

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

3
4 HEIDI SIPE and KYLE SIPE,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF UMATILLA,
10 *Respondent,*

11
12 and

13
14 UMATILLA ELECTRIC COOPERATIVE,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2024-099

18
19 ORDER
20

21 The challenged decision is a city council decision approving a conditional
22 use permit to construct, operate, and maintain two 230kV, double-circuit
23 transmission lines.

24 **MOTION TO INTERVENE**

25 Umatilla Electric Cooperative (intervenor), the applicant below, moves to
26 intervene on the side of the city. No party opposes the motion and it is allowed.

27 **RECORD OBJECTIONS**

28 On January 24, 2025, LUBA received electronic copies of the record in
29 this appeal on flash drives. On February 5, 2025, petitioners filed objections to
30 the record. On February 7, 2025, intervenor filed objections to the record. On

1 February 21, 2025, LUBA received the city’s response to petitioners’ and
2 intervenor’s objections, along with electronic copies of an amended record on
3 flash drives. On March 5, 2025, petitioners filed objections to the amended
4 record. On March 13, 2025, LUBA received a paper copy of the amended record
5 from the city. The certificate appended to the paper copy of the amended record
6 indicates that a paper copy of the amended record was served on the parties on
7 March 11, 2025. On March 18, 2025, the city filed a response to petitioners’
8 objections to the amended record. We now resolve petitioners’ and intervenor’s
9 record objections.

10 **A. Petitioners’ Record Objections**

11 **1. Record Organization and Document Descriptions**

12 Petitioners object that certain items in the record are improperly located,
13 described or numbered. Specifically, petitioners object that certain items in the
14 table of contents do not separately list their attachments. OAR 661-010-
15 0025(4)(a)(B)(i). For example, petitioners fault the city for listing Item 1.4 “Staff
16 Report with Attachments” at record pages 16 to 227 without separately listing the
17 staff report’s attachments which appear at record pages 39 to 227. Petitioners
18 identify the same defect in record items 3.4, 4.3, and 5.3. Petitioners also object
19 that certain record items are incorrectly identified. For example, Item 1.5 is
20 identified as “Notice of City Council Review and Affidavits” at record pages 228
21 to 239, however those pages contain a different document.

22 The city responds that it has corrected these errors in the amended record.

1 We have reviewed the amended record and amended table of contents and
2 conclude that it resolves petitioners' objections.

3 Petitioners' first objection is sustained and resolved.

4 **2. Searchability**

5 Petitioners object that the electronic record is not fully text searchable as
6 required by OAR 661-010-0025(2)(b).¹ Petitioners identify certain terms in the
7 record that petitioners allege either cannot be found, or whose occurrence can
8 only partially be found, using their software's text search function.

9 The city responds, initially, that "both the original record and [amended]
10 [r]ecord were processed for searchability by Adobe Acrobat Pro a common

¹ OAR 661-010-0025(2)(b) provides, in relevant part, that "[i]f the record exceeds 100 pages, the electronic copy shall be searchable." In *Rogue Advocates v. Josephine County*, we concluded:

"Nothing in our rules require the local government to go beyond using standard, readily available technology to produce searchable PDF documents, where searchability is required. An electronic record that allows clearly printed text to be located with reasonable effort is sufficient to comply with OAR 661-010-0025(2)(b). The local government is not required to produce a record that allows searching for obscured, unusual or handwritten text, or to format and index images and tables for searchability. LUBA has searched for printed words on the pages that petitioners cite to, and the search function on LUBA's off-the-shelf version of Adobe Reader has no trouble locating the search terms. Petitioners do not identify what search terms they used, and have not demonstrated that printed words in the record served on them are not searchable, or that any deficiency in searchability significantly affects the usability of the record." 71 Or LUBA 409, 412 (2015).

1 character recognition program which the City regularly uses for such purpose.
2 Any inability of the software to identify terms is a function of either the software
3 or the quality of the original. The City cannot and does not intend to take any
4 further steps in response to this objection.” City Response 1-2. In their objections
5 to the amended record, petitioners renew their objection to the amended record’s
6 electronic text searchability.

