BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUE BEILKE,
Petitioner,

vs.

CITY OF TIGARD,
Respondent,

and

SPECTRUM DEVELOPMENT, INC.,
Intervenor-Respondent.

LUBA No. 2006-017

ORDER

MOTION TO INTERVENE

Spectrum Development, Inc. (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO DISMISS

On February 14, 2006, petitioner filed a notice of intent to appeal a decision by the Tigard City Council declining to review a city hearings officer's decision approving applications for site development review, sensitive lands review and adjustments for a proposed development of two commercial office buildings and three buildings containing nine residential units on 8.33 acres.[1] Intervenor moves to dismiss this appeal because the challenged decision is not a "land use decision" subject to our review jurisdiction.

[1] The NITA identifies the challenged decision as follows:

> "[T]hat land use decision of respondent entitled 'REFUGE AT FANNO CREEK,' which was finally approved by the Tigard City Council (City Council) at a hearing on January 24, 2006, and which involves site development review, sensitive lands reviews and adjustments to the Tigard Community Development Code (TCDC)."

A. Background

On November 15, 2005, the city hearings officer conducted a public hearing on the three applications. He issued his decision approving the applications on December 22, 2005. One of the findings supporting approval was a finding that a railroad underpass access easement providing secondary access exists at the northeast edge of the proposed development. On December 27, 2005, the city mailed notice of the hearings officer's decision to those entitled to such notice, including petitioner.

The local code provides that any party with standing may appeal a decision of the hearings officer to the city council. TCDC 18.390.040.G.2.[2] Petitioner testified at the hearing before the hearings officer and was thus a party entitled to appeal the December 22, 2006 hearings officer's decision to the city council within 10 business days of the date the notice of the hearings officer's decision was mailed. There appears to be no dispute that

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[2] TCDC 18.390.040.G provides, in relevant part:

> "Appeal. A Type II administrative decision may be appealed as follows:
>
> "1. Standing to appeal. The following parties have standing to appeal a Type II Administrative Decision:
>
> "a. The applicant;
>
> "b. Any party who was mailed written notice of a pending Type II administrative decision;
>
> "c. Any other party, who demonstrates by clear and convincing evidence that they participated in the proceeding through the submission of written or verbal testimony;
>
> "2. Appeal procedure.
>
> "a. Notice of appeal. Any party with standing, as provided in Section G1 above, may appeal a Type II Administrative Decision by filing a Notice of Appeal according to the following procedures;
>
> "(1) Time for filing. A Notice of Appeal shall be filed with the Director within ten business days of the date the Notice of Decision was mailed[.]"

neither petitioner nor any other party entitled to appeal filed an appeal within the required timeline.

On January 10, 2006, a citizen appeared before the city council during a regularly scheduled meeting and requested that the city council exercise its authority pursuant to ORS 227.180(1)(a) to review the hearings officer's decision, and in particular, his finding that an access easement exists under the railroad underpass right-of-way.[3] In response, the city council approved a motion to schedule a hearing on January 24, 2006 to allow comment on whether such an easement exists and "to advocate as to whether or not the Council should even hear this matter."[4]

At the January 24, 2006 hearing, the city attorney stated:

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[3] ORS 227.180(1) provides, in relevant part:

> "(a) A party aggrieved by the action of a hearings officer may appeal the action to the planning commission or council of the city, or both, however the council prescribes. The appellate authority on its own motion may review the action. The procedure for such an appeal or review shall be prescribed by the council, but shall:
>
> > "(A) Not require that the appeal be filed within less than seven days after the date the governing body mails or delivers the decision of the hearings officer to the parties;
> >
> > "(B) Require a hearing at least for argument; and
> >
> > "(C) Require that upon appeal or review the appellate authority consider the record of the hearings officer's action. That record need not set forth evidence verbatim.
>
> "(b) Notwithstanding paragraph (a) of this subsection, the council may provide that the decision of a hearings officer or other decision-making authority in a proceeding for a discretionary permit or zone change is the final determination of the city."

