

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

3
4 TED M. COOPMAN,
5 *Petitioner,*

6
7 and

8
9 PAUL CONTE and GARY NANCE,
10 *Intervenors-Petitioners,*

11
12 vs.

13
14 CITY OF EUGENE,
15 *Respondent,*

16
17 and

18
19 AL JOHNSON,
20 HOME BUILDERS ASSOCIATION OF LANE COUNTY,
21 ELIZA KASHINSKY, JOSHUA KASHINSKY, ANNE BROWN,
22 CHRISTOPHER DEEL, PATTY HINE, ISAAC JUDD,
23 ANGIE R. MARZANO, SIGH O’NARA, BABE O’SULLIVAN,
24 BILL RANDELL, CARLEEN REILLY, SETH SADOFSKY,
25 KEVIN SHANLEY, HEATHER SIELICKI, SUE WOLLING,
26 1000 FRIENDS OF OREGON, BETTER HOUSING TOGETHER,
27 and DEVNW,

28
29 *Intervenors-Respondents.*

30
31 LUBA No. 2022-056

32
33 ORDER

34 Petitioner appeals Ordinance 20667, which approves amendments to a
35 Eugene-Springfield Metropolitan Area General Plan policy and Eugene Code
36 definitions and standards for “middle housing.”

1 **TAKING EVIDENCE NOT IN THE RECORD**

2 “The Board may * * * upon motion or at its discretion take evidence to
3 resolve disputes regarding the content of the record[.]” OAR 661-010-0045(1).
4 Intervenor-petitioner Conte (Conte) has included in and attached to their
5 pleadings evidence not in the record and moves the Board to take evidence to
6 settle disputes regarding the content of the record.¹ We will consider evidence
7 attached to Conte’s pleadings that is useful in resolving the disputes regarding
8 the contents of the record.

9 **RECORD OBJECTIONS**

10 On July 27, 2022, the Board received the record in this appeal. On August
11 9, 2022, Conte filed record objections. On August 24, 2022, the Board received
12 the city’s response to Conte’s record objections, which includes (1) a revised
13 table of contents; (2) a supplemental record; and (3) responsive arguments
14 contesting some of the record objections. On August 30, 2022, Conte filed a
15 pleading titled “Objections to the Supplemental Record; Reply to Respondent’s
16 Response to Intervenor-Petitioner Conte’s Record Objections; Motion to Take
17 Evidence Not in the Record” (Conte’s August 30, 2022 filing). On September 6,

¹ Conte’s record objections include the text of multiple emails not included in the record, a printed copy of a Petition to Eugene City Council to Support Housing and Climate Justice, and photocopies of an AARP mailed document with a detachable postcard. Conte’s August 30, 2022 filing includes a declaration of Rene Kane, bank account statements, a photograph of an envelope, and a copy of a public record request form.

1 2022, the city filed an objection to Conte’s August 30, 2022 filing. On September
2 6, 2022, Conte filed a supplement to their August 30, 2022 filing in response to
3 the city’s objection. We now resolve the pending record objections.

4 The record shall include “[a]ll written testimony and all exhibits, maps,
5 documents or other materials specifically incorporated into the record or placed
6 before, and not rejected by, the final decision maker, during the course of the
7 proceedings before the final decision maker.” OAR 661-010-0025(1)(b). That
8 rule recognizes two categories of items that are included in the record: those
9 materials specifically incorporated into the record and those items placed before,
10 and not rejected by, the final decision maker during the course of the proceedings
11 before the final decision maker. In *ONRC v. City of Oregon City*, 28 Or LUBA
12 775, 778 (1994), we explained that documents are “placed before” the decision
13 maker, within the meaning of OAR 661-010-0025(1)(b) in three circumstances:

14 “Items are placed before the local decision maker if (1) they are
15 physically placed before the decision maker prior to the adoption of
16 the final decision; (2) they are submitted to the decision maker
17 through means specified in local regulations or through appropriate
18 means in response to a request by the decision maker for submittal
19 of additional evidence; or (3) local regulations require that the item
20 (e.g., record of a lower level decision maker’s proceeding) be placed
21 before the decision maker.”

