

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

3
4 JOEL HAUGEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SCAPPOOSE,
10 *Respondent,*

11
12 and

13
14 DAVID WEEKLEY HOMES,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2023-001

18
19 ORDER

20 On January 3, 2023, petitioner filed their notice of intent to appeal (NITA)
21 the city's adoption of an ordinance amending the city's zoning map and
22 approving planned development, subdivision, conditional use and sensitive land
23 development permit applications (Ordinance 909). On January 25, 2023, LUBA
24 received the record. On February 8, 2023, petitioner filed objections to the record.
25 On February 22, 2023, the city and intervenor-respondent (intervenor) each filed
26 responses to the record objections. On March 1, 2023, petitioner filed their reply
27 to the responses. We resolve petitioner's objections below.

1 **RECORD OBJECTIONS**

2 **A. First Objection**

3 In their reply to the responses, petitioner withdraws their first objection.
4 The first objection is withdrawn.

5 **B. Third Objection**

6 OAR 661-010-0025(1)(b) provides that the record shall include, unless the
7 board otherwise orders or the parties otherwise agree in writing, “[a]ll written
8 testimony and all exhibits, maps, documents or other materials specifically
9 incorporated into the record or placed before, and not rejected by, the final
10 decision maker, during the course of the proceedings before the final decision
11 maker.” Petitioner’s third record objection is that the record improperly includes,
12 at Record 23, an email from the Department of Land Conservation and
13 Development (DLCD) to the city planning director that was sent the day after the
14 city council’s final hearing. Petitioner argues that the email was not placed before
15 the decision maker during the course of the proceedings before the final decision
16 maker. The city and intervenor do not contest petitioner’s third record objection.

17 The third record objection is sustained. Record 23 is stricken from the
18 record. The parties shall not cite to Record 23 in their briefs.

19 **C. Second Objection**

20 Ordinance 909 states that:

21 “In support of the proposed Planned Development Overlay Zone
22 Change, Subdivision Tentative Plan Approval, Conditional Use
23 Approval, and Sensitive Lands Development Permits for Flooding,

1 Wetlands, Slope Hazard and Fish and Riparian Corridor, the City
2 Council hereby adopts the recommendations of the Scappoose
3 Planning Commission and the findings outlined in the staff report
4 attached as Exhibit B, attached hereto and incorporated herein.”
5 Record 24.

6 Petitioner’s second objection is that the version of Ordinance 909 included in the
7 record improperly attaches to the Ordinance (1) Exhibits 1 through 47 of the staff
8 report, and (2) public comments received after the planning commission hearing.
9 Petitioner argues that Exhibits 1 through 47, and the comments received after the
10 planning commission hearing were improperly included as part of Exhibit B to
11 the Ordinance.

12 The city responds that Exhibits 1 through 47 and the public comments were
13 part of the city council packet and placed before the city council. City’s Response
14 to Petitioner’s Record Objection 2-3. Absent reason to conclude otherwise, we
15 defer to the custodian of the record concerning the contents of the record. *Curl v.*
16 *City of Bend*, 56 Or LUBA 794 (2008) (stating that we will defer to respondent,
17 as the custodian of the record, where the proponent of the inclusion of the
18 documents fails to uphold the burden of showing the item(s) should be included).
19 Petitioner’s objection is not, however, that these documents are not part of the
20 record but instead, that they are not part of Ordinance 909, and therefore are
21 improperly included immediately after Ordinance 909.

22 As discussed above, the city council adopted the “findings outlined in the
23 staff report attached as Exhibit B, attached hereto and incorporated herein.”
24 Record 24. In response to the objection, intervenor argues that “[t]he staff report

1 incorporated at Exhibit B of the Ordinance clearly identified Exhibits 1 through
2 47 as being part of the staff report. As a result, a reasonable person reading the
3 decision could conclude that Exhibits attached to the staff report were included
4 as part of the findings.” Intervenor-Respondent’s Response to Petitioner’s
5 Record Objections 3.

6 Ordinance 909 clearly identifies the staff report as a document attached to
7 Ordinance 909 as its Exhibit B. Immediately after describing the application and
8 the property location and identifying the applicant and property owner, the staff
9 report identifies and describes 47 exhibits. *See* Record 27-29. The referenced
10 exhibits are properly included in the record as exhibits to the staff report attached
11 to Ordinance 909.¹

12 Petitioner also objects that comments received after the planning
13 commission hearing are improperly included as part of Exhibit B to Ordinance
14 909. Petitioner’s Objections to the Record 3. The city responds that the packet of
15 information received by the city council included all of the material that was
16 placed before the city council, including the comments. The city, the custodian
17 of the record, takes the position that the documents were placed before and not
18 rejected by the city council. City’s Response to Petitioner’s Record Objection 3.
19 However, neither the city nor intervenor explain why the comments should be

¹ We resolve only the record object here and do not express any opinion whether the staff report, planning commission, or city council findings incorporate the disputed exhibits.

