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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

MASONRY BUILDING OWNERS OF)
OREGON, an Oregon mutual)
benefit nonprofit corporation,)
FOUNTAIN VILLAGE DEVELOPMENT)
LLC, an Oregon limited)
liability company, and JIM A.)
ATWOOD, in his capacity as)
trustee of the Jim. A. Atwood)
Trust dated August 10, 2017,)

Plaintiffs,)

Case No. 3:18-cv-02194-AC

v.)

May 14, 2019

TED WHEELER, in his official)
capacity as Mayor of the City)
of Portland and Commissioner)
in charge of the Bureau of)
Development Services, JO ANN)
HARDESTY, in her official)
capacity as Commissioner in)
charge of the Fire Bureau, and)
CITY OF PORTLAND, an Oregon)
municipal corporation,)

Defendants.)

ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS

VOLUME 1

BEFORE THE HONORABLE JOHN V. ACOSTA

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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TRANSCRIPT OF PROCEEDINGS

(May 14, 2019)

(In open court:)

THE COURT: All right. We're here on the record for the hearing on the plaintiffs' amended motion, Docket No. 44, for preliminary injunction.

Mr. DiLorenzo, are you ready?

MR. DiLORENZO: Your Honor, the plaintiffs are ready to proceed.

THE COURT: All right. Thank you.

Ms. Moynahan, are you ready?

MS. MOYNAHAN: Yes, Your Honor.

THE COURT: All right. Let's talk about some housekeeping. We'll start with opening statements, if you wish to make those, and then evidence. We'll take at least one break during the morning. Possibly two. We'll break as close to noon as possible, reconvene at 1:15 or 1:30, depending on when we break, and go as close to 5:00 until possible. If you want to take a break at any other time, just let me know, and we'll stop and take a recess for as long as we need. All right.

MR. DiLORENZO: Your Honor, one more bit of housekeeping. Plaintiff is moving to exclude witnesses pursuant to Rule 615. We have informed Mr. Gale of our representative parties. There are other interested parties

1 here, and our motion pertains only to those on the witness
2 list.

3 THE COURT: Sure. Ms. Moynahan?

4 MS. MOYNAHAN: We agree, Your Honor. We don't have
5 any witnesses in the courtroom.

6 THE COURT: All right. Mr. DiLorenzo, then, are any
7 of plaintiffs' witnesses present?

8 MR. DiLORENZO: Your Honor, let me run through the
9 witness list, and we will see.

10 Walt McMonies is here, but he's a representative.

11 THE COURT: All right. That's fine.

12 MR. DiLORENZO: Mr. Atwood is here, but he's a party.

13 THE COURT: Yes.

14 MR. DiLORENZO: Mr. Beardsley is here, but he's a
15 party.

16 THE COURT: All right.

17 MR. DiLORENZO: The other witnesses are Carmen Merlo.
18 I don't think she's here.

19 THE COURT: Good.

20 MR. DiLORENZO: Jonna Papaefthimiou.
21 Commissioner Dan Saltzman.

22 Mr. Reingold's testimony is going to come in via
23 stipulation by his declaration.

24 THE COURT: All right.

25 MR. DiLORENZO: Michael Hagerty, Shelly Duquette,

1 Robert Dortignacq, Amit Kumar, Ben Kaiser, Adam Jongeward, and
2 Elisabeth Perez.

3 And I think the City has another potential witness.

4 THE COURT: Right.

5 MS. MOYNAHAN: Yes, we do, Your Honor.

6 Debora Leopold-Hutchins.

7 Just to be clear, I don't believe you've called Elisabeth
8 Perez.

9 MR. DiLORENZO: I had not. Your Honor, I apologize
10 for the confusion here. I lumped all the witnesses together
11 because we wanted to try to give you an idea of when we would
12 be calling them. So I'm not going to call Ms. Perez, but I
13 will call the others.

14 THE COURT: All right. Any of you whose names were
15 called as a witness, you'll need to wait outside in the lobby;
16 otherwise, you're free to stay and watch.