[4] The minutes of the January 10, 2006 city council meeting provide:

> "Motion by Councilor Harding, seconded by Councilor Woodruff, to set this matter for a hearing on January 24, directing staff to provide notice to all participants in the proceeding and anyone else entitled to notice under the zoning code and also directing the staff to contact the railroad to determine if the railroad has any position on the scope and applicability of the easement; directing the City Attorney's office to do the same. January 24, 2006, is the time for anyone to comment on the findings from the railroad and the City Attorney's office; also at this time, allowing to people to advocate as to whether or not the Council should even hear this matter. The proceeding will be confined to this narrow issue." Record 74-75.

> "In this hearing, the Council will consider whether it should review the decision and may also consider whether to amend the decision as it relates to the rail crossing. The Council will accept argument on whether to review the decision and will accept testimony on the merits of the decision as it relates to the rail crossing. In order to get through this procedure in a reasonable time, the Council will allow both the argument on whether to review and the testimony on the substantive issue at the same time. After it has heard argument and testimony, the Council will decide whether it wishes to review the hearing officer's decision. If it decides to review the decision, it will then make a decision on the application as it relates to the proposed rail crossing for the secondary access to the property. If the Council decides to review the matter, the Council's role will be to make a land use decision applying the existing laws of the City of Tigard, but limited to the crossing issue." Record 55.

The city council proceeded to conduct a hearing, apparently accepting testimony on both (1) the procedural issue whether the council should review the hearings officer's decision and (2) the merits of whether the hearings officer was correct in finding that an access easement exists.

B. Discussion

Intervenor contends that this Board has exclusive jurisdiction to review "land use decisions," and argues that the decision challenged in this appeal is not a land use decision. ORS 197.825(1). A "land use decision" includes a "final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) [t]he goals; (ii) [a] comprehensive plan provision; (iii) [a] land use regulation; or (iv) [a] new land use regulation." ORS 197.015(11)(a)(A). Intervenor asserts that it was the hearings officer's December 22, 2005 decision that was the "land use decision." No local appeal of that decision was filed and, according to intervenor, the city council did not "review" the matter pursuant to ORS 227.180(1)(a).[5] It argues that the city council did not

[5] Neither party identifies a land use regulation that provides a local process, implementing ORS 227.180(1)(a), authorizing the city council to "call up" the matter. However, both parties appear to assume that ORS 227.180(1)(a) provides that authorization directly. Intervenor does cite to Tigard Community Development Code (TCDC) 18.390.040.H, which provides:

adopt, amend, or apply the goals, comprehensive plan provisions or land use regulation when it declined to exercise its authority to review the hearings officer's decision, pursuant to ORS 227.180(1)(a). Therefore, according to intervenor, this Board does not have jurisdiction to review the city council's determination.

Petitioner argues that, in substance, the city council did in fact review the hearings officer's decision, and, in particular, his finding that an easement exists. First, the city council received and apparently considered testimony that was presented at the hearing regarding the easement issue. Second, the minutes reflect an understanding among the councilors that they were in fact making a determination on the merits of the existence of the easement and thus were making a substantive determination on the hearings officer's decision. Finally, petitioner points out that the January 24, 2006 hearing was noticed as a review of a land use decision. Record 63.

We do not understand intervenor to argue that the challenged decision, the minutes of the January 24, 2006 hearing, is not a "final" decision. *See* OAR 661-010-0010(3) ("A

> "The decision of the Hearing Officer with regard to any appeal of a Type II Administrative Decision is the final decision of the City. The decision of the Hearings Officer is final for purposes of appeal on the day after the appeal period expires, unless an appeal is filed. If an appeal is filed, the decision is effective on the day after the appeal is resolved."

Intervenor argues that no appeal was filed and that, pursuant to TCDC 18.390.040.H, the hearings officer's decision became final on January 12, 2006, the day after the appeal period expired. However, we do not understand intervenor to argue that this provision means that the city council *did not have authority* to review the hearings officer's decision on its own motion. Rather, intervenor argues that the city council *did not exercise the authority* that it did have to review the matter, pursuant to ORS 227.180(1)(a).

