

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

3  
4                                   PAUL T. CONTE,  
5   *Petitioner,*

6  
7   vs.

8  
9                                   CITY OF EUGENE,  
10   *Respondent,*

11  
12   and

13  
14                                   HOME BUILDERS ASSOCIATION OF LANE COUNTY,  
15   1000 FRIENDS OF OREGON, AARP OREGON,  
16   BETTER HOUSING TOGETHER, ELIZA KASHINSKY,  
17   JOSHUA KASHINSKY, RIA ANDERSON, ANNE BROWN,  
18   CHRISTOPHER DEEL, JOHN FISCHER, RINA HERRING,  
19   ANGELA LIN, ANGIE R. MARZANO, RYAN MOORE,  
20                                   KORY NORTHROP, SIGH O’NARA, WILLIAM A. RANDALL,  
21   SETH SADOFSKY, JEAN TATE, and KATE WILSON,  
22   *Intervenors-Respondents.*

23  
24   LUBA No. 2021-092

25  
26   ORDER

27   **MOTIONS TO INTERVENE**

28                   On October 13, 2021, Home Builders Association of Lane County filed a  
29 motion to intervene on the side of the city. On October 21, 2021, 1000 Friends of  
30 Oregon, AARP Oregon, and Better Housing Together filed a motion to intervene  
31 on the side of the city. On October 22, 2021, Eliza Kashinsky, Joshua Kashinsky,  
32 Ria Anderson, Anne Brown, Christopher Deel, John Fischer, Rina Herring,  
33 Angela Lin, Angie R. Marzano, Ryan Moore, Kory Northrop, Sigh O’Nara,

1 William A. Randall, Seth Sadofsky, Jean Tate, and Kate Wilson filed a motion  
2 to intervene on behalf of the city. The motions are unopposed and allowed.

3 **RECORD OBJECTIONS**

4 Petitioner appeals Ordinance 20659, a legislative decision that amends the  
5 Eugene Code in order to implement ORS 197.312(5).<sup>1</sup> On October 25, 2021,  
6 LUBA received the record in this appeal. On November 12, 2021, LUBA  
7 received petitioner’s record objections. On November 24, 2021, LUBA received  
8 the city’s response to petitioner’s record objections and a supplemental record.  
9 On December 1, 2021, LUBA received petitioner’s reply to the city’s response.

10 **A. Resolved Objections**

11 **1. Improperly Omitted Items**

12 Item 177 in the record is an email exchange. One of the emails in that  
13 exchange refers to an attachment. Petitioner objects that that attachment is  
14 improperly omitted from the record. The city responds that the email exchange

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<sup>1</sup> Ordinance 20659 is the city’s third attempt to amend the Eugene Code to implement ORS 197.312(5). *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018); *Home Builders Association of Lane County v. City of Eugene*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-015, Nov 24, 2020). ORS 197.312(5)(a) provides:

“A city with a population greater than 2,500 \* \* \* shall allow in areas within the urban growth boundary that are zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.”

1 was placed before the city council without the attachment; however, the city notes  
2 that the document that was attached to the email is included in the record  
3 elsewhere. Petitioner replies that this objection is resolved. This objection is  
4 therefore resolved.

## 5 **2. Improperly Included Items**

6 Petitioner objects that Item 96 in the record is improperly included in the  
7 record because it is undated, because it is “unidentified,” and because there is “no  
8 indication of how or whether it should be included in the Record.” Record  
9 Objections 4. The city responds that Item 96 was prepared by city staff and placed  
10 before the city council. Petitioner replies that this objection is resolved. This  
11 objection is therefore resolved.

12 On May 17, 2021, petitioner sent an email to a senior planner. That email  
13 states, “This is not for the record.” Record 2340. Petitioner objects that that email  
14 is improperly included in the record. The city responds that the email was placed  
15 before the city council. Petitioner replies that this objection is resolved. This  
16 objection is therefore resolved.

