

1 the application, and accordingly did not forward them to the planning
2 commission for review. Because the building plans were never “placed before”
3 either the planning commission or the city council, the final decision maker, the
4 city contends that the plans do not belong in the evidentiary record. The city’s
5 contention is supported by the affidavit of the planner who made the initial
6 decision not to forward the building plans to the planning commission and city
7 council.¹

8 Petitioners move to strike the affidavit, arguing that it constitutes
9 evidence outside the record that LUBA can consider to resolve the record
10 objection only pursuant to a motion to take evidence under OAR 661-010-
11 0045(1).² Petitioners note that the city has not filed a motion under OAR 661-

¹ The affidavit states, in relevant part:

“* * * It is common for an applicant to submit a land use application along with the materials necessary to obtain a building permit including detailed construction plans. When I received both materials, I assumed that the building plan and bid documents were intended for inclusion in the building permit review and not as part of the development application. For this reason, I did not include them in the packet for consideration by the Planning Commission or the City Council.” Second Affidavit of William Searles, 2, attached to the Response to Second Record Objection.

² OAR 661-010-0045(1) provides:

“Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at

1 010-0045(1). If such a motion is filed and allowed, petitioners assert that they
2 have the right to (1) place the building plan materials in the evidentiary record
3 and (2) cross-examine the planner regarding the veracity of his statements in
4 the affidavit.

5 OAR 661-010-0045(1) provides that LUBA may “upon motion or at its
6 discretion take evidence to resolve disputes regarding the content of the record
7 * * *.” Even without a motion from the city, LUBA could consider the
8 affidavit for the limited purpose of resolving the parties’ dispute about the
9 content of the record, specifically whether or not the building plans submitted
10 as part of the site plan review application were “placed before” the final
11 decision maker and thus were included in the record. However, it is not
12 necessary for LUBA to consider the affidavit for that purpose, because as we
13 understand it we do not have before us a factual dispute about the content of
14 the record.

15 As relevant here, there are two ways a document such as the disputed
16 building plans can be included in the local evidentiary record: either (1) the
17 documents were “placed before, and not rejected by, the final decision maker,
18 during the course of the proceedings before the final decision maker,” or (2)
19 the documents were otherwise incorporated into the record by operation of law.
20 OAR 661-010-0025(1)(b); *ONRC v. City of Oregon City*, 28 OR LUBA 775,
21 778 (1994). In its record objection, petitioners argue that the building plans
22 were submitted as part of the site plan review application, and therefore are
23 automatically deemed to be part of the record before the final decision maker.

its discretion take evidence to resolve disputes regarding the
content of the record, requests for stays, attorney fees, or actual
damages under ORS 197.845.”

1 Second Objection to the Record 9-10. In essence, that argument is that the
2 building plans were incorporated into the evidentiary record by some operation
3 of law. That of course is a legal argument, and we resolve that legal argument
4 below in considering petitioners' record objections. We do not understand
5 petitioners to contend that at any point during the proceedings below the
6 building plans were in fact ever physically "placed before" either the planning
7 commission or city council, within the meaning of OAR 661-010-0025(1)(b).
8 The city's contention that the planner did not forward the building plans to the
9 planning commission or city council goes to the factual question of whether
10 those plans were "placed before" either body. Because that point is not in
11 dispute, there is no need to consider under OAR 661-010-0045 the factual
12 statements in the affidavit regarding the building plans.³ Petitioners' motion to

³ If we misunderstand petitioners' position, and they *do* contend as a matter of fact that the building plans were "placed before" the planning commission and city council, then we would likely exercise our authority under OAR 661-010-0045(1) to consider the affidavit for the limited purpose of resolving that factual dispute. If petitioners requested it, we would likely allow them to submit affidavits or other documents to substantiate any contention that the plans were in fact placed before the final decision makers. Contrary to petitioners' suggestion, any documents so submitted to LUBA would not be part of the local evidentiary record, but would be used only for the limited purpose of resolving the factual dispute regarding the content of the evidentiary record. Moreover, petitioners do not have the "right" to cross-examination under OAR 661-010-0045, and it is highly unlikely that we would grant any request to conduct depositions on this matter. We note that in a sur-reply memorandum petitioners lists the questions they would ask the planner in a deposition. However, all of the questions appear to go to whether the planner erred in failing to forward the building plans to the planning commission; none of the questions go to whether he in fact forwarded the building plans to the planning

1 strike those portions of the affidavit is allowed. In resolving the record
2 objections, the Board will not consider the factual statements in the affidavit
3 regarding the building plans.