Even if intervenor did take the position that the city did not have authority to call up the matter, as we explain later in this order, the city council did in fact review the matter. Its determination to uphold the hearings officer's decision might provide a basis to reverse the city council's decision as *ultra vires*, but it is not clear to us that any lack of authority to call up the hearings officer's decision would mean that LUBA would lack jurisdiction over an appeal of that decision. *See Vanspeybroeck v. Tillamook County*, ___ Or LUBA ___ (LUBA Nos. 2005-182/185, March 24, 2006) (where a county governing body affirms a planning commission decision denying a building permit to expand an existing nonconforming use, but remands for a determination of the type of review required with regard to the expansion, the governing body's decision is not a "final" land use decision, notwithstanding petitioner's allegation that the governing body's remand was *ultra vires*).

For purposes of analyzing intervenor's motion to dismiss, we assume, without deciding, that ORS 227.180(1)(a) authorized the city council to review the hearings officer's decision on its own motion.

decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s)"); *see also Weeks v. City of Tillamook,* 113 Or App 285, 289, 832 P2d 1246 (1992) (city council action reflected in written minutes may constitute a final land use decision). Rather, we understand intervenor to argue only that the challenged decision is not a land use decision because the city council did not exercise its authority under ORS 227.180(1)(a) to review the hearings officer's decision. In determining whether the city council exercised its authority to "call up" the matter, the relevant inquiry is whether the city council, in substance, reviewed the determination of the hearings officer, or whether it in fact declined to review the matter. If the city council simply declined to review the matter, then we understand all parties to agree that the challenged decision is not a land use decision. If, on the other hand, the city council exercised its authority pursuant to ORS 227.180(1)(a), and actually reviewed the determination of the hearings officer regarding the existence of an easement, then the challenged decision is a land use decision.[6] At the outset, we note that the procedures followed and comments provided by council members and even by the city attorney are confusing at best. However, all of the factors provided by petitioner, and other circumstances, support petitioner's position.

The city council motion that was unanimously approved at the January 10, 2006 meeting included a direction to investigate the railroad's position on the existence of the easement at issue. *See* n 4. The motion also provided that the public would have an opportunity to respond to the information from the railroad and the existence of the easement at the January 24, 2006 hearing. Finally, the motion directed staff to prepare notices and to

[6] The city attorney's "rules of procedure" for the January 24, 2006 hearing provide, in relevant part:

> "If the Council decides to review the matter, the council's role will be to make a land use decision applying the existing laws of the City of Tigard, but limited to the crossing issue." Record 55.

mail those notices to all interested persons, just as would be done for a local appeal of the hearings officer's decision.

The notices that were mailed to interested persons were in the form of a notice of a quasi-judicial local appeal hearing:

> "NOTICE IS HEREBY GIVEN THAT THE **TIGARD CITY COUNCIL,** AT A MEETING ON **TUESDAY, JANUARY 24, 2006 AT 7:30 PM**, * * * WILL CONSIDER THE FOLLOWING APPLICATION:
>
> **"FILE NOS. SITE DEVELOPMENT REVIEW (SDR) 2005-00002**
>
> **"SENSITIVE LANDS REVIEWS (SLR) 2005-00017, 18, 19 & 20**
>
> **"ADJUSTMENTS (VAR) 2005-00055 & 56**
>
> "* * * * *
>
> **"HEARING ITEM:** On January 10, 2006, the Tigard City Council moved to review the Hearings Officer decision of December 27, 2005 in regard to whether there is an access easement under the Southern Pacific Railroad right-of-way." Record 63.

The notice went on to direct citizens how to provide testimony on the matter. The notice clearly indicated, and any person receiving the notice would reasonably assume, that the city council would be reviewing the applications listed in the notice.

