

1 BEFORE THE LAND USE BOARD OF APPEALS

2
3 OF THE STATE OF OREGON

4
5 GENE R. OSTER,
6 *Petitioner,*

7
8 vs.

9
10 CITY OF SILVERTON,
11 *Respondent,*

12
13 and

14
15 MARY ROSE BRANDT,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2018-103

19
20 ORDER

21 **MOTION TO INTERVENE**

22 Mary Rose Brandt (intervenor) moves to intervene on the side of
23 respondent. No party opposes the motion, and it is granted.

24 **RECORD OBJECTIONS**

25 On September 20, 2018, the Board received the record in this appeal. On
26 September 28, 2018, petitioner filed an objection to the record pursuant to OAR
27 661-010-0026(2)(a), which provides, in part, that a record objection may be made
28 on the ground that, “[t]he record does not include all materials included as part
29 of the record during the proceedings before the final decision maker.” The city

1 and intervenor filed responses to petitioner's record objection. We now resolve
2 the record objection.

3 The procedural history of this appeal provides useful context for our
4 discussion and disposition of petitioner's record objection. Petitioner appeals an
5 order of the city council denying petitioner's subdivision application. The
6 planning commission held the initial public hearing on June 12, 2018, and heard
7 the staff report and petitioner's presentation. The planning commission continued
8 the hearing to July 10, 2018, and received additional testimony in support and
9 opposition to the subdivision, including petitioner's rebuttal testimony. The
10 planning commission denied the subdivision application. Petitioner appealed the
11 planning commission decision to the city council, pursuant to the Silverton
12 Development Code (SDC) 4.1.400.E.7(c), which provides:

13 "7. Appeals. Appeals of Type III decisions are heard by the city
14 council, as applicable, and follow the procedures below:

15 "* * * * *

16 "c. Scope of Appeal. The review body shall determine the
17 scope of review on appeal to one of the following:

18 "i. Restricted to the record made on the decision
19 being appealed. *The record shall include* a
20 factual report prepared by the community
21 development director, all exhibits, materials,
22 pleadings, memoranda, stipulations, and
23 motions submitted by any party and received or
24 considered in reaching the decision under
25 review, and *the minutes of the hearing*. The
26 reviewing body may make its decision based
27 only upon the record or may grant the right of

1 oral argument to all affected parties, but not the
2 introduction of additional evidence.

3 “ii. Limited to such issues as the reviewing body
4 determines necessary for a proper resolution of
5 the matter.

6 “iii. A de novo hearing on the merits. ‘De novo
7 hearing’ shall mean a hearing by the review body
8 as if the request had not been previously heard
9 and as if no decision had been rendered, *except*
10 *that all testimony, evidence, and other material*
11 *from the record of the previous consideration*
12 ***may be included in the record of the review.*** The
13 presiding officer may establish a time limit for
14 presentation of information at the public
15 hearing.” (Emphases added.)

16 The city council decided to hear the appeal on the record pursuant to SDC
17 4.1.400.E.7(c)(i). Accordingly, the city council allowed additional oral argument
18 but did not accept any additional evidence. The minutes of the planning
19 commission hearings were included as part of the record on review. Record 262–
20 71; 613–24. No party attempted to submit a media recording or transcript of the
21 planning commission hearings into the record before the city council. The city
22 council affirmed the planning commission’s decision denying the subdivision
23 application.

24 Petitioner relies on OAR 661-010-0025(1)(c), which provides, in part, that
25 “the record shall include * * * [m]inutes and tape, CD, DVD or other media
26 recordings of the meetings conducted by the final decision maker as required by
27 law, or incorporated into the record by the final decision maker.” Petitioner

1 argues that rule requires the city to include in the LUBA record a media recording
2 or verbatim transcript of the planning commission hearings held on June 12,
3 2018, and July 10, 2018. Petitioner argues that the city council incorporated the
4 audio recordings of the planning commission hearings into the record when a city
5 councilor moved to review the planning commission's decision on the record, or
6 in the alternative that the city council's intent to incorporate the oral testimony
7 into the record can be inferred from statements made during the city council
8 review hearing.

