

1 BEFORE THE LAND USE BOARD OF APPEALS

2
3 OF THE STATE OF OREGON

4
5 BERNADETTE NIEDERER,
6 *Petitioner,*

7
8 vs.

9
10 CITY OF ALBANY,
11 *Respondent,*

12
13 and

14
15 MARK SIEGNER,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2018-133

19
20 ORDER

21 **RECORD OBJECTIONS**

22 The Board received the original record transmittal on November 26, 2018.
23 On December 10, 2018, petitioner filed record objections. On December 28,
24 2018, the Board received a revised table of contents and amended record, which
25 we understand the city intends to replace the original record. We refer to the two
26 records as the original record and the replacement record. All record citations in
27 this order are to the replacement record. On December 31, 2018, the city filed a
28 response to petitioner's record objections. We now resolve the outstanding
29 objections.

1 **A. Objection 1**

2 OAR 661-010-0025(1)(c) provides that the record includes “[m]inutes
3 * * * of the meetings conducted by the final decision maker as required by law,
4 or incorporated into the record by the final decision maker.” OAR 661-010-
5 0026(2)(c) provides that one basis for objecting to the record is that “[t]he
6 minutes or transcripts of meetings or hearings are incomplete or do not accurately
7 reflect the proceedings.” OAR 661-010-0026(3) provides that “[a]n objection on
8 grounds that the minutes or transcripts are incomplete or inaccurate shall
9 demonstrate with particularity how the minutes or transcripts are defective and
10 shall explain with particularity why the defect is material.”

11 Petitioner objects that the hearing minutes for the October 10, 2018, city
12 council meeting are incomplete and do not accurately reflect the proceedings.
13 Petitioner argues that the minutes fail to accurately reflect testimony in which
14 petitioner argued that the city council’s decision was improperly based on bias,
15 extra-record evidence, and *ex parte* contacts. Petitioner argues that certain
16 testimony is inaccurately or incompletely represented in the minutes and that the
17 record should include a complete transcript of the meeting.

18 The city responds that the original and replacement records include
19 minutes from the October 10, 2018, city council meeting and that those minutes
20 accurately reflect the proceedings. In addition, the original and replacement
21 records include a complete video recording of the October 10, 2018, city council
22 meeting.

1 LUBA will require a local government to provide a partial transcript of the
2 city council's deliberations where the minutes fail to summarize the deliberations
3 and petitioner demonstrates that the defect is material to a key issue in the appeal.
4 *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014); *see also* OAR
5 661-010-0025(1)(c) ("A verbatim transcript of media recordings shall not be
6 required[.]"). We have reviewed the meeting minutes and conclude that they
7 adequately summarize the city council's deliberations and accurately reflect the
8 proceeding. To the extent that petitioner intends to rely on specific statements
9 that are not reflected in the minutes, petitioner may refer to the video recording
10 that is in the record and may attach a verbatim transcript to her petition for review.
11 OAR 661-010-0030(5) ("The petition for review may include appendices
12 containing verbatim transcripts of relevant portions of media recordings that are
13 part of the record.").

14 The first record objection is denied.

15 **B. Objection 2**

16 Petitioner objects that the original record is not organized according to
17 LUBA's rules. OAR 661-010-0025(4)(a)(B), (E).¹ The city transmitted a revised

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

"Specifications of Record:

"(a) The record, including any supplements or amendments,
shall:

1 table of contents, revised the chronological order of the contents, and removed
2 items the city states are not “relevant to this proceeding.” Respondent’s Response
3 to Petitioner’s Objection 2. The replacement record appears to satisfy LUBA’s
4 rules and petitioner’s second record objection.

5 The second record objection is resolved.

6 **C. Objection 3**

7 Petitioner objects that items were improperly omitted from the record.
8 Petitioner objects that the record does not include minutes or recording of the
9 September 12, 2018, city council meeting, in which the city council reviewed and
10 discussed the Albany Landmarks Advisory Commission’s September 5, 2018,
11 decision, the decision on review before the city council, and therefore the minutes
12 and/or audio of the September 12, 2018, city council meeting should also be

“* * * * *

“(B) Begin with a table of contents, listing each item contained therein, and the page of the record where the item begins.