22 The challenged decision is a legislative land use decision adopted by the
23 city council. The city has not directed us to any generally applicable provisions
24 governing submittal of materials during a legislative land use proceeding.

1 On March 28, 2022, the city mailed a public notice for the city’s April 18,
2 2022 virtual public hearing on the middle housing code amendments. Record
3 3293-95. That notice provided the following instruction:

4 **“How to Submit Testimony to the City Council & Attend the**
5 **Public Hearing**

6 “Submit a written statement to the City Council, c/o Jeff Gepper,
7 Planning Division, 99 W. 10th Avenue, Eugene, Oregon 97401 or
8 by e-mail MiddleHousingTestimony@eugene-or.gov. To be
9 included in the City Council’s materials for the April 18th public
10 hearing, your statement must be received by staff no later than 5pm
11 on April 18, 2022. Written testimony received after 5pm on April
12 18th will be provided to the City Council in batches. The City
13 Council may have less time to review testimony that is received after
14 April 18th.” Record 3295 (boldface in original).

15 On March 31, 2022, the city published in a local newspaper a public notice
16 of the April 18, 2022 public hearing that provided: “Written testimony may be
17 sent to mayorcouncilandcitymanager@eugene-or.gov and
18 MiddleHousingTestimony@eugene-or.gov or to Planning Division, 99 West
19 10th Avenue, Eugene, OR 97401.” Record 3287.

20 The city explains that staff placed materials received through those
21 channels before the city council by depositing hard copies of the materials at city
22 hall for the mayor and city councilors to access, as well as providing the mayor
23 and city councilors electronic copies. Response to Conte’s Record Objections 1-
24 2.

25 Conte objects that the city improperly omitted from the record six items
26 that they argue were “placed before” the city council during the legislative

1 proceeding. OAR 661-010-0026(2)(a). “The term ‘placed before’ is a term of art
2 and does not merely describe the act of setting documents in front of the decision
3 maker. Legislative decisions, like the present case, often involve less precisely
4 defined procedures for compiling an evidentiary record, as compared to quasi-
5 judicial decision making procedures.” *Witham Parts and Equipment Co. v.*
6 *ODOT*, 42 Or LUBA 589, 593 (2002) (citing *Home Depot, Inc. v. City of*
7 *Portland*, 36 Or LUBA 783, 784-85 (1999)).

8 In multiple record objections, Conte argues that items that were sent to the
9 mayor and individual city councilors outside the channels identified by the city
10 were nonetheless “placed before” the city council. The city argues that only those
11 items that were submitted through the identified channels were “placed before”
12 the city council. We turn to Conte’s specific objections and agree with the city
13 for the reasons explained below.

14 **A. May 7, 2022, Kane Email**

15 Conte objects that the record omits a May 7, 2022, email from Rene Kane
16 to the mayor and all city councilors at their individual city email addresses. The
17 email states that Kane physically mailed a Housing and Climate Justice Petition
18 (the petition) and comments to the city councilors’ home addresses.²

19 The city responds that Kane’s email is not included in the record because
20 it was not submitted through one of the channels identified by the city in its public

² Conte also objects that the city omitted from the record a copy of the mailed petition. We address that objection below.

1 notices. The city argues that, where the city’s public notices specify how and to
2 whom testimony is to be submitted, testimony not submitted through those
3 channels is not “placed before” the decision maker and is not part of the record.
4 In support of that argument the city cites *Stadelman v. City of Bandon* (Order,
5 LUBA No 2020-113, March 3, 2021) and *Neighbors 4 Responsible Growth v.*
6 *City of Veneta*, 50 Or LUBA 745 (2005).

7 *Neighbors 4 Responsible Growth* concerned a joint city council/planning
8 commission decision that granted a variance to a wetland protection ordinance.
9 The city’s hearing was scheduled for July 5, 2005. Both the written and published
10 notice of the July 5, 2005 hearing specified how written comments were to be
11 submitted, to whom they were to be submitted, and the deadline for submission—
12 5:00 p.m. on Friday, July 1st. On July 2, someone submitted an email message
13 and attached letter to the city planner who the city had designated as the person
14 to whom interested parties were to submit written comments. The email asked
15 the city planner to enter the attached letter into the record. The email message
16 was sent at 11:24 p.m. July 2, 2005, which was a Saturday and a day after the
17 Friday deadline. The city held the hearing on Tuesday July 5, 2005. The city
18 planner was absent from that hearing. The city contended that the July 2, 2005,
19 email message and attachment were never placed before the city council and
20 planning commission and, thus, it was not part of the record.

