

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NORMAN MARTIN and JUDY MARTIN,
5 Trustees under Declaration of Trust
6 Dated November 29, 1991,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF DUNES CITY,
12 *Respondent.*

13
14 LUBA No. 2003-051

15 ORDER ON RECORD OBJECTIONS

16 **BACKGROUND**

17 This matter is before us for the second time. We remanded the city's initial decision
18 for the city to adopt a written decision that explained its reasons for denying petitioners'
19 application to partition their property. *Martin v. Dunes City*, 43 Or LUBA 354 (2002). On
20 remand, the city adopted a new decision without holding an evidentiary hearing. The city
21 approved petitioners' partition application, with conditions. Petitioners now appeal that
22 decision to LUBA.

23 On April 23, 2003, the city filed its record in this appeal. Petitioners identified
24 omissions in the record, and worked informally with the city to resolve those record
25 objections. The city filed a supplemental record on May 1, 2003. On May 9, 2003, petitioners
26 filed objections to the supplemental record. Petitioners concede that the supplemental record
27 resolves some of their objections to the initial record. However, petitioners object to the
28 omission of three items from the supplemental record. The city filed its response to
29 petitioners' record objection on May 15, 2003.

1 **ITEM 1**

2 Petitioners argue that the record should include a March 17, 2003 letter that they
3 provided to the city council. Petitioners argue that the letter was placed before the decision
4 maker prior to the date the city’s decision became final and, therefore, the March 17, 2003
5 letter should be included in the record pursuant to OAR 661-010-0025(1).¹

6 The city does not dispute that the March 17, 2003 letter was placed before the city
7 council prior to March 19, 2003, when the city recorder signed the city’s decision and
8 notified petitioners of the action taken by the city council.² However, the city argues that the
9 letter was sent *after* March 13, 2003, the date the city council made its oral decision to
10 approve petitioners’ partition with the conditions recommended by staff. The city contends
11 that the city’s record was closed after the city council deliberated and made its oral decision,
12 thus concluding the proceedings that led to the decision signed by the city recorder.

¹ OAR 661-010-0025(1) “Contents of Record” provides, in relevant part:

“Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

- “(a) The final decision including any findings of fact and conclusions of law;
- “(b) All written testimony and all exhibits, maps, documents or other written 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.
- “(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. * * *”

² The city appears to take the position that the city decision in this matter became “final” for purposes of an appeal to LUBA when the city recorder signed the decision and gave notice of its decision to petitioners. This position is based on Section 3.06 of the Dunes City Land Subdivision Ordinance (LSO), which provides, in relevant part:

“Final Disposition of the Tentative Plan

- “(A) Notification of Applicant. The city recorder shall notify the applicant of any * * * action [taken] by the city council * * * on a tentative plan application within seven days of such action and shall note the nature of the action and the effective date thereof on the tentative map.”

1 The record includes all evidence that is “placed before, and not rejected by, the final
2 decision maker, during the course of the proceedings before the local decision maker.” OAR
3 661-010-0025(1)(b); *Bloomer v. Baker County*, 19 Or LUBA 482, 483 (1990). It does not
4 matter if the documents are placed before the final decision maker after the evidentiary
5 hearings were closed. *See Schatz v. City of Jacksonville*, 22 Or LUBA 799, 802 (1991) (and
6 cases cited therein). The city appears to contend that while the city’s decision did not become
7 final for purposes of appeal to LUBA until March 19, 2003, the local proceedings ended with
8 the city council’s oral decision on March 13, 2003.

9 We have some question as to when the city’s decision in this matter became final.³
10 However, the city does not contend that the challenged decision was reduced to writing and
11 signed by the decision maker before March 19, 2003. Nor does the city appear to dispute that
12 the letter was placed before the city council before that date. The city also does not contend
13 the disputed letter was specifically rejected. Petitioners are therefore correct that the March
14 17, 2003 letter must be included in the record in this appeal.

15 **ITEMS 2 AND 3**

16 Petitioners allege that the city council discussed their application in an executive
17 session held on February 13, 2003. The agenda for the regular February 13, 2003 city council
18 meeting indicates that an executive session would be held pursuant to ORS 192.660(1).⁴ The
19 minutes of the February 13, 2002 city council meeting explain that petitioner Judy Martin,
20 who is also a city councilor, recused herself from participating in that executive session

³ OAR 661-010-0010(3) defines “[f]inal decision” as follows:

“A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.”

⁴ ORS 192.660(1) limits the topics that may properly be the subject of an executive session held by a public body. ORS 192.660(1)(h) provides that an executive session may be held to “consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed”.

1 because the subject of that executive session pertained to “the LUBA appeal regarding the
2 Martins’ property.” Petitioners argue that the agenda for the February 13, 2003 city council
3 meeting and the minutes of that meeting should be included in the record. A copy of the
4 agenda and draft minutes are attached to petitioners’ record objection.

5 The city asserts that the documents petitioners seek to include in the record are
6 exempt from public disclosure pursuant to the executive session statute and, therefore, the
7 city properly excluded those items from the record, citing *Dimone v. City of Hillsboro*, __ Or
8 LUBA __ (Order, LUBA No. 2002-150/151, February 6, 2003).

9 We disagree with the city that *Dimone* has any bearing on the question presented in
10 this case. In *Dimone*, petitioners sought disclosure of discussions held during executive
11 sessions. Here, petitioners seek to supplement the city’s record with an agenda that shows
12 that an executive session was held pursuant to ORS 192.660(1) and minutes from the city
13 council meeting where the general topic of that executive session was announced. Petitioners
14 do not seek to have the tapes or minutes of that executive session included in the record.
15 There is no dispute that petitioners’ partition application was the subject of the executive
16 session. Therefore, the agenda and minutes are properly included in the record.

17 **CONCLUSION**

18 Petitioners’ record objections are sustained. The city shall provide a supplemental
19 record that includes petitioners’ March 17, 2003 letter, a copy of the February 13, 2003 city
20 council agenda and a copy of the February 13, 2003 city council meeting minutes.

21 Dated this 18th day of June, 2003.

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Anne Corcoran Briggs
Board Member