

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

3  
4                   JEFF HARRISON, CLEVE ROOPER, DALE HINTZ,  
5                   LINDA HINTZ, ELIZABETH LORISH, JANE EMRICK,  
6                   DIANE AMOS, REX AMOS, MINDY HARDWICK,  
7                   and ROBIN RISLEY,  
8                   *Petitioners,*

9  
10                   vs.

11  
12                   CITY OF CANNON BEACH,  
13                   *Respondent,*

14  
15                   and

16  
17                   JEFF NICHOLSON,  
18                   *Intervenor-Respondent.*

19  
20                   LUBA No. 2015-016

21                   ORDER

22                   **MOTION TO INTERVENE**

23                   Jeff Nicholson, the applicant below, moves to intervene on the side of  
24                   the city. The motion is allowed.

25                   **BACKGROUND**

26                   The challenged decision is a city council decision approving intervenor's  
27                   applications for (1) a zone change and comprehensive plan map amendment to  
28                   add a Planned Unit Development Overlay, (2) planned unit development (PUD)  
29                   approval, and (3) a variance, to authorize a four-lot planned development. In  
30                   December 2014 and January 2015, the planning commission held public  
31                   hearings on the applications. The planning commission recommended denial  
32                   of the applications to the city council. On February 10, 2015, the city council

1 held a public hearing on the applications and, at the conclusion of the hearing,  
2 voted to approve the applications. At its March 3, 2015 hearing on the  
3 applications, the city council adopted findings of fact to support its February  
4 10, 2015 decision.

5 **RECORD OBJECTIONS**

6 The city transmitted the Original Record, and petitioners filed an  
7 objection. In response, the city filed a First Supplemental Record. The First  
8 Supplemental Record added documents that were submitted by intervenor  
9 during the proceedings below and that were inadvertently omitted from the  
10 Original Record. The First Supplemental Record also amended the Original  
11 Record to remove Items 10, 11 and 12 at Original Record 31-46, because the  
12 city took the position that the items were submitted after the close of the  
13 record. Petitioners then objected to the removal of Items 10, 11 and 12 from  
14 the Original Record.

15 The city then filed a Second Supplemental Record to respond to one of  
16 petitioners' objections to the Original Record, and filed a response to  
17 petitioners' objections to the Original Record. Petitioners then filed an  
18 objection to the Second Supplemental Record and the city filed a response to  
19 that objection. We now resolve the objections.

20 **A. Objections to the Original Record**

21 **1. Objection A**

22 In Objection A to the Original Record, petitioners object that not all  
23 documents are arranged in inverse chronological order as required by OAR

1 661-010-0025(4)(a)(E).<sup>1</sup> However, petitioners only generally object that it is  
2 difficult to review the record for completeness when all documents are not in  
3 inverse chronological order, and do not point to any documents in the record  
4 that are not arranged in inverse chronological order. The documents appear  
5 generally to be in inverse chronological order, with a few minor deviations.  
6 Petitioners have not established that the deviations warrant requiring the city to  
7 reorder the documents in the Original Record.

8       Objection A is denied.

9                   **2.     Objection B**

10       In Objection B to the Original Record, petitioners object that a number  
11 of documents were improperly omitted from the record. OAR 661-010-  
12 0026(2)(a).

13                   **a.     Objections B-3, B-5 and B-6**

14       In Objections B-3, B-5 and B-6, petitioners object that (1) documents  
15 submitted by intervenor, (2) agendas for the planning commission and city  
16 council meetings, and (3) an email comment are missing from the record. As  
17 explained above, in response to petitioners' objection to the Original Record,  
18 the city submitted two supplemental records. The First Supplemental Record  
19 includes documents that were attachments to a January 15, 2015 letter  
20 submitted into the record by intervenor that the city explains were erroneously

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<sup>1</sup> OAR 661-010-0025(4)(a)(E) requires that the record shall:

“[b]e arranged in inverse chronological order, with the most recent item first. Exhibits attached to a record item shall be included according to the numerical or alphabetical order in which they are attached, not the date of the exhibits. Upon motion of the governing body, the Board may allow the record to be organized differently.”

1 excluded from the Original Record. The Second Supplemental Record includes  
2 two planning commission and two city council meeting agendas, and a  
3 complete version of the email at Original Record 36-37 that had been  
4 inadvertently cut short in the Original Record. The two supplemental records  
5 resolve petitioners' objections B-3, B-5, and B-6.

6 **b. Objection B-1**

7 Petitioners object that the record fails to include the planning  
8 commission's final written order recommending denial of the applications. The  
9 city responds that no such order exists and cannot be included in the record.  
10 Based on that response, this objection is denied.

11 **c. Objection B-2**

12 Petitioners object that the record fails to include intervenor's written  
13 appeal of the planning commission's recommendation of denial of the PUD and  
14 variance applications, and the intervenor's request for a consolidated  
15 procedure. The city responds that no such documents exist. Based on that  
16 response, this objection is denied.