21 We agreed with the city and denied the objection. We remarked that, if the
22 comments had been sent to and received by the city planner before the deadline,

1 and the city planner thereafter failed to provide those comments to the decision
2 maker, we likely would have agreed that the comments were placed before the
3 decision maker within the meaning of OAR 661-010-0025(1)(b). *Neighbors 4*
4 *Responsible Growth*, 50 Or LUBA at 754-55. However, because the sender did
5 not follow the instructions in the public notice, we concluded that their comments
6 could only have been placed before the decision maker if city staff or petitioner
7 physically placed the comments before the decision maker. *Id.* Because that did
8 not happen, we concluded that the comments were not part of the record. *Id.*

9 *Stadelman* concerned an ordinance amending the city’s code to remove
10 zone-specific geotechnical reporting requirements and to adopt a hazard overlay
11 zone. The petitioner objected that the city improperly omitted from the record a
12 letter that the petitioner emailed to the city manager and the city attorney on
13 November 2, 2020, at 5:35 p.m., after close of business and before the start of the
14 public hearing at 7:00 p.m. Neither person saw the email nor physically placed
15 the letter before the city council before the record was closed during the city
16 council meeting. Petitioner emailed the letter to the mayor at 8:41 p.m.—after the
17 hearing had concluded. The public notice for the hearing directed participants to
18 email comments to a specific email address: ““Written comments are encouraged
19 and may be submitted to the planning department by mail, by emailing
20 planning@cityofbandon.org, or in-person at City Hall.”” *Stadelman v. City of*
21 *Bandon*, ___ Or LUBA ___ (LUBA No 2020-113, May 10, 2021) (slip op at 4).
22 Thus, the city argued that the letter was not “placed before * * * the final decision

1 maker, during the course of the proceedings before the final decision maker.”
2 OAR 661-010-0026(1)(b). We denied the objection and agreed with the city that
3 the email was not placed before the decision maker and is not part of the record
4 because the petitioner did not comply with the instructions that specified how and
5 to whom comments were to be submitted. Like *Neighbors 4 Responsible Growth*,
6 there was no argument in *Stadelman* that the letter was physically placed before
7 the city council. Instead, the petitioner argued that the disputed document was
8 placed before the city council by sending it to city employees.

9 Neither *Stadelman* nor *Neighbors 4 Responsible Growth* involve the same
10 factual circumstances of this appeal. In those appeals, the disputed material was
11 not sent to all members of the city council. The circumstances in this appeal
12 appear to present an issue of first impression. It is undisputed that Kane did not
13 submit their email in a manner prescribed by the city. The question is whether
14 the email was “placed before” the city council by sending it to the mayor and city
15 council members at their individual city email addresses.

16 An identified process for establishing how items may be submitted into the
17 record provides certainty for the final decision maker and all parties who are
18 interested in ascertaining the contents of the record of a legislative proceeding.
19 The city and other interested persons cannot identify and review information
20 submitted into the record unless information is submitted through the means
21 specified in a notice or in local law, after which the local government can
22 organize and maintain it for the decision maker and interested persons to review.

1 We agree with the city that sending emails to individual elected officials,
2 even at their public email addresses, is not sufficient to place those emails before
3 the governing body for purposes of OAR 661-010-0026(1)(b) when the local
4 government has specified other means by which to place information before the
5 governing body. That is so even in the absence of a specific rejection. We
6 conclude that the Kane email was not “placed before” the city council and it is
7 not part of the record. This objection is denied.

8 **B. The Housing and Climate Justice Petition**

9 Conte objects that a copy of the petition should be included in the record
10 as physically “placed before” the city council because Kane mailed copies of the
11 petition by first class mail to the mayor and each councilor individually at their
12 home addresses.³

13 The city responds that the petition was not placed before the city council
14 because it was not submitted through any of the methods specified in the public
15 notices. As with the Kane email, the issue is whether the petition was placed
16 before the city council.