17 Mr. Gale, is the "Witnesses Excluded" sign displayed
18 outside?

19 DEPUTY COURTROOM CLERK: It is not.

20 THE COURT: Okay. If you would do that, please.

21 MS. MOYNAHAN: Your Honor, may I introduce our client
22 representative here today?

23 THE COURT: Yes.

24 MS. MOYNAHAN: Thank you very much. We have
25 Rebecca Esau, who's the director of the Bureau of Development

1 Services.

2 THE COURT: Welcome.

3 MS. ESAU: Thank you.

4 THE COURT: All right. Mr. DiLorenzo.

5 MR. DiLORENZO: Thank you. We have a few comments,
6 and I've spoken with Mr. Vannier, and we'll try to keep our
7 comments to 10 or 15 minutes, or so, each.

8 THE COURT: Okay. Be mindful I have read all the
9 briefing, so you don't need to repeat what has been in the
10 briefing. But of course you are entitled, if you wish, to make
11 an opening statement.

12

13 PLAINTIFFS' OPENING STATEMENT

14 MR. DiLORENZO: Thank you, Your Honor.

15 First of all, Your Honor, thank you for your courtesies in
16 scheduling this hearing and with respect to the numerous
17 iterations that this ordinance has -- has experienced since
18 this lawsuit has been filed.

19 At this point in time, the ordinance consists of the
20 following: A requirement to post placards, required statements
21 to be made in lease applications, and an acknowledgment form,
22 which plaintiffs contend still will require owners to agree to
23 comply with provisions of the ordinance in the future. So I
24 believe those are the three -- the issues that we have in
25 today's ordinance which differs from the ordinance that was

1 passed that triggered this lawsuit.

2 Each of these seek to compel speech of owners of
3 buildings. Plaintiffs object being forced to speak for many
4 reasons. Most notably because the messages which the
5 government seeks to impose on them are often false and
6 certainly misleading.

7 They also object to the ordinance's moving target for
8 enforcement which gives rise to their due process claims. We
9 believe the Court will conclude that the ordinance is not an
10 exercise of government speech. Rather, it is forced upon
11 plaintiffs in an effort to compel them to say what they would
12 rather not say.

13 The *NIFLA* cases -- the *NIFLA/Becerra* cases make it clear
14 that when commercial speech is not at issue, strict scrutiny
15 will apply. But even if the *Zauderer* standard is ultimately in
16 play, the facts will show that plaintiffs are either likely to
17 succeed on the merits or that plaintiffs, at the very least,
18 will meet the Ninth Circuit standard for raising serious legal
19 questions, suffering irreparable harm, and showing the
20 remaining factors that then will warrant a preliminary
21 injunction.

22 Now, Your Honor, if I may have permission to approach the
23 bench.

24 THE COURT: Yes.

25 MR. DiLORENZO: Well, I can't approach the bench this

1 way.

2 I'll go this way.

3 DEPUTY COURTROOM CLERK: I'll come to you.

4 MR. DiLORENZO: Thank you.

5 Your Honor, we thought we would prepare a chart of our
6 legal claims arranged the way we handled them in the briefs.
7 This is a combination -- it's an outline which is a combination
8 of our claims. It restates our legal arguments. It also, on
9 the left-hand side, forecasts what we believe witnesses will
10 say and on the right-hand side it has a big blank, and this is
11 going to be useful for us to organize what it is the witnesses
12 actually say and how they pertain to our legal arguments. And
13 it may be of use to the Court, too, and if it is, we -- we
14 commend it to you.

15 THE COURT: Thank you.

16 MR. DiLORENZO: First of all, Your Honor, strict
17 scrutiny. We believe that both the placarding -- the
18 placarding requirements, the forced statement requirements in
19 the lease agreements -- or not the lease agreements, the rental
20 applications, and also the requirements to have to confirm
21 compliance are subject to strict scrutiny. And, of course, if
22 we are talking about strict scrutiny, it is incumbent upon the
23 government to show a compelling state interest, governmental
24 interest, and also show that the ordinance is narrowly tailored
25 to address those interests.

1 The purported interest that the government has is to --
2 one of them is to build market demand for seismic improvements
3 to these properties.

4 Well, Your Honor, we believe the evidence will show you
5 that after failing to obtain political support for an ordinance
6 requiring compulsory URM retrofitting, the City chose to compel
7 targeted building owners to speak in order to coerce them to
8 retrofitting the buildings anyway.

9 And the *Sorrell v. United States* case makes it very clear
10 that when there are options available to the government to
11 accomplish things directly and they choose speech as a way of
12 indirectly obtaining that result, that doing so is improper and
13 unconstitutional.

