

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 NO TRAM OHSU, INC., LARRY J. BECK,
5 BARBARA HUTCHINSON and SEAN BRENNAN,
6 *Petitioners,*

7
8 and
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10 CORBETT-TERWILLIGER LAIR HILL
11 NEIGHBORHOOD ASSOCIATION,
12 *Intervenor-Petitioner,*

13
14 vs.
15

16 CITY OF PORTLAND,
17 *Respondent,*

18
19 and
20

21 OREGON HEALTH & SCIENCE UNIVERSITY,
22 *Intervenor-Respondent.*

23
24 LUBA No. 2002-099

25 ORDER

26 **MOTIONS TO INTERVENE**

27 Corbett-Terwilliger Lair Hill Neighborhood Association and Oregon Health &
28 Science University, participants below, move to intervene in this case. There is no opposition
29 to the motions and they are allowed.

30 **RECORD OBJECTIONS**

31 A primary source of contention between the parties regarding petitioners' record
32 objections concerns the voluminous documents generated at the planning commission level.
33 Petitioners contend that the entire planning commission record should also be part of the city
34 council record. The city contends that only selected portions of the planning commission
35 record that were actually placed before the city council are properly part of the record. A
36 majority of petitioners' record objections involve materials that were clearly part of the

1 planning commission record, but that the city asserts were never actually placed before the
2 city council.

3 OAR 661-010-0025(1) provides in part:

4 “Contents of Record: Unless the Board otherwise orders, or the parties
5 otherwise agree in writing, the record shall include at least the following:

6 “* * * * *

7 “(b) All written testimony and all exhibits, maps, documents, or other
8 written materials specifically incorporated into the record or placed
9 before, and not rejected by, the final decision maker, during the course
10 of the proceedings before the final decision maker.”

11 The parties apparently do not dispute that the city planning staff placed numerous
12 boxes of materials from the planning commission record before the city council, and that
13 those boxes did not contain certain documents that had been placed before the planning
14 commission.¹ The city argues that because the omitted documents were never “placed
15 before” the city council, they are not part of the record. Petitioners argue that the documents
16 were nonetheless “specifically incorporated” into the record because the planning
17 commission’s proceedings were part of the legislative process the city used to adopt the
18 challenged plan.

19 The city asserts that its code does not require that the entire planning commission
20 record be made part of the city council record. According to the city, Portland City Code
21 (PCC) 33.740.020.E.2 requires only that the planning commission report and
22 recommendation be forwarded to the city council.² We addressed similar PCC provisions in

¹ The city does not explain how it selected the documents that were made available to the city council from among the many documents that were placed before the planning commission. For instance, the city included a letter from petitioners, but did not include the 11 pages of attachments that accompanied the letter.

² PCC 33.740.010 provides:

“Legislative actions provide for the establishment and modification of land use plans, policies, regulations, and guidelines. The legislative procedure includes a public hearing by a designated commission. The hearings provide opportunities for public comment and input on actions which may affect large areas of the city.”

1 *Union Gospel Ministries v. City of Portland*, 21 Or LUBA 557 (1991). There the city adopted
2 a legislative ordinance pertaining to single-occupancy rooms pursuant to PCC 33.220.010
3 and 33.220.020.E.1, predecessor provisions to the legislative PCC provisions at issue here.³
4 The petitioner objected to the record the city filed in that case, arguing that the city
5 improperly failed to include written and oral statements made before the city planning
6 commission. There, as here, the petitioner argued that the planning commission’s hearing
7 was part of the city’s overall legislative process and, therefore, any evidence that was
8 presented to the planning commission was necessarily part of the city council’s record as
9 well. In *Union Gospel Ministries*, we concluded that provisions governing legislative actions
10 implicitly require that the record of the lower body be incorporated into the record of the city
11 council. 21 Or LUBA at 560. While the current PCC language is not identical to the code
12 language at issue in *Union Gospel Ministries*, we do not believe the change in code language
13 supports a different result here. *See* ns 2 and 3. Therefore, the entire record of the
14 proceedings before the planning commission is part of the city council record in this
15 proceeding. With the above in mind, we now turn to petitioners’ individual record objections.

PCC 33.740.020.E.2 provides:

“If the last Commission reviewing a legislative action recommends approval, a report and recommendation will be forwarded to City Council.”

³ *Former* PCC 33.220.010 provided:

“Legislative actions provide for the establishment and modification of legislative land use policies and plans. Legislative actions include a public hearing by the designated commission. If the commission recommends an action to City Council, the Council also holds a public hearing prior to rendering a decision.”

Former PCC 33.220.020.E provided, in relevant part:

“Commission recommendation and decisions:

“1. Favorable recommendations. If the proposal is approved, a report and recommendation shall be forwarded to City Council.”