The city council's final determination could be read to support both petitioner's contention that the city reviewed the hearings officer's decision and intervenor's position that it did not; *i.e.*, the motion that was unanimously approved by the city council was a motion "that the Council uphold the hearings officer decision and decline to re-open the case." Record 8. During the public hearing, however, the city council accepted and considered evidence regarding the existence of the easement at issue. The minutes reflect that the city council relied almost exclusively on the evidence regarding the easement in

making its determination.[7] Based on the discussion of the councilors set forth in n 7, it is apparent that the determination was, in substance, an affirmance of the hearings officer's determination regarding the easement at issue. The city council did review the hearings officer's decision and, based on the evidence presented at the hearing, decided to uphold that decision. It did not, as intervenor asserts, decline to review the matter.

Because the city council exercised its authority to review the hearings officer's decision pursuant to ORS 227.180(1)(a), its action was a final land use decision. Accordingly, intervenor's motion to dismiss is denied.

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[7] The minutes reflect the following discussion among the city councilors following the presentation of the evidence from both sides and just prior to voting on the motion:

> "Councilor Harding said it would be nice if the railroad were represented at this meeting. There is no new evidence but there is still a question in her mind. The fact that the railroad is not here doesn't prove the existence of an easement.
>
> "Mr. Corbin said all of this evidence was before the Hearings Officer when he made his decision. The evidence was substantial enough for him to make that decision.
>
> "Mr. Sprague said the trestle is indicative that there is an easement in that location. The railroad would only have built it to allow people to cross under. By building a trestle, the railroad acknowledges that there is access. The railroad has not objected to this easement.
>
> "Mr. Frewing stated that the applicant has not produced anything saying that the railroad gave anyone the easement.
>
> "Councilor Wilson said that the adjacent property owners could not convey the railroad easement because it was not theirs to convey; however, this does not imply that there is no easement. He said he would vote not to reopen the case.
>
> "Attorney Ramis said Mr. Frewing does make a point that the property deeds do not show access but it is an overstatement to say there is no evidence of the right to cross. There is a great deal of indirect evidence.
>
> "Councilor Harding said she would rather not see the second access.
>
> "Mayor Dirksen said he came to the meeting tonight ready to approve striking the second access but the testimony convinces him that there is a historical easement. If there is an access concern in the future, the dispute will be between the railroad and the applicant." Record 12-13.

RECORD OBJECTIONS

On March 20, 2006, petitioner filed objections to the record. Both the city and intervenor filed responses to petitioner's record objections. We will address each objection in turn.

A. First Record Objection

Petitioner argues that the record submitted by the city fails to include the materials included in the city's file on the underlying applications for site development review, sensitive lands review and adjustments. Specifically, she contends that the record should include the pre-application materials, the application itself, review comments by agencies and the public, the staff report, materials available and testimony presented to the hearings officer, and the hearings officer's decision. Objection to Record 1. She contends that those materials "were the subject of and which the Tigard City Council considered at its January 24, 2006 hearing." *Id*. She also argues, in support of her contention that these items should be included in the record, that (1) legal counsel for applicant "acknowledged these record materials" by stating that all but one of the graphics he used during his oral presentation on January 24, 2006 were already in the record, (2) applicant's attorneys made reference to the hearings officer's record, and (3) the mayor noted review of the materials listed above.

OAR 661-010-0025(1) provides that the record shall contain (1) materials specifically incorporated into the record and (2) those items placed before, and not rejected by, the final decision maker.[8] The city contends that the materials that petitioner seeks to include in the

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[8] OAR 661-010-0025(1) provides, in relevant part:

> "Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:
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> "(a) The final decision including any findings of fact and conclusions of law;
>
> "(b) All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the

record were not before the city council and thus are not properly part of the record in this appeal.[9] As discussed above, petitioner alleges that all of the listed materials were considered by the city council.

In this case, there is evidence that something more than what appears in the record submitted by the city was actually placed before the city council. The minutes of the January 24, 2006 city council hearing provide:

> "[The city attorney] asked the Council if they'd had ex-parte contact or if there were any other potential conflicts. * * * *He asked if they were familiar with the Council packet materials*." Record 8 (emphasis added).