14 The -- the second page also references Resolution 37364,
15 and we are going to point out that the City Council has already
16 issued a number of directives aimed at making Portland's
17 inventory of buildings safer. The City has simply failed to
18 follow through on most of those initiatives, and that's also
19 what the evidence will show you.

20 The evidence will also show that the other purported
21 interest, to build awareness of seismic risk about what to
22 do -- what to do in an unreinforced masonry building -- to
23 duck, cover, and to not get out -- does not directly advance
24 public safety because, first of all, it exempts and omits
25 thousands of similarly situated buildings of identical

1 construction and none of the forced speech mandates, if that's
2 the reason, mentioned what to do in the event of an earthquake.

3 If the purported reason is to duck, cover, and not get
4 out, why is it that the placards don't say that? The City has
5 not been able to give any explanation as to how it is that the
6 method that they have chosen even addresses that objective.

7 We believe the evidence will show that one of the managers
8 in charge of implementing this program has acknowledged that
9 the placards, quote, "won't save even one life," unquote.

10 We believe the ordinance is also based on inaccurate and
11 unreliable data in the URM database, which the City officially
12 disclaims in all of its publications. It ignores substantial
13 variation of structural characteristics among the covered
14 buildings, and of course we believe the acknowledgment form --
15 again, under a strict scrutiny perspective, the acknowledgment
16 form no longer serves any purpose at all.

17 The City's original purpose in requiring an agreement that
18 would be recorded in the County records was purportedly to
19 notify potential purchasers of buildings when they took a look
20 at the title that these buildings were subject to the URM --
21 the URM ordinance.

22 But the City Council repealed the provision that required
23 recordation, and so they were left, then, with a provision of
24 an ordinance that merely required building owners to pledge to
25 obey the law. Sort of like the loyalty oaths of times past.

1 They then changed that again and made it an acknowledgment
2 form, but the -- you'll see in the record that the latest
3 version of the acknowledgment form also requires owners to
4 acknowledge that things will occur in the future. And so we
5 believe strict scrutiny will cause you to strike down that
6 provision too.

7 Now, the ordinance is also not narrowly tailored. First,
8 it is wildly underinclusive. Owners -- the evidence will show
9 that owners of at least a thousand structures of identical
10 construction devoted to housing single and dual families are
11 not required to disseminate these messages at all
12 notwithstanding the fact that they have identical masonry
13 construction.

14 The evidence will also show that the City administratively
15 granted the Portland Public School District an administrative
16 exemption, allowing them an indeterminate period of time to
17 comply, even though their structures are identical to the
18 others that are subject to the ordinance.

19 Also, the ordinance does not require forced speech from
20 owners of other forms of building construction which are
21 equally dangerous in the minds of the City.

22 And for those reasons, the ordinance is wildly
23 underinclusive.

24 In addition, the evidence will show that there were many
25 other alternatives available to the City. When the City

1 embarks upon speech as a tool to accomplish something, the
2 courts first look to what other alternatives were available to
3 the City. And the evidence will show that there are many less
4 restrictive means available for accomplishing the City's goals,
5 many of which, at page 7, we forecast the City will have to
6 acknowledge.

7 We then move on to the *Zauderer* standard.

8 *Zauderer* requires substantial interest and then purely
9 factual and not controversial, essentially. It is our
10 understanding that the City is not attempting to apply *Zauderer*
11 to the placards. Rather, it is applying *Zauderer* -- and I see
12 Mr. Vannier nodding. Rather, *Zauderer*, the City is attempting
13 to apply to the lease applications.

14 Well, Your Honor, in order for *Zauderer's* commercial
15 speech requirements to apply, the Court must first apply the
16 *Bolger* factors. And our lease applications are not in
17 advertising format.

18 *Zauderer* had to do with a circumstance in which a lawyer
19 was engaging in advertising and advertised what would happen if
20 clients came to him and gave him contingent fee cases. And he
21 basically said, "If you -- if you lose, you owe nothing." What
22 he failed to include in his advertising was that, "Oh, by the
23 way, you're still responsible for paying costs and fees."

24 And so the State Bar required that any lawyer who made
25 such an advertisement had to also include information that made

1 that commercial speech not misleading.

