

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

3
4 RICK MICHAELSON,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11
12 and

13
14 GUARDIAN REAL ESTATE SERVICES, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2017-119

18
19 NORTHWEST DISTRICT ASSOCIATION,
20 *Petitioner,*

21
22 vs.

23
24 CITY OF PORTLAND,
25 *Respondent,*

26
27 and

28
29 GUARDIAN REAL ESTATE SERVICES, LLC,
30 *Intervenor-Respondent.*

31
32 LUBA No. 2017-120

33
34 ORDER

1 **MOTIONS TO INTERVENE**

2 Guardian Real Estate Services, LLC, the applicant below, moves to
3 intervene on the side of respondent in these consolidated appeals. No party
4 opposes the motions and they are granted.

5 **RECORD OBJECTIONS**

6 Petitioners object to the record transmitted by the city. The city
7 responded, agreeing with some objections and disputing others. We now
8 resolve the outstanding objections.

9 **A. Organization of the Record**

10 OAR 661-010-0025(4)(a)(E) requires that the record be “arranged in
11 inverse chronological order, with the most recent item first.”¹ Item 21 of the
12 table of contents consists of the decision of the city design commission, along
13 with over 1,500 pages of documents, representing the record compiled before
14 the design commission over the course of eight hearings. Record 510-2126.
15 The documents are organized into a number of topically-organized exhibits (A
16 through H). For example, Exhibit A is entitled “Applicant’s Statement,” and

¹ OAR 661-010-0025(4)(a)(E) provides that the record shall:

“Be arranged in inverse chronological order, with the most recent item first. Exhibits attached to a record item shall be included according to the numerical or alphabetical order in which they are attached, not the date of the exhibits. Upon motion of the governing body, the Board may allow the record to be organized differently.”

1 includes a number of application materials. Exhibit E is “Agency Responses.”
2 Exhibit F is “Letters,” and includes public testimony submitted to the design
3 commission. Each document within each exhibit is separately listed in the
4 table of contents, and mostly organized in chronological order, with the most
5 recent items last. The design commission’s decision was appealed to the city
6 council, which is the city’s final decision maker. The city represents that Item
7 21 represents the form and organization of the design commission record, both
8 as it was presented to the design commission and as it was presented to the city
9 council.

10 Petitioners argue that topically-organized exhibits and the documents
11 within each exhibit are not “arranged in inverse chronological order,” and thus
12 violate OAR 661-010-0025(4)(a)(E). Petitioners acknowledge that to the
13 extent alternative organizations violate OAR 661-010-0025(4)(a)(E), LUBA
14 has considered such violations to be “technical violations,” as long as the
15 organizational principle chosen by the local government makes it possible to
16 “identif[y] and locate documents with reasonable effort.” *Sanchez v. Clatsop*
17 *County*, 26 Or LUBA 631, 633 (1994); OAR 661-010-0005(technical
18 violations of LUBA’s rules not affecting the substantial rights of the parties
19 shall not interfere with LUBA’s review). However, petitioners argue that the
20 organizational principle the city chose here makes it too difficult to identify
21 documents with reasonable effort, and further makes it difficult to understand
22 each document in context, since documents submitted at the same time or in the

1 same proceeding are scattered throughout Item 21. Petitioners suggest that an
2 appropriate remedy would be to duplicate the documents in Item 21 in a
3 supplemental record, organized in strict inverse chronological order by
4 document date, without topical categories.

5 The city responds that Item 21 accurately reflects the organization of the
6 record before the design commission, both as used by the design commission
7 and as presented on appeal to the city council. Further, the city notes that the
8 record is in a searchable electronic format, and argues that searching the record
9 to locate specific documents should require little additional effort.

10 We agree with the city that no remedial action is warranted regarding
11 Item 21. Item 21's organization reflects the actual organization of the record
12 before the initial and final decision makers, which offers some advantages in
13 using and understanding the record on appeal. Further, the topical (and
14 partially chronological) organization used here arguably offers an equal or
15 better means of accessing and understanding the role of individual documents
16 in the city's final decision, compared to a strict inverse chronological
17 organization by document date. Finally, as the city argues, the searchability of
18 the electronic record makes it relatively easy to locate individual documents.
19 To the extent Item 21 is inconsistent with OAR 661-010-0025(4)(a)(E), we see
20 no purpose in requiring the city to reorganize or duplicate Item 21. This
21 objection is denied.

