

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 RESTORE OREGON,
5 BOSCO-MILLIGAN FOUNDATION
6 ARCHITECTURAL HERITAGE CENTER,
7 NIKKEI LEGACY ENDOWMENT,
8 PORTLAND CHINATOWN MUSEUM,
9 and PEGGY G. MORETTI,
10 *Petitioners,*

11
12 vs.

13
14 CITY OF PORTLAND,
15 *Respondent,*

16
17 and

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19 GUARDIAN REAL ESTATE SERVICES, LLC,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2018-072

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24 OSB2LAN IVON, LLC,
25 and HAITHEM TOULAN,
26 *Petitioners,*

27
28 vs.

29
30 CITY OF PORTLAND,
31 *Respondent.*

32
33 LUBA Nos. 2018-073/086/087

34
35 ORDER

1 On January 9, 2019, the approximately 63,000-page electronic record was
2 received by the board. The record index consists of 208 pages. On January 14,
3 2019, a Supplemental Record was received by the board. On January 29, 2019,
4 petitioners filed objections to the record. On February 11, 2019, the city filed a
5 response to the record objections. On February 28, 2019, petitioners filed a reply
6 to the city's response. Petitioners' reply includes a motion to take evidence not
7 in the record pursuant to OAR 661-010-0045(1) "to resolve disputes regarding
8 the content of the record[.]" We now resolve the objections.

9 **RECORD OBJECTIONS**

10 **A. Conceded Objections**

11 In objections B1, B10, F4, and F5 petitioners argue that a number of items
12 were improperly excluded from the record. OAR 661-010-0025(1)(b) (the record
13 shall include "[a]ll written testimony and all exhibits, maps, documents or other
14 materials specifically incorporated into the record or placed before, and not
15 rejected by, the final decision maker, during the course of the proceedings before
16 the final decision maker"). The city concedes petitioners' record objections B1,
17 B10, F4, and F5, and agrees to provide a Second Supplemental Record and
18 Revised Index that includes these additional items.

19 Accordingly, objections B1, B10, F4, and F5 are resolved.

20 **B. Documents Included in the Record**

21 Petitioners' record objections B4, B9, C3, C5, C8, C9, C10, E2, E3, and
22 F3 argue that various items are missing from the record. For these objections, the

1 city responds that those items are included in the record as follows: B4 (Record
2 25109), B9 (Record 7726), C3 (Record 31317), C5 (Record 25355), C8 (Record
3 25182), C9 (Record 15845), C10 (Record 15354), E2 (Record 24979), E3
4 (Record 24797), and F3 (Record 46246).

5 Accordingly, objections B4, B9, C3, C5, C8, C9, C10, E2, E3, and F3 are
6 denied.

7 With respect to petitioners' objection B7 (Record 15009, mis-dated in the
8 index as 09/14/17, rather than 09/07/17) and E1 (Record 55013-15, incorrectly
9 identified at the index as 55011), the city responds that the record includes these
10 documents, but that the index references to them contain typographical errors (as
11 noted). The city agrees to correct these mistakes in its submission of the Revised
12 Index.

13 Accordingly, objections B7 and E1 are sustained.

14 **C. Petitioners' Remaining Record Objections A-F**

15 Petitioners object that various items submitted by or on behalf of the
16 Coalition for Historic Resources and Northwest District Association (NWDA)
17 (Objection A), Restore Oregon (Objection B), Architectural Heritage Center and
18 Bosco Milligan Foundation (Objection C), Nikkei Endowment (Objection D),
19 Irvington Community Association (Objection E), and Old Town Chinatown
20 Community Association (Objection F) were improperly omitted from the record.

21 The city offers several responses, which can be categorized as follows:

1 **1. Documents Not in the Record**

2 According to the city, the documents described in Objections A1-A3, B2,
3 B3, B6, B8, C1, C2, and C4 were not “placed before” the final decision maker.¹
4 OAR 661-010-00225(1)(b). The city takes the position that the majority of the
5 disputed materials relate to the city council’s adoption of Ordinance No. 188177
6 (adopted December 21, 2016), Ordinance No. 187832 (adopted June 15, 2016),
7 and Ordinance No. 188623 (adopted September 28, 2017), which are separate
8 decisions and not a part of this appeal. The city argues that absent reason to
9 question the city’s representation, LUBA generally defers to the city as custodian
10 of the record, unless petitioner supplies a sufficient reason to decide otherwise,
11 which the city argues petitioners have failed to do here. *Curl v. City of Bend*, 55
12 Or LUBA 719, 725 (2008).

13 Petitioners bear the burden of establishing that a document was made part
14 of the record. *Weeks v. City of Tillamook*, 23 Or LUBA 662, 663 (1992).
15 Petitioners’ assertion that the material was placed before the decision maker
16 during the proceedings leading to the final decision in this appeal is insufficient
17 to overcome the city’s representations, as custodian of the record, that the
18 documents were not made part of the record.

¹ The city argues that although the document referenced in objection C1 is not in the record because it was not placed before the final decision maker, a version of this document with an earlier date is located at Record 62534.

1 Accordingly, objections A1-A3, B2, B3, B6, B8, C1, C2, and C4 are
2 denied.

3 **2. Documents Summarizing Oral Testimony**

4 In objections C6, C7, D1, D2, D3, and D4 petitioners argue that written
5 scripts or notes for testimony that was presented orally to the city at various
6 public meetings during the proceedings that led to the final decision are missing
7 from the record. The city responds that these documents are not a part of the
8 record because they were not placed before the city during the course of the
9 proceedings. The city takes the position that the oral testimony was not submitted
10 in written form, and therefore petitioners' record objections should be denied.