4 **RECORD OBJECTIONS**

5 The parties have resolved several objections. We address below the
6 unresolved objections.

7 **A. First Objection**

8 Petitioners object to the newspaper clipping at Record 24 as improperly
9 included in the record. OAR 661-010-0025(1) provides that the record includes
10 all documents placed before and not rejected by the final decision maker during
11 the course of the proceedings before the final decision maker.⁴ Petitioners

commission. For purposes of settling the content of the record, is it irrelevant *why* he did not forward the building plans to the final decision maker, or whether failure to do so was error. The only salient question is whether he did or did not place the building plans before the final decision maker. As far as we can tell, it is undisputed that he did not.

⁴ OAR 661-010-0025(1) provides, in relevant part:

“(1) Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

“* * * * *

“(b) All written testimony and all exhibits, maps, documents or other materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.”

1 contend that no basis exists in the record to infer that Record 24 was placed
2 before the city council at its June 17, 2014 meeting.

3 The city responds that at the June 17, 2014 meeting a city councilor
4 submitted the newspaper clipping at Record 24 into the record as part of her
5 disclosure of ex parte communications, that is, her reading of the clipping.
6 That disclosure is reflected in the minutes. Petitioners reply that the minutes do
7 not state expressly that the councilor submitted the newsletter clipping into the
8 record or placed it before the city council or provided a copy to the public.
9 Petitioners also note that minutes refer to a single newspaper “article” but the
10 clipping at Record 24 includes two letters to the editor, suggesting that the
11 clipping may not be the “article” the councilor referred to.

12 Petitioners carry the ultimate burden of demonstrating that the record
13 does not comply with the requirements of OAR 661-010-0025. *See Weeks v.*
14 *City of Tillamook*, 23 Or LUBA 662, 662-63 (1992) (the petitioner bears the
15 burden of demonstrating that documents omitted from the record were placed
16 before the final decision maker). The minutes of the city council meeting
17 provide some support for the city’s position that the councilor submitted the
18 newsletter clipping into the record as part of her disclosure of an ex parte
19 communication, *i.e.*, her reading of the newspaper clipping. Petitioners’
20 speculation that the councilor submitted a different newspaper article instead of
21 the clipping is just that, speculation.⁵ The first objection is denied.

22 Petitioners’ first objection is denied.

⁵ Petitioners appear to suggest that the city may have erred in accepting the newspaper clipping into the record. That may or may not be, but that argument would go to an assignment of error, not to the content of the record.

1 **B. Second Objection**

2 Petitioners contend that the minutes of the May 29, 2014 city council
3 meeting are incomplete or inaccurate because they fail to adequately
4 summarize certain oral statements made before and by the city councilors.
5 Petitioners request that the city provide a full transcript of the meeting,
6 pursuant to OAR 661-010-0026(3).⁶

7 **1. Oral Argument by Petitioners’ Attorney**

8 Minutes of a proceeding are necessarily summary, and are not expected
9 to include specific arguments or details of oral statements. The general gist of
10 oral statements is usually the best that can be expected. Where the minutes do
11 not adequately capture the gist of oral statements, a transcript or partial
12 transcript may be warranted if the petitioners demonstrate with particularity
13 that the omissions or inadequacies in the minutes are material to the appeal. On
14 that point, petitioners first contend that the minutes’ failure to reflect specific
15 arguments from their attorney’s oral presentation is material to the appeal,
16 because that failure will make it more difficult for petitioners to respond to any
17 arguments in the response brief that issues raised in assignments of error were

⁶ 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.”

1 not raised during the proceedings below, in other words, challenges under the
2 “raise it or waive it” requirement of ORS 197.763(1).⁷

3 The minutes summarize the oral argument of petitioners’ attorney in one
4 paragraph, and provide only limited detail. Record 21. Petitioners list a
5 number of specific arguments made to the city council in their attorney’s oral
6 argument. We tend to agree with petitioners that the one-paragraph summary
7 of their attorney’s oral argument does not adequately capture the gist of her
8 statements, and that the minutes are incomplete in that regard. However,
9 petitioners have not demonstrated that any incompleteness in the minutes on
10 this point is material to this appeal.

11 The proceedings before the city council were on the record, and the
12 parties were limited to legal argument. Petitioners’ assertion that the
13 incompleteness in the minutes is “material” rests on speculation that the
14 petition for review will include assignments of errors raising certain issues
15 discussed in the oral arguments of their attorney, and that the city, in its
16 response brief, will argue that issues raised in those assignments of error were
17 not raised during the proceedings below as required by ORS 197.763(1). If so,
18 petitioners argue that, without a transcript, they will be forced to cite to the

⁷ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 media recording of the city council hearing in order to respond to the waiver
2 challenge, which would be inconvenient for petitioners.

