

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NEIGHBORS FOR SMART GROWTH

5 and JAKE MINTZ,

6 *Petitioners,*

7
8 vs.

9
10 WASHINGTON COUNTY,

11 *Respondent,*

12
13 and

14
15 LENNAR NORTHWEST, INC.,

16 *Intervenor-Respondent.*

17
18 LUBA No. 2018-059

19
20 ORDER

21 **MOTION TO INTERVENE**

22 Lennar Northwest, Inc., the applicant below, moves to intervene on the
23 side of respondent. No party opposes the motion, and it is granted.

24 **RECORD OBJECTIONS**

25 Petitioners Neighbors for Smart Growth (NFSG) and Jake Mintz
26 (together, petitioners), as well as intervenor-respondent Lennar Northwest, Inc.
27 (intervenor) filed objections to the record. The county responded to both sets
28 of objections, disputing some and agreeing with others. Based on the county's
29 response and the parties' replies, we now resolve the objections.

1 **A. Intervenor’s Record Objections (Objections 1-2)**

2 The county agrees with intervenor’s record objections 1 and 2. The
3 county agrees to provide the documents intervenor alleges were improperly
4 omitted (Minutes of May 15, 2018 County Board of Commissioners
5 Proceedings) (record objection 1).¹ The county also agrees to strike those
6 documents from the record that intervenor alleges were improperly included
7 (Record 28-65, 78-94, 100-116) (record objection 2). According to the county’s
8 response, after conducting “[a]dditional legal research,” county counsel
9 concluded the items were “specifically rejected” by the county and therefore
10 are not part of the record. County Response to Record Objections 10; OAR
11 661-010-0025(1)(b).²

¹ Petitioners join in intervenor’s record objection 1.

² OAR 661-010-0025(1)(b) provides, in relevant part:

“(1) Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

“* * * * *

“(b) All written testimony and all exhibits, maps, documents or other materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.”

1 In response to intervenor's record objection 2, petitioners argue that the
2 documents at Record 28-65, 78-94, and 100-116 that intervenor seeks to strike
3 are properly included in the record. Petitioners state that in the petition for
4 review they intend to allege procedural and substantive assignments of error
5 arguing that the county improperly failed to give notice of the public meeting,
6 and that county counsel and staff represented to petitioners that the evidence
7 and testimony which intervenor seeks to strike would be included in the record.

8 In support of its response, the county submitted the declaration of county
9 counsel indicating she disputes petitioners' claims that she explicitly "granted
10 permission" to petitioners to submit the testimony and evidence which they
11 claim should remain in the record. Saito-Moore Declaration 3.

12 As the declaration of county counsel indicates, "all materials submitted
13 by Petitioners were specifically rejected" by the board of county
14 commissioners. Saito-Moore Declaration 4. Accordingly, those items do not
15 belong in the record. Whether the county erred in rejecting those items, or
16 whether the county committed some procedural error in how it dealt with the
17 disputed documents, may be the subject of an assignment of error in this
18 appeal, but that has no bearing on whether the items are part of the record on
19 appeal.

20 Intervenor's record objections 1 and 2 are sustained.

1 **B. Petitioners’ Resolved Record Objections**

2 Petitioners represent that the county has agreed to resolve two of
3 petitioners’ objections, involving the official minutes of the May 15, 2018
4 board of county commissioners’ meeting, and a missing page 117 in the
5 electronic record, by including the missing items in a supplemental record. No
6 party contests petitioners’ representations. These objections are sustained.

7 **C. Petitioners’ Record Objections (Objections 1-5)**

8 **1. Record Objection 1**

9 Petitioners request that Record 117, the “Notice List,” be amended to
10 show that petitioners NFSG and Jake Mintz received an email from county
11 counsel informing them of the May 15, 2018 board of commissioners’ meeting
12 and including as attachments materials which were to be distributed at the
13 meeting. In response, county counsel agrees she did separately email
14 petitioners with these materials, but states petitioners were not identified on the
15 notice list because they received notice by her separate email and not in the
16 manner that those individuals on the Notice List received notice, which was via
17 email or U.S. postal mail from Department of Land Use and Transportation
18 Staff. Saito-Moore Declaration 2. The county argues to amend the notice list
19 post-decision would be improper as it would be an inaccurate representation of
20 how petitioners received notice. We agree with the county.

