

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MARCIE A. ROSENZWEIG,
5 LEROY E. HENDRICKSON,
6 LARRY CARPENTER,
7 ELISE CARPENTER, JEFF WIESE,
8 MARY SCHAFER, FRANK BROWN,
9 FRANK McLEOD, NADIA McLEOD,
10 PAM NICHOLIESEN, GARY NICHOLIESEN,
11 ROY BONNETT and MARIBETH BONNETT,
12 *Petitioners,*

13
14 vs.

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16 CITY OF MCMINNVILLE,
17 *Respondent,*

18
19 and

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21 MCMINNVILLE AREA HABITAT
22 FOR HUMANITY,
23 *Intervenor-Respondent.*

24
25 LUBA No. 2011-076

26 ORDER

27 Petitioners object to the record transmitted by the city in this appeal. In this order we
28 resolve those objections.

29 **A. Resolved Objections (Objections 1, 3, 4, 5).**

30 In partial response to petitioner's record objections, the city has agreed to submit a
31 supplemental record that includes the following documents:

- 32 1. The final, adopted minutes of a July 12, 2011 city council meeting.
- 33 2. The final, adopted minutes of a June 28, 2011 city council meeting.
- 34 3. Clearer copies of Record pages 244, 249, 258, 264 and 348 with
35 legible date stamps.
- 36 4. A paginated version of the PowerPoint presentation that is included at
37 the end of the Record.

1 The agreed-to supplemental record resolves petitioners' first, third and fifth record
2 objections and part of petitioner's fourth record objection.

3 **B. Objection 2 (E-Mail Message From City Attorney to City Council)**

4 Petitioner objects that an e-mail message from the city attorney to the city council
5 was read to the city council at its July 12, 2011 meeting and should be included in the record.

6 The city responds that this objection should be denied. The city contends that a
7 written version of the e-mail message was not given to the city council at its July 12, 2011
8 meeting and that only a portion of the e-mail message was read to the city council at that
9 time. The city contends that the minutes and audio recording of the July 12, 2011 meeting
10 disclose the part of the e-mail message that was read to the city council and that the rest of
11 the e-mail message, which was not read to the city council at the July 12, 2011 meeting, is
12 not properly included in the record.

13 We agree with the city. This objection is denied.

14 **C. Objection 4 (Log of Receipt of Documents; Illegible Date Stamps)**

15 The part of Objection 4 concerning illegible date stamps will be resolved by the
16 supplemental record the city agrees to transmit. Petitioners also object that the record should
17 include a log that shows the dates documents were received during the open record period in
18 this matter. The city responds that it does not keep such a log, and we do not understand
19 petitioners to dispute that response.

20 This part of petitioners' fourth objection is denied.

21 **D. Objection 6 (Inaccurate June 14, 2011 City Council Minutes)**

22 Petitioners object that the minutes of the June 14, 2011 city council meeting "under-
23 report or inaccurately report testimony." Petitioners provide three brief "examples" of the
24 alleged under-reporting or inaccurate reporting. Amended Petitioners' Record Objection 2.

25 The city responds to this objection in two ways. In responding to another challenge
26 to the adequacy of minutes in the record the city responded that "the remedy for defective

1 minutes is for LUBA to order the governing body to prepare a transcript of that portion of the
2 meeting—but only if the audio recordings are not part of the record. OAR 661-010-
3 0026(3).” Respondent City of McMinnville’s Response to Petitioners’ Record Objection 2.
4 City repeats that response here and argues that because the record includes an audio
5 recording of the June 14, 2011 meeting, Objection 6 is “rendered moot.” *Id* at 3..

6 OAR 661-010-0026(3) provides that:

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

14 If the demonstration with particularity that is required by the first sentence of OAR 661-010-
15 0026(3) is provided, LUBA requires that the governing body prepare a transcript or partial
16 transcript if a recording of the proceeding “is available.” Whether the available recording is
17 included in the record or not is irrelevant.

18 However, the city also responds that petitioners have not demonstrated with
19 particularity why the minutes are defective or why any defects in the minutes are material.
20 We agree with the city, and Objection 6 is denied.¹

21 **E. Objection 7 (April 21, 2011 Planning Commission Minutes)**

22 Petitioners object that the April 21, 2011 planning commission meeting minutes are
23 “inaccurate,” and that because the record does not include an audio recording of that
24 meeting, the record should be supplemented with a copy of that recording.

25 The city responds that OAR 661-010-0025(1)(c) requires that the record include
26 “media recordings of the meetings conducted by the final decision maker as required by law

¹ We note, however, that under OAR 661-010-0030(5) petitioners may make their own partial transcripts from any media recordings that are included in the record and attach those partial transcripts as an appendix to their petition for review.

1 * * *.” The city council, not the planning commission, was the final decision maker in this
2 matter. The city also responds that the copy of the minutes of the April 21, 2011 meeting
3 that is included in the record is a copy of the minutes that was actually placed before the city
4 council and therefore is properly included in the record in the same form it was provided to
5 the city council.

6 We agree with the city, and, in any event, petitioners once again fail to demonstrate
7 with particularity how the minutes are defective or why any such defects are material.

8 Objection 7 is denied.

9 Petitioners’ record objections will be resolved when the city transmits a supplemental
10 record in accordance with this order. Upon receipt of that supplemental record, LUBA will
11 enter an order settling the record and establishing a briefing schedule.

12 Dated this 26th day of September, 2011.

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17 _____
18 Michael A. Holstun
19 Board Member