

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

3  
4 ARNOLD ROCHLIN,  
5 *Petitioner,*

6  
7 and

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9 LINNTON NEIGHBORHOOD ASSOCIATION,  
10 *Intervenor-Petitioner,*

11  
12 vs.

13  
14 CITY OF PORTLAND,  
15 *Respondent,*

16  
17 and

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19 DISHONGH & PALMER, LTD.,  
20 *Intervenor-Respondent.*

21  
22 LUBA No. 99-155

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24 LINNTON NEIGHBORHOOD ASSOCIATION,  
25 *Petitioner,*

26  
27 and

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29 ARNOLD ROCHLIN,  
30 *Intervenor-Petitioner,*

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32 vs.

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34 CITY OF PORTLAND,  
35 *Respondent,*

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37 and

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39 DISHONGH & PALMER, LTD.,  
40 *Intervenor-Respondent.*

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42 LUBA No. 99-156

43 ORDER

44 On October 25, 1999, petitioner in LUBA No. 99-155 (petitioner) filed precautionary

1 objections to the record. The city responded on November 3, 1999, and petitioner replied on  
2 November 8, 1999. On December 17, 1999, the city filed a motion for extension of time to  
3 file a rebuttal to petitioner's reply memorandum. We now resolve the motion and  
4 petitioner's objections.

#### 5 **MOTION TO FILE REBUTTAL**

6 On December 17, 1999, the city filed an uncontested motion for extension of time to  
7 file a rebuttal to petitioner's reply memorandum, to January 14, 2000. Our rules do not  
8 entitle parties to submit either reply memoranda or rebuttals to such memoranda. The city  
9 does not explain why additional briefing would be useful, and we do not perceive a need for  
10 additional briefing.

11 The city's motion is denied.

#### 12 **RECORD OBJECTIONS**

##### 13 **A. Objection 1**

14 Petitioner objects that the record does not include an audio tape of the August 3, 1999  
15 meeting of the final decision maker in this case. Petitioner and the city agree that the tape of  
16 the August 3, 1999 meeting has been inadvertently re-used, and its contents related to that  
17 meeting no longer exist. Nonetheless, petitioner argues, the tape itself should be part of the  
18 record, because the city's failure to preserve the record may have some bearing on an  
19 assignment of error. *Andrews v. City of Prineville*, 28 Or LUBA 653, 661-62 (1995).

20 In *Andrews*, the tapes of a planning commission hearing were missing from the  
21 record, which meant that LUBA was unable to verify whether the city council correctly  
22 concluded that only certain issues had been preserved before the planning commission.  
23 LUBA decided that the city's failure to maintain a sufficient record of the planning  
24 commission proceedings meant that LUBA must resolve the question of preservation against  
25 the city. *Id.* at 662. We understand petitioner to argue that, as in *Andrews*, the fact that the  
26 city failed to maintain a record of relevant proceedings may be determinative with respect to

1 some yet unknown issue in this case. Be that as it may, petitioner does not explain why the  
2 physical presence of the tape in the record is a necessary foundation to any conceivable issue  
3 in this case. The tape at issue has been recorded over, and its current contents have no  
4 bearing whatsoever to the present case. The fact that the city inadvertently erased the  
5 previous contents of the tape is a fact that, if it ever becomes relevant to any issue in this  
6 case, can be addressed in an assignment of error without the presence of the disputed tape in  
7 the record. *See Friends of Neabeack Hill v. City of Philomath*, 29 Or LUBA 557, 557-58 n 1  
8 (1995) (denying a record objection involving defective minutes that could not be corrected,  
9 because no tape recording of the relevant hearing existed, but noting that deficiencies in  
10 record-keeping could be assigned as error).

11 This objection is denied.

12 **B. Objection 2**

13 Petitioner argues that during an August 31, 1999 meeting, two members of the  
14 Adjustment Committee, the final decision maker in this case, referred to a transcript of the  
15 committee’s August 3, 1999 session. Petitioner states that he has no direct knowledge that a  
16 transcript exists, but argues that if such a transcript was prepared it must be included in the  
17 record.

