

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

3  
4                   TOM BENDER and LANE deMOLL,  
5                   *Petitioners,*

6  
7                   vs.

8  
9                   CITY OF NEHALEM,  
10                  *Respondent.*

11  
12                  LUBA No. 2018-032

13  
14                  ORDER

15       **REQUEST FOR TELEPHONE CONFERENCE**

16           Pursuant to OAR 661-010-0026(5), petitioners request a telephone  
17 conference to address their pending record objections.

18           We do not believe a telephone conference is warranted, and petitioners'  
19 request is therefore denied.

20       **RECORD OBJECTIONS**

21           This appeal concerns a city council decision that denies petitioners'  
22 request that the city's urban growth boundary be amended to include their  
23 property. On April 24, 2018, LUBA received the record in this appeal.  
24 Petitioners filed record objections that LUBA received on May 9, 2018. On  
25 May 23, 2018, LUBA received a Supplemental Record. On May 29, 2018  
26 LUBA received the city's response to petitioners' record objections and a  
27 declaration signed by the city manager. And finally, on June 8, 2018,  
28 petitioners filed a reply to the city's May 29, 2018 response, which LUBA

1 received on June 11, 2018. The Supplemental Record resolves all of  
2 petitioners' record objections except two.

3 Petitioners object to the city's inclusion of the City of Nehalem 2017  
4 Buildable Lands Inventory (2017 BLI) in the record (Objection B(1)).  
5 According to petitioners, although the 2017 BLI was discussed at a February  
6 12, 2018 city council hearing where the city council adopted its decision, the  
7 2017 BLI was not made available to the petitioners or members of the public,  
8 prior to the close of the public hearing on February 12, 2018. Based on  
9 petitioners' June 8, 2018 reply, we understand petitioners to take the position  
10 that the 2017 BLI was not placed before the city council until after the public  
11 hearing closed on February 12, 2018:

12 "[T]he public hearings [were] closed and then and only then does  
13 Councilman Welsh disclose the BLI 2017 study and attempt to  
14 introduce it as the basis for a finding to reverse the Council  
15 previous decision without any notice to the public or the applicant  
16 and after the public hearing had already been closed." Petitioners'  
17 Reply 9.

18 The city responds:

19 "OAR 661-010-0025(1) provides that the record 'shall include at  
20 least the following: [(b)] [a]ll . . . documents or other materials  
21 specifically incorporated into the record or placed before, and not  
22 rejected by, the final decision maker, during the course of the  
23 proceedings before the final decision maker.' As indicated above,  
24 the [2017] BLI was specifically considered by the Nehalem City  
25 Council, discussed at length, and was the basis for the City  
26 Council's Final Decision. Petitioner Tom Bender was present at  
27 the City Council's February 12, 2018 meeting, Rec 30, and had the  
28 opportunity to object to the inclusion of the [2017] BLI [] in the

1 record at that time. He did not object.”<sup>1</sup> Respondent’s Response  
2 to Petitioners’ Objection to the Record 3.

3 Turning first to the city’s last point, it seems at the very least debatable  
4 whether petitioner Bender had a real opportunity to object if the 2017 BLI was  
5 not placed before the city council until after the public hearing had closed and  
6 the deliberative phase of the proceeding commenced. But even if petitioner  
7 Bender had an opportunity to object to including the 2017 BLI in the record  
8 and failed to do so, that might have some bearing on whether petitioners  
9 preserved their right to assign error to the city council’s decision to include the  
10 2017 BLI in the record. However, any failure to object has no bearing on  
11 whether the 2017 BLI was placed before the city council. We understand  
12 petitioners to argue the 2017 BLI was not placed before the city council until  
13 *after* the public hearing was closed. If that is the case, the city council may  
14 have committed a remandable error by accepting the BLI into the record at that

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<sup>1</sup> The declaration submitted by the city makes the following additional points:

1. The city received the 2017 BLI before it rendered the decision in this matter.
2. The 2017 BLI has been publicly available on the city’s website since October 2017.
3. The 2017 BLI was discussed at an October 17, 2017 planning commission hearing.
4. The 2017 BLI was given to persons who co-own the subject property with petitioners.