17 **d. Objection B-4**

18 Petitioners object that publication notices for the December 22, 2014  
19 planning commission meeting and the February 10, 2015 city council meeting  
20 are improperly excluded from the record. The city responds that no publication  
21 notice was given for either of the meetings. Based on that response, this  
22 objection is denied.

23 **e. Objection B-7**

24 Petitioners object that the record improperly excludes a letter from  
25 petitioner Jeff Harrison that he submitted to the city council during the March

1 3, 2015 hearing on the applications. We understand the city to respond that  
2 because the record closed at the conclusion of the February 10, 2015 city  
3 council hearing, the letter was “rejected by” the city council during the March  
4 3, 2015 hearing.

5 The minutes of the March 3, 2015 city council meeting state that  
6 petitioner Harrison read aloud and submitted the letter, and further state that the  
7 letter “will be included as part of tonight’s record copy.” Record 28.  
8 Accordingly, we disagree with the city that the letter was rejected by the city  
9 council. It clearly was not. We agree with petitioners that the letter should be  
10 included in the record because it was “placed before, and not rejected by” the  
11 city council at the March 3, 2015 city council hearing. This objection is  
12 sustained.

13 **f. Objection B-8 and Objection to Second**  
14 **Supplemental Record<sup>2</sup>**

15 Petitioners object that the record fails to include “sign up sheets” for the  
16 two planning commission hearings and the two city council hearings. The city  
17 responds that no sign up sheets were created for the two planning commission  
18 hearings or the first city council hearing on February 10, 2015.<sup>3</sup> Based on that  
19 response, petitioners’ objection regarding the sign up sheets for the planning  
20 commission hearings and the February 10, 2015 city council hearing is denied.

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<sup>2</sup> In their objection to the Second Supplemental Record petitioners restate the substance of Objection B-8.

<sup>3</sup> The city attaches the “sign up sheets” for the March 3, 2015 city council meeting to its response to petitioners’ objection to the Second Supplemental Record. Exhibit 1 to Respondent’s Response to Petitioners’ Third Record Objection.

1 The city also responds that because the record was closed at the  
2 conclusion of the February 10, 2015 hearing, any sign up sheet that was created  
3 for the March 3, 2015 hearing was not “placed before \* \* \* the final decision  
4 maker, during the course of the proceedings before the final decision maker.”

5 The city’s response conflates the closure of the evidentiary record of the  
6 proceedings with the “course of the proceedings before the final decision  
7 maker.” The course of proceedings before the final decision maker includes  
8 any public hearing or public meeting on an application held by the final  
9 decision maker, even where the evidentiary record is closed and no public  
10 testimony or other evidence is allowed. Although the evidentiary record may  
11 be closed, that does not mean that any documents that are generated during the  
12 post-evidentiary phase of the local proceedings in order to adopt the final  
13 decision and provide required notices of that decision need not be included in  
14 the record. *See Von Lubken v. Hood River County*, 19 Or LUBA 548, 552  
15 (1990) (minutes of public meetings to deliberate regarding decision after  
16 evidentiary record closed are properly included in the record); OAR 661-010-  
17 0025(1)(b) (same); OAR 661-010-0025(1)(d) (notices of final decision).  
18 Accordingly, we disagree with the city that the sign up sheets in this matter that  
19 were created during the March 3, 2015 city council meeting need not be  
20 included in the record. This part of the objection is sustained.

21 **g. Objection B-9**

22 Petitioners object that the record omits a design review board decision  
23 and associated documents. The city responds that the city’s design review  
24 board was not involved in the decision and therefore no such decision or  
25 documents exist. Based on that response, this objection is denied.

1 **h. Objection B-10**

2 Petitioners object that the record omits the mailed and published notice  
3 for the planning commission’s January 22, 2015 meeting. The city responds  
4 that no mailed or published notice for the planning commission’s January 22,  
5 2015 meeting exists. Based on that response, this objection is denied.

6 Objections B-7 and a portion of Objection B-8 are sustained. All other  
7 Objections in section B are denied.

8 **3. Objection C**

9 OAR 661-010-0025(1)(c) provides that the record includes as relevant  
10 “[m]inutes \* \* \* of the meetings conducted by the final decision maker as  
11 required by law, or incorporated into the record by the final decision maker.”  
12 OAR 661-010-0026(2)(c) provides that one basis for objecting to the record is  
13 that “[t]he minutes or transcripts of meetings or hearings are incomplete or do  
14 not accurately reflect the proceedings.” OAR 661-010-0026(3) provides that  
15 “[a]n objection on grounds that the minutes or transcripts are incomplete or  
16 inaccurate shall demonstrate with particularity how the minutes or transcripts  
17 are defective and shall explain with particularity why the defect is material.”