7 The city responds that it has provided a paper copy of the amended record
8 to LUBA and the parties in accordance with OAR 661-010-0025(2)(a).² Our rules
9 provide that the city may transmit an electronic record “[a]s an alternative to
10 transmitting a certified paper copy of the record[.]” OAR 661-010-0025(2)(b).
11 The city’s provision of a paper copy of the record resolves petitioners’ objections
12 to the electronic text searchability of the electronic record.

13 Petitioners’ second objection is resolved.

14 **3. Omitted Items**

15 Petitioners object that certain items are improperly omitted from the
16 record. OAR 661-010-0025(1)(b). Specifically, petitioners object to the record’s
17 omission of (1) pictures and added overlays displayed during public testimony at
18 the September 24, 2024 planning commission meeting; (2) a definitions poster

² Petitioners acknowledge: “If the City is unable to produce a record that complies with the electronic filing requirements, it is free to file a paper copy of the record, as authorized by OAR 661-010-0025.” Petitioners’ Objection to Supplemental Record 2.

1 displayed during public testimony at the November 21, 2024 city council
2 meeting; and (3) an email sent on November 5, 2024 from petitioner to city staff.
3 Petitioners argue that “[t]hese items were presented to and not rejected by the
4 decision-maker as part of these proceedings and therefore, they must be
5 reproduced as part of the LUBA record.” Petitioners’ Record Objections 4.

6 The city responds that the November 5, 2024 email has been included in
7 the amended record. This portion of the objection is sustained and resolved.

8 The city responds that the pictures and added overlays and the definitions
9 poster “were held up at the meetings on September 24 and November 21,
10 respectively, but were never given to the City or otherwise entered into the record
11 by their proponents, and as such are not part of the record.” City Response 2.

12 OAR 661-010-0025(1)(b) requires the record include:

13 “All written testimony and all exhibits, maps, documents or other
14 materials specifically incorporated into the record or placed before,
15 and not rejected by, the final decision maker, during the course of
16 the proceedings before the final decision maker.”

17 In *ONRC v. City of Oregon City*, we explained that documents are “placed
18 before” the decision maker, within the meaning of OAR 661-010-0025(1)(b), if:

19 “(1) they are physically placed before the decision maker prior to
20 the adoption of the final decision; (2) they are submitted to the
21 decision maker through means specified in local regulations or
22 through appropriate means in response to a request by the decision
23 maker for submittal of additional evidence; or (3) local regulations
24 require that the item (e.g., record of a lower level decision maker’s
25 proceeding) be placed before the decision maker.” 28 Or LUBA
26 775, 778 (1994).

1 Thus, under OAR 661-010-0025(1)(b), documents must be included in the record
2 if they have been placed before the decision maker, either physically or through
3 operation of local law, or the documents were specifically incorporated into the
4 record. No party points us to any established city procedures for admitting items
5 displayed during city land use hearings into the record of those hearings.

6 In *Home Depot U.S.A., Inc. v. City of Portland*, 36 Or LUBA 783, 785
7 (1999), we explained that in the absence of established procedures governing how
8 items are submitted into the record before the final decision maker, whether items
9 are “placed before” the decision maker within the meaning of OAR 661-010-
10 0025(1)(b) “turns on whether the decision maker’s conduct, or acquiescence in
11 the conduct of staff, regarding those items is such that participants in the
12 proceedings reasonably should expect that those items are part of the local
13 evidentiary record.” In *Redland/Viola/Fischer’s Mill CPO v. Clackamas County*,
14 27 Or LUBA 645, 647 (1994), we concluded that, in the absence of established
15 county procedures for formally admitting documents displayed during county
16 land use hearings into the record of those hearings, certain wildlife inventory
17 maps displayed during the hearing and discussed in the testimony of planning
18 staff were “placed before” the decision maker because it was reasonable for
19 participants in those proceedings to expect that the maps in the county’s
20 possession, which were displayed before the county decision maker and
21 discussed by county staff during their testimony, were part of the record. By
22 contrast, in *Wicks v. City of Reedsport*, 28 Or LUBA 739, 741 (1994), we

