

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

3  
4                                   SHANNON SMITH,  
5                                   *Petitioner,*

6  
7                                   vs.

8  
9                                   CITY OF GEARHART,  
10                                  *Respondent.*

11  
12                                  LUBA No. 2014-058

13                                  ORDER

14                    Petitioner appeals a city council decision made after petitioner appealed  
15 a city manager decision regarding her application for verification of substantial  
16 construction of a conditional use, to operate a community events center. The  
17 city transmitted the record, and petitioner filed objections to the record. The  
18 city filed a response. We now resolve the objections.

19                    **BACKGROUND**

20                    The decision that is challenged in the appeal is a city council decision  
21 that is embodied in the minutes of a June 4, 2014 city council meeting.<sup>1</sup> We  
22 summarize the background of the proceedings that led to the city council's  
23 decision at its June 4, 2014 meeting to the extent we glean that background  
24 from statements in the parties' pleadings. In 2012 petitioner received a  
25 conditional use permit to operate a community events center. Record 15.  
26 Gearhart Municipal Zoning Ordinance (GMZO) 7.090 provides that  
27 authorization of a conditional use permit is void after one year unless

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<sup>1</sup> The record does not contain a written decision that is separate from the meeting minutes, and apparently there is none.

1 “substantial construction \* \* \* has taken place.” GMZO 7.090 allows for a six-  
2 month extension of the conditional use permit at the city’s discretion, if a  
3 request is submitted at least 10 days prior to the expiration of the conditional  
4 use permit.

5 Sometime in 2014, petitioner apparently sought verification from the city  
6 manager that the “substantial construction \* \* \* [had] taken place” within the  
7 meaning of GMZO 7.090. The city manager apparently made a determination  
8 on that request in a written decision dated April 24, 2014. We say apparently  
9 because that April 24, 2014 city manager decision is not included in the record  
10 transmitted by the city.

11 GMZO 11.050(1) provides that a city administrative officer’s decision  
12 may be appealed to the planning commission by filing an appeal with the city  
13 auditor within 15 days of the date that notice of decision was mailed by the  
14 city. On April 25, 2014, petitioner filed an appeal of the city manager’s  
15 decision. For reasons that are not clear from the record or the parties’  
16 pleadings, the city council agreed to hear petitioner’s appeal of the city  
17 manager’s decision. Apparently at its June 4, 2014 meeting, the city council  
18 took action on petitioner’s appeal. Petitioner appealed that action to LUBA,  
19 and the city transmitted the record.

20 **RECORD OBJECTIONS**

21 **A. OAR 661-010-0026(1)**

22 OAR 661-010-0026(1) provides:

23 “Before filing an objection to the record, a party shall attempt to  
24 resolve the matter with the governing body’s legal counsel. The  
25 objecting party shall include a statement of compliance with this  
26 section at the same time the objection is filed. The Board may

1 deny any objection to the record that does not comply with this  
2 rule.”

3 The city initially responds to petitioner’s objections by arguing that petitioner’s  
4 attorney’s single phone call to the city’s attorney on July 22, 2014, prior to the  
5 deadline for filing objections to the record, fails to satisfy the requirement of  
6 the rule. We disagree with the city. Petitioner’s attorney’s phone call to the  
7 city’s attorney prior to filing the objections to the record is sufficient to comply  
8 with OAR 661-010-0026(1).

9 **B. Objections 1-5 and 7-12**

10 OAR 661-010-0025(1)(b) provides in relevant part that the record  
11 includes “[a]ll written testimony and all exhibits, maps, documents or other  
12 written materials specifically incorporated into the record or placed before, and  
13 not rejected by, the final decision maker, during the course of the proceedings  
14 before the final decision maker.” In petitioner’s Objections 1, 2, 3, 4, 5, 7, 8, 9,  
15 10, 11 and 12, petitioner objects that the record fails to include all materials  
16 required to included as part of the record. We set out and resolve the  
17 objections below.

18 **1. Objection 1**

19 Petitioner objects that the city manager’s April 24, 2014 written decision  
20 should be included in the record. The city responds that the April 24, 2014  
21 decision by city manager was not “placed before” the city council under OAR  
22 661-010-0025(1)(b).

23 There are two ways a document can be included in the local evidentiary  
24 record. One way is that the document is “placed before, and not rejected by,  
25 the final decision maker, during the course of the proceedings before the final  
26 decision maker.” OAR 661-010-0025(1)(b). The second way is that the

1 documents were otherwise incorporated into the record by operation of law.  
2 *Union Gospel Ministries v. City of Portland*, 21 Or LUBA 557, 559-60 (1991).

3 GMZO 11.050(5)(A) provides that unless the city council provides  
4 otherwise, review of a decision on appeal is an on the record review, and  
5 provides that the record includes:

6 “(1) All exhibits, materials, pleadings, memoranda, and motions  
7 submitted by any party and received or considered in  
8 reaching the decision under review.

