

1 **C. Objection B.1.**

2 Wal-Mart argues that the record improperly includes minutes of the April 15, 2004 city
3 council meeting and audio tapes for the July 17, 2003, August 21, 2003, and April 15, 2004 city
4 council meetings.¹ It argues that the meetings were not conducted for purposes of the application
5 and, pursuant to OAR 661-010-0025(1)(c), should not be part of the record.² The city responds
6 that the minutes were included because they contain the substance of comments or discussions by
7 citizens or city council members expressing opinions about the proposal that is the subject of this
8 appeal.

¹ Wal-Mart does not appear to specifically object to the minutes of the July 17, 2003 and August 21, 2003 meetings, but we assume that it intended to.

² OAR 661-010-0025(1) provides:

- “(1) Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:
 - “(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 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.
 - “(d) Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed during the course of the land use proceeding, including affidavits of publication, posting or mailing. Such notices shall include any notices concerning amendments to acknowledged comprehensive plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1) and (2).”

1 OAR 661-010-0025(1)(c) requires a local government to include in the record “minutes
2 and tape recordings of the meetings by the final decision maker as required by law.” See n 2.
3 Although the rule does not specifically state that the minutes to be included in the record must be of
4 meetings conducted by the final decision maker *on the particular application at issue*, we believe
5 that is the intended meaning.

6 The minutes of the July 17, 2003 city council meeting appear to reflect that a member of the
7 city council, at the end of the meeting, raised a concern with the size and location of the Wal-Mart
8 store that is the subject of this appeal, and directed staff to schedule a study session regarding big
9 box stores in general. Record 1594. The minutes of the August 21, 2003 meeting reflect that a
10 citizen, during what appears to be the equivalent of a public comment period, expressed concern
11 regarding the Wal-Mart store that is the subject of the local decision that was eventually challenged
12 in this appeal. Record 1541. The minutes of the April 15, 2004 city council meeting include a
13 request by the local appellant, intervenor in this case, that the local appeal hearing before the city
14 council be rescheduled. Record 154. Her statement was made during a public comment period,
15 and it clearly was related to the proceedings on Wal-Mart’s application.

16 OAR 661-010-0025(1)(c) does not necessarily require a local government to include the
17 minutes of every meeting where the development proposal that is the subject of the decision on
18 appeal may have been mentioned. The city has not shown that the minutes are of hearings or
19 meetings where the application was before the city council or are minutes that were placed before
20 the final decision maker or incorporated into the record in one of the ways described in OAR 661-
21 010-0025(1). The parties have not agreed in writing to include the disputed minutes. Therefore,
22 we agree with Wal-Mart that the disputed items are not properly part of the record.

23 Objection B.1. is sustained.

24 **D. Objection B.2.**

1 Wal-Mart argues that documents pertaining to a public records request were not placed
2 before the city council during its proceedings in this matter and are improperly included in the
3 record. The city agrees with the objection and will remove the item from the record.

4 Objection B.2. is sustained.

5 **E. Objection B.3.**

6 Wal-Mart objects to several e-mail messages included in the record that were not placed
7 before the city council. The city agrees to remove items that appear at record 40, 55-56, 146-52,
8 and 159-60. The city asserts that the material found at pages 1018-19 of the record was presented
9 by staff to the city council and is properly part of the record. Wal-Mart does not contradict that
10 statement.

11 Objection B.3. is denied as to the materials found at pages 1018-19 of the record. The
12 remainder of the objection is sustained.

13 **F. Objection B.4.**

14 Wal-Mart objects to the inclusion of site plan drawings, which it asserts are not relevant and
15 were not placed before the decision maker. The city agrees and will remove the item.

16 Objection B.4. is sustained.

17 **G. Objection C**

18 The record contains two separate notices; one dated June 7, 2004 and the other dated June
19 23, 2004. Wal-Mart asserts that the city only mailed one notice, and that the latter notice should be
20 removed. The city explains that it mailed the second notice to ensure proper notification because
21 the first notice was not mailed to all necessary parties.