1 concluded that it was not reasonable for participants to expect that oversized aerial
2 photographs that were permanently affixed to hearing room walls would become
3 part of the record simply because they were within view of the decision maker
4 and were referred to in testimony. In *Home Depot, Inc. v. City of Portland*, 37 Or
5 LUBA 994, 996 (1999), we further explained that items do not become part of
6 the local record simply because they are “physically present and visible.” We
7 held that “[s]omething more must be done to place it before the decision maker.”
8 *Id.* For example, in *Tri-River Investments Co. v. Clatsop County*, 35 Or LUBA
9 820, 823 (1998), we held that where a party had prepared and displayed maps at
10 a hearing, but did not request that the maps be included in the record and removed
11 the maps at the conclusion of the hearing, the maps were not part of the record.
12 We also cautioned in *Home Depot, Inc.* that “[w]here a party alleges that certain
13 documents were not ‘placed before’ the decision maker, the proponent of
14 [inclusion of those documents] bears some burden to support its contention to the
15 contrary.” 37 Or LUBA at 996.

16 Petitioners have not demonstrated that “something more” than the
17 participants simply displaying and referencing the pictures with overlays and
18 definitions poster at the hearing on this matter occurred to make those items part
19 of the record. Petitioners do not claim that the decision maker or city staff
20 discussed those items or that the participants requested that the items be included
21 in the record. For those reasons, participants in the proceedings would not
22 reasonably expect those items to be part of the local record. These portions of the

1 objection are denied.

2 Petitioners' third objection is sustained, in part, and resolved.

3 **4. Items Not Reproduced in Color**

4 Petitioners object that numerous record pages were submitted to the city in
5 color, but the record reproduces them in black and white, and the city should be
6 required to submit those pages in color or, in the alternative, indicate that the
7 documents are difficult to duplicate and that the color originals will be provided
8 at oral argument.³

9 The city responds that several of the pages petitioners identify were in fact
10 reproduced in color in the record; that better quality copies of record pages 42
11 and 43 are included in the amended record; and that the remaining pages to which
12 petitioners object were received in black and white and so cannot be reproduced
13 in color. The city also "questions how the difference between color and black and
14 white images of these pages, which are all signature pages of notarized
15 documents, materially affects the usability of the record in Petitioners' pursuit of
16 this appeal." City Response 2.

17 In *Oien v. City of Beaverton*, 45 Or LUBA 722, 727 (2003), we explained:

18 "Where the record filed with LUBA includes black and white copies
19 of color originals and the city does not indicate that it will provide

³ Petitioners identify record pages 12, 13, 14, 15, 42, 43, 46, 47, 48, 654, 655, 660, 670, 671, 690, 691, 699, 700, 707, 708, 715, 716, 723, 731, 732, 738, 745, 751, 758, 763, 764, 771, 772, 779, 787, 788, 796, 797, 804, 812, 813, and 822.

1 the color originals at oral argument, * * * parties are free to object.
2 However, such objections should be limited to the color documents
3 in the original record where material information is actually lost in
4 the black and white copy that is provided to LUBA and the parties.”

5 We have reviewed the record pages that the city contends were in fact
6 reproduced in color in the record and conclude that they were indeed reproduced
7 in color.⁴

8 The city responds that better quality copies of record pages 42 and 43 are
9 included in the amended record, but that response does not address petitioners’
10 contention that those pages should be reproduced in color. We have reviewed the
11 amended record pages 42 and 43, which are sign-up sheets for a planning
12 commission meeting, and conclude that those pages are, in fact, reproduced in
13 color, based on the presence of blue and black writing.