3 Petitioners’ speculation that their petition for review will include
4 assignments of error raising issues that, petitioners further speculate, the city
5 will argue were not raised below and thus were waived under ORS 197.763(1)
6 fail to demonstrate that any inadequacy in the minutes is “material.” The city
7 argues, and it appears to be the case, that the issues petitioners’ attorney raised
8 during her oral presentation are also substantively raised in her written
9 arguments and in the notice of appeal, at Record 27-41 and Record 70-73.⁸ In
10 any case, even if the oral presentation was the only place in the record where
11 key issues were raised, we question whether the speculative possibility that
12 there might be waiver challenges, and the inconvenience of having to respond
13 to those challenges by citing to media recordings rather than a transcript,
14 qualifies as a sufficient material disadvantage to warrant requiring the city to
15 generate a transcript of the hearing. Petitioners have not demonstrated that any
16 defects in the minutes with respect to petitioners’ oral arguments to the city
17 council are material.⁹

⁸ Indeed, under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), the issues before the city council and properly before LUBA may be framed and limited by the local notice of appeal, and thus it may be irrelevant what other issues were raised in oral testimony.

⁹ Petitioners may, of course, transcribe relevant portions of the audio recording included in the record, at petitioners’ own expense, and include such transcripts as appendices to their petition for review in support of arguments made therein. OAR 661-010-0030(5); *Champion v. City of Portland*, 28 Or LUBA 730, 735 n 5 (1994).

1 **2. City Council Deliberations**

2 The minutes of the May 29, 2014 city council hearing include three
3 paragraphs describing the city council’s initial vote to uphold the planning
4 commission decision, which failed on a 2-2 vote, the second vote to overturn
5 the planning commission meeting, which failed on a 2-2 vote, and a third
6 unanimous vote to continue the proceeding to June 17, 2014 for further
7 deliberations. However, the minutes do not summarize any deliberations that
8 may have occurred at the May 29, 2014 hearing.

9 Petitioners argue that the minutes are incomplete because they do not
10 summarize any of the deliberations, and that the omission is material because it
11 does not reflect comments councilors made regarding the status of the city’s
12 acknowledged comprehensive plan and zoning map, an issue that petitioners
13 state will be one of the key issues in this appeal. The city responds that any
14 omission in the minutes regarding comments by the councilors is not material,
15 because any such comments are legally irrelevant to any issue in this appeal.
16 The city argues that the city council’s decision is embodied in its written
17 decision, and it is that written decision that LUBA reviews, not the verbal
18 deliberations of the councilors. *Oregon Entertainment Corporation v. City of*
19 *Beaverton*, 38 Or LUBA 445 (2000); *Cook v. City of Eugene*, 15 Or LUBA
20 344, 355 (1987).

21 Petitioners reply that the councilors’ comments regarding the status of
22 the city’s comprehensive plan and land use regulations constitute “evidence”
23 regarding the legislative history of the adoption of the plan and regulations in
24 2013, evidence that petitioners allege the city councilors considered in
25 ultimately concluding in their final written decision that the process leading to

1 adoption of the plan and regulations was “mistaken,” which petitioners state is
2 a key finding that they intend to challenge. Combined Objection 10.

3 Because the minutes do not attempt to provide any summary at all of the
4 May 29, 2014 deliberations, we have no trouble agreeing with petitioners that
5 the minutes are incomplete in that regard. Petitioners have also presented a
6 plausible explanation for why that deficiency could be material to an issue in
7 this appeal, notwithstanding that LUBA’s review is of the city’s written
8 decision rather than the oral statements of the decision makers. The city offers
9 no challenge to that explanation. Accordingly, the city shall prepare and
10 submit as a supplemental record a partial transcript of the May 29, 2014
11 hearing, limited to the deliberations and further limited, if the city chooses, to
12 those comments regarding the status and history of the city’s comprehensive
13 plan and land use regulations.

14 **3. Other Alleged Deficiencies in the Minutes**

15 In response to two other objections regarding the adequacy of the May
16 29, 2014 minutes, the city submitted in a supplemental record two brief
17 transcripts of portions of the testimony and the final vote to continue the
18 proceeding to June 17, 2004. As far as we can tell, the partial transcripts
19 satisfy petitioners’ objections.

