

1                               BEFORE THE LAND USE BOARD OF APPEALS

2                               OF THE STATE OF OREGON

3  
4                               SANE, ORDERLY DEVELOPMENT, INC.,

5                               and JOSEPH MEYER

6                               *Petitioner,*

7  
8                               vs.

9  
10                              DOUGLAS COUNTY,

11                              *Respondent.*

12  
13                              LUBA No. 2011-011

14                              ORDER

15   **RECORD OBJECTIONS**

16               The challenged decision is the county’s decision that adopts an amendment to the  
17   Population Element of the Douglas County Comprehensive Plan, after LUBA remanded a  
18   previous plan amendment in *Meyer v. Douglas County*, \_\_ Or LUBA \_\_ (LUBA No. 2010-  
19   004, July 2, 2010). Petitioners filed objections to the record that was transmitted by the  
20   county. The county filed a response, and we now resolve the objections.

21               **1.       Record Objection 1**

22               OAR 661-010-0025(1)(b) provides that the record includes “[a]ll written testimony  
23   and all exhibits, maps, documents or other written materials specifically incorporated into the  
24   record or placed before, and not rejected by, the final decision maker, during the course of  
25   the proceedings before the final decision maker.” Record 132 is an email message that was  
26   sent by a member of the public to the county’s senior planner on January 11, 2011, one day  
27   prior to the date of a continued public hearing on the proposed comprehensive plan  
28   amendment. The email message was five sentences long and listed six items as attachments  
29   to the message. The last sentence requested that the email message and the attached  
30   materials be “entered into the record.” Petitioners object that the record does not include any  
31   of the documents that were attached to the email message.

1           We understand petitioners to argue that submitting the email message and  
2 attachments to the county's senior planner with a clear and understandable request that the  
3 email message and attachments be included in the record effectively placed the documents  
4 before the local decision maker. We have held that items can be "placed before" a local  
5 decision maker within the meaning of OAR 661-010-0025(1)(b) if, in relevant part "they are  
6 submitted to the decision maker through means specified in local regulations or through  
7 appropriate means in response to a request by the decision maker for submittal of additional  
8 evidence." *ONRC v. City of Oregon City*, 28 Or LUBA 775, 778 (1994).

9           The county responds that none of disputed documents were submitted to the county  
10 planner in response to a request by the board of commissioners for submittal of documents  
11 regarding the comprehensive plan amendment. However, the record includes other items  
12 submitted to the county planner with a request that those items be included in the record. In  
13 particular, the record includes the email message at Record 132 and a 30-page letter from the  
14 sender of the same email message, which was sent separately by facsimile. Record 155-184.  
15 The inclusion of those items in the record suggests that the county's practice, at least with  
16 respect to the legislative proceeding that led to the challenged decision, was for the county  
17 planner to receive submittals for inclusion in the record by various means, including email,  
18 and to include those items in the record before the board of commissioners. The county  
19 apparently has no adopted policy on electronic filing of documents for the record or on  
20 making requested copies of e-mail messages or electronic file attachments. The county  
21 planner did not object to the e-mail sender's request, and does not argue that making the  
22 requested copies would have been difficult or unreasonably expensive. Absent any other  
23 explanation from the county regarding why the attachments to the email message at Record  
24 132 were not included in the record, we conclude that by submitting the email message and  
25 attachments to the planner with a request that the email message and attachments be included

1 in the record, the items were “placed before” the board of commissioners within the meaning  
2 of OAR 661-010-0025(1)(b).

3 Record objection 1 is sustained.

## 4 **2. Record Objection 2**

5 Petitioners object that the record that was transmitted to petitioners does not include  
6 the record from *Meyer* and “request that respondent add the files from the prior record to the  
7 current record.” Record Objection 2. The county responds that LUBA’s rules allow it to  
8 incorporate the record from Meyer into the record of the current appeal and that it has done  
9 precisely what OAR 661-010-0025(4)(b) allows. OAR 661-010-0025(4)(b) provides  
10 “[w]here the record includes the record of a prior appeal to this Board, the table of contents  
11 shall specify the LUBA number of the prior appeal, and indicate that the record of the prior  
12 appeal is incorporated into the record of the current appeal.”

13 We agree with the county that it may list the prior record as an incorporated item  
14 under OAR 661-010-0025(4)(b). The table of contents contains an entry at the end of the list  
15 of items included in the record that states: “The record of the prior appeal [*Meyer*] is  
16 incorporated in the record of this current appeal.” We also agree with the county that it is not  
17 obligated to provide a copy of the record from *Meyer* to petitioners. *Foland v. Jackson*  
18 *County*, 53 Or LUBA 629, 631 (2007) (absent extenuating circumstances, if the local  
19 government has already served the petitioners with a copy of the record from the previous  
20 LUBA appeal, the local government is not required to re-serve the petitioners with another  
21 copy of the previous LUBA record). However, we note that the county must transmit a copy  
22 of the previous LUBA record to LUBA at or prior to the time of oral argument, because  
23 pursuant to LUBA’s retention policies LUBA returned its copy of the record in *Meyer* to the  
24 county or recycled that copy of the record, if the county did not request its return.

25 Record objection 2 is denied.

1   **SUPPLEMENTAL RECORD**

2           We sustained Record Objection 1. Petitioners offer to provide copies of the disputed  
3 attachments to the county. Petitioners shall, within seven days of the date of this order,  
4 provide copies of the attachments to the email message that is at Record 132 to the county for  
5 inclusion in a supplemental record. The county shall, within seven days of receipt of the  
6 disputed documents, transmit a supplemental record that complies with OAR 661-010-  
7 0025(4) to LUBA and the parties. Thereafter, the Board will issue an order settling the  
8 record and establishing a briefing schedule.

9           Dated this 9<sup>th</sup> day of June, 2011.  
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16           Melissa M. Ryan  
17           Board Chair