## 17 **3. Miscellaneous**

18 Petitioner objects that, while Item 103(b)(i) in the record table of contents  
19 refers readers to Item 202(d)(i), there is no Item 202(d)(i) in the record. The city  
20 responds that the reference to Item 202(d)(i) should have been a reference to Item  
21 206(d)(i). The city responds that the supplemental record includes a revised table

1 of contents that corrects this error. Petitioner replies that this objection is  
2 resolved. This objection is therefore sustained and resolved.

3 Petitioner objects that, while the record includes draft minutes for a  
4 number of city council meetings, it does not include final, adopted minutes for  
5 those meetings. The city responds that the supplemental record includes final,  
6 adopted minutes for those meetings. Petitioner replies that this objection is  
7 resolved. This objection is therefore sustained and resolved.

8 Petitioner objects that a number of items of which color versions were  
9 submitted to the city or placed before the city council are included in the record  
10 in black and white. The city responds that the supplemental record includes color  
11 versions of those items. Petitioner replies that this objection is resolved. This  
12 objection is therefore sustained and resolved.

13 On May 17, 2021, petitioner submitted to the city a number of documents,  
14 including a spreadsheet. Petitioner objects that the version of that spreadsheet  
15 that is included in the record is illegible. The city responds that the supplemental  
16 record includes a legible version of the spreadsheet. Petitioner replies that this  
17 objection is resolved. This objection is therefore sustained and resolved.

18 Petitioner objects that the record table of contents lists Item 221(c) as  
19 beginning at Record 3139, while Item 221(c) actually begins at Record 3164. The  
20 city responds that the revised table of contents corrects this error. Petitioner  
21 replies that this objection is resolved. This objection is therefore sustained and  
22 resolved.

1           **B.     Unresolved Objections**

2                   **1.     Good Faith Conferral**

3           OAR 661-010-0026(1) provides:

4                   “Before filing an objection to the record, a party shall attempt to  
5                   resolve the matter with the governing body’s legal counsel. The  
6                   objecting party shall include a statement of compliance with this  
7                   section at the same time the objection is filed. The Board may deny  
8                   any objection to the record that does not comply with this rule.”

9           This rule requires a “good faith” effort to resolve record objections prior to filing  
10           them with LUBA. *Casey Jones v. City of Lowell*, 33 Or LUBA 812, 813 (1997).  
11           The city argues that petitioner failed to confer in good faith before filing the  
12           remaining record objections and they should therefore be denied.

13                   Record objections must “be filed with the Board within 14 days of the date  
14                   appearing on the notice of the record transmittal sent to the parties by the Board.”  
15           OAR 661-010-0026(2). On October 26, 2021, LUBA mailed the parties notice  
16           that it had received the record on October 25, 2021. Accordingly, petitioner’s  
17           record objections were due to be filed on November 8, 2021. The following facts  
18           are undisputed. At 9:56 a.m. on November 8, 2021, petitioner’s attorney called  
19           the city’s attorney to discuss petitioner’s record objections. Because the city’s  
20           attorney was unavailable, petitioner’s attorney requested that the city’s attorney’s  
21           legal assistant ask the city’s attorney to return the phone call. At 10:05 a.m.,  
22           petitioner’s attorney emailed the city’s attorney, stating the reason for the phone  
23           call and suggesting that petitioner’s attorney email the city’s attorney their

1 written record objections when they were complete so that the parties could “start  
2 from there.” Response to Record Objections 3.

3 At 12:02 p.m., the city’s attorney responded to petitioner’s attorney’s  
4 email, asking petitioner’s attorney to continue to correspond about their record  
5 objections by email but asserting that, because petitioner’s record objections were  
6 due that day, petitioner’s attorney had “waited too long to give the City any real  
7 opportunity to resolve whatever objections [they] may [have had].” *Id.* at 3-4. At  
8 2:43 p.m., petitioner’s attorney replied to the city’s attorney’s response, attaching  
9 to their reply a “draft version” of their record objections and indicating that they  
10 intended to file their record objections that afternoon. *Id.* at 4. At 4:16 p.m.,  
11 petitioner’s attorney’s legal assistant emailed the city’s attorney a copy of  
12 petitioner’s record objections and indicated that those record objections had been  
13 filed with LUBA. The city argues that petitioner failed to confer in good faith  
14 because petitioner provided the city with a copy of their record objections less  
15 than two hours before filing them with LUBA.