20 The second objection is sustained, in part.

21 **C. Third Objection**

22 The record table of contents describes the June 17, 2014 city council
23 proceeding as a “continued public hearing.” Petitioners object, arguing that the
24 June 17, 2014 city council proceeding was not a public hearing, but rather a
25 “meeting” limited to deliberations. Petitioners speculate that the city will take
26 advantage of that erroneous description in the table of contents in order to

1 argue that petitioners could have provided testimony or raised objections at the
2 June 17, 2014 “hearing.” Petitioners request that the table of contents be
3 amended to accurately characterize the June 17, 2014 proceeding as a
4 “meeting” rather than a hearing.

5 The city responds that whether the table of contents describes the June
6 17, 2014 proceeding as a hearing or a meeting has no legal significance. We
7 agree with the city. The character of the proceeding is determined by the city
8 council’s actions in continuing the May 29, 2014 proceeding, not by a
9 description in the record table of contents. This objection is denied.

10 **D. Fourth Objection**

11 As explained above, petitioners argue that the site plan review
12 application it submitted to the city included building plans that are omitted
13 from the record submitted to LUBA. Petitioners argue that because the building
14 plans were submitted as part of the site plan review application, they are
15 “necessarily submitted to the decision maker” as a matter of law. Second
16 Objection 9. However, petitioners identify no local regulation or other source
17 of law that necessarily renders all documents submitted as part of an
18 application part of the local evidentiary record on appeal to LUBA, or that
19 automatically incorporates such documents into the evidentiary record before
20 the final decision maker by operation of law. As explained above, the building
21 plans are part of the record in this appeal only if they were placed before the
22 final decision maker during the course of the proceedings before the final
23 decision maker. The final decision maker in this case is the city council. The
24 city council’s review was conducted on the record compiled before the
25 planning commission. However, as explained, there is no dispute that the
26 planner who accepted the application did not forward the building plan

1 materials into the planning commission’s record, and those materials were
2 never “placed before” the final decision maker. Failure to forward those
3 materials may or may not constitute procedural error, but for purposes of
4 settling the content of the record, petitioners have not established that the
5 building plans are properly part of the local evidentiary record.

6 The fourth objection is denied.

7 **E. Fifth Objection**

8 Petitioners object to the illegibility of certain documents within the
9 record. In response, the city provided somewhat more legible copies in the
10 supplemental record. However, petitioners state that even more legible copies
11 of the documents at Record 74, 99, 161, and 700 are in petitioners’ possession.
12 Petitioners offer to attach the more legible copies of these documents to their
13 petition for review. The city does not object, and that seems an acceptable
14 solution. This record objection is resolved.

15 **F. Sixth Objection**

16 Petitioners object that seven pages in the record are missing pagination
17 numbers, apparently caused when those documents were re-oriented from
18 portrait to landscape view. The city responds that the missing pagination does
19 not warrant remedial action, because the pages before and after each
20 unpaginated page are correctly paginated and the omitted numbers are unlikely
21 to create problems locating or referring to documents. We agree with the city.
22 The sixth objection is denied.

23 **G. Seventh Objection**

24 The applicant, the Port of Umatilla, submitted its final written argument
25 after the close of the evidentiary record before the planning commission. The
26 planning commission redacted from the final argument what it considered to be

1 “new evidence,” and the redacted version is located in the record. Petitioners
2 express confusion regarding whether the rejected or redacted pages are in the
3 record. In its response, the city clarifies that the record does not include the
4 rejected or redacted pages. In reply, petitioners request that the rejected or
5 redacted pages be included in the record, to aid LUBA’s review of an
6 anticipated assignment of error alleging that the city erred in rejecting or
7 redacting portions of the documents submitted.

8 This objection is denied. Items rejected from the record are, obviously,
9 not in the record.¹⁰ Petitioners may attach to their petition for review
10 unredacted versions of the documents they submitted, in aid of an assignment
11 of error that alleges that the city erred in redacting some portions as new
12 evidence. If no party objects, LUBA will consider the pages for the limited
13 purpose of resolving that procedural assignment of error. If a party objects,
14 then petitioners may file a motion to take evidence outside the record under
15 OAR 661-010-0045, for that same limited purpose.

16 **H. Conclusion**

17 The city shall submit a second supplemental record including a transcript
18 of the relevant portions of the May 29, 2014 deliberations. On receipt, LUBA
19 will issue an order settling the record and setting forth a briefing schedule.

20 Dated this __th day of September, 2014.

¹⁰ That said, it is acceptable for local governments to transmit rejected documents to LUBA, in order to simplify LUBA’s review of an anticipated assignment of error regarding the rejected documents. However, in that circumstance, the rejected documents should be bound or located separately from the local record or, if physically bound or located within the local record, clearly marked as rejected documents both on the documents themselves and on the table of contents.

1
2
3
4
5
6

Tod A. Bassham
Board Member