1 included in the record where they are located and identified, as part of Ordinance
2 909. The public comments must be listed as a separate item in the table of
3 contents, separate from Ordinance 909.

4 The second objection is sustained, in part.

5 **D. Fourth Objection**

6 Petitioner's fourth objection is that a December 1, 2022 email from the city
7 attorney to the city planning director concerning intervenor's extension of the
8 120-day deadline should not be included in the record because it was not
9 specifically incorporated into the record or placed before the decision maker. The
10 city does not take the position that the email was physically placed before the city
11 council or specifically incorporated into the record by the city council. During
12 conferral with petitioner on the objections, the city agreed to remove this item
13 from the record. Intervenor argues, however, that the email should remain in the
14 record. The city states in its reply that although it agreed to remove the email
15 during conferral, it finds intervenor's argument "compelling." City's Response
16 to Petitioner's Record Objection 3.

17 Again, OAR 661-010-0025(1)(b) provides that the record shall include,
18 unless the board otherwise orders or the parties otherwise agree in writing, "[a]ll
19 written testimony and all exhibits, maps, documents or other materials
20 *specifically incorporated into the record or placed before, and not rejected by,*
21 *the final decision maker, during the course of the proceedings before the final*
22 *decision maker.*" (Emphasis added.) We have explained that

1 “[t]he scope of written materials that are ‘placed before, and not
2 rejected by, the final decision maker,’ within the meaning of OAR
3 661-010-025(1)(b), is not necessarily limited to materials that are
4 physically placed on a table in front of decision makers. As we stated
5 in *ONRC v. City of Oregon City*, 28 Or LUBA 775, 778 (1994):

6 “Items are placed before the local decision maker if (1) they
7 are physically placed before the local decision maker prior to
8 the adoption of the final decision; (2) they are submitted to
9 the decision maker through means specified in local
10 regulations or through appropriate means in response to a
11 request by the decision maker for submittal of additional
12 evidence; or (3) local regulations require the item (*e.g.*, record
13 of a lower level decision maker’s proceeding) be placed
14 before the decision maker.” *Montgomery v. City of Dunes*
15 *City*, 59 Or LUBA 519, 520 (2009).

16 Intervenor first maintains that the email to the city attorney was forwarded
17 to the planning director and the city manager and therefore placed before and not
18 rejected by the final decision maker. Intervenor-Respondent’s Response to
19 Petitioner’s Record Objections 4. Intervenor does not develop its argument that
20 the forwarding of the email to the planning director and city manager placed it in
21 the record and we do not address this argument further.

22 Next, citing Scappoose Land Use and Development Code (LUDC)
23 17.162.230(C), intervenor argues that the email is properly included in the record
24 pursuant to that code section. LUDC 17.162.230 governs the “Record of
25 proceedings *for public hearings*” and, as relevant here, LUDC 17.162.230(C)(6)
26 provides that the record shall include all correspondence related to the
27 application. Intervenor-Respondent’s Response to Petitioner’s Record
28 Objections 4. We understand intervenor to argue that the email is properly part

1 of the record under the third prong identified in *ORNC*, that is, that local
2 regulations require that correspondence concerning an application be placed in
3 the record of the quasi-judicial public hearing held by the city council. 28 Or
4 LUBA at 778.

5 In *Montgomery*, the petitioner contended that the disputed material was
6 properly part of the record under the second *ORNC* scenario because the local
7 code provided that “[t]he record shall contain all testimony and evidence that is
8 submitted to the City, the Planning Commission, and the City Council and not
9 rejected.”² 59 Or LUBA at 520-21 (emphases omitted). We agreed with the
10 petitioner that any disputed materials that were testimony or evidence must be
11 included in the record. *Id.* at 521.

12 Petitioner argues that intervenor relies on the second prong of the test set
13 out in *ORNC* and that “*Montgomery* and *ONRC* do not stand for the proposition
14 that the LUBA record includes anything the local code requires to be include
15 regardless of whether the document was or should have been submitted to the
16 final decision maker, especially something as vague as any document ‘relating to
17 the application.’” Petitioner’s Reply to Respondents’ Response to Objections to

² The petitioner in *Montgomery* also argued that the disputed material was properly part of the record under the third *ONRC* scenario because the local code required that such material be included in the record. *Montgomery*. 59 Or LUBA at 521.

1 the Record 7. Petitioner argues that LUDC 17.162.230(C) does not provide that
2 the correspondence must be placed before the local decisionmaker. *Id.* at 7-8.

3 Unlike the code we reviewed in *Montgomery*, the LUDC does not provide
4 that the record shall contain all testimony and evidence that is submitted to the
5 city, the planning commission, and the city council and not rejected. However,
6 pursuant to LUDC 17.162.230(C)(6), all correspondence related to the
7 application is part of the record of quasi-judicial public hearings. The city council
8 held a public hearing on the quasi-judicial application on December 5, 2022.
9 Record 688-89. Because the city council was also the final decision maker in this
10 case, the material that the code provides is part of the public hearing record of
11 proceedings was, under the code, part of the record before the final decision
12 maker.