9 “(2) The final order and finding of fact adopted in support of the  
10 decision being appealed.

11 “(3) The request for an appeal filed by the appellant.”

12 Thus under GMZO 11.050(5)(A)(2), the decision being appealed and any  
13 findings of fact adopted in support of the decision are included in the record  
14 before the city council, and the city does not argue that “the city council [has  
15 provided] otherwise.”

16 Objection 1 is sustained. The city shall include the city manager’s April  
17 24, 2014 decision and any findings of fact adopted in support of the decision in  
18 a supplemental record.

19 **2. Objection 2**

20 On April 25, 2014, petitioner filed her appeal of the April 24, 2014 city  
21 manager decision and submitted a packet of documents along with the appeal.  
22 Petitioner’s appeal and the packet of documents she submitted with the appeal  
23 are also not included in the record transmitted by the city.

24 Under GMZO 11.050(5)(A)(3) “[t]he request for an appeal filed by the  
25 appellant” is included in the record before the city council. Petitioner’s April  
26 25, 2014 filing is a “request for an appeal” under GMZO 11.050(5)(A)(3).

1           Objection 2 is sustained. The city shall include the “request for an  
2 appeal [ ]” and any documents submitted with the request for an appeal in the  
3 supplemental record.

4                           **3.    Objection 3**

5           On April 30, 2014, the city manager responded in writing to petitioner’s  
6 appeal. That response is also not included in the record, but the city agrees to  
7 include the city manager’s April 30, 2014 response to petitioner. That resolves  
8 petitioner’s Objection 3.

9           The city shall include the city manager’s April 30, 2014 response to  
10 petitioner in the supplemental record.

11                           **4.    Objection 4**

12           On May 1, 2014, petitioner sent an email request to the city manager and  
13 all members of the city council that the city council review “the matter.”  
14 Petitioner’s Record Objections 3. That email is not included in the record. We  
15 conclude that e-mail is part of “[t]he request for an appeal filed by the  
16 appellant” under GMZO 11.050(5)(A)(3), and therefore petitioner’s May 1,  
17 2014 email request to the city manager and all members of the city council is  
18 properly considered part of the “request for an appeal filed by the appellant.”

19           Objection 4 is sustained. The city shall include petitioner’s May 1, 2014  
20 email request to the city manager and all members of the city council in the  
21 supplemental record.

22                           **5.    Objection 5**

23           On May 2, 2014, the city manager sent an email to petitioner that  
24 confirmed that her appeal would be on the agenda for the city council’s May 7,

1 2014 meeting.<sup>2</sup> That email included information regarding the procedures for  
2 providing information to the city council. That May 2, 2014 email is not  
3 included in the record.

4 Petitioner argues that under GMZO 11.050(5)(A)(3) the May 2, 2014  
5 email should be included in the record. We disagree. As described by  
6 petitioner, the May 2, 2014 email cannot reasonably be considered to be a  
7 “request for an appeal filed by the appellant,” and we do not understand  
8 petitioner to contend that the e-mail was placed before the city council.

9 Objection 5 is denied.

#### 10 **6. Objection 7**

11 On May 16, 2014, petitioner sent an email to the city manager and all  
12 members of the city council that is not included in the record, and the city  
13 agrees to include that May 16, 2014 email in a supplemental record. That  
14 resolves petitioner’s Objection 7.

15 The city shall include petitioner’s May 16, 2014 email to the city  
16 manager and the members of the city council in the supplemental record.

#### 17 **7. Objections 8, 9, 10 and 11**

18 Between May 19, 2014 and May 21, 2014, petitioner and the city  
19 manager engaged in email communications about her conditional use permit.  
20 Those emails are not included in the record. Petitioner does not argue that the  
21 emails were “placed before, and not rejected by” the city council. Absent any  
22 argument that the emails were placed before the city council or that they were

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<sup>2</sup> The record does not include any information indicating that petitioner’s appeal of the city manager’s decision was heard by the city planning commission, pursuant to GMZO 11.050(1).

1 required to be placed before the city council by operation of law, we agree with  
2 the city that the May 19 through May 21, 2014 emails between the city  
3 manager and petitioner are not a part of the record.

4       Objections 8, 9, 10, and 11 are denied.

5                   **8.     Objection 12**

6       On May 28, 2014, petitioner emailed the city manager and all members  
7 of the city council regarding her appeal. That email is not included in the  
8 record. Petitioner’s email to all members of the city council was sufficient to  
9 place it before the final decision maker, and we agree with petitioner that her  
10 May 28, 2014 email should be included in the record.

11       Objection 12 is sustained. The city shall include petitioner’s May 28,  
12 2014 email to the city manager and all members of the city council in the  
13 supplemental record.

