

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

3
4 BRUCE PACKING COMPANY, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SILVERTON,
10 *Respondent,*

11 and

12
13 YAKIMA VALLEY FARM
14 WORKERS CLINIC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2003-047

18
19 ORDER

20 **MOTION TO INTERVENE**

21 Yakima Valley Farm Workers Clinic (intervenor), the applicant below, moves to
22 intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

23 **RECORD OBJECTIONS**

24 On May 1, 2003, petitioner filed objections to the record. The parties advise us that
25 they have resolved all but two of petitioner's record objections. We now resolve the
26 remaining objections.

27 **A. Audio Tapes of Planning Commission Proceedings**

28 The challenged decision in this case is the city council's approval of intervenor's
29 application for a zone change. The city planning commission initially considered the
30 application, conducted hearings, and recommended approval to the city council. The city
31 council then conducted hearings, and adopted the challenged decision. The record includes
32 the minutes of the planning commission hearings, but does not include the audio tapes of
33 those hearings.

1 Petitioner argues that the local record should include the audio tapes of the planning
2 commission hearings, citing OAR 661-010-0025(1)(c).¹ However, that rule concerns only
3 the minutes and audio tapes of the proceedings “conducted by the final decision maker.”
4 There is no dispute that the city council was the final decision maker in this case. OAR 661-
5 010-0025(1)(c) does not require the city to include the audio tapes of the *planning*
6 *commission* hearings in the record. Such tapes may be included only if they were placed
7 before the final decision maker, specifically incorporated into the record by the final decision
8 maker, or automatically included by operation of local code requirements. OAR 661-010-
9 0025(1)(b); *Leonard v. Union County*, 23 Or LUBA 664, 667 (1992). Petitioner does not
10 assert that the audio tapes were placed before the final decision maker or specifically
11 incorporated into the record. The city states, and petitioner does not dispute, that the city’s
12 code does not require that the preliminary decision maker’s record be included in the record
13 before the final decision maker. Accordingly, this objection is denied.

14 **B. Ordinances 01-106 and 01-107**

15 Petitioner states that during the public hearing before the city council, petitioner’s
16 attorney “specifically incorporated” into the record two ordinances and supporting city files,

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

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

- “(a) The final decision including any findings of fact and conclusions of law;
- “(b) All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.
- “(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. * *

1 within the meaning of OAR 661-010-0025(1)(b).² See n 1. Therefore, petitioner argues,
2 those ordinances and files are part of the local record.

3 Intervenor responds that OAR 661-010-0025(1)(b) does not permit persons other than
4 the local government decision maker to include items in the record by incorporating them by
5 reference. We agree. While OAR 661-010-0025(1)(b) is not absolutely clear on this point,
6 we interpret the rule to limit powers of incorporation to the local decision maker. If persons
7 other than the local decision maker could incorporate documents into the record that are in
8 fact not “placed before” that decision maker by simply requesting their incorporation, then
9 the local decision maker’s traditional role in controlling the content of the record would be
10 lost. In addition, petitioner’s view of OAR 661-010-0025(1)(b) is inconsistent with the well-
11 established principle that a party’s request to include documents in the record is not
12 sufficient, in itself, to make those documents part of the record, if those document are not
13 actually “placed before” the final decision maker. *McKenzie v. Multnomah County*, 30 Or
14 LUBA 461, 462 (1996); *ONRC v. City of Oregon City*, 28 Or LUBA 775, 780 (1994).
15 Because we do not understand OAR 661-010-0025(1)(b) to undermine the local decision
16 maker’s role in controlling the content of the record, or to implicitly overrule the above-cited
17 cases, we reject petitioner’s argument that his request was sufficient to “specifically
18 incorporate” the requested documents into the record.³

19 This objection is denied.

20 The record is settled as of the date of this order. The petition for review is due 21

² The minutes of the February 3, 2003 city council hearing indicates that petitioner’s attorney “asked [the] Council to incorporate by reference the City files on Ordinance No. 01-106 & 01-107.” Record 40. During the subsequent deliberations, the city attorney reminded the council of that request, and advised that the council “could accept the referenced ordinances as part of the record or make a finding that the legislative record behind the two ordinances was insufficiently necessary for consideration of the application.” *Id.* The minutes do not reflect any further discussion or action taken on petitioner’s request, and the city council concluded its deliberations by voting to approve intervenor’s requested zone change.

³ We do not understand the city to dispute that Ordinances 01-106 and 01-107 themselves may be subject to official notice by LUBA.

1 days, and the response brief are due 42 days, from the date of this order. The Board's final
2 opinion and order is due 77 days from the date of this order.

3 Dated this 5th day of June, 2003.
4
5
6
7
8
9

10

Tod A. Bassham
11 Board Chair