16 In *LO 138, LLC v. City of Lake Oswego*, the petitioners’ attorney advised  
17 the city by email “late” on the day on which record objections were due that they  
18 had record objections to discuss with the city and, later that day, they filed their  
19 record objections with LUBA. 70 Or LUBA 538, 538 (2014). The intervenor-  
20 respondent argued that LUBA should deny the objections for failure to confer in  
21 good faith. We explained that the “5,000+ page record” in that appeal was “of  
22 sufficient length and complexity, that the 14 days provided by OAR 661-010-

1 0026(2) to review the record and comply with the consultation requirement in  
2 OAR 661-010-0026(1) easily might not have been sufficient.” *Id.* at 538-39. We  
3 therefore denied the intervenor-respondent’s request to deny the objections for  
4 failure to confer in good faith.

5 Here, the record is over 4,500 pages long, excluding the records of the  
6 city’s prior attempts to amend the Eugene Code to implement ORS 197.312(5),  
7 which are also included in the record in this appeal. *See* n 1. We conclude that  
8 the record is sufficiently lengthy and complex that the 14-day period may not  
9 have been sufficient to allow greater conferral before filing. The city points out  
10 that 1,040 pages of the record are materials that were submitted by petitioner.  
11 However, the city does not explain how that fact makes the record less lengthy  
12 or complex, or made the 14-day period sufficient to both file record objections  
13 and engage in greater or earlier conferral. Petitioner likely needed to ensure that  
14 their own materials were accurately reproduced in the record. While the city did  
15 not receive a copy of petitioner’s specific record objections until less than two  
16 hours before petitioner filed them, petitioner’s attorney was by all accounts  
17 willing to discuss those specific record objections at 9:56 a.m. that morning when  
18 they called the city’s attorney.

19 We deny the city’s request to deny petitioner’s record objections for failure  
20 to confer in good faith. We therefore proceed to address petitioner’s unresolved  
21 record objections.

1                   **2. Improperly Omitted Items**

2                   On August 19, 2021, petitioner met with the planning director, a senior  
3 planner, a city councilor, and the chair of the Jefferson Westside Neighbors  
4 (JWN) via Zoom. Petitioner points out that the senior planner stated in an email  
5 on August 17, 2021, that they would record the meeting and that that recording  
6 would “be a public record.” Record 1335. Petitioner also asserts that, on August  
7 19, 2021, after the meeting had ended, the JWN chair emailed their own recording  
8 of the meeting to the senior planner and the senior planner responded,  
9 acknowledging receipt of the JWN chair’s email. Petitioner objects that that email  
10 exchange and a recording of the meeting are improperly omitted from the record.<sup>2</sup>  
11 For the following reasons, we agree with petitioner that the JWN chair’s email  
12 should be included in the record. However, we agree with the city that the senior  
13 planner’s response and the recording are properly omitted from the record.

14                   Generally, the record must include all “materials specifically incorporated  
15 into the record or placed before, and not rejected by, the final decision maker,  
16 during the course of the proceedings before the final decision maker.” OAR 661-  
17 010-0025(1)(b). We understand petitioner to argue that the email exchange and  
18 recording are properly part of the record because they were “placed before \* \* \*  
19 the final decision maker.” In *ONRC v. City of Oregon City*, we explained:

20                   “Items are placed before the local decision maker if (1) they are

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<sup>2</sup> The city attaches a copy of the email exchange to its response to petitioner’s record objections as Exhibit E.



