

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.¹ 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

¹ 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.² 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

² 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 30th day of September, 2014.

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Melissa M. Ryan
Board Chair