 197.830(10)(a) requires LUBA to
2 issue an order on a record objection within 60 days of receiving the objection. Complying
3 with that statutory deadline is considerably more difficult if the parties have unlimited
4 opportunities to file new, additional objections to the original record past the 14-day deadline
5 prescribed by OAR 661-010-0026(2). That is because under our rules the parties have up to
6 14 days to file a response to any new record objections, and the Board requires time to
7 consider the new objections and any responses to the new objections. Due to the potential
8 for significant delay required to review untimely-filed record objections, there is a
9 heightened probability of prejudice to other parties' substantial rights, for purposes of
10 OAR 661-010-0005.

11 Accordingly, we generally decline to consider new, additional record objections filed
12 after the deadline expires to file objections, unless the objector explains why the new,
13 additional objections could not reasonably have been made prior to the deadline, and even
14 then only if considering the new, additional objections would not unduly delay settlement of
15 the record or complicate the Board's efforts to comply with the 60-day day deadline at
16 ORS 197.830(10)(a).

17 Turning to the present case, the deadline to file objections was April 14, 2010, on
18 which date petitioners filed the first set of objections. The second set of objections was filed
19 April 22, 2010, approximately one week after the 14-day deadline expired. The city's
20 response to the second set of objections was filed April 30, 2010. Given this timing, we do
21 not see that considering the second set of objections would unduly delay settlement of the
22 record, or threaten the Board's ability to issue an order on the objections within the 60-day
23 deadline set by ORS 197.830(10)(a). With respect to why the second set of objections could
24 not reasonably be advanced prior to the 14-day deadline for filing objections, petitioners
25 argue that the city initially provided the record to them in the form of a box of 1,250 loose,
26 unbound pages, which made it difficult to review the record for omitted items. Not until

1 April 26, 2010, petitioners assert, did the city supply them with suitable binders to organize
2 the record. We agree with petitioners that the city’s failure to provide them with suitable
3 binders and a securely fastened record probably hampered petitioners’ ability to evaluate the
4 record, and that failure justifies the one week delay in filing the second set of objections.
5 Therefore, we will consider the second set of objections.

6 **1. Sign-Up Sheets**

7 Petitioners object to the omission from the record of sign-up sheets that participants
8 signed before testifying in each of the city council hearings. The two-page sign-up sheets
9 describe the “Rules for Meetings” and require participants to state that they have read and
10 understood the rules, provide contact information, and indicate what subject they would like
11 to speak to the council about. Petitioners argue that the sign-up sheets were submitted to and
12 therefore “placed before” the city council and are part of the record. OAR 661-010-
13 0025(1)(b) (the record includes all written testimony or written materials “placed before, and
14 not rejected by, the final decision maker, during the course of the proceedings before the
15 final decision maker”).

16 The city responds that the sign-up sheets are used exclusively by the Mayor to
17 manage and organize the conduct of the meeting, do not play any other role in the land use
18 proceeding, and are not “placed before” or considered by the other city council members at
19 all. Petitioners reply that city council members are presumably familiar with the content of
20 the sign-up sheets and that giving the sheets to the Mayor is sufficient to constructively
21 “place” the sheets before the final decision maker, the city council.

22 Petitioners do not dispute the city’s contention that the meeting sign-up sheets are
23 provided to the Mayor solely to organize the conduct of the meeting, and that the other
24 council members do not consider or use the sheets in any way. Given the undisputed limited
25 function of the sign-up sheets, we agree with the city that providing the sheets to the Mayor

1 is insufficient to place the sheets before the final decision maker, the city council. This
2 objection is denied.⁴

3 **2. Planning Commission Minutes and Audiotapes**

4 Petitioners object to the omission of the planning commission minutes and
5 audiotapes, arguing that the city’s website and e-mails from the city suggest that the planning
6 commission minutes and audiotapes would be made part of the record before the final
7 decision maker, the city council. Petitioners attach to their reply affidavits from participants
8 stating that they chose not to testify to the city council because they understood their oral
9 testimony to the planning commission would be forwarded to the city council and made part
10 of the record before the city council.

11 The city responds that, pursuant to its usual practice, the planning commission
12 minutes or audiotapes were not forwarded to or made part of the record before the city
13 council. According to the city, the city council took no action to incorporate the planning
14 commission minutes and audiotapes into the record before the city council

15 OAR 661-010-0026(1)(c) provides that the record includes “minutes and tape
16 recordings of the meetings conducted by the final decision maker, or incorporated into the
17 record by the final decision maker.” Under LUBA’s rules, the minutes and tape recordings
18 of lower review bodies become part of the record before the final decision maker (and hence
19 part of the record before LUBA) only if they are placed before the final decision maker,
20 incorporated into the record by the final decision maker, or included in the record by
21 operation of local code requirements. *Bruce Packing Company, Inc. v. City of Silverton*, 44
22 Or LUBA 836, 837 (2003). Petitioners do not contend that the planning commission minutes

⁴ Petitioners suggest that they wish to cite the “Rules of Meetings” listed on the sign-up sheets, in
pursuance of a procedural assignment of error, and want the sign-up sheets in the record for that purpose. The
city attaches the resolution that adopted the Rules of Meetings to its response, and it appears to be the kind of
legislative enactment that LUBA can consider, pursuant to a motion to take official notice under Oregon
Evidence Code 202, notwithstanding that the resolution and rules are not in the record submitted to LUBA.

1 and audiotapes were entered into the record before the city council in any of those three
2 ways. This objection is denied.

3 **3. Documents Submitted February 2, 2010**

4 Petitioners argue that Eugene Stewart, a participant in the February 2, 2010 hearing,
5 submitted into the record his written testimony, attached to which was one or possibly two e-
6 mail messages regarding a petition supporting the project, but that the record filed by the city
7 does not include the attached e-mail messages. The city replies that it has carefully searched
8 its original file and while there is an e-mail message and related document attached to Mr.
9 Stewart's written testimony, the e-mail message and its attachment have nothing to do with a
10 petition or the application before the city, and they were apparently submitted in error.
11 Record 247-48. The city suggests that Mr. Stewart simply attached the wrong e-mail
12 message to his written testimony.

13 In reply, petitioners provide an affidavit from Stewart, stating that he submitted to the
14 city recorder during the February 2, 2010 hearing a copy of an e-mail message regarding a
15 petition circulated by supporters of the project, and a copy of that petition. Copies of the e-
16 mail message and petition are attached to the reply. Petitioners argue that based on the
17 affidavit both the e-mail message and the petition were submitted to the city during the
18 evidentiary hearing, and should be included in the record.

19 The city is correct that the e-mail message at Record 247 and the attached document
20 have nothing to do with a petition or the subject application. While it is impossible to tell
21 for certain what happened at the hearing, the likeliest explanation is that Mr. Stewart
22 intended to attach to his written testimony the e-mail message regarding the petition and a
23 copy of the petition, but inadvertently attached the wrong documents. We conclude that
24 petitioners have not demonstrated that the e-mail message regarding the petition and the copy
25 of the petition were submitted to the city. This objection is denied.

1 The record is settled as of the date of this order. The petition for review is due 21
2 days, and the response brief(s) due 42 days, from the date of this order. The Board's final
3 order and opinion is due 77 days from the date of this order.

4 Dated this 11th day of May, 2010.
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10 _____
11 Tod A. Bassham
 Board Member