1 **OBJECTION 1**

2 Petitioners assert that 11 pages of attachments to a letter dated April 22, 2002, that
3 they sent to the planning commission should be included in the record. No party disputes that
4 the attachments were part of the planning commission record. Therefore, they should be
5 included in the record.

6 Objection 1 is sustained.

7 **OBJECTION 2**

8 Petitioners request that the minutes or tapes of a May 23, 2002 city council hearing be
9 included in the record. The city responds that the May 23, 2002 city council hearing involved
10 a separate decision making process, initiated by the city's office of transportation, to evaluate
11 a suspended cable transportation system. The present case involves a plan, initiated by the
12 city's bureau of planning, for the area where the suspended cable transportation system may
13 be built. The two cases involve different applications and constitute separate decisions.
14 Petitioners have not directed us to anything that would support a conclusion that the disputed
15 minutes or tapes were placed before the city council during the proceedings that led to the
16 decision that is the subject of this appeal.

17 Objection 2 is denied.

18 **OBJECTION 3**

19 Petitioners assert that the minutes from the April 2 and April 9, 2002 planning
20 commission hearings should be included in the record. The minutes are properly viewed as
21 part of the planning commission record. Therefore, they must be included in the record in
22 this appeal.

23 Objection 3 is sustained.

1 **OBJECTION 4**

2 Petitioners assert that the minutes and tapes of the April 23, May 7, and May 14, 2002
3 planning commission work sessions should be included in the record. The minutes and tapes
4 are part of the planning commission record. Therefore, they must be included in the record.

5 Objection 4 is sustained.

6 **OBJECTION 5**

7 Petitioners assert that the minutes and tapes of the July 11, 2002 city council session
8 were not included in the record. The city has already submitted those minutes and tapes in a
9 supplemental record.

10 Objection 5 is moot.

11 **OBJECTION 6**

12 Petitioners assert that 1998 real estate negotiation documents prepared by Steve
13 Seigel should be included in the record. The city responds that the alleged documents are not
14 in the city's planning files and that planning staff do not recall ever having seen such
15 documents. As discussed earlier, any documents that were part of the planning commission
16 record are incorporated into the city council record. The burden, however, remains on
17 petitioners to demonstrate that any materials that they believe should be included in the
18 record were actually part of the planning commission record. Petitioners have not
19 demonstrated that the alleged real estate negotiation documents were placed before the
20 planning commission or otherwise made part of the city council record.

21 Objection 6 is denied.

22 **OBJECTION 7**

23 Record objection 7 is not really a record objection. We understand petitioners to seek
24 copies of all tapes that were originally included in the record in this matter or that may be
25 included in the record as a result of petitioners' record objections. Under OAR 661-010-
26 0025(3), the copy of the record that the city is required to serve on petitioners need not

1 include copies of “large maps, tapes, and difficult-to-duplicate documents and items.” Our
2 rule requires that the city provide petitioners with copies of such tapes only if petitioners
3 reimburse the city “for the reasonable expense incurred in copying the tape.”⁴ *Id.* We
4 understand the city to be willing to provide copies of all tapes that are ultimately included in
5 the record in this matter, “provided that petitioners reimburse the City for its reasonable
6 expenses of copying the tapes, pursuant to OAR 661-010-0025(3).” Respondent’s Response
7 to Petitioners’ Record Objection 7-8. Although petitioners never expressly say so, we
8 understand that they are willing to pay any reasonable expenses the city may incur in
9 providing copies of those tapes to petitioners.

10 Petitioners shall advise the city within three days of the date of this order whether
11 they agree to reimburse the city for the reasonable expense of copying all tapes that are
12 ultimately included in the record in this appeal. If the city receives such an agreement from
13 petitioners, the city shall provide petitioners with copies of all tapes that are included in the
14 record in this matter not later than the date it files the supplemental record that is required by
15 this order.⁵

16 **CONCLUSION**

17 The city shall submit a supplemental record in accordance with this order.

18 Dated this 10th day of December, 2002.

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Anne Corcoran Briggs

⁴ It is understandable that petitioners may wish to have copies of tapes that will ultimately be included in the record and that they may wish to receive those tapes either before the record is filed and served or at the same time the record is filed with LUBA. However, in view of OAR 661-010-0025(3), petitioners who wish to obtain copies of tapes at the same time the record is filed should forward that request directly to the local government well before the deadline for filing the record. Since OAR 661-010-0025(3) expressly authorizes the city to exclude tapes from the copy of the record that is served on petitioners, a record objection is not an appropriate means of requesting copies of tapes that are or will be included in the local government record.

⁵ If the city already knows what its reasonable costs of copying the tapes will be, it may advise petitioners of the cost and require that petitioners pay the cost of copying the tapes before the tapes are provided to petitioners.

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Board Member