17 We agree with the city that mailing items to individual elected officials at
18 their home addresses is not sufficient to place those materials before the decision
19 maker for purposes of OAR 661-010-0026(1)(b). Unless the city expressly

³ The city explains that two copies of a petition with substantially similar text were placed into the record using channels identified by the city to place documents before the city council. Response to Conte’s Record objections 10, 10 n 4; Record 3527, 4361.

1 provides for submission of materials into the record by physically mailing them
2 to individual city councilors at their home addresses, that is not a proper method
3 to submit items into the official record. That is so even in the absence of any
4 express rejection. Accordingly, we conclude that the Kane copy of the petition
5 was not “placed before” the city council. Accordingly, that copy of the petition
6 is not part of the record. This objection is denied.

7 Conte requests a board order to allow Conte to depose the mayor and city
8 councilors to gather evidence in support of this record objection pursuant to OAR
9 661-010-0045(2)(c).⁴ We deny that request. Given our disposition of the record
10 objection, any such testimony would not be relevant or material to the issue of
11 whether the petition was placed before the city council. OAR 661-010-
12 0045(2)(c).

13 **B. July 27, 2022 Notice of Decision**

14 The original record table of contents includes, under item one, “Affidavit
15 of Mailing,” an entry for an item identified as “Exhibit A; Notice of City Council
16 Decision, dated July 27, 2022, re-mailed to persons on the interested parties list

⁴ OAR 661-010-0045(2)(c) provides:

“Depositions: The Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. Depositions under this rule shall be conducted in the same manner prescribed by law for depositions in civil actions (ORCP 38-40).”

1 for whom the City received return mail envelopes.” As we understand the
2 objection, Conte objects that the record does not include copies of the July 27,
3 2022 notices or evidence that the city provided notice of the July 27, 2022 notices
4 to parties to this appeal and the Department of Land Conservation and
5 Development (DLCD).

6 The city responds that this objection “appears to stem from some confusion
7 caused by a typographical error in the Record Table of Contents.” Response to
8 Conte’s Record Objections 14. The item listed as Exhibit A to item one of the
9 record is dated July 27, 2022 on the table of contents, but the item itself, at Record
10 2, is dated June 27, 2022. The city transmitted a revised table of contents that
11 corrects the identified typographical error. The city explains that the city did not
12 provide notice of the June 27, 2022, mailing to the parties to this appeal or DLCD,
13 so there is nothing additional to include in the record related to the June 27, 2022,
14 mailing. This objection is resolved.

15 **C. Emails from Conte to City Planner**

16 Conte objects to the exclusion of two emails between Conte and senior
17 planner Jeff Gepper (Gepper) on November 17, 2021. We understand Conte to
18 argue that those emails concern and document Conte’s request related to notice
19 and public participation in the legislative proceeding. The city responds, and we
20 agree, that the city properly omitted those emails from the record because they
21 were not placed before the final decision maker, the city council. The city does
22 not contest that the emails were sent to Gepper, who is a city designated recipient

1 of testimony for the record. The city explains that those emails were not placed
2 before the city council because they requested information, or responded to such
3 a request, and were not identified by petitioner as testimony requested to be
4 included in the record and the planner did not understand them as such. *Curl v.*
5 *City of Bend*, 56 Or LUBA 794, 796 (2008) (explaining that we will defer to
6 respondent, as the custodian of the record, where the proponent of the inclusion
7 of the documents fails to uphold the burden of showing that the items should be
8 included). These objections are denied.

9 **D. Postcards**

10 Conte objects to the omission from the record of postcards that were
11 mailed to the city at “101 W. 10th Ave Floor 2,” addressed to “Eugene City
12 Council Member,” and marked by the city as “Received by City Manager.”
13 Conte’s Record Objections Ex B; Supplemental Filing to August 30th Filing Ex
14 A. Conte argues that the postcards mailed to the city should be included because
15 the postcard’s message was directed to the mayor and city councilors and
16 addresses multiple issues related to middle housing that were under consideration
17 by the city during the legislative proceeding.⁵ Conte argues that the postcards

⁵ The postcard provides:

“Dear Mayor and Councilors,

“I’m writing to ask you to please take action to make housing more affordable and equitable in Eugene. We need a ‘missing middle’ housing ordinance that will allow duplexes, tri-plexes, and four-plexes in every neighborhood.