The record submitted by the city, however, does not appear to include an item titled "council packet," nor does it appear to contain any materials that might have been included in such a packet.[10] The city shall submit a supplemental record that includes the materials that were included in the council packet referred to in the minutes quoted above. The city shall also include in that supplemental record any other materials regarding the applications at issue that were before the city council.

Petitioner's first record objection is sustained.

> final decision maker, during the course of the proceedings before the final decision maker.
>
> "(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. A verbatim transcript of audiotape or videotape recordings shall not be required, but if a transcript has been prepared by the governing body, it shall be included. If a verbatim transcript is included in the record, the tape recordings from which that transcript was prepared need not be included in the record, unless the accuracy of the transcript is challenged."

[9] Intervenor merely reiterates the argument it provides in its motion to dismiss regarding why the challenged decision is not a land use decision. That response does not directly relate to petitioner's record objection, and we do not address it further.

[10] Presumably, that packet would have included, at the very least, the decision of the hearings officer.

B. Second Record Objection

Petitioner argues that written materials and graphics that she presented to the city council for the January 10, 2006 and January 24, 2006 hearings are not included in the record. The city responds that "The materials (photo, etc.) that Petitioner offered to the Council are outside the scope of the evidence that the Council allowed." Respondent's Response to Petitioner's Objections to the Record 1. The sole inquiry here, however, is whether the materials were placed before and not rejected by the city council. *See* n 8.

If the city intends to argue that the city council in fact rejected the materials submitted by petitioner, there is no indication of that in the minutes of the hearings. The minutes reflect that the city attorney announced at the outset of the January 24, 2006 hearing that testimony would be limited to only one issue, *i.e.*, whether there was legal access across the railroad track providing secondary access. However, notwithstanding that announcement, petitioner and other opponents apparently submitted other written materials and graphics. There is no indication that the city council rejected that or any other evidence, written or oral, presented at the January 24, 2006 hearing. Accordingly, such evidence is properly part of the record in this appeal.

Petitioner's second record objection is sustained.

C. Third Record Objection

Petitioner alleges that the minutes of both the January 10, 2006 and the January 24, 2006 city council meetings are inaccurate in various particulars. OAR 661-010-0026(3).[11]

[11] OAR 661-010-0026(3) provides:

> "An objection on grounds that the minutes or transcripts are incomplete or inaccurate shall demonstrate with particularity how the minutes or transcripts are defective and shall explain with particularity why the defect is material. Upon such demonstration regarding contested minutes, the Board shall require the governing body to produce a transcript of the relevant portion of the proceeding, if an audiotape recording or other type of recording is available. Upon such demonstration regarding contested transcripts, the Board shall require the governing body to produce a more complete or amended transcript."

Intervenor and the city merely respond that the minutes are "complete and correct" and are "sufficient, especially considering that tapes of the hearing are part of the record." We note, initially, that tape recordings of the proceedings are required to be included in the record pursuant to OAR 661-010-0025(1)(c), and we do not see that compliance with our rules by including tape recordings of the proceedings in any way influences our determination whether the minutes are incomplete or inaccurate for purposes of OAR 661-010-0026(3).

Petitioner lists 13 items, A through M, under her third record objection. Not all of those items actually challenge the accuracy or completeness of the minutes included in the record. We will separate our discussion of these 13 items into those items that actually challenge the minutes and those that do not.[12]

1. Challenges to Accuracy or Completeness of Minutes

In those items in which petitioner does make a challenge under OAR 661-010-0026(3), she refers to the "transcripts" included in the record. The rule requires only that "minutes" of the proceedings be included in the record. *See* n 8. The minutes that the city included in the record it submitted in this appeal are not *verbatim* transcripts of testimony presented during the local proceedings. A summary of testimony in minutes of a proceeding necessarily omit details of that testimony. *Boyer v. Baker County*, 34 Or LUBA 758, 760 (1998). If petitioner objects to a summary of testimony in the minutes provided, she must explain how the summary mischaracterizes that testimony. *Id*.