18 The city responds that no such transcript exists, and that the committee members  
19 misspoke in referring to summary minutes of the August 3, 1999 session, which are in the  
20 record. Petitioner replies that it is unlikely that anyone could mistake summary minutes for a  
21 transcript, and argues that the city attorney’s assertion that the committee members did not  
22 mean what they said is of no probative value, because it is unsupported by affidavit or other  
23 evidence. Petitioner urges us to order the city to locate a transcript that the city attorney  
24 states does not exist.

25 In resolving record objections we generally rely on the parties’ representations  
26 regarding the existence of disputed documents. We do not require that opponents or

1 proponents of such documents submit affidavits in support of their position, absent some  
2 substantial reason to question those representations.<sup>1</sup> Based on the parties' representations,  
3 we conclude that petitioner has not established that any transcripts of the August 3, 1999  
4 session exist.

5 This objection is denied.

6 **C. Objection 3**

7 The record table of contents lists a tape of an August 31, 1999 meeting that the city  
8 retains as an oversize exhibit and will bring to oral argument pursuant to OAR 661-010-  
9 0025(2).<sup>2</sup> Petitioner explains that, pursuant to OAR 661-010-0025(3),<sup>3</sup> he obtained a copy of  
10 that tape, but the copy is partially inaudible. Petitioner states that the city then supplied him  
11 with two additional copies, but each is as inaudible as the first. Petitioner states his  
12 understanding that the original tape the city retains is audible. Petitioner requests that the  
13 Board direct the city to provide an audible tape at oral argument, and to make audible copies  
14 available to the parties.

15 The city responds that petitioner is free to come and listen to the original tape in the  
16 city's possession, and that it will bring the original audible tape to oral argument, as required

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<sup>1</sup>Such evidentiary disputes are more appropriately resolved, if necessary, in the context of a motion to take evidence not in the record, pursuant to OAR 661-010-0045(1) (the Board may upon motion or at its direction take evidence to resolve disputes regarding the contents of the record).

<sup>2</sup>OAR 661-010-0025(2) provides in relevant part:

“\* \* \* The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board the original or a certified copy of the record of the proceeding under review. The governing body may, however, retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument. \* \* \*”

<sup>3</sup>OAR 661-010-0025(3) provides in relevant part:

“\* \* \* Contemporaneously with transmittal [to LUBA], the governing body shall serve a copy of the record, exclusive of large maps, tapes, and difficult-to-duplicate documents and items, on the petitioner or the lead petitioner, if one is designated. \* \* \* The governing body shall also serve a copy of any tape included in the record, or any tape from which a transcript included in the record was prepared, on any party requesting such a copy, provided such party reimburses the governing body for the reasonable expense incurred in copying the tape.”

1 by OAR 661-010-0025(2). Petitioner replies that he is entitled to a reasonably audible copy  
2 of the tape, pursuant to OAR 661-010-0025(3), and that it is not a satisfactory substitute to  
3 work from the original tape at the city's offices.

4 Implicit in OAR 661-010-0025(3) is the requirement that the city supply petitioner, at  
5 his expense, an audible copy of the original audio tape in the city's possession. However, the  
6 city has attempted to do so on three occasions, and petitioner does not explain why another  
7 attempt will have a different result, or what the city can do to provide petitioner with a more  
8 audible copy. Under these circumstances, the parties as well as the Board must rely on the  
9 original tape.

10 This objection is denied.

11 **D. Objection 4**

12 Petitioner objects to the items at Record 70-80, which petitioner argues were rejected  
13 by the final decision maker and not accepted into the record. The city agrees. The items at  
14 Record 70-80 shall not be considered part of the record. This objection is sustained.

15 The record is settled as of the date of this order. The petition for review is due 21  
16 days, and the response brief is due 42 days, from the date of this order.

17 Dated this 29th day of December, 1999.

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25 Tod A. Bassham  
Board Member