21 This objection is denied.

1 **2. Record Objection 2**

2 The county agrees with petitioners' objection and states that it will
3 supplement the record with the May 15, 2018 email from county counsel to
4 petitioners, discussed above. With this representation, the objection is
5 resolved.

6 **3. Record Objection 3**

7 Petitioners request the record include the affidavit of mailing confirming
8 that notices and attachments were emailed or mailed to the individuals
9 identified on Record 117. In response the county represents that no affidavit
10 was prepared, and that none is required under state or county law. We agree
11 with the county.

12 This objection is denied.

13 **4. Record Objections 4-5**

14 Petitioners request that all written or electronic communication between
15 petitioners and the county, and all written or electronic communications
16 between petitioners and intervenor (Petitioners' Objection to the Record,
17 Exhibit B) from the date of LUBA's final opinion November 20, 2017, to the
18 May 15, 2018 board of commissioners' meeting be included in the record. In
19 response, the county states that all emails and other written communication
20 between the county and petitioners was only via county counsel, and these
21 communications were never placed before the board of county commissioners
22 during the proceedings before the commissioners. OAR 661-010-0025(1)(b).

1 See n 2. Likewise, petitioners have not established any communication between
2 petitioners and intervenor was placed before the final decision-maker. *Id.*

3 In their reply, petitioners argue that the record should include
4 intervenor's draft proposed findings and related correspondence because these
5 items are "material to the record," and support arguments petitioners intend to
6 make in their petition for review regarding alleged procedural error committed
7 by the county. Further, petitioners state that they intend to argue that the
8 proposed findings were provided to the county in an effort to improperly
9 influence the county's final supplemental findings (which are part of the
10 record). In its response to petitioners' reply, intervenor points out that none of
11 petitioners' contentions apply the correct standard for a record objection, *i.e.*,
12 that the items were placed before and not rejected by the county, or otherwise
13 specifically incorporated into the record. OAR 661-010-0025(1)(b); *see* n 2.
14 We agree with the county and intervenor. As set forth above, petitioners'
15 statements that particular items are "material to the record," or that petitioners
16 otherwise believe the items to be relevant to their claims does not meet the
17 standard for establishing that those documents were specifically incorporated
18 into the record or placed before and not rejected by the final decision maker.

19 These objections are denied.

20 **REPLACEMENT RECORD**

21 We understand the county to propose to resolve some objections by
22 submitting a paper supplemental record to include items omitted in the original,

1 electronic record. However, some of the objections conceded or sustained
2 above involve items improperly included in the electronic record. There are no
3 practical means for LUBA or the parties to actually remove those items from
4 their copies of the electronic record, and the original table of contents
5 continues to inaccurately list those items as being part of the record.

6 As the name suggests, a *supplemental* record is best limited to adding
7 new items to the original record. Where the local government proposes to
8 remove, replace or repaginate a significant number of documents in an original
9 electronic record, the far better course is for the local government to submit a
10 new electronic record and a new table of contents that incorporates all the
11 proposed insertions, deletions and replacements, as well as consistent
12 pagination, and that completely replaces the original record. *Rogue Advocates*
13 *v. Josephine County*, __ Or LUBA __ (LUBA No. 2016-127, Order, Dec 13,
14 2017) (slip op at 3); *Harra v. City of West Linn*, __ Or LUBA __ (LUBA No.
15 2017-074, Order, Sept 27, 2017) (slip op at 2). Such a replacement record,
16 with a single revised table of contents, is far more usable to the parties, LUBA
17 and other review bodies than a combination of a paper supplemental record
18 with a flawed original electronic record and an inaccurate original table of
19 contents.

20 Accordingly, within 21 days after the date of this order, the county shall
21 transmit to the Board and all parties a replacement record consistent with the

1 foregoing. Thereafter, the Board will issue an order settling the record and
2 establishing a briefing schedule.

3 Dated this 31st day of August, 2018.

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9 Tod A. Bassham

 Board Member