14 As the custodian of the record, we defer to the city’s assertion that black
15 and white originals of the remaining pages were submitted into the record. *Curl*
16 *v. City of Bend*, 55 Or LUBA 719, 725 (2008).⁵

17 Petitioners’ fourth objection is denied.

18 **5. Meeting Minutes and Video Recordings**

19 Petitioners object that the record does not include a tape or video recording

⁴ The city identifies record pages 13, 14, 15, 46, 47, 48, 654, and 660 as reproduced in color.

⁵ We understand the remaining pages to be record pages 655, 670, 671, 690, 691, 699, 700, 707, 708, 715, 716, 723, 731, 732, 738, 745, 751, 758, 763, 764, 771, 772, 779, 787, 788, 796, 797, 804, 812, 813, and 822.

1 of the November 21, 2024 city council meeting, as required by OAR 661-010-
2 0025(1)(c). The city responds that the amended record includes a video recording
3 of the November 21, 2024 city council meeting. This portion of the objection is
4 sustained and resolved.

5 Petitioners also object that the minutes of the August 27 and September
6 24, 2024 planning commission meetings in the record do not comply with ORS
7 192.650(1). ORS chapter 192 is the Oregon Public Records Law. We understand
8 petitioners to argue that noncompliance with ORS 192.650(1) makes the minutes
9 incomplete or does not accurately reflect the proceedings before the final decision
10 maker within the meaning of OAR 661-010-0026(2)(c). Specifically, petitioners
11 argue that the minutes of the August 27, 2024 meeting “conclude with the
12 statement ‘motion carries’ but fail to identify the speaker of the motion, the nature
13 of the motion, who seconded the motion and the vote count in violation of ORS
14 192.650(1)(b) and (c),” and that the minutes of the September 24, 2024 meeting
15 do not include lists of who provided public testimony at the meeting or
16 summaries of that testimony in violation of ORS 192.650(1)(d). Petitioners’
17 Record Objections 5. Petitioners argue that “[i]f the City is going to rely on
18 minutes as a substitute for including a recording of the Planning Commission
19 meetings, it must include meeting minutes that otherwise comply with the public
20 meeting law requirements for adequate minutes. Without this information,
21 Petitioners will be prejudiced in their ability to fully present their case to LUBA.”
22 *Id.*

1 The city responds that the amended record includes video recordings of the
2 August 27, September 24, and October 22, 2024 planning commission meetings,
3 and therefore petitioners’ objections regarding the inadequacy of the written
4 minutes of those meetings are moot. In their objections to the amended record,
5 petitioners object that the August 27 and September 24, 2024 video recordings of
6 the planning commission meetings are not complete. Petitioners argue that the
7 August 27 and September 24, 2024 meeting minutes reflect approximately 2.5-
8 hour long meetings, while the video recordings of those meetings are only 2 hours
9 long, omitting approximately 30 minutes of each meeting. Petitioners also object
10 that portions of the August 27, 2024 recording are inaudible and provide time
11 stamps of the allegedly inaudible portions of those recordings. Based on these
12 defects in the video recordings, petitioners renew their objections to the minutes
13 of the planning commission meetings.

14 OAR 661-010-0025(1)(c) provides that the record shall include:

15 “Minutes and tape, CD, DVD or other media recordings of the
16 meetings conducted by the final decision maker, if created by the
17 final decision maker or incorporated into the record by the final
18 decision maker. A verbatim transcript of media recordings shall not
19 be required, but if a transcript has been prepared by the governing
20 body, it shall be included.”

21 The amended record includes minutes as well as video recordings of the
22 planning commission meetings. OAR 661-010-0026(2)(c) provides that record
23 objections may be made on the grounds that “[t]he minutes * * * of meetings or
24 hearings are incomplete or do not accurately reflect the proceedings.” OAR 661-

1 010-0026(3) provides, in turn, that such an objection to incomplete or inaccurate
2 minutes “shall demonstrate with particularity how the minutes * * * are defective
3 and shall explain with particularity why the defect is material.” To demonstrate
4 that defects in minutes are material, objectors must explain why the alleged
5 inaccuracies or omissions impede their ability to prepare their petition for review
6 or brief or affect our resolution of the appeal. *Pardee v. City of Astoria*, 17 Or
7 LUBA 1003, 1005 (1988).