1 **B. Omitted Items**

2 Petitioners argue that eight documents were omitted from the record.
3 The city agrees that three documents, described as (1) an attachment to an
4 October 11, 2017 email, (2) proposal options 1 and 2, and (3) a design
5 guidelines cheatsheet, were placed before and not rejected by the decision-
6 maker, and offers to include those three documents in a supplemental record.
7 OAR 661-010-0025(1)(b) (the record includes all documents incorporated into
8 the record or placed before, and not rejected by, the final decision maker).
9 Those three objections are sustained. The city disputes that the five remaining
10 items belong in the record.

11 **1. Attachments to Design Advice Request Summaries**

12 Petitioners argue that three city staff “design advice request summary”
13 memorandums at Record 1464-78 are missing attachments that are referenced
14 in each summary. The city responds that city staff did not include the
15 attachments when providing copies of the summaries to the design commission
16 and city council, and therefore the attachments were never placed before the
17 decision maker. We agree with the city. This objection is denied.

18 **2. Email Correspondence**

19 Petitioners argue that three emails between staff and a member of the
20 Northwest District Association Planning Committee should be included in the
21 record. The city responds that petitioners do not argue that the emails were
22 ever incorporated into the record or placed before any decision maker. We

1 agree with the city that petitioners have not demonstrated a basis under OAR
2 661-010-0025(1) to include the emails in the record. This objection is denied.

3 **3. Audio Files**

4 Petitioners argue that the record should include audio files of five design
5 commission hearings or meetings: April 23, 2015, June 11, 2015, August 20,
6 2015, May 19, 2016, and May 12, 2017. The city responds that the first three
7 meetings took place as part of a pre-application process called “design advice
8 request,” and that petitioners do not explain why audio recordings of pre-
9 application meetings belong in the record. Response to Record Objections 4, 6.
10 With respect to the May 19, 2016 design commission hearing, the city argues
11 that that hearing was rescheduled and thus no audio recording exists. *Id.* at 6-
12 7. The city argues that the May 12, 2017 meeting was a work session for which
13 no audio recording was made. *Id.*

14 We agree with the city that audio recordings of proceedings that occur
15 prior to the date of the application are not generally part of the record of the
16 decision on the application, unless those recordings are later incorporated into
17 the record or placed before the final decision maker. Petitioners do not argue
18 that the recordings were incorporated into, or placed before, the record before
19 the final decision maker, or offer any argument at all why audio recordings of
20 proceedings that predate the application must be included in the record of the
21 decision on the application. This objection is denied.

1 With respect to the May 19, 2016 and May 12, 2017 proceedings, based
2 on the city's representation that no audio recordings of those proceedings exist,
3 these objections provide no basis for remedial action and are denied.

4 **C. Illegible and Black-and-White Images**

5 Petitioners object that the transmitted record includes a number of black-
6 and-white copies of color images submitted into the record that are illegible or
7 have lost information in the conversion from color to black-and-white. The
8 city responds that some of the images or documents identified by petitioners
9 were originally submitted in black-and-white, but agrees to submit a
10 supplemental record to include identified images that were originally submitted
11 in color, and some documents that were imperfectly scanned into the electronic
12 record. Specifically, the city agrees to include in a supplemental record color
13 or rescanned images of documents at Record 207-11, 217-24, 349-61, 717-18,
14 730, 783, 1443, 1766-90, 1865-66, and 1874-90. These objections are
15 sustained.

16 With respect to the remainder of the images or documents identified by
17 petitioners, the city argues that the originals were submitted in black-and-
18 white.² These include Record 121-25, 133-37, 159-63, 212-15, 471-75, 1304-

² In some cases, the city notes that the record includes color versions of the same black-and-white documents identified by petitioners. The color versions were presumably submitted by different persons or at different times separately from the documents identified by petitioners.

1 09, 1321-23, 1333-35, 1345-48, 1358-60, 1514-19, and 1639-45. Based on that
2 representation, these objections are denied.

3 **D. Conclusion**

4 The city shall submit a supplemental record responsive to the objections
5 sustained above. On receipt of the supplemental record, the Board will issue an
6 order settling the record and establishing a briefing schedule.

7 Dated this 8th day of March, 2018.

8

9

10

11

12 _____
Tod A. Bassham

13 Board Member