

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

3
4 ALLEN L. HUBENTHAL,
5 *Petitioner,*

6
7 vs.

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9 CITY OF WOODBURN,
10 *Respondent,*

11 and

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14 EUGENE R. GASCHO, JUDITH A. GASCHO,
15 WILLIS A. BYERS, RACHEL L. BYERS, RODNEY
16 LEE BYERS, and MARCIA KATHRYN BYERS,
17 *Intervenors-Respondent.*

18
19 LUBA No. 2000-050

20 ORDER ON RECORD OBJECTIONS
21

22 Petitioner objects to the record filed by the city in this appeal. We address
23 petitioner's objections below

24 **A. First Objection**

25 Petitioner first objects that the record does not include either the agendas or notices of
26 hearing for the September 23, 1999, October 14, 1999 and January 27, 2000 planning
27 commission hearings in this matter.

28 Respondent contends that under OAR 661-010-0025 the city is only required to
29 include the record of the proceedings before the "final decision maker," which in this case is
30 the city council. Respondent argues that the record need not include the agendas or notices
31 of hearing for planning commission hearings, unless the city council specifically
32 incorporated those agendas and notices into the local record.

33 Although our rule could be clearer, we do not agree with respondent. Under OAR
34 661-010-0025(1)(b), *evidence* that is presented to lower local decision making bodies need

1 not be included in the record of the final decision maker *unless* that evidence is (1) placed
2 before the final decision maker or (2) incorporated into the record by the final decision
3 maker. Similarly OAR 661-010-0025(1)(c) only requires that the record include the *minutes*
4 *and tape recordings* of meetings conducted by the final decision maker. Under
5 OAR 661-010-0025(1)(c), the minutes and tape recordings of lower level local decision
6 makers must be included in the record only if they are incorporated into the record by the
7 final decision maker.

8 Unlike OAR 661-010-0025(1)(b) and (c), OAR 661-010-0025(1)(d) requires that the
9 record include all *notices of hearing*, whether those hearings were conducted by the final
10 decision maker or by lower decision makers.¹ Because the notices of hearing required by
11 OAR 661-010-0025(1)(d) are not limited to notices of hearing before the city council, we
12 agree with petitioner that the notices of hearing for the September 23, 1999, October 14,
13 1999 and January 27, 2000 planning commission hearings in this matter should be included
14 in a supplemental record.² However, our rule does not require that the *agendas* for those
15 meetings be included in the record.

16 The first objection is sustained in part.

17 **B. Second Objection**

18 Petitioner next objects that the record only includes three pages of the application in
19 this matter. Respondent points out that the entire application appears at Record 166-336.

20 The second objection is denied.

¹OAR 661-010-0025(1)(d) requires that the record include “[n]otices of * * * public hearing * * *, if any, published, posted or mailed during the course of the land use proceeding * * *.”

²If separate notices were not sent for one or more of those hearings, respondent may so indicate when the supplemental record is filed.

1 **C. Third Objection**

2 Petitioner objects that the materials at Record 432-37 are not in inverse chronological
3 order, as required by OAR 661-010-0025(4)(a)(E). For the reasons explained in respondent's
4 response to this objection, petitioner is incorrect.

5 The third objection is denied.

6 **D. Fourth Objection**

7 Exhibit A to the affidavit that appears at Record 464 is composed of two pages.
8 Apparently the originals of those pages are larger than 8 ½ inches by 11 inches and, in
9 copying those pages of the record, the bottom portion of the pages were not reproduced in
10 some copies of the record. The city agrees to provide a complete copy of the affidavit that
11 appears at Record 464, with its exhibits, as a supplemental record.

12 The fourth objection is sustained.

13 **E. Fifth Objection**

14 Petitioner objects that the minutes of the planning commission's October 14, 1999
15 and January 13, 2000 hearings are inaccurate or incomplete.

16 As we have already noted, OAR 661-010-0025(1)(c) only requires that the minutes of
17 proceedings before the final decision maker be included in the record. That rule requires that
18 the minutes of lower level decision makers also be included, but only if those minutes were
19 (1) placed before the final decision maker or (2) incorporated as part of the record by the
20 final decision maker. Here the minutes that are included in the record apparently are the
21 same minutes that were placed before the final decision maker. That the minutes that were
22 actually placed before the final decision maker may be incomplete or inaccurate does not
23 provide a basis for a record objection under OAR 661-010-0026(3).³ OAR 661-010-0026(3)

³OAR 661-010-0026(3) provides, as relevant:

“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

1 provides a way to correct the minutes of the proceedings of the final decision maker; it does
2 not provide a way to correct incomplete or inaccurate minutes that were actually placed
3 before or incorporated by the final decision maker.

4 The fifth objection is denied.

5 **F. Conclusion**

6 Petitioner's first objection is sustained in part and petitioner's fourth objection is
7 sustained. Petitioner's remaining objections are denied.

8 The record shall be considered settled when LUBA receives a supplemental record
9 that includes: (1) any notices of hearing for the planning commission's September 23, 1999,
10 October 14, 1999 and January 27, 2000 hearings in this matter, and (2) the affidavit that
11 appears at Record 464, together with complete copies of all exhibits to that affidavit. The
12 supplemental record shall comply with the relevant requirements of OAR 661-010-0025(4).

13 Dated this 19th day of June, 2000.
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20 _____
21 Michael A. Holstun
Board Member

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.
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