1 physically placed before the decision maker prior to the adoption of  
2 the final decision; (2) they are submitted to the decision maker  
3 through means specified in local regulations or through appropriate  
4 means in response to a request by the decision maker for submittal  
5 of additional evidence; or (3) local regulations require that the item  
6 (e.g., record of a lower level decision maker’s proceeding) be placed  
7 before the decision maker.” 28 Or LUBA 775, 778-79 (1994) (citing  
8 *Eckis v. Linn County*, 20 Or LUBA 589, 593 (1991); *Blatt v. City of*  
9 *Portland*, 20 Or LUBA 572, 574 (1991); *Panner v. Deschutes*  
10 *County*, 14 Or LUBA 512 (1985); *League of Women Voters v. Coos*  
11 *County*, 13 Or LUBA 311, 312 (1985)).

12 We do not understand petitioner to argue that the email exchange and  
13 recording were physically placed before the city council. Accordingly, the email  
14 exchange and recording were not placed before the city council through the first  
15 *ONRC* method. Nevertheless, petitioner argues that “testimony and evidence that  
16 is submitted to city planning staff must be included in the record, even if it was  
17 never actually placed before the final decision maker.” Reply to Response to  
18 Record Objections 5. In support of that argument, petitioner cites *Montgomery v.*  
19 *City of Dunes City*, 59 Or LUBA 519 (2009), and *Putnam v. Marion County*, \_\_\_  
20 Or LUBA \_\_\_ (LUBA No 2021-018, Aug 12, 2021). We understand that  
21 argument to implicate the second and third *ONRC* methods.

22 In *Montgomery*, we concluded that, because the city’s land use code  
23 provided that “[t]he record shall contain all testimony and evidence that is  
24 submitted to the City, the Planning Commission, and the City Council and not  
25 rejected,” testimony and evidence that was submitted to contract planning staff  
26 had to be included in the record, even though it was never placed before the city  
27 council, which was the final decision-maker. 59 Or LUBA at 521. Here,

1 petitioner does not cite any local regulation that required that the email exchange  
2 or recording be placed before the city council or otherwise included in the record.  
3 Accordingly, *Montgomery* does not assist petitioner. We conclude that the email  
4 exchange and recording were not placed before the city council through the third  
5 *ONRC* method.

6 In *Putnam*, a hearings officer approved an application, the petitioners  
7 appealed the hearings officer's decision to the board of county commissioners,  
8 the board of county commissioners approved the application, and the petitioners  
9 appealed the board of county commissioners' decision to LUBA. The notice of  
10 the public hearing before the hearings officer on the application instructed  
11 interested persons to submit materials to the county planning department and  
12 represented that the planning department would provide materials submitted in  
13 that manner to the hearings officer. At the conclusion of the public hearing, the  
14 hearings officer instructed parties to submit materials during the open record  
15 period in the same manner as the hearing notice. During the open record period,  
16 the petitioners submitted materials to the planning department in accordance with  
17 those instructions. The planning department then sent emails to the petitioners  
18 confirming receipt of the submittals.

19 However, due to human error, the submittals were not actually included in  
20 the record before the hearings officer. Because the submittals were not included  
21 in the record before the hearings officer, they were also not included in the record  
22 that was transmitted to the board of county commissioners when the petitioners

1 appealed the hearings officer's decision. We concluded that it was reasonable for  
2 the petitioners to rely on the planning department's confirmations to conclude  
3 that the submittals would be placed before the hearings officer, at least in the  
4 absence of any express statement in those confirmations that that would not  
5 automatically be the case. We therefore agreed with the petitioners that the  
6 county's failure to include the submittals in the record before the hearings officer  
7 and, consequently, the record before the board of county commissioners  
8 prejudiced the petitioners' substantial rights to a full and fair hearing.

9       Whether a local government committed procedural error by failing to place  
10 certain materials before a decision-maker does not inform whether those  
11 materials are properly part of the record. If a local government commits  
12 procedural error by failing to place certain materials before a decision-maker, that  
13 error may result in remand if it prejudiced the substantial rights of the petitioner.  
14 ORS 197.835(9)(a)(B). However, regardless of any procedural error, those  
15 materials would be properly part of the record only if they qualify for inclusion  
16 in the record under OAR 661-010-0025(1). *Putnam* does not assist petitioner with  
17 respect to the contents of the record.