18 Petitioners object that the minutes for the planning commission hearings  
19 on December 22, 2014, and January 22, 2015, and the city council hearings on  
20 February 10, 2015, and March 3, 2015, are “inadequate,” and argue that the  
21 city should be required to prepare transcripts for those meetings pursuant to  
22 OAR 661-010-0026(3).<sup>4</sup> Specifically, petitioners object that the minutes of the

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<sup>4</sup> OAR 661-010-0026(3) provides in relevant part that “[u]pon 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.”

1 February 10, 2015 city council hearing are “defective and omit critical detail”  
2 and “do not reflect the true tone of the mayor’s statement (Rec 56).” Objection  
3 to Original Record 4. Petitioners additionally object that the minutes for the  
4 March 3, 2015 city council hearing are “defective because they show virtually  
5 none of the opponents’ arguments or procedural objections.” *Id.*

6 The city responds first that the planning commission was not the final  
7 decision maker, and therefore OAR 661-010-0026(3) does not provide a basis  
8 to object to the accuracy of minutes of the planning commission hearings. We  
9 agree with the city.

10 The city also responds petitioners have failed to state with specificity  
11 why the minutes of the February 10, 2015 city council meeting are incomplete  
12 or inaccurate, and that the lack of description of any “tone” used by the mayor  
13 or any summary of project opponents’ arguments does not establish that the  
14 minutes of that meeting are inaccurate. We agree with the city.

15 Petitioners’ objection that the minutes of the March 3, 2015 meeting  
16 “show virtually none of the opponents’ arguments or procedural objections”  
17 presents a closer question. But petitioners do not identify what those  
18 arguments or procedural objections were, so that we can confirm the minutes  
19 fail to reflect them or assess the significance of the failure to reflect them.  
20 Minutes are merely summaries of the proceedings, and a summary of testimony  
21 necessarily omits details of that testimony. *Boyer v. Baker County*, 34 Or  
22 LUBA 758, 760 (1998). Objection C does not “demonstrate with particularity  
23 how the minutes \* \* \* are defective and \* \* \* why the defect is material,” and  
24 for that reason is denied. However, petitioners may, under OAR 661-010-  
25 0030(5), attach as appendices to their petition for review “verbatim transcripts  
26 of relevant portions of media recordings that are part of the record.”

1           Objection C is denied.

2           **B.     Objection to the First Supplemental Record**

3           As explained above, the city submitted the First Supplemental Record, in  
4           which the city removed Items 10, 11, and 12 at Record 31-46 from the Original  
5           Record. The city took the position that the Items are not properly included in  
6           the record because the Items were submitted after the close of the February 10,  
7           2015 public hearing on the applications, and accordingly the Items were not  
8           “placed before” the city council. However, in response to petitioners’  
9           Objection B-6, the city included a complete copy of the email comment at  
10          Record 36-37 (a portion of Item 12) at Second Supplemental Record 270, and  
11          agrees that it can be properly included in the record.

12          Petitioners argue that Items 10, 11, and 12 should be included in the  
13          record because the persons who submitted the documents at Items 10, 11 and  
14          12 did not realize that the record of the proceeding had closed at the conclusion  
15          of the February 10, 2015 public hearing on the applications. However,  
16          petitioners do not argue that Items 10, 11, and 12 were (1) placed before the  
17          final decision maker prior to the close of the evidentiary record or during the  
18          March 3, 2015 public hearing before the city council, (2) incorporated by the  
19          final decision maker into the record, or (3) that Items 10, 11 and 12 are  
20          included in the record by operation of law.<sup>5</sup>

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<sup>5</sup> Generally, there are three ways a document can be included in the local evidentiary record. One way is that the document is “placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.” OAR 661-010-0025(1)(b). A second way is that the final decision maker incorporates the documents into the record. *Id.* A third way is the documents are otherwise included in the record by operation of

1           Accordingly, petitioners’ objection to the First Supplemental Record is  
2 denied, except that the email comment included at Second Supplemental  
3 Record 270 (and partially included in the Original Record at Record 36-37) is  
4 included in the record.

5           **CONCLUSION**

6           Petitioners’ Objections B-7 and a portion of B-8 are sustained. Within  
7 14 days of the date of this order, the city shall transmit to the Board and the  
8 parties a Third Supplemental Record that is paginated and that includes (1) the  
9 letter submitted by Jeff Harrison during the March 3, 2015 city council hearing  
10 and (2) the sign up sheets created during that hearing. After the Third  
11 Supplemental Record is received, the Board will issue an order settling the  
12 record and establishing a briefing schedule.

13           Dated this 16<sup>th</sup> day of June, 2015.  
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20           \_\_\_\_\_  
21           Melissa M. Ryan  
              Board Member

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law. *Union Gospel Ministries v. City of Portland*, 21 Or LUBA 557, 559-60 (1991).