11 In their reply, with respect to record objections C6 and C7, petitioners seek
12 to have these documents allowed into the record pursuant to OAR 661-010-
13 0045(1).² Petitioners argue that although it "is not clear that the[se] document[s]
14 [were] actually submitted, [the documents] reflect[] a verbatim transcript of the

² OAR 661-010-0045(1) provides:

"Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. *The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record * * *.*" (Emphasis added.)

1 testimony actually delivered” during the city’s July 26, 2016 Planning and
2 Sustainability Commission hearing on the final decision. Reply 2. Further,
3 petitioners argue that it “appears to be virtually impossible to dig-out this
4 testimony” from the city’s voluminous 63,000-page record, and that LUBA
5 should therefore allow this document into the record “to resolve disputes
6 regarding the content of the record.” Reply 3 (quoting OAR 661-010-0045(1)).

7 Arguments that testimony is inadequately or inaccurately reflected in the
8 minutes of the local proceedings may be adequate to justify requiring a local
9 government prepare a transcript of the proceedings where the objecting party
10 demonstrates with particularity why the defect in the minutes are material. *West*
11 *Amazon Basin Land Owners v. Lane County*, 24 Or LUBA 597 (1992). However,
12 petitioners do not argue here that any minutes or summaries of testimony are
13 inaccurate or inadequate, or even that the disputed documents were “actually
14 submitted.” Instead, petitioners argue that it is challenging to identify the
15 testimony in the city’s voluminous record, and for that matter, LUBA should
16 allow the documents to “resolve disputes regarding the content of the record.”
17 There appears to be no dispute regarding whether the documents are part of the
18 record where petitioners state that it “is not clear that the document was actually
19 submitted.” Therefore, petitioners have not provided a basis for LUBA to allow
20 the documents to be part of the record pursuant to OAR 661-01-0045(1).

21 Accordingly, petitioners record objections’ C6, C7, D1, D2, D3, and D4
22 are denied.

3. Undated and/or Unsigned Documents

In response to record objections D5, D6, D7, F1, and F2, the city responds these documents are not a part of the record because the city has not been able to identify the documents as part of the record, and because the disputed document is either unsigned (D5), or both unsigned and undated (D5-D7), or is undated and without an addressee (F1 and F2), and therefore the city cannot ascertain or verify when the document may have been submitted. With respect to record objections D5, F1, and F2, we agree with the city, and these objections are denied.

With respect to objections D6 and D7, petitioners argue that Lynn Fuchigami, a member of petitioner Oregon Nikkei Endowment, attached a cover email to both these documents, and that cover email demonstrates she submitted both documents to the mayor and all city commissioners via email on April 4, 2018. Petitioners argue that because the city's response to petitioners' objections was based solely on the argument that the city could not verify that the documents were part of the record due to the lack of a date, signature and/or addressee, LUBA should conclude the documents described in D6 and D7 are part of the record.

We agree with petitioners. Because petitioners have provided evidence that petitioners sent these documents to all city commissioners in writing on April 4, 2018, prior to the final decision (which occurred in June 2018), the documents are appropriately part of the record.

1 Petitioners’ record objections D6 and D7 are sustained. The city shall
2 include the documents described in objections D6 and D7 in the Second
3 Supplemental Record

4 **4. Documents Sent to Staff and City Council**

5 In response to petitioners’ record objection B5, the city responds that the
6 document appears to contain notes taken by an individual who had a meeting with
7 a city council person’s staff, but nothing on the face of the document
8 demonstrates it was provided to the city council person. The city argues a
9 document does not become part of the record unless the document is physically
10 placed before the city council as a final decision maker, and that petitioners have
11 failed to meet their burden to prove the document was placed before the city
12 council. *Terrace Lakes Homeowners Assn. v. City of Salem*, 290 Or LUBA 600,
13 602 (1995); *Blatt v. City of Portland*, 20 Or LUBA 572 (1991). We agree with
14 the city, and record objection B5 is denied.

15 Similarly, in response to petitioners’ record objection B11, the city argues
16 the document to which petitioners object is an email sent to some, but not all,
17 members of the city council, that no evidence in the record indicates that the
18 email was submitted into the record by any of the recipients, and therefore it was
19 not “placed before” the final decision maker pursuant to OAR 661-010-
20 0025(1)(b).

21 In reply, petitioners argue “[e]ven though this document was sent to fewer
22 than all of the city commissioners, it was nonetheless submitted to three

1 commissioners about this legislative proposal and was before at least those three
2 commissioners” and is therefore properly part of the record before LUBA. Reply
3 2. We disagree with petitioners. Documents presented to individual city council
4 members, but not to the entire city council, and which are not submitted into the
5 record by any of the individual recipients are not properly considered “placed
6 before” the final decision maker and are not part of the record.

7 Accordingly, objections B5 and B11 are denied.

8 **SECOND SUPPLEMENTAL RECORD**

9 Within 21 days after the date of this order, the county shall transmit to the
10 Board and the parties a Second Supplemental Record and Revised Index,
11 consistent with this order. Thereafter, LUBA will issue an order settling the
12 record and establishing a briefing schedule.

13 **EXTENDED ORAL ARGUMENT**

14 Pursuant to OAR 661-010-0040(3), the Board will allow a 40-minute oral
15 argument for these consolidated appeals. Petitioners shall share 20 minutes, and
16 respondent and intervenor-respondent shall share 20 minutes.

17 Dated this 25th day of March, 2019.

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23 Melissa M. Ryan
Board Chair