8 Petitioners argue that the August 27, 2024 meeting minutes violate ORS
9 192.650(1)(b) and (c) because they “conclude with the statement ‘motion carries’
10 but fail to identify the speaker of the motion, the nature of the motion, who
11 seconded the motion and the vote count,” and that the September 24, 2024
12 meeting minutes violate ORS 192.650(1)(d) because they do not include lists of
13 who provided public testimony at the meeting or summaries of that testimony.
14 However, simply stating that those alleged defects will cause petitioners to be
15 “prejudiced in their ability to fully present their case to LUBA” does not explain
16 with any particularity how the evidence allegedly not reflected in the minutes
17 would impede petitioners’ ability to prepare their petition for review or affect our
18 resolution of the appeal. Petitioners’ objection to the meeting minutes is denied.
19 *Rogue Advocates v. Josephine County*, 71 Or LUBA 409 (2015).

20 With respect to the video recordings, the city responds that it
21 “acknowledges that the audio recording it has for the August 27, 2024, Planning
22 Commission meeting (‘August 27th Hearing’) is not of perfect quality, and that

1 the audio is cut off in places. Nonetheless, the recordings provided to the parties
2 are complete copies of the audio files the City has and are the only recordings
3 available to be included in the record.” City Response to Petitioners’ Objections
4 to Amended Record 2-3. The city disputes that some portions of the video
5 recordings of the meetings petitioners identify as inaudible are in fact inaudible,
6 explaining that during those portions, no one was speaking. The city admits that
7 other portions of the video recordings are difficult to hear or are cut off entirely,
8 but that the written minutes reflect what was happening during the meetings at
9 those times. The city also responds that the differences between the meeting times
10 indicated in minutes and the length of the video recordings are due to the fact that
11 the meetings included agenda items unrelated to the present appeal and the city
12 is not obligated to provide video recordings of other, unrelated agenda items. The
13 city concludes that “[a]ny perceived gaps or variation in the quality of the audio
14 files are a function of the technology used at the Planning Commission hearing.
15 The copies provided to Petitioners are complete, and they do not constitute an
16 omission of information from the record by the City.” City Response to
17 Petitioners’ Objections to Amended Record 6.

18 We agree with the city. The city is required to take reasonable steps to
19 include in the record complete and audible recordings of the proceedings.
20 *Paterson v. City of Bend*, 48 Or LUBA 614, 617 (2004). However, according to
21 the city’s responses to the record objections, the versions of the video recordings
22 in the record are the only recordings that exist. Accordingly, there is no remedy

1 to this objection.

2 Petitioners' objections regarding the video recordings are denied.

3 Petitioners' fifth objection is sustained, in part, and resolved.

4 Petitioners' record objections are sustained, in part, and resolved.

5 **B. Intervenor's Record Objections**

6 Intervenor objects that the record improperly omits two PowerPoint
7 presentations submitted by intervenor during the proceedings below and that a
8 document submitted by intervenor and included in the record is missing the last
9 three pages. Intervenor's Record Objections 1-2.

10 The city responds that the amended record includes all of the materials
11 identified in intervenor's objection. City Response 3. We have reviewed the
12 amended record and conclude that it resolves intervenor's objections.

13 Intervenor's objections are sustained and resolved.

14 **BRIEFING SCHEDULE**

15 The record is settled as of the date of this order. The petition for review
16 shall be due 21 days after the date of this order. Respondent's and intervenor-
17 respondent's briefs shall be due 42 days after the date of this order. We encourage
18 respondent and intervenor to coordinate their briefing in order to avoid repetitive
19 and overlapping arguments. The final opinion and order shall be due 77 days after
20 the date of this order.

1 Dated this 11th day of April 2025.

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6 H. M. Zamudio

7 Board Chair