

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

3
4 CAMRON SETTLEMIER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF ALBANY,
10 *Respondent.*

11
12 LUBA No. 2020-106

13
14 ORDER

15 **RECORD OBJECTIONS**

16 The challenged decision is a city council decision amending numerous
17 provisions of the city’s development code related to residential, commercial, and
18 industrial development. On November 25, 2020, LUBA received the record in
19 this appeal. On December 11, 2020, the Board received petitioner’s objections to
20 the record. On December 24, 2020, the Board received the city’s response to the
21 record objections.

22 **A. Resolved Objections**

23 The challenged ordinance provides that the text of the amendments,
24 findings of fact and conclusions of law, and supplemental findings and
25 conclusions are attached as Exhibits A, B, and C. Petitioner argues that, while the
26 record includes the challenged ordinance itself, it improperly omits Exhibits A,
27 B, and C. Petitioner also argues that the record improperly omits the minutes for
28 the October 14, 2020 city council meeting.

1 To resolve these objections, the city attaches Exhibits A, B, and C and the
2 minutes for the October 14, 2020 city council meeting to its response, which are
3 apparently intended to constitute a supplemental record. With that response, we
4 understand the city to concede that the omitted items should be included in the
5 record. These objections are therefore sustained.

6 **B. Unresolved Objections**

7 Unless LUBA otherwise orders, or the parties otherwise agree in writing,
8 the record must include

9 “[m]inutes and * * * media recordings of the meetings conducted by
10 the final decision maker as required by law, or incorporated into the
11 record by the final decision maker. A verbatim transcript of media
12 recordings shall not be required, but if a transcript has been prepared
13 by the governing body, it shall be included. If a verbatim transcript
14 is included in the record, the media recordings from which that
15 transcript was prepared need not be included in the record, unless
16 the accuracy of the transcript is challenged.” OAR 661-010-
17 0025(1)(c).

18 **1. Minutes**

19 The minutes for the September 9, 2020 city council meeting provide that
20 petitioner “spoke about Goal 5, trees, and historic resources (see agenda file).”
21 Petitioner argues that the record improperly omits the referenced “agenda file.”
22 Petitioner also argues that, because the minutes contain no details about
23 petitioner’s oral testimony, the city must include the oral testimony itself in the
24 record—potentially by providing a physical media recording of the September 9,
25 2020 city council meeting. We understand petitioner to argue that the minutes

1 “are incomplete or do not accurately reflect the proceedings.” OAR 661-010-
2 0026(2)(c).

3 The city responds that the minutes’ reference to the “agenda file” is in error
4 and that the agenda for the September 9, 2020 city council meeting does not
5 contain petitioner’s testimony.¹ The city also responds that petitioner’s oral
6 testimony is already included in the record by virtue of media recordings of the
7 city council meetings that are themselves allegedly included in the record. We
8 address those media recordings below.

9 The remedy for incomplete or inaccurate minutes is for the local
10 government to provide a *transcript* of relevant portions of its proceedings. OAR
11 661-010-0026(3). However, before LUBA will require a local government to
12 provide such a transcript, the objector must first “demonstrate with particularity
13 how the minutes or transcripts are defective and shall explain with particularity
14 why the defect is material.” OAR 661-010-0026(3). The minutes of land use
15 proceedings are necessarily summary in nature and are not expected to include
16 specific arguments or the details of oral testimony. *Port of Umatilla v. City of*
17 *Umatilla*, 70 Or LUBA 527, 530 (2014). Because petitioner merely asserts that
18 the minutes are incomplete or inaccurate, without some comparison between the

¹ We understand the phrase “agenda file” to be synonymous with the word “agenda.” The agenda for the September 9, 2020 city council meeting is included in the record, and the city is correct that it does not contain petitioner’s testimony. Record 615. Petitioner’s written testimony is included elsewhere in the record. Record 579-81.

1 minutes and what a transcript would show, petitioner has demonstrated neither
2 that the minutes are defective nor that any defect is material. *Rogue Advocates v.*
3 *Josephine County*, 71 Or LUBA 409, 415 (2015)). This objection is therefore
4 denied.

5 2. **Media Recordings**

6 The record table of contents includes hyperlinks for the media
7 recordings—including audio and video—of three city council meetings, which
8 are hosted on YouTube, an online video platform. Petitioner argues that, because
9 there is no guarantee that YouTube will continue to host these videos until this
10 appeal has concluded, the city must provide LUBA and the parties with physical
11 media recordings.

12 The city responds that it has posted media recordings of meetings to
13 YouTube for over five years and has not taken any of them down. The city also
14 responds that it is not feasible to provide LUBA and the parties with physical
15 media recordings due to the size of the relevant files.

16 Petitioner is correct that identifying where a document or media recording
17 may be accessed online is insufficient to include that material in the record before
18 LUBA. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 511, 513 (2013).
19 Accordingly, we agree with petitioner that the hyperlinks in the table of contents
20 are inadequate to include the media recordings in the record.