a. Items A, B and E

Petitioner alleges that the minutes do not accurately reflect the details of certain discussions at both the January 10, 2006 city council meeting and the January 24, 2006 city council hearing. She argues that the minutes of the January 10, 2006 meeting do not include

[12] Intervenor and the city provide only the brief responses set forth above. Accordingly, they do not provide specific responses to any of the 13 items petitioner identifies, and we are left to resolve them without assistance from respondents.

the substance of discussions regarding the easement at issue, what action would be taken if the council concluded an easement does not exist, and the scope and content of any possible hearing (Item A). She also alleges that the minutes do not reflect her oral testimony regarding the issue of flooding and required alternative access (Item B). Finally, she argues that the minutes of the January 24, 2006 hearing do not reflect assertions made by intervenor's attorney that "the area crossing the railroad property beneath the trestle has been 'continuously used.'" (Item E).

We understand petitioner to contend that the minutes are incomplete and that the omission of the testimony cited is material. However, as explained above, minutes of proceedings are merely summaries of those proceedings, and they are not intended to provide a verbatim or word for word account of the testimony presented. Furthermore, we have declined to require the local government to prepare a transcript, pursuant to OAR 661-010-0026(2), where a petitioner does not explain why an alleged defect in the minutes is material, *i.e.*, why the alleged deficiencies prevent adequate review by LUBA or how the alleged deficiencies would affect LUBA's resolution of the appeal. *Eckis v. Linn County*, 20 Or LUBA 589, 597 (1991). Here, petitioner does not explain how the omission of certain details in the minutes is a "mischaracterization" of that testimony, rather than an appropriate summary of the testimony. Petitioner also does not explain why the alleged deficiencies are material.[13] Petitioners may, however, prepare a transcript of the local proceedings and attach relevant portions to their petition for review. *Bates v. Josephine County*, 27 Or LUBA 673 (1994).

Accordingly, these objections are denied.

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[13] Petitioner alleges that the omissions are "material to the City of Tigard action regarding a required easement beneath the railroad trestle." However, that allegation fails to explain, pursuant to the standard set forth in *Eckis*, why the alleged deficiencies prevent adequate review by LUBA or how the alleged deficiencies would affect LUBA's resolution of the appeal.

b. Item D

Petitioner alleges that "[t]he DVD provided as Record does not contain any statement by [the City of Tigard planning staff], as represented in the minutes." Objection to Record 2. The minutes of the January 24, 2006 hearing provide, in relevant part: "Dick Bewersdorff (City of Tigard Planning) stated that the secondary access is not a requirement of the project." Record 9. We understand petitioner to allege that the minutes are inaccurate because the tape recording of the proceeding indicates that the planner made no such comment. She argues that the deficiency is material because "it attempts to influence City Council members in their consideration of the required easement beneath the railroad trestle." Objection to Record 2.

We do not understand petitioner's argument. If the statement was, in fact, not made, as petitioner seems to allege, we do not see how it could have influenced the city council's consideration of the matter. We therefore fail to see how the error, even assuming petitioner is correct that the statement was not made, satisfies the materiality standard explained in our discussion above.

This record objection is denied.

c. Item F

Petitioner points out that a reference in the minutes for the January 24, 2006 hearing to a letter from intervenor's attorney dated January 26, 2006 should be corrected to identify that letter as dated January 24, 2006. Petitioner does not explain how this error is material, and we do not see that it is.

This objection is denied

d. Item K

Petitioner argues that the minutes of the January 24, 2006 hearing do not reflect opponent Frewing's rebuttal to oral testimony by intervenor's representative that an easement was reserved in 1907 "for an area of railroad property passing beneath the trestle."

She alleges that the omission is material because intervenor's representative's assertion might be considered true if the rebuttal offered by opponent Frewing is not reflected in the minutes. However, at least a summary of opponent Frewing's rebuttal is reflected in the minutes:

> "Mr. Frewing stated that the applicant has not produced anything saying that the railroad gave anyone the easement." Record 12.

