

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ROY CARROLL,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF MALIN,
10 *Respondent.*

11
12 LUBA No. 2018-131

13
14 ORDER

15 The challenged decision denies petitioner's application for a zone
16 change. On January 11, 2019, petitioner filed objections to the record. On
17 February 13, 2019, the city responded. On February 26, 2019, petitioner filed a
18 motion to take evidence not in the record pursuant to OAR 661-010-0045(1),
19 which allows a motion to take evidence to "resolve disputes regarding the
20 content of the record." We now resolve the outstanding objections.

21 **RECORD OBJECTIONS**

22 **a. Objection 1**

23 Petitioner objects to the omission from the record of those provisions of
24 the city's comprehensive plan and land use regulations that the final decision-
25 maker relied upon in issuing the challenged decision. The city responded by
26 providing copies of selected portions of the city's comprehensive plan and land
27 use regulations. LUBA may take official notice of relevant portions of the

1 city's comprehensive plan and land use regulations, even if those selections are
2 not included in the record. Oregon Evidence Code 202(7); ORS 40.090(7).
3 Accordingly, LUBA will take official notice of the selected portions of the
4 city's comprehensive plan and land use regulations attached to the city's
5 response. This objection is resolved.

6 **b. Objection 2**

7 Petitioner objects to the omission of "notes, documents, and related
8 information" that the city council or planning commission "relied upon when
9 making" the challenged decision. Objection to the Record 3. The city responds
10 that no such documents exist that are not already in the record, and that any
11 documents that are referred to in testimony but not specifically incorporated
12 into the record are not part of the record.

13 In his motion to take evidence not in the record, we understand petitioner
14 to move for LUBA to consider Exhibit A, which is a series of email
15 communications between petitioner and the city's attorney regarding the
16 parties' positions on this record objection. As we understand the objection and
17 the motion to take evidence, petitioner alleges that documents and/or notes may
18 have been created or used by individual members of the city council or planning
19 commission during the meetings and accordingly, those documents and
20 notepads are part of the record.

21 The purpose of the provision of OAR 661-010-0045(1) quoted above is
22 to provide for LUBA to consider evidence outside the record when there is a

1 factual dispute as to whether particular evidence was actually placed before the
2 decision maker in the proceeding before the local government. *Dickas v. City of*
3 *Beaverton*, 17 Or LUBA 1076 (1989). We deny the motion to take evidence for
4 two reasons. First, while there may be a factual dispute over whether individual
5 planning commissioners or city councilors did or did not possess documents
6 and/or notepads, petitioner's Exhibit A does not address that factual dispute or
7 establish that documents or notes were before individual planning
8 commissioners or city councilors during the meeting. Rather, Exhibit A
9 establishes at most that *petitioner's position* is that documents and/or notes
10 were before individual planning commissioners or city councilors. Second, and
11 more importantly, petitioner has not established that any such written notes or
12 documents that were created by individual councilors or planning
13 commissioners were "placed before" the city council or incorporated into the
14 record by the city council. *STOP Tigard Oswego Project v. City of West Linn*,
15 67 Or LUBA 494, 497-98 (2013).

16 Accordingly, this objection is denied.

17 **c. Objection 3**

18 OAR 661-010-0026(3) provides:

19 "An objection on grounds that the minutes or transcripts are
20 incomplete or inaccurate shall demonstrate with particularity how
21 the minutes or transcripts are defective and shall explain with
22 particularity why the defect is material. Upon such demonstration
23 regarding contested minutes, the Board shall require the governing
24 body to produce a transcript of the relevant portion of the

1 proceeding, if an audiotape recording or other type of recording is
2 available. * * *”

3 Petitioner argues that the minutes in the record are inadequate, but fails to cite
4 to OAR 661-010-0026(3), much less explain why the minutes are inadequate or
5 defective, or explain why any relief is warranted under OAR 661-010-0026(3).
6 The minutes of land use proceedings are necessarily summary in nature, and
7 often do not include specific or detailed summaries of testimony. The city notes
8 that the audio recordings of all hearings are in the record, and we understand the
9 city to suggest that, if petitioner believes a verbatim transcript of some portion
10 of an audio recording would assist the Board in understanding an assignment of
11 error in the petition for review, OAR 661-010-0030(5) authorizes petitioner to
12 attach to the petition for review appendices containing self-prepared verbatim
13 transcripts of relevant portions of the audio recordings. We agree with the city
14 that petitioner has not demonstrated a basis to require the city to prepare
15 transcripts under OAR 661-010-0026(3). This objection is denied.

16 **BRIEFING SCHEDULE**

17 The record is settled as of the date of this order. The petition for review
18 is due 21 days, and the response brief due 42 days, from the date of this order.
19 The Board’s final opinion and order is due 77 days from the date of this order.

20 Dated this 12th day of April, 2019.

21

22

23

24

Melissa M. Ryan, Board Chair