22 Objection C. is denied.

23 **SGP'S PRECAUTIONARY OBJECTIONS**

24 Petitioner SGP objects to the record, arguing that two items should have been included in
25 the record: (1) a 1991 ordinance adopting a zone change for properties throughout the city,
26 including property that is apparently relevant to this appeal; and (2) minutes and a resolution or

1 ordinance memorializing a December 21, 1995 city council hearing in which the city council
2 accepted SGP's traffic study and "allowed development of 600,000 square feet." SGP's
3 Precautionary Objection to the Record 2-3.

4 **A. Specifically Incorporated**

5 SGP argues that the 1991 zone change decision was mentioned in the findings of the
6 challenged decision and was incorporated by testimony before the Site Plan and Architectural
7 Commission (SPAC) and the city council. SGP also argues that the 1995 minutes or council
8 decision were incorporated by verbal testimony before the SPAC and city council.

9 The city responds that it agrees with SGP's objections. Wal-Mart asserts that the materials
10 SGP seeks to include in the record should not be included because (1) they were never placed
11 before the city council and (2) they were not properly incorporated into the record because they
12 were merely referred to in testimony, referenced in other documents in the record or referenced in
13 the findings of the challenged decision. *See* OAR 661-010-0025(1)(b); *see* n 2.

14 We have recognized that OAR 661-010-0025(1)(b) describes two categories of items that
15 are properly included in the record: (1) items placed before, and not rejected by, the final decision
16 maker and (2) materials "specifically incorporated" into the record. *Highlands Condominium*
17 *Assoc. v. City of Eugene*, 35 Or LUBA 772, 774 (1998). SGP does not argue that the items it
18 seeks to have included in the record were placed before the decision maker. The only question
19 here is whether those items were "specifically incorporated."

20 SGP alleges generally that the items were "incorporated" into the record by verbal and
21 written testimony. SGP does not explain with any particularity, however, how those incorporations
22 were effectuated. SGP's citations to the record fail to demonstrate that a specific request to
23 incorporate those items was ever made or that they were incorporated into the record by the final
24 decision maker. Rather, it appears the decisions SGP seeks to include in the record were merely
25 referred to in verbal and written testimony. Such references are insufficient to "specifically

1 incorporate” those items under OAR 661-010-0025(1)(b) or (c).³ *See Ramsey v. City of*
2 *Portland*, 22 Or LUBA 845, 846 (1992) (references to items in testimony during the local
3 proceedings do not make those items part of the record, if they were not actually placed before the
4 local decision maker).

5 **B. Official Notice**

6 SGP also argues that we should take official notice of the 1995 action and the 1991 zone
7 change decision under Oregon Evidence Code (OEC) 202(7).⁴ As a preliminary matter, this Board
8 has authority to take official notice of judicially cognizable law, under OEC 202. A local ordinance,
9 comprehensive plan or enactment of which we may take official notice under OEC 202(7),
10 however, does not become part of the local record. *Ramsey v. City of Portland*, 23 Or LUBA
11 291, 294 (1992). Accordingly, OEC 202(7) cannot justify an order requiring a local government to
12 supplement the record to include the item that is officially noticed. The proper procedure would be
13 to file a motion to take official notice.⁵

14 SGP’s precautionary objections are denied.

15 The city shall have twenty-one days to file a supplemental record consistent with this order.

16 Dated this 21st day of September, 2004.
17

³ As discussed above, the minutes of the December 21, 1995 city council hearing are not properly part of the record unless they were specifically incorporated into the record.

⁴ OEC 202 provides:

“Law judicially noticed is defined as:

“* * * * *

“(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, ‘comprehensive plan’ has the meaning given that term by ORS 197.015.”

⁵ We note that this Board may not take official notice of adjudicative facts. *Ramsey v. City of Portland*, 23 Or LUBA 291, 294 (1992). *See also Adkins v. Heceta Water District*, 23 Or LUBA 207, 211 (1992) (where LUBA takes official notice of legislative history, any statement of fact in documents offered as legislative history cannot constitute evidentiary support for the challenged decision).

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Anne C. Davies
Board Member