1 time, but it does not mean the 2017 BLI was not “placed before, and not  
2 rejected by, the final decision maker,” which is the relevant inquiry in deciding  
3 whether the 2017 BLI should be included in the record

4 As the city recognizes, for the 2017 BLI to be included in the record,  
5 under OAR 661-010-0025(1)(b) it must have been “specifically incorporated  
6 into the record or placed before, and not rejected by, the final decision maker,  
7 during the course of the proceedings before the final decision maker.” Neither  
8 the city’s response nor the city’s declaration clearly takes the position that the  
9 2017 BLI was specifically incorporated into the record or physically before the  
10 city council at some point during its February 12, 2018 meeting or at any other  
11 time during this proceeding.

12 There is no question the 2017 BLI was discussed at the February 12,  
13 2018 meeting. However, we have long held that mere references by the  
14 decision makers or parties to a document are insufficient to make that  
15 document part of the evidentiary record. *Tualatin Riverkeepers v. ODEQ*, 51 Or  
16 LUBA 826, 829 (2006); *Hoffman v. City of Lake Oswego*, 19 Or LUBA 607,  
17 610 (1990); *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA  
18 500, 505 (1990); *Hudson v. City of Baker*, 15 Or LUBA 657, 658 (1987);  
19 *Hillsboro Neigh. Dev. Comm. v. City of Hillsboro*, 15 Or LUBA 628, 630  
20 (1987). We noted a qualification to that general principle in *Tualatin*  
21 *Riverkeepers* where references in the decision or record suggest a document  
22 was in fact before the decision maker. 51 Or LUBA at 829.

1       The city council’s discussion of the 2017 BLI and the city’s contention  
2       that “the [2017] BLI was specifically considered by the Nehalem City Council”  
3       comes close to taking the position that a copy of the 2017 BLI was actually  
4       before the city council at February 12, 2018 meeting. Respondent’s Response  
5       to Petitioners’ Objection to the Record 3. The city staff person who drafted the  
6       order the city council ultimately adopted likely had a copy of the 2017 BLI  
7       when he or she drafted the order, but that does not establish that a copy of the  
8       BLI was ever given to the city council. That the 2017 BLI may have been (1)  
9       available on the city’s website, (2) given to some owners of the property, and  
10      (3) discussed at planning commission and city council meetings is not  
11      sufficient to establish that the 2017 BLI was “placed before” the city council  
12      during the proceedings that led to the decision challenged in this appeal, within  
13      the meaning of OAR 661-010-0025(1)(b). Nevertheless, as noted above, we  
14      understand petitioners to concede that the 2017 BLI was placed before the city  
15      council, albeit after the February 12, 2018 public hearing was closed and the  
16      city council commenced deliberations. Because both petitioners and  
17      respondent apparently take the position that the 2017 BLI was “placed before,  
18      and not rejected by, the final decision maker,” it is properly included in the  
19      record. If petitioners believe the 2017 BLI was erroneously “placed before,  
20      and not rejected by, the final decision maker,” after the public hearing was  
21      closed on February 12, 2018, petitioners may include in their petition for  
22      review an assignment of error to challenge that action by the city.

1 For the reasons explained above, petitioners' Objection B1 is denied.

2 Finally, in their June 8, 2018 reply petitioners argue, "based on  
3 conversations with \* \* \* the Tillamook County Director of Community  
4 Development on June 8, 2018, \* \* \* there is significant email correspondence  
5 between the \* \* \* Nehalem City manager and \* \* \* the Tillamook County  
6 Director of Community Development regarding the City Council's decision to  
7 reverse their previous approval of the Petitioner's application \* \* \*."  
8 Petitioners' Reply 1-2. Petitioners object that email correspondence should be  
9 included in the record.

10 Because petitioners make no attempt to show that the referenced email  
11 correspondence was "placed before, and not rejected by, the final decision  
12 maker," as they must have been under OAR 661-010-0025(1)(b) to a part of the  
13 record in this appeal, their belated record objection is denied.

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. The response brief shall be due  
17 42 days after the date of this order. The final opinion and order shall be due 77  
18 days after the date of this order.

19 Dated this 12<sup>th</sup> day of June, 2018.  
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25 Michael A. Holstun  
Board Member