

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

3
4 J4J, A MISCELLANEOUS PAC FILED UNDER
5 COMMITTEE ID NO. 18077,
6 *Petitioner,*

7
8 vs.

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10 CITY OF JEFFERSON,
11 *Respondent,*

12
13
14 and

15
16 HAMBY FAMILY LIMITED PARTNERSHIP,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2016-083

20
21 ORDER

22 **MOTION TO INTERVENE**

23 Hamby Family Limited Partnership (intervenor) moves to intervene in
24 the appeal on the side of the city. Intervenor was the applicant below for the
25 annexation that is approved by the appealed ordinance. There is no opposition
26 to the motion, and it is allowed.

27 **RECORD OBJECTIONS**

28 On September 14, 2016, the city filed the record. On September 29, 2016
29 petitioner filed objections to the record. On October 13, 2016 the city filed a
30 response. On October 24, 2016 petitioner filed a reply.

1 The city objects to the reply, arguing that LUBA’s rules do not authorize
2 a reply to a response to a record objection. Further, the city argues that any
3 reply must be limited to new matters raised in the city’s response, and the city’s
4 response raised no new matters.

5 The reply is allowed. LUBA’s rules neither authorize nor prohibit filing
6 a reply to a response to record objection, and the Board’s practice is to consider
7 such replies if time allows and the reply concerns new matters raised in the
8 response or is otherwise useful in resolving the original objections. Here, the
9 city’s response to the objections raised several issues that could not have been
10 anticipated in filing the objections, and petitioner’s reply is somewhat useful in
11 resolving the parties’ record disputes. The Board will consider the reply.

12 **A. First Record Objection**

13 Petitioner objects that the final adopted version of the minutes from the
14 city council’s August 4, 2016 meeting is omitted from the record.

15 The city responds that the record includes the draft minutes to the
16 August 4, 2016 meeting, and that the adopted minutes are verbatim the same as
17 the draft minutes. The city states that it has provided a copy of the adopted
18 minutes to petitioner, and will include the adopted minutes in a supplemental
19 record if LUBA so orders.

1 It is appropriate under OAR 661-010-0025(1)(c) to include the final
2 adopted minutes of meetings in the record.¹ *West Side Rural Fire Protection*
3 *District v. City of Hood River*, 43 Or LUBA 612, 614-615 (2002). That is the
4 case, even if the record already includes the nearly identical draft version of the
5 minutes. Nonetheless, if this objection were the only reason to require the city
6 to submit a supplemental record, we would likely not require the city to
7 transmit a supplemental record. However, as explained below, we sustain two

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

“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 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, CD, DVD or other media 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 media 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 media recordings from which that transcript was prepared need not be included in the record, unless the accuracy of the transcript is challenged.”

1 other objections, which require the record to be supplemented for other
2 reasons. Accordingly, the city shall submit the adopted minutes as part of that
3 supplement.

4 The second part of petitioner’s record objection argues that the draft
5 minutes at Record 27 “fail to accurately capture the City’s response to
6 [petitioner’s attorney’s] attempt to place the procedural objection before the
7 Council.” Petitioner’s Objection 1. We understand this to be an objection under
8 OAR 661-010-0026(2)(c) (“The minutes or transcripts of meetings or hearings
9 are incomplete or do not accurately reflect the proceedings.”)

10 The August 4, 2016 draft minutes state that petitioner’s attorney
11 attempted to “provide 4 objections, to which Mayor McKenzie refused”
12 because the hearing portion had closed and no further testimony was allowed.
13 Record 27. The minutes also state that “[t]he City Attorney agreed.” Petitioner
14 argues that the minutes are inaccurate and that in fact the city attorney declared
15 that the council would take petitioner’s procedural objection under advisement,
16 but that the minutes do not include the city attorney’s statement or “any final
17 disposition of the City Council’s resolution of the submitted written
18 document.” Record Objection at 1-2.

19 The city argues, and we agree, that petitioner has failed to explain with
20 particularity why any defect in the minutes is material as required by OAR 661-
21 010-0026(3) (“An objection on grounds that the minutes or transcripts are
22 incomplete or inaccurate shall demonstrate with particularity how the minutes

1 or transcripts are defective and shall explain with particularity why the defect is
2 material”). The August 4, 2016 minutes may or may not accurately reflect the
3 city attorney’s statements regarding the submitted written objections, but
4 petitioner does not explain why any inaccuracy on that point is material to any
5 issue in this appeal. The minutes plainly state that the Mayor rejected the
6 proffered written objections. That rejection may or may not provide a basis to
7 assign procedural error to the decision, but petitioner has not established that
8 the August 4, 2016 minutes are defective or that any defect is material.

9 Petitioner’s first objection is sustained, in part.

10 **B. Second Record Objection**

11 Petitioner next objects that the document petitioner attempted to submit
12 at the August 4, 2016 proceeding is properly included in the record, because
13 the city council, not the mayor, was the final decision-maker, and therefore the
14 mayor’s purported rejection of the document was ineffective. OAR 661-010-
15 0025(1)(b) (the record does not include items specifically rejected by the final
16 decision maker).