Petitioner does not argue or explain why that summary is inadequate.

This objection is denied.

e. Item L

Petitioner argues that the minutes of the January 24, 2006 hearing mischaracterize testimony provided by opponent Frewing regarding "an easement across railroad property beneath the trestle." Objection to Record 3. She alleges that the minutes provide that opponent Frewing referred to a "bridge" when in fact he referred in his testimony to a "trestle." She also alleges that the minutes provide that opponent Frewing proposed the development application should be "thrown out" when in fact he requested that the application should be "denied." She argues that the alleged deficiencies are material "because an accurate understanding of the fact situation is necessary to find for petitioner and the proposed remedy for action must be accurately stated." *Id*. We do not see that these minor word substitutions are material.

This objection is denied.

2. Other Record Objections

a. Item C

Petitioner alleges that the record fails to include the city council packet, which she describes as "material provided by staff to Council members prior to the [January 24, 2006] hearing." We determined earlier in this order that the city is required to include this packet in a supplemental record. Accordingly, this objection is sustained.

b. Items G, H, I and J

Petitioner objects to the record because it does not include a tax lot map (Item G), three maps referring to easements between Cascade Boulevard and the railroad property (Item H), a 1974 aerial photograph (Item J), and Page 615 of a 1965 bargain and sale deed and the deed itself (Item I). According to petitioner, intervenor's representative displayed and/or referred to all of these materials during his presentation at the January 24, 2006 hearing. It is unclear from a review of the minutes which of these items were actually displayed and which were merely referred to by intervenor's representative.[14] In any event, it is clear that at least some of the items that petitioner identifies were (1) placed before and not rejected by the city council at the January 24, 2006 hearing and (2) do not appear in the record submitted by the city. Accordingly, the city shall include in a supplemental record those maps, photographs and copies of deeds that were placed before the city council during the January 24, 2006 hearing.[15]

Petitioner also argues in Item G that the record includes illegible photocopies of photographs that were presented at the hearing. We assume petitioner is referring to Record pages 49-54. Petitioner notes that the city does not list the original photographs as items retained by the city until oral argument, pursuant to OAR 661-010-0025(2).[16] We have

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[14] The minutes provide the following summary of intervenor's representative's testimony:

> "[Intervenor's representative] displayed maps and photos of the property in question. He showed a tax lot map showing a dotted line and the word 'easement'. He had a photograph from 1936 showing a raised grade. A July, 1953 photograph showed a raised grade but no trestle yet. In 1968, the aerial photograph showed Cascade Boulevard and the trestle in place. In a 1977 aerial photo there is access to Cascade Boulevard as well as in a 1983 photograph. He brought in an enlarged copy of page 615 of the Bargain & Sale Deed." Record 10.

[15] It is unclear to us what 1974 aerial photo petitioner refers to in Item J. The minutes refer to a 1977 aerial photograph, but not to a 1974 aerial photograph. However, Record 48 is a copy of an oversized aerial photograph titled "Aerial Survey Map" and dated 1974. If another 1974 aerial photograph was presented at the January 24, 2006 hearing, but is not referenced in the minutes, it shall be included in the supplemental record. If Record 48 was the only 1974 aerial photograph placed before the city council, the city shall indicate that.

[16] OAR 661-010-0025(2) provides, in relevant part:

reviewed the photographs and agree with petitioner that the reproductions are of very poor quality, making it exceedingly difficult to ascertain what the photographs are intended to depict. The city shall include in the table of contents to its supplemental record a reference indicating that the original photographs are retained by the city and will be made available at the time of oral argument.

These record objections are sustained.

c. Item M

Petitioner argues that the record fails to include copies of two e-mail messages that opponent Frewing provided to the city council during the January 24, 2006 hearing. Respondents do not respond to this objection, and it is sustained.

D. Conclusion

The city shall submit a supplemental record in accordance with this order within 14 days from the date of this order.

Dated this 26th day of May, 2006.

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Anne C. Davies
Board Member

"The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board 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."