13 We understand intervenor to rely on *Montgomery* for the proposition that
14 “documents which may not have been placed before the decision maker are
15 properly within the record when local code provisions defining the scope of the
16 record requires such documents to be included in the record.” Intervenor-
17 Respondent’s Response to Petitioner’s Record Objections 5. Although it is a
18 close call, we conclude that LUDC 17.162.230(C)(6), under these facts, has the
19 effect of placing the disputed email before the city council by operation of the
20 local code. The email is properly included in the record.

21 The fourth objection is denied.

1 **E. Fifth Objection**

2 Petitioner’s fifth objection to the record concerns items 48, 50-58, 62, 66,
3 68, 70,74, 76, 80, and 84-99. First, petitioner contends that these documents are
4 improperly included in the record because they

5 “were submitted to the City prior to the planning commission public
6 hearings, and they were not included as exhibits to the planning
7 commission staff report (Rec 1554-2069). Since these documents do
8 not appear to have been specifically incorporated into the record or
9 placed before the city council, they must be removed from the
10 record.” Petitioner’s Objections to the Record 5-6.

11 Petitioner explains that during conferral, the city stated that these items
12 were included as part of the city council’s December 5, 2022 city council agenda
13 packet

14 “but Petitioner did not have sufficient time to verify if Items 48, 50-
15 58, 62, 66, 68, 70, 74, 76, 80, ad 84-99 were in fact included as part
16 of the city council agenda packet. The documents are not in the same
17 order and there appear to be some differences between the
18 documents included in the December 5, 2022 city council agenda
19 packet and those included at the end of the LUBA record.”
20 Petitioner’s Objections to the Record 6.

21 Petitioner also maintains that if, as the city responded during conferral, these are
22 documents included in the December 5, 2022 city council agenda packet and
23 therefore properly part of the record, it is nonetheless

24 “unnecessary and confusing to include a duplicate copy of these
25 documents at the end of the LUBA record. It is also contrary to OAR
26 661-010-0025(4)(a)(ii)(E), which requires the record to be ‘arranged
27 in inverse chronological order’ and any exhibit attached to a record
28 item ‘shall be included according to the numerical or alphabetical
29 order in which they are attached, not the date of the exhibits.”

1 Petitioner’s Objections to the Record 6-7.

2 First, the city responds that items 87, 91 and 93 are properly part of the
3 record as correspondence related to the application under LUDO
4 17.162.230(C)(6). Item 87 is a letter from city to intervenor concerning the
5 completeness of the application. Item 91 is correspondence to the city from the
6 Columbia Soil and Water Conservation District concerning the application and
7 Item 93 is correspondence to the city from DLCD concerning the application. As
8 we explained above, because the city council held a public hearing on the
9 application and the LUDO provides that the record for quasi-judicial public
10 hearings includes all correspondence related to an application, the
11 correspondence is properly included in the record. The objection concerning
12 items 87, 91 and 93 is denied.

13 Second, the city responds that the remaining documents were placed before
14 the city council and included in the city council packet. Petitioner bears the
15 ultimate burden of demonstrating that their objection is valid. Petitioner has failed
16 to meet their burden to identify any differences between the copies of documents
17 provided in the record as part of the city council packet and other, potentially
18 different copies. As intervenor observes, we have said that “[d]uplication of items
19 properly included in the record does not provide a basis for sustaining a record
20 objection.” *Laurance v. Douglas County*, 44 Or LUBA 845, 851 (2003).

21 The remaining issue is whether the inclusion of these documents in what
22 petitioner describes as something other than inverse chronological order is

1 sufficient for us to order the record to be reorganized. OAR 661-010-0025(4)(E)
2 provides that the record is to

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

8 The city argues that “[i]n this case the Record exceeds 3000 pages. It is
9 reasonable and customary for small jurisdictions to order and organize
10 documents received during the process, as they are submitted. This is true
11 regardless as to whether identical documents are already part of the record.”
12 City’s Response to Petitioner’s Record Objection 4. The items appear to us to be
13 in chronological order of receipt and the record is in a usable format. *Burness v.*
14 *Douglas County*, 61 Or LUBA 530, 533 (2010); *Mar-Dene Corporation v. City*
15 *of Woodburn*, 32 Or LUBA 481, 483 (1997).

16 The fifth objection is denied.

17 **F. Conclusion**

18 The first objection was withdrawn. The fourth and fifth record objections
19 are denied. The second is sustained in part and denied in part. The third objection
20 is sustained.

21 Within 14 days of the date of this order, the city shall submit a revised table
22 of contents that (1) instead of including the comments received after the planning
23 commission hearing as part of the final decision, separately lists those comments

1 as items in the table of contents and (2) adds a notation that the DLCD
2 correspondence at Record 23 is not included in the record and strikes through that
3 entry in the revised table of contents. After the Board receives the revised table
4 of contents, the Board shall issue an order settling the record and establishing the
5 briefing schedule.

6 Dated this 29th day of March 2023.

7

8

9

10

11

Michelle Gates Rudd

12 Board Member