17 It is reasonably clear from the minutes that the mayor, as presiding
18 officer, spoke for the city council in rejecting the proffered document.
19 Petitioner does not argue that there was any disagreement on this point among
20 the other city council members or that the mayor does not have the authority to
21 make the decision whether to accept or reject the document. We disagree with
22 petitioner’s apparent premise that documents submitted to a multi-person entity

1 such as a commission or city council are rejected for purposes of OAR 661-
2 010-0025(1)(b) only if the commission or city council conducts a vote on the
3 matter and makes the collective decision to reject the document. A rejection by
4 the presiding officer or similar person with apparent authority is sufficient for
5 purposes of determining whether the rejected document is part of the local
6 record under OAR 661-010-0025(1)(b).

7 Petitioner's second record objection is denied.

8 **C. Third Record Objection**

9 Petitioner objects to the omission from the record of unspecified email
10 communications between city councilors, the mayor and members of the public
11 regarding the approved annexation. Petitioner argues that the emails constitute
12 *ex parte* communications, and should have been disclosed and provided to the
13 public for rebuttal pursuant to ORS 227.180.

14 The city responds that none of the alleged *ex parte* communications were
15 placed before the final decision maker during the course of the city council
16 proceedings, and therefore the alleged emails are not part of the local record
17 under OAR 661-010-0025(1)(b).²

18 We agree with the city. Petitioner's objection is denied.

² Petitioner notes, correctly, that *ex parte* contacts are a permissible basis for LUBA to grant a motion to consider evidence outside the record, pursuant to OAR 661-010-0045. Any evidence considered pursuant to a granted motion to take evidence under OAR 661-010-0045 is part of LUBA's record, but does not become part of the local record.

1 **D. Fourth Record Objection**

2 Petitioner argues the minutes for the July 28, 2016 city council meeting
3 at Record 102 fail to accurately reflect (1) petitioner’s objection to the lack of
4 disclosure of *ex parte* communications, and (2) petitioner’s arguments
5 regarding the applicability of ORS 227.178 to the annexation application.

6 The city responds that petitioner has failed to demonstrate that any
7 alleged defects in the minutes are material. OAR 661-010-0026(3).³ Further,
8 the city argues that petitioner’s arguments regarding ORS 227.178 are
9 substantively included in petitioner’s written comments to the city beginning at
10 Record 55. The city cites *Port of Umatilla v. City of Umatilla*, 70 Or LUBA
11 527 (2014), for the proposition that incomplete minutes are not a basis to
12 require a transcript, if the same oral testimony can be found in other writings
13 already included in the record.

³ 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 We agree with the city. Petitioner has failed to demonstrate how the
2 alleged defects in the July 28, 2016 minutes are material. The minutes reflect
3 petitioner’s objection that the city councilors had failed to disclose the
4 substance of *ex parte* communications. Record 102. In its reply, petitioner
5 argues the merits of whether the city councilors adequately disclosed the
6 substance of *ex parte* communications. However, the relevant question here is
7 not the merits of what may be a future assignment of error, but whether the
8 minutes are materially defective. Petitioner has not demonstrated that the July
9 28, 2016 minutes are materially defective.

10 Further, the city appears to be correct that petitioner’s arguments
11 regarding ORS 227.178 can be found in petitioner’s written submission at
12 Record 55-56. Petitioner does not argue that there is any material difference
13 between petitioner’s oral and written testimony regarding ORS 227.178.
14 Accordingly, this record objection is denied.

15 **E. Fifth Record Objection**

16 The record includes as retained items audio recordings of hearings
17 before the city council. Petitioner complains that audio recordings of hearings
18 that petitioner obtained through a public records request are of poor quality.
19 Petitioner argues that if the retained audio recordings included in the record are
20 of similar quality, they will be useless to verify certain statements made during
21 the hearings, and, accordingly, will limit petitioner’s ability to demonstrate
22 procedural error. Petitioner argues that the audio recordings should be

1 processed or enhanced to remove distracting keyboard noises made by the city
2 recorder taking minutes of the hearings close to the recording device's
3 microphone.

4 The city acknowledges that the quality of the audio recordings in the
5 record may be impaired due to the method of recording, but argues that it
6 should not be required to undertake unspecified efforts to process or enhance
7 the audio quality of the recordings, citing *Paterson v. City of Bend*, 48 Or
8 LUBA 614, 617 (2004) (LUBA will not require a city to go to extraordinary
9 lengths to enhance media recordings). The city notes that petitioner has failed
10 to explain what type of enhancement is being requested, how burdensome and
11 expensive it would be, and the probability of success of enhancing the
12 recording.

13 We agree with the city. The apparent problem with the audio recordings
14 is original to the recording, not a copying error that might be corrected by
15 making a new copy. Petitioner identifies no ready and inexpensive means to
16 enhance the quality of the original recording. Even if one were identified, we
17 question whether we would require the city to undertake such a process for the
18 audio recordings in the record, absent a compelling justification. Petitioner
19 offers none.