9 As the party objecting to the record, petitioner bears the burden to
10 demonstrate that the city improperly excluded the disputed items from the record.
11 *Doherty v. Morrow County*, 43 Or LUBA 627, 630 (2002). The city is required
12 to transmit a record to LUBA that includes "all materials included as part of the
13 record during the proceedings before the final decision maker," including
14 "[m]inutes and tape, CD, DVD or other media recordings of the meetings
15 conducted by the final decision maker as required by law, or incorporated into
16 the record by the final decision maker." OAR 661-010-0026(2)(a); OAR 661-
17 010-0025(1)(c). In this proceeding, the city council was the final decision maker.
18 Accordingly, neither OAR 661-010-0026(2)(a) or OAR 661-010-0025(1)(c)

1 require the city to include media recordings of the planning commission hearings
2 in the record.¹

3 Petitioner argues that the city council “generally” incorporated recordings
4 of the planning commission hearings into the record when a city councilor moved
5 to review the planning commission’s decision on the record. Petitioner’s Record
6 Objection 5. Petitioner points to a discussion among the city attorney, community
7 development director, and city council regarding the procedure for an on-the-
8 record review before the city council. The city attorney stated that the city council
9 would not receive any new testimony. The mayor clarified that only parties who
10 had testified before the planning commission would be permitted to present oral
11 argument, stating, “the only people who can testify are the ones who have already
12 testified, and we have their testimony from the planning commission hearing.”
13 Petitioner’s Record Objection 4.² Petitioner argues that that statement “generally”
14 incorporated complete recordings or verbatim transcripts of the the planning

¹ Petitioner does not assert that the media recordings were “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.” OAR 661-010-0025(1)(b).

² We accept the accuracy of petitioner’s quotation for purposes of resolving petitioner’s record objection. We note that the table of contents for the record in this appeal lists the August 20, 2018 city council meeting video with a “vimeo” hyperlink. Merely supplying a hyperlink/web address for a video as the sole means of accessing material that is part of the local record is insufficient to include that material in the LUBA record. *Dodds v. City of West Linn*, __ Or LUBA __ (LUBA No. 2016-071, Order, Sept 27, 2016).

1 commission hearings into the record before the city council. *Id.* at 5. Petitioner
2 argues that we should recognize a general incorporation principle, comparing
3 OAR 661-010-0025(1)(b), which refers to documents and other materials
4 “specifically incorporated” with OAR 661-010-0025(1)(c), which does not
5 include that phrase. See n 1.

6 We reject petitioner’s argument that an item that the local government did
7 not explicitly incorporate into the record could nevertheless be required to be
8 included in the record under OAR 661-010-0025(1)(c), which requires the local
9 government to include in the record transmitted to LUBA “media recordings of
10 the meetings conducted by the final decision maker * * * or incorporated into the
11 record by the final decision maker.” To be sure, a city may incorporate recordings
12 of prior hearings into the record, but the rule requires that it must do so explicitly
13 in order for those recordings to be required to be included in the LUBA record.

14 Petitioner’s incorporation theory also conflicts with the city’s code
15 governing city council review, which expressly provides that the record in an on-
16 the-record hearing before the city council will include the minutes of the planning
17 commission hearings but does not expressly reference media recordings or
18 verbatim transcripts of those hearings. SDC 4.1.400.E.7(c)(i). In contrast, in a de
19 novo hearing before the city council, “testimony, evidence, and other material
20 from the record of the previous consideration *may be* included in the record of
21 the review.” SDC 4.1.400.E.7(c)(iii) (emphasis added). Moreover, even if we
22 accepted petitioner’s “general incorporation” theory, petitioner has not

1 established that the city council “generally incorporated” complete recordings of
2 the planning commission hearings. The mayor’s statement that petitioner relies
3 upon did not purport to incorporate a media recording or verbatim transcript of
4 the planning commission hearings.

5 Finally, petitioner argues that we must interpret OAR 661-010-0025(1)(c)
6 in the manner that petitioner suggests, because to do otherwise would effectively
7 strike petitioner’s planning commission testimony from the record and thereby
8 violate his right to constitutional due process. The applicable city code provisions
9 do not require media recordings or verbatim transcripts of the planning
10 commission hearings be included in the record for review before the city council.
11 Petitioner has not alleged that those materials were actually placed before, and
12 not rejected by, the city council. Therefore, such recordings and transcripts are
13 not part of the record transmitted to LUBA. While the city’s failure to include
14 media recordings or transcripts of the planning commission hearings may be a
15 basis for an assignment of error in the petition for review, that does not change
16 the fact that the media recordings and transcript are not part of the record. For
17 purposes of identifying the contents of the record required under OAR 661-010-
18 0025, it does not matter whether the decision maker erred in accepting or
19 excluding evidence. *Von Lubken v. Hood River County*, 17 Or LUBA 1129, 1131
20 (1989).

21 Petitioner’s record objection is denied.

1 **BRIEFING SCHEDULE**

2 The record is settled as of the date of this order. The petition for review
3 shall be due 21 days after the date of this order. Respondents' briefs shall be due
4 42 days after the date of this order. The final opinion and order shall be due 77
5 days after the date of this order.

6 Dated this 27th day of November, 2018.

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H. M. Zamudio

12 Board Member