18       Petitioner asserts that the JWN chair emailed the senior planner their own  
19 recording of the meeting and that the senior planner responded, acknowledging  
20 receipt of the JWN chair's email. Petitioner points out that the notice of the city  
21 council's May 17, 2021 public hearing instructed participants to submit  
22 testimony to the senior planner and represented that such testimony would be

1 included in the record in this appeal: “Written statements received prior to the  
2 public hearing will be provided to the City Council. Please address your written  
3 statement to [name of and contact information for the senior planner].” Record  
4 4138, 4145.

5 We have observed that, even where a local government does not have  
6 generally applicable rules governing the pre-hearing submission of testimony,  
7 instructions in public notices may nonetheless implicate the second *ONRC*  
8 method. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745,  
9 778 (2005). We note that the notice of the city council’s May 17, 2021 public  
10 hearing was a pre-hearing notice, governing the submission of testimony *before*  
11 the public hearing, and that the JWN chair emailed the senior planner their own  
12 recording on August 19, 2021, long after the public hearing. However, we also  
13 note that the record includes voluminous testimony that was submitted *after* the  
14 public hearing, and the city does not cite anything in the record that instructed  
15 participants to submit testimony in another manner during that open record  
16 period. Accordingly, we conclude that the JWN chair’s email was placed before  
17 the city council through the second *ONRC* method and is properly part of the  
18 record.

19 The same is not true for the senior planner’s response or the recording  
20 itself. Unlike the JWN chair’s email, there is no indication that the senior  
21 planner’s response was “submitted to the decision maker through means  
22 specified in local regulations or through appropriate means in response to a

1 request by the decision maker for submittal of additional evidence.” *ONRC*, 28  
2 Or LUBA at 778. Accordingly, we conclude that the senior planner’s response  
3 was not placed before the city council through the second *ONRC* method and is  
4 properly omitted from the record.

5 That leaves the recording itself. Petitioner does not attach a copy of the  
6 JWN chair’s email to its objections. However, the city attaches a copy to its  
7 response. Response to Record Objections Ex E. That attachment indicates that  
8 the JWN chair emailed the senior planner a hyperlink to their own recording of  
9 the meeting. However, merely including a hyperlink in a document that is  
10 submitted to the local government and that is properly part of the record is not  
11 sufficient to place the hyperlinked material before the final decision-maker for  
12 purposes of OAR 661-010-0025(1)(b). *See Fernandez v. City of Portland*, 72 Or  
13 LUBA 482, 488-89 (2015) (“Just because \* \* \* parties to a city land use  
14 proceeding submitted documents that include hyperlinks to reports and other  
15 information, that does not mean the documents that are accessible via those links  
16 \* \* \* become part of the evidentiary record.”). Accordingly, we conclude that the  
17 recording was not placed before the city council through the second *ONRC*  
18 method and is properly omitted from the record.

19 These objections are sustained, in part.

### 20 **3. Improperly Included Items**

21 Item 264 in the record is an email containing testimony that was sent to the  
22 city on February 8, 2021. Petitioner objects that that email is improperly included

1 in the record because it was sent to the city “prior to the City indicating in any  
2 way that it was beginning its consideration of this matter and the City provided  
3 no notice that the record was open.” Record Objections 4. We understand  
4 petitioner to argue that the email was not placed before the city council “during  
5 the course of the proceedings before the final decision maker.” OAR 661-010-  
6 0025(1)(b).

7 The city responds that the email is properly included in the record because  
8 it was included in the “first batch of testimony packaged by staff and provided to  
9 the City Council in this matter. ‘Batch 1’ was made up of public testimony  
10 received from January 21, 2020 through May 5, 2021.” Response to Record  
11 Objections 11-12. The city asserts that the email was placed before the city  
12 council for the May 17, 2021 public hearing; a July 12, 2021 work session; and  
13 a September 15, 2021 work session.