1 were placed before the city council because they were addressed to the mayor
2 and city councilors and received by the city manager. Conte further argues that
3 they have “seen no evidence that the elected officials rejected any or all” of the
4 postcards sent to the city, and that two city councilors referenced having received
5 postcards, one of whom brought “a stack of postcards he received” to a city
6 council meeting. Conte’s Record Objections 6, 6 n 3-4; Record 2897, 745.

7 The city argues that mailing the postcards to the city’s address was
8 insufficient to place the postcards before the city council because this “was not
9 identified in the City’s public notice as an appropriate avenue to submit testimony
10 on the middle housing amendments.” Response to Conte’s Record Objections 13.
11 The city responds that there is no evidence that these postcards were placed
12 before the city council or otherwise incorporated into the record. The city

“I want you to incentivize middle housing –

“INCREASE HOUSING OPTIONS IN ALL NEIGHBORHOODS
– Allow smaller lots and cottage clusters. Reduce parking requirements. These actions create more homes and prioritize green space over car storage and pavement.

“SUPPORT DEEPER AFFORDABILITY – Encourage homeownership by supporting a deeper affordability bonus, that would require at least two units to be affordable based on area median income.

“Older adults looking to downsize to smaller homes because of cost or necessity need options to age in community. Let’s make housing more affordable for working families and lower income residents. You have a historic opportunity to address our housing crisis.”
Record Objections Ex B.

1 observes that the city council as a body is the final decision maker in this matter
2 and only two councilors discussed having received postcards. *Id.*

3 The entire city council is the final decision maker, not any individual city
4 councilor. *Thunderbird Hotels, LLC v. City of Portland*, 53 Or LUBA 625, 627
5 (2007). In order to place the postcards before the decision maker, they need to
6 have been placed before the city council as a body in a manner specified in the
7 notice, here, by sending them through the mail to the address and recipient
8 specified in the notice. Sending documents to city staff is not by itself sufficient
9 to place those documents before the city council. *Terrace Lakes Homeowners*
10 *Assoc. v. City of Salem*, 29 Or LUBA 600, 602 (1995).

11 The city notices specified that hard copy written comments be sent to the
12 Planning Division at 99 West 10th Avenue. Record 3287. Instead, the postcards
13 were sent to 101 West 10th Avenue and received by the city manager. Two city
14 councilors acknowledged generally having received postcards regarding middle
15 housing. Record 2897, 745. Nothing that we have received identifies those
16 postcards as the postcards that are the subject of Conte's objection. Nor is there
17 any evidence that those postcards were placed before the entire city council. Even
18 if we assume, as Conte does, that the postcards referenced by the two city
19 councilors included the disputed postcards, something "does not become part of
20 the local record simply because it is physical present and visible." *Home Depot,*
21 *Inc. v. City of Portland*, 37 Or LUBA 994, 996 (1999). "Something more must
22 be done to place it before the decision maker." *Id.*


1 The city states that the disputed postcards were not placed before the city
2 council as part of the record in this proceeding, and Conte has not established that
3 they were placed before the city council. We therefore defer to the city's
4 assertion. *Curl*, 56 Or LUBA at 796. This objection is denied.

5 **BRIEFING SCHEDULE**

6 The record is settled as of the date of this order. The petitions for review
7 and intervenors-petitioners' briefs shall be due 21 days after the date of this order.
8 Petitioners and intervenors-petitioners are encouraged to coordinate their briefing
9 to avoid overlapping and repetitive arguments. The response brief and
10 intervenors-respondents' briefs shall be due 42 days after the date of this order.
11 Respondent and intervenors-respondents are encouraged to coordinate their
12 briefing to avoid repetitive and overlapping arguments. The final opinion and
13 order shall be due 77 days after the date of this order.

14 Dated this 4th day of October 2022.

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H. M. Zamudio
Board Member