20 In its reply, petitioner states that it possesses a clear audio recording of
21 the proceedings, and suggests that the city substitute that recording for the
22 original recording retained by the city, to be transmitted later to LUBA. If the

1 city and petitioner agree on that approach, the city may do so. OAR 661-010-
2 0025(1) (the parties may agree in writing to the content of the record). Absent
3 such agreement, however, this record objection is denied.

4 **F. Sixth Record Objection**

5 Petitioner objects that the record does not contain evidence submitted at
6 the first evidentiary hearing before the planning commission.

7 For purposes of OAR 661-010-0025(1)(b), the record transmitted to
8 LUBA includes only the record before the final decision maker, in this case, the
9 city council. Petitioner does not allege that evidence placed before the
10 planning commission was “specifically incorporated into the record or placed
11 before, and not rejected by, the final decision maker,” the city council, in the
12 proceedings before the city council. OAR 661-010-0025(1)(b). Nor does
13 petitioner allege that the record before the planning commission became part of
14 the record before the city council by operation of law or any other means.

15 Petitioner’s sixth record objection is denied.

16 **G. Seventh Record Objection**

17 Petitioner argues that the record omits petitioner’s July 26, 2016 letter to
18 the city recorder objecting to the city’s alleged failure to provide the staff
19 report seven days prior to the city council’s evidentiary hearing.

20 The city responds that petitioner fails to allege that the July 26, 2016
21 letter to the city recorder was “placed before” the city council. However, the
22 city does not dispute petitioner’s implicit premise that submitting a letter to the

1 city recorder is an appropriate means the city has provided for participants to
2 submit documents, including procedural objections, to the attention of the city
3 council. The city recorder apparently functions as a clerk for purposes of city
4 council proceedings, including the present proceeding. We conclude that
5 petitioner has adequately demonstrated that the July 26, 2016 letter was placed
6 before the city council, and the city has offered no reason to conclude
7 otherwise.

8 Petitioner's seventh record objection is sustained.

9 **H. Eighth and Ninth Record Objections**

10 Petitioner argues that the record improperly omits the city recorder's
11 August 2, 2016 email to the city council with attachments consisting of the
12 annexation application and a revised staff report. Petitioner states that it
13 obtained a copy of the email and attachments via a public records request.

14 The city responds that the August 2, 2016 email and any attachments
15 were not included in the record transmitted to LUBA because the evidentiary
16 record had closed by that date. The city does not dispute that the August 2,
17 2016 email included the annexation application as an attachment, but notes that
18 the application is already found in the record, at Record 180. The city disputes
19 that a revised staff report was attached to the email.

20 That the August 2, 2016 email was provided to the city council after the
21 evidentiary record closed has no bearing on whether it was "placed before" the
22 city council during the proceedings before the city council. We agree with

1 petitioner that the August 2, 2016 email should be included in the record
2 transmitted to LUBA. Because the annexation application attached to the email
3 is already in the record, in its chronologically appropriate location in the
4 record, the city is not required to provide a duplicate copy. With respect to the
5 alleged revised staff report, petitioner does not explain the basis for its
6 assertion that a revised staff report was attached to the August 2, 2016 email.
7 Petitioner does not, for example, provide LUBA a copy of the email and its
8 attachments, so LUBA could evaluate the assertion. Accordingly, without
9 more explanation from petitioner, we accept the city's position that a revised
10 staff report was not attached to the August 2, 2016 email.

11 Petitioner also objects that the copy of the annexation application at
12 Record 180 is not located in inverse chronological order, as required by OAR
13 661-010-0025(4)(a)(E), because it was first placed before the city council on
14 August 2, 2016, as an attachment to the city recorder's email.⁴ The city
15 responds that the annexation application was placed into the record before the
16 city council long before August 2, 2016, and in any case its current location in
17 the record accurately reflects both its document date and its date of entry into

⁴ OAR 661-010-0025(4)(a)(E) provides that the record must be "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 the record. We agree with the city that petitioner has not demonstrated that the
2 record organization violates OAR 661-010-0025(4)(a)(E).

3 Petitioner's eighth record objection is sustained in part, and the city must
4 submit a supplemental record that includes a copy of the August 2, 2016 email,
5 minus attachments. Petitioner's ninth record objection is denied.

6 **I. Tenth Record Objection**

7 Petitioner and city have resolved this objection, and petitioner withdraws
8 the objection.

9 **CONCLUSION**

10 The city shall transmit and serve a supplemental record that includes (1)
11 the adopted minutes of the August 4, 2016 city council meeting, (2) petitioner's
12 July 26, 2016 letter to the city recorder, and (3) the August 2, 2016 email from
13 the city recorder to the city council, minus attachments. Upon receipt of the
14 supplemental record, LUBA will issue an order settling the record and
15 establishing a briefing schedule.

16 Dated this 3rd day of November, 2016.

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Tod A. Bassham
Board Member