14 We have held that, in some circumstances, the local government may  
15 determine when the local proceedings began for purposes of the record. *See*  
16 *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009)  
17 (concluding that the city was entitled to determine that the proceedings began on  
18 the date that the city sent notice of the proposed post-acknowledgment plan  
19 amendment to the Department of Land Conservation and Development and,  
20 therefore, exclude from the record scoping materials that were placed before the  
21 city council before that notice was sent); *McKay Creek Valley Assoc. v.*  
22 *Washington County*, 19 Or LUBA 500 (1990) (concluding that documents placed

1 before the board of county commissioners during a citizen input and prioritization  
2 phase had to be included in the record because the board of county commissioners  
3 participated in the citizen input and prioritization phase with the planning  
4 commission). Petitioner does not explain why the city was not entitled to  
5 determine that the local proceedings began for purposes of the record before the  
6 city indicated that it was accepting public testimony. More importantly, even if  
7 we agreed with petitioner that the email was sent to the city before the local  
8 proceedings began, petitioner does not address the city’s response that the email  
9 was subsequently placed before city council multiple times. Absent a more  
10 developed argument from petitioner regarding why the email is improperly  
11 included in the record, we agree with the city that it is properly included.

12 This objection is denied.

13 **4. Miscellaneous**

14 OAR 661-010-0025(4)(a)(B)(i) provides, “Where an item listed in the  
15 table of contents includes attached exhibits, the exhibits shall be separately listed  
16 as an exhibit to the item.” Petitioner objects that, while Items 17, 60, 79, 82, 91,  
17 92, 109, 155, 163, 167, and 203 contain attachments, those attachments are not  
18 separately listed in the record table of contents.

19 The city responds that the title for each of those items indicates that there  
20 is an attachment. For example, Item 17 is titled, “Email from [petitioner] to  
21 Mayor and City Council, with attachment, received September 14, 2021  
22 (Included in Public Testimony Batch 12).” The city asserts that that approach was

1 taken where the item is an email and where the email contains only one  
2 attachment.

3 “[W]hat is essential in organizing and indexing the record is that the parties  
4 and LUBA can identify and locate documents with reasonable effort.” *1000*  
5 *Friends of Oregon v. Clackamas County*, 45 Or LUBA 754, 755 (2003) (citing  
6 *D.S. Parklane v. Metro*, 33 Or LUBA 848, 858 (1997)). OAR 661-010-0005  
7 provides, in part, “Technical violations not affecting the substantial rights of  
8 parties shall not interfere with the review of a land use decision or limited land  
9 use decision.”

10 “Consistent with OAR 661-010-0005, we have held that the table of  
11 contents must be amended to separately list attachments to  
12 documents in the record if that is necessary to make the record  
13 usable for the parties and the Board, but otherwise we will not  
14 require amendment to a deficient table of contents.” *Kane v. City of*  
15 *Beaverton*, 60 Or LUBA 497, 502 (2010) (citations omitted).

16 We agree with the city that, in this case, petitioner has not established that the  
17 table of contents must be amended for the parties to be able to locate individual  
18 documents with reasonable effort.

19 This objection is denied.

### 20 **C. Second Supplemental Record**

21 This order partially sustains one of petitioner’s record objections and  
22 requires the city to transmit to the Board and the parties a single-page second  
23 supplemental record that consists of the August 19, 2021 JWN chair email to the  
24 senior planner. Within 14 days of the date of this order, the city shall transmit a



1 second supplemental record containing the JWN chair’s email. The parties shall  
2 refer to the JWN chair’s email, which will be the only item in the second  
3 supplemental record, as SR 1. Due to the brevity of the second supplemental  
4 record, we settle the record in this order and establish the briefing schedule to run  
5 concurrently with the city’s transmittal of the second supplemental record.

6 **BRIEFING SCHEDULE**

7 The record is settled as of the date of this order. The petition for review  
8 shall be due 21 days after the date of this order. The response briefs shall be due  
9 42 days after the date of this order.<sup>3</sup> The final opinion and order shall be due 77  
10 days after the date of this order.

11 Dated this 14th day of January 2022.

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Melissa M. Ryan  
Board Member

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<sup>3</sup> Intervenors-Respondents are encouraged to coordinate their briefing to avoid repetitive and overlapping arguments.