21 However, the city also cites ORS 192.650(1), which provides, in part:

22 “The governing body of a public body shall provide for the sound,

1 video or digital recording *or* the taking of written minutes of all its
2 meetings. Neither a full transcript nor a full recording of the meeting
3 is required, except as otherwise provided by law, but the written
4 minutes *or* recording must give a true reflection of the matters
5 discussed at the meeting and the views of the participants.”
6 (Emphases added.)

7 We understand the city to argue that, under ORS 192.650(1), it is “required by
8 law” to keep *either* a media recording *or* minutes for the city council meetings,
9 not both. Because the city has provided minutes for all of the city council
10 meetings, and because petitioner has not established that the minutes are
11 incomplete or inaccurate, we understand the city to argue that any failure to
12 include media recordings is harmless error.

13 The city is incorrect. We have previously noted ambiguity in the “required
14 by law” language of OAR 661-010-0025(1)(c). We have held that, where minutes
15 or media recordings have already been prepared, a local government must include
16 them in the record even if the local government was not legally required to
17 prepare them in the first place. *Volny v. City of Bend*, 36 Or LUBA 760, 762-63
18 (1999); *Ramsay v. Linn County*, 29 Or LUBA 559, 560 (1995). As noted,
19 identifying where a document or media recording may be accessed online is
20 insufficient to include that material in the record before LUBA. *Terra Hydr*, 68
21 Or LUBA at 513.

22 This reading of our rules is supported by important policy and practical
23 considerations. Arguments before LUBA that a decision is or is not supported by
24 substantial evidence under ORS 197.835(9)(a)(C), or that a party did or did not

1 raise a specific issue during the local proceeding for purposes of ORS 197.763(1)
2 and 197.835(3), are sometimes supported or demonstrated by reference to oral
3 testimony before the decision maker. *See, e.g., Oregon Entertainment*
4 *Corporation v. City of Beaverton*, 38 Or LUBA 440, 461-62 (2000) (substantial
5 evidence); *Rawson v. Hood River County*, 75 Or LUBA 200, 210-11 (2017)
6 (waiver); *Tillamook People’s Utility District v. City of Tillamook*, 69 Or LUBA
7 1, 4-7 (2014) (waiver); *Tylka v. Clackamas County*, 22 Or LUBA 166, 175 (1991)
8 (substantial evidence). As we have noted, minutes are necessarily summary in
9 nature, and they may or may not contain enough detail for us to accurately resolve
10 these arguments.

11 In cases where a local government has prepared media recordings but was
12 not legally required to do so, one approach, that may or may not be supported by
13 a literal reading of OAR 661-010-0026(1)(c), would be to not require that the
14 recordings be included in the record. This would increase the burden on the other
15 parties to consider the evidentiary and preservation arguments that they wish to
16 make far enough in advance to demonstrate during the record objection period
17 that the minutes are materially defective, and to seek to have LUBA order a
18 transcript prepared under OAR 661-010-0026(3). Under this approach, given the
19 summary nature of minutes, it is likely that local governments would be required
20 to prepare far more transcripts for inclusion in the record at LUBA, thereby
21 protracting the record objection period and delaying resolution of an appeal.
22 However, it is also possible that some local governments would choose to include

1 far more detail in their minutes, which would create additional work for local
2 governments in preparing the minutes and the record, and potentially lead to
3 additional motions for extension of time to do so. Both of these results would
4 contravene the legislative policy that “time is of the essence in reaching final
5 decisions in matters involving land use.” ORS 197.805.

6 The far better approach, we believe, is to require that media recordings be
7 included in the record whenever they are prepared, even where the local
8 government was not legally required to prepare them in the first place. *Ramsay*,
9 29 Or LUBA at 560. Here, it is apparent from the parties’ arguments that the city
10 has in fact prepared media recordings. Accordingly, it must include them in the
11 record by providing LUBA and the parties with physical copies. This objection
12 is sustained.

13 **CONCLUSION**

14 As noted above, the city has conceded some of petitioner’s objections and
15 attached responsive documents to its response. However, the documents attached
16 to the city’s response do not comply with our rules governing the required form
17 for supplemental records. *See* OAR 661-010-0025(4)(a) ((1) providing that the
18 record must, among other things, begin with a table of contents, have pages
19 numbered consecutively, and be arranged in inverse chronological order and (2)
20 allowing LUBA to reject a record that does not substantially conform to those
21 requirements).

1 Accordingly, within 14 days of the date of this order, the city shall transmit
2 to the Board and petitioner a supplemental record that includes (1) Exhibits A, B,
3 and C to the challenged ordinance, (2) the minutes for the October 14, 2020 city
4 council meeting, and (3) physical media recordings of city council meetings on
5 September 9, 2020 and October 14, 2020. After the Board receives the
6 supplemental record containing these materials, the Board will issue an order
7 settling the record and establishing a briefing schedule.

8 Dated this 9th day of February 2021.

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Melissa M. Ryan
Board Member