“* * * * *

“(E) Be arranged in inverse chronological order with the most recent items 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 included in the record. The replacement record includes meeting minutes and a
2 video recording of the September 12, 2018, city council meeting. The third record
3 objection is resolved with respect to the September 12, 2018, city council
4 meeting.

5 In addition, petitioner asserts that she submitted print-outs of several blog
6 posts, online comments, and newspaper articles to the city recorder at the October
7 10, 2018, city council meeting. Petitioner contends that submitting those items to
8 the city recorder was sufficient to place those items before the city council and,
9 thus, they should have been included in the record. *See* OAR 661-010-0025(1)(b)
10 (providing that the record shall include “[a]ll written testimony and all exhibits,
11 maps, documents or other materials specifically incorporated into the record or
12 placed before, and not rejected by, the final decision maker, during the course of
13 the proceedings before the final decision maker”); *ONRC v. City of Oregon City*,
14 28 Or LUBA 775, 778 (1994) (items can be “placed before” a local decision
15 maker within the meaning of OAR 661-010-0025(1)(b) if they are submitted to
16 the decision maker through means specified in local regulations or through
17 appropriate means in response to a request by the decision maker for submittal of
18 additional evidence).

19 The city responds that all items that were placed before the city council
20 during the course of the proceeding have been included in the replacement record
21 and that “[t]here were no newspaper articles or blog posts submitted into the
22 record by Petitioner.” Respondent’s Response to Petitioner’s Objection 3.

1 However, the city does not directly dispute petitioner's assertion that she
2 submitted the disputed items to the city recorder at the city council meeting or
3 argue that submitting documents to the city recorder is insufficient to submit
4 items into the record.

5 Petitioner has the ultimate burden of demonstrating that the local record is
6 deficient. When an objecting party alleges that documents are missing from the
7 record, and the local government responds that such documents were not
8 submitted for the record, LUBA generally defers to the local government as the
9 custodian of the record, unless petitioner supplies a sufficient reason to decide
10 otherwise. *Curl v. City of Bend*, 55 Or LUBA 719, 725 (2008). We have reviewed
11 petitioner's objection, the city's response, the October 10, 2018, meeting
12 minutes, and the video recording of petitioner's testimony at that meeting
13 regarding city councilor bias. The minutes and video recording reflect that,
14 during her testimony, petitioner referred to blog posts and a city councilor's
15 online comments on those blog posts. Record 2. The video recording shows that
16 petitioner referred to and quoted from a stack of papers that appear to be print
17 reproductions of those blog posts and comments. The city recorder is not visible
18 in the video, and there is no visual confirmation that petitioner handed the
19 materials to the recorder, as petitioner states she did. On the other hand, the city
20 offers no specific contradictory evidence that no such materials were in fact
21 handed to the city recorder, such as an affidavit or declaration of the recorder.

1 We conclude that the disputed printed materials were submitted into the
2 record and should be included in the record based on petitioner's assertion that
3 she submitted the items to the city recorder, which is circumstantially supported
4 by the meeting minutes and video recording. The city's vague denial is
5 insufficient to overcome petitioner's specific assertion and other evidence.

6 The third record objection is sustained with respect to the disputed printed
7 blog posts and articles.

8 **SUPPLEMENTAL RECORD**

9 Not later than Monday, January 14, 2019, petitioner shall file and serve
10 paper copies of the blog posts, comments, and articles that she submitted to the
11 city recorder at the October 10, 2018, hearing as a supplemental record and
12 number the pages as "SR-1," *et cetera*.² LUBA shall regard that supplemental
13 record as part of the record of this proceeding. After the supplemental record is
14 received, the Board will issue an order settling the record and setting a briefing
15 schedule.

16 Dated this 9th day of January, 2019.

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20 _____
21 H. M. Zamudio
 Board Member

² At the time that this order issues, petitioner's motion for stay is pending and the challenged decision is subject to an interim stay. *Niederer v. City of Albany*, ____ Or LUBA ____ (LUBA No 2018-133, Order, Jan 7, 2019).