

1 petitioner’s assertion that parts of those documents remain missing. The city must submit the
2 complete documents identified in petitioner’s first and sixth objections.

3 The first and sixth record objections are sustained.

4 **B. Second Record Objection**

5 Petitioner asserts that the audiotapes of the public hearing before the hearings officer are
6 inaudible. He “seeks to have the tape made audible, if possible, through digital enhancement or
7 other method, and a transcript made.” Record Objections 2. The city agrees that the tapes are
8 inaudible but states that “there is no regulatory or statutory requirement that the city digitally enhance
9 or through some other mechanism make the tapes audible.” Response to Record Objections 1.
10 The city adds that it does not object if petitioner pays for the enhancement. *Id.* Petitioner filed a
11 reply, arguing that the city must be required to produce audible tapes, and adds that “Petitioner will
12 reimburse Respondent for the reasonable expense incurred in copying the tapes as required by
13 [OAR 661-010-0025(3)].” Petitioner’s Reply to Respondent’s Response to Record Objections
14 3.¹

15 OAR 661-010-0025(1)(c) provides in pertinent part that the record includes, “tape
16 recordings of the meetings conducted by the final decision maker as required by law * * *.” We
17 generally do not require local governments to submit tapes of hearings when the tapes have been
18 lost, destroyed, or are inaudible. *Hal’s Construction v. Clackamas County*, 37 Or LUBA 1037,
19 1038 (2000); *Friends of Neabeack Hill v. City of Portland*, 29 Or LUBA 557 (1995). We
20 have held, however, that implicit in OAR 661-010-0025(3) is the requirement that the local
21 government supply a party, *at the party’s expense*, an audible copy of the original audiotape in the

¹ OAR 661-010-0025(3) provides in pertinent part:

“The governing body shall also serve a copy of any tape included in the record * * * on any party requesting such a copy, provided such party reimburses the governing body for the reasonable expense incurred in copying the tape.”

1 local government's possession. *Rochlin v. City of Portland*, 37 Or LUBA 1005, 1009 (1999).²
2 Also implicit in that rule is an assumption that the original audiotape in the local government's
3 possession is itself audible.

4 In *Rochlin*, the city's original audiotape, which was part of the record, was audible. When
5 the city attempted to make a copy of the audiotape for petitioner pursuant to OAR 661-010-
6 0025(3), however, it was unable, after three attempts, to reproduce an audible copy of the
7 audiotape. The petitioner did not explain why any further attempts to reproduce the audiotape
8 would be successful, and under those circumstances we held that the parties and the board must
9 rely on the original tape. *Id.* at 1009-10.

10 Our order in *Rochlin* did not address the issue of whether the city was required to make, or
11 who would pay to attempt to make, an inaudible tape audible through technological enhancement.
12 However, we did recognize that technological mishaps do occur, and refused to hold the local
13 government to an unreasonably high standard in attempting to rectify such unfortunate events. We
14 believe that the logical extension of our holding in *Rochlin* and our cases holding that the local
15 government is not required to submit to this Board, as part of the record, tapes of hearings that have
16 been lost, destroyed or are inaudible, is that the city is only required to submit and provide to the
17 parties copies of the audiotapes in the city's possession.

18 If a party requests a copy of an audiotape, he may pay for the city to make a copy of the
19 tape, pursuant to OAR 661-010-0025(3). If a party requests a copy of a tape that turns out to be
20 inaudible, the city must take reasonable steps to make the copy of the tape audible, as it did in
21 *Rochlin*. If it is not reasonable for the city to make any attempts to make the tapes audible, or after
22 reasonable attempts, the tapes cannot be made audible, we see no reason why the party could not,

²OAR 661-010-0025(3) requires service of copies of tapes on parties. It has nothing to do with what is or is not properly part of the record. However, the city does not object to petitioner's record objection on this ground, and we therefore decline to deny the objection on that basis.

1 on its own, take steps to make the copy provided to it audible for purposes of review and
2 preparation for briefing on appeal. We do not see, however, that the rule requires that the city go to
3 extraordinary lengths to attempt to restore faulty recordings or that it be required to pay for those
4 attempts.

5 Although petitioner mentions digital enhancement, he does not explain what such
6 enhancement involves, how burdensome or expensive it might be, or the probability of success.
7 Therefore, petitioner must rely on the original audiotape.³

8 The second record objection is denied.

9 **CONCLUSION**

10 Petitioner's first and sixth record objections are sustained. Petitioner's second record
11 objection is denied. The city will provide a second supplemental record in accordance with this
12 order.

13 Dated this 7th day of October, 2004.

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Anne C. Davies
Board Member

³ In certain circumstances, the failure of a local government to provide a sufficient record can serve as a basis for reversal or remand. *Friends of Neabeack Hill*, 29 Or LUBA at 557-58 n 1; *Andrews v. City of Prineville*, 28 Or LUBA 653, 661 (1995).