

1 respond to these objections, pending further investigation by the city’s attorney. On April
2 13, 2001, the city filed its response. We now resolve the parties’ objections.

3 **A. Intervenor’s Objections**

4 Intervenor objects to the omission or improper reproduction of three documents. The
5 city agrees to submit a supplemental record responding to these objections. These objections
6 are sustained.

7 **B. Petitioners’ Objections**

8 **1. Objections 1, 2, 5 and 6**

9 The parties agree that the items at Record 76-82, 102-09, 273-75 and 279-86 were
10 improperly included in the record, and that such items are considered deleted from the
11 record. These objections are sustained.

12 **2. Objection 3**

13 The record contains the minutes and a transcription of the audiotapes of the July 17,
14 2000 hearing before the city council. The audiotapes of that hearing are not in the record.
15 Petitioners contend that the minutes of that hearing are materially defective, because they
16 misstate the terms of the city council’s ruling setting out a process for resolving certain
17 evidentiary objections before the council. Petitioners assert that the transcript in the record
18 contains a number of “(unintelligible)” entries and mistranscriptions. Petitioners argue that
19 the defects in the minutes are material, because the exact terms of the city council’s ruling
20 are essential to resolving petitioners’ contention that the city council later committed
21 reversible procedural error in rejecting petitioners’ objections to certain evidence. Petitioners
22 explain that they have obtained the audiotapes of that hearing, and prepared a more accurate
23 revised transcript. Petitioners request that the record include the audiotapes and the revised
24 transcript prepared by petitioners.

25 Intervenor agrees with petitioners’ understanding of the terms of the city council’s
26 ruling, and agrees that the audiotapes of the hearing should be included. However,

1 intervenor states that, because the audiotapes are not in the record, intervenor is not in a
2 position to agree to the accuracy or the inclusion of the revised transcript. The city responds
3 that it will submit a supplemental record including the audiotapes, and argues that, with the
4 audiotapes are in the record, there will be no need to accept the revised transcript.

5 The usual remedy for inaccurate or incomplete minutes is for the Board to order the
6 respondent to prepare a transcript. OAR 661-010-0026(3). In the present case, the city has
7 already prepared and included a transcript. While the relevant portion of the transcript at
8 Record 168-73 contains a number of ellipses, petitioners have not demonstrated that that
9 transcript is materially incomplete or inaccurate, or provided any other basis that would
10 warrant requiring that the record be supplemented with the transcript prepared by
11 petitioners.¹

12 This objection is sustained, in part.

13 **3. Objections 4, 7, and 9**

14 Petitioners object that exhibits at Record 267-69 and 544-52 are poorly reproduced,
15 and that the record table of contents fails to list each item contained therein. The city agrees
16 to submit a supplemental record responding to these objections. These objections are
17 sustained.

18 **4. Objection 8**

19 The challenged decision is on remand from LUBA, and the record of this appeal
20 includes the record in the previous appeal, *Terra v. City of Newport*, 36 Or LUBA 582 (1999)
21 (*Terra I*). The record in *Terra I* includes a main volume, a supplemental record, audiotapes,
22 and a number of oversize exhibits. Pursuant to LUBA's procedures, the city was informed
23 after remand that the audiotapes and the oversize exhibits would be destroyed if the city did
24 not retrieve them. The city did not retrieve the items, and the audiotapes and most of the

¹However, we see no reason why the revised transcript could not be attached to the petition for review in support of arguments therein. OAR 661-010-0030(5); *Fraley v. Deschutes County*, 31 Or LUBA 566, 571-72 (1996).

1 oversize exhibits in *Terra I* were subsequently destroyed. Petitioners advance several
2 requests regarding the *Terra I* record.

3 **A. Oversize Exhibits**

4 Petitioners request that the record table of contents reflect the surviving oversize
5 exhibits from *Terra I* in LUBA’s keeping. These consist of Exhibits B, L, Z and SR-11
6 through SR-17. Further, petitioners request that petitioners be allowed to replace four
7 destroyed exhibits originally submitted by petitioners: Exhibits J, K, M and Q. Petitioners
8 attach to their record objections copies and re-creations of these exhibits and an affidavit
9 from one of the petitioners attesting that the attachments are either photocopies or
10 substantially identical re-creations of the originals.²

11 The city agrees to amend the table of contents to reflect Exhibits B, L, Z and SR-11
12 through SR-17, but takes no position as to the replacement or recreation of Exhibits J, K, M
13 and Q. Intervenor objects to including re-created exhibits because it has no basis to verify
14 their accuracy.

15 The record submitted to LUBA often consists of photocopies of originals, and we see
16 no reason to reject the two photocopies of Exhibits J and Q proffered by petitioners.
17 Intervenor does not object that those photocopies are inaccurate. However, intervenor does
18 object to inclusion of the re-created exhibits. We agree with intervenor that petitioners have
19 demonstrated no basis in law that would require inclusion of re-created documents into the
20 record over the objection of parties.³ This objection is sustained in part.

²The affidavit states that attachments 1 and 4 are reduced size photocopies of the original Exhibits J and Q. Attachment 2 is a r-creation of Exhibit K, which was a composite of two city zoning maps, with residential zones colored in blue. Attachment 3 is a r-creation of Exhibit M, which was a composite of city zoning maps, with attached photos and brochures for three short-term rental developments, with lines drawn from the photos/brochures to the location of each development on the zoning map.

³The destroyed exhibits are, in a limited legal sense, still part of the record, despite their physical nonexistence. Petitioners have not established here what role, if any, the destroyed exhibits played in the city’s decision on remand, or how their nonexistence may affect our review function. The petition(s) for review and response briefs may explore those issues.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

B. Audiotapes

Items A, C, G, P, X and SR-6 through SR 10 from the *Terra I* record were audiotapes of city council and planning commission meetings. As noted above, LUBA destroyed any audiotapes in its possession after the city declined to retrieve them. Petitioners request that, if any copies of these audiotapes are available to the city, they be included in the record. The city responds that it has no objection to including copies of these audiotapes, but the city does not indicate that it has any such copies. Because no such copies apparently exist, there is no relief LUBA can order. This objection is denied.

C. Supplemental Record

Petitioners request that the table of contents reflect the supplemental record in *Terra I*, specifically items SR-1 through SR-5. The city does not object. This objection is sustained.

5. Objection 10

Petitioners object to the omission of minutes and tape recordings of several city council work sessions on June 19, July 17, August 21, September 5 and November 6, 2000, at which the city council considered the subject proceeding on remand. The city agrees to provide the minutes of those meetings, but does not indicate if any tape recordings exist. Intervenor disagrees that any such minutes or tape recordings must be included in the record. We understand intervenor to argue that the record need not include the minutes or tape recordings of such work session meetings under OAR 661-010-0025(1)(c).⁴ However,

⁴OAR 661-010-0025(1)(c) provides:

“Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

“* * * * *

“(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker.
* * *”

1 intervenor does not explain why. Intervenor's point may be that no law requires that such
2 meetings be recorded and minutes prepared. However, if such minutes or tape recordings
3 exist, they must be included in the record, notwithstanding the absence of a legal obligation
4 to create them. *Volny v. City of Bend*, 36 Or LUBA 760, 763 (1999); *Ramsey v. Linn County*,
5 29 Or LUBA 559, 560 (1995). This objection is sustained.

6 The city shall submit a supplemental record responding to the objections sustained
7 above.

8 Dated this 25th day of April, 2001.
9

10
11
12
13
14
15
16

Tod A. Bassham
Board Member