14                   **C.     Objections 6 and 13**

15       OAR 661-010-0026(2)(c) provides that one basis for objecting to the  
16 record is that “[t]he minutes or transcripts of meetings or hearings are  
17 incomplete or do not accurately reflect the proceedings.” OAR 661-010-  
18 0026(3) further provides that

19                   “[a]n objection on grounds that the minutes or transcripts are  
20 incomplete or inaccurate shall demonstrate with particularity how  
21 the minutes or transcripts are defective and shall explain with  
22 particularity why the defect is material. Upon such demonstration  
23 regarding contested minutes, the Board shall require the governing  
24 body to produce a transcript of the relevant portion of the  
25 proceeding, if an audiotape recording or other type of recording is  
26 available.”

27                   **1.     Objection 6(a)**

28       The record includes the minutes of the May 7, 2014 city council meeting.

1 The minutes of the meeting include the following summary of petitioner’s  
2 matter:

3 “Visitor Shannon Smith asked Council to look at whether her  
4 conditional use permit should expire and if there has been  
5 substantial work done on the barn. Council agreed to put it on as  
6 an agenda it[em] for the June council meeting.” Record 13.

7 In Objection 6(a), petitioner objects that the minutes of the May 7, 2014 city  
8 council meeting are “not adequate to provide sufficient detail about petitioner’s  
9 arguments, or staff’s and the city council’s exact discussion on the various  
10 procedural and substantive issues raised in this proceeding.” Petitioner’s  
11 Record Objections 3-4. The city responds that petitioner’s objection does not  
12 “demonstrate with particularity how the minutes \* \* \* are defective \* \* \* and \*  
13 \* \* why the defect is material” and therefore does not satisfy OAR 661-010-  
14 0026(3). We agree with the city.

15 Objection 6(a) does not “demonstrate with particularity how the minutes  
16 \* \* \* are defective \* \* \* and \* \* \* why the defect is material,” and for that  
17 reason is denied. However, petitioner may, under OAR 661-010-0030(5),  
18 attach as appendices to her petition for review “verbatim transcripts of relevant  
19 portions of media recordings that are part of the record.”

20 **2. Objections 6(b) and (c)**

21 At the May 7, 2014 city council meeting, petitioner submitted a  
22 memorandum regarding her conditional use permit. That memorandum is not  
23 included in the record, but the city agrees to include the memorandum in a  
24 supplemental record. That resolves petitioner’s Objection 6(b).

25 Petitioner also objects that the record fails to include the agenda, notices,  
26 and speaker sign up for the May 7, 2014 city council meeting. The city  
27 responds that there was no “[n]otice[] of proposed action, public hearing and

1 adoption of a final decision, if any, published, posted or mailed during the  
2 course of the land use proceeding[.]” within the meaning of OAR 661-010-  
3 0025(1)(d). The city agrees to include the agenda in a supplemental record,  
4 and that resolves a portion of Objection 6(c). The remainder of Objection 6(c)  
5 is denied.

6 The city shall include the memorandum that petitioner submitted at the  
7 May 7, 2014 city council meeting and the agenda for the May 7, 2014 city  
8 council meeting in a supplemental record.

9 **3. Objection 13**

10 As explained above, there is no final written decision adopted by the city  
11 council, beyond the minutes. The minutes of the June 4, 2014 city council  
12 meeting contain approximately 4 pages summarizing the portion of the meeting  
13 at which petitioner’s conditional use permit was discussed. Petitioner objects  
14 that the minutes are inaccurate and that the inaccuracies in the minutes  
15 “prejudice petitioner’s ability to provide to the Board a full and detailed picture  
16 of what transpired at the June 4 \* \* hearing.” Petitioner’s Record Objections  
17 5. Petitioner requests that the city be ordered to prepare a complete transcript  
18 of the meeting.

19 The city responds that petitioner has failed to satisfy the requirement in  
20 OAR 661-010-0026(3) that she demonstrate “with particularity” how the  
21 minutes are defective and why the defect is material and therefore the objection  
22 should be denied. Given that the minutes provide more detail than most  
23 minutes provide, and given the lack of specificity in petitioner’s objection  
24 explaining “with particularity” how the minutes are defective, we agree with  
25 the city. Objection 13 is denied. However, petitioner may, under OAR 661-  
26 010-0030(5), attach as appendices to her petition for review “verbatim

1 transcripts of relevant portions of media recordings that are part of the record.”

2 **CONCLUSION**

3       Within 14 days of the date of this order, the city shall transmit a  
4 supplemental record that includes the items specified in this order. Thereafter,  
5 the Board will issue an order settling the record and establishing a briefing  
6 schedule.

7       Dated this 30<sup>th</sup> day of September, 2014.

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Melissa M. Ryan  
Board Chair