2 Well, in order to apply the *Zauderer* standard, you have to
3 have advertising forced speech to begin with. And there's
4 absolutely nothing in the lease application that is advertising
5 and the -- the declaration of Mr. Reingold will show that
6 applications take place late in the process. An application is
7 not used to entice a tenant to rent property. It's not
8 contained on websites to advertise property. There's no
9 advertising contained in the -- in the lease applications.

10 They are instead required by landlords to determine
11 whether the tenants who want to lease are creditworthy and
12 whether they have had committed crimes or in other ways should
13 be screened such that they may or may not rent property.

14 But landlords do not advertise. The *Zauderer* standard
15 does not apply at all.

16 If the *Zauderer* standard did apply, though, the statements
17 would have to be purely factual and not controversial, and of
18 course, as this Court will see from the evidence that we
19 adduce, that whether or not particular buildings are
20 unreinforced is a matter of hot debate.

21 We do not believe that the requirement that -- that the
22 lease applications have to contain these forced messages are
23 also reasonably related to any substantial government interest,
24 and we go through the same analysis that we go through for the
25 placards.

1 So then we get to due process. And our due process claim
2 begins on our chart at page 19. And by the way, there's so
3 many pages because I asked my -- my staff to put this in
4 18 point type so I can read it, and so I'm not as loquacious as
5 20-some pages would suggest, but the ordinance fails to provide
6 for sufficient clarity.

7 First of all, we believe the City employs an unreliable
8 URM database. We think the evidence will show that.

9 We think it ignores substantial variations and structural
10 characteristics. It is underinclusive, overinclusive, same
11 sorts of arguments. It also has totally indeterminate
12 standards for appeals, and I believe the evidence will show
13 that whether or not a building that is on the list can be taken
14 off the list and is subject to the ordinance is based on the
15 decision-making of one to three particular structural engineers
16 who do not even have a formal committee.

17 For all of those reasons, we believe the Court will find
18 that in addition to being unconstitutional as an infringement
19 of free speech, the ordinance is also unconstitutional based on
20 violation of the due process clause.

21 With that, I'll sit down. That's our forecast of what we
22 believe the evidence will show.

23 THE COURT: Thank you.

24 Ms. Moynahan?

25 MS. MOYNAHAN: Your Honor, Mr. Vannier will be

1 presenting the opening, Your Honor.

2 THE COURT: All right. Mr. Vannier, go ahead,
3 please.

4

5 DEFENDANTS' OPENING STATEMENTS

6 MR. VANNIER: Thank you, Your Honor.

7 Unreinforced masonry buildings are more seismically
8 dangerous to their occupants and passersby than any other type
9 of construction. By their very nature, unreinforced masonry
10 walls are heavy and brittle. In earthquakes, roofs and floors
11 pull away from the walls. They crack and crumble. Passersby
12 aren't immune from those dangers either as cornices and
13 parapets can collapse and injure or kill those standing below.
14 And recent earthquakes in Washington, California, and abroad
15 provide ample illustrations of those dangers.

16 Your Honor will hear today or actually possibly tomorrow
17 from the Bureau of Services Engineering Supervisor, Amit Kumar,
18 who will testify about the built-in dangers inherent in URM
19 construction. And Your Honor will hear that there is no
20 reasonable dispute about those dangers.

21 Now, until the mid '90s, the risk of a major earthquake in
22 Oregon was not well understood, and building codes reflected
23 that reality. As Engineering Supervisor Kumar will explain,
24 however, geologists now estimate that there is a greater than
25 20 percent chance of a major earthquake occurring in our area

1 sometime within the next 50 years.

2 Your Honor will also hear that while URM buildings are
3 more dangerous in earthquakes than any other type of
4 construction, they can be retrofitted to a point that while
5 they remain more dangerous than buildings constructed of other
6 materials, they are no longer uniquely dangerous, and that
7 will mean -- that means that while they may still suffer some
8 serious damage in earthquakes, a reinforced masonry building is
9 no longer at risk of complete collapse and crushing -- crushing
10 occupants.

11 Promoting public safety is a core function of the City.
12 In fact, the Portland City Charter expressly states this.
13 Charter Section 2-105 imbues the City with the authority to
14 make all necessary or appropriate safety laws and regulations,
15 to secure the protection of persons, and to provide for the
16 health and safety of its residents.

17 And Your Honor will hear how the City amended its building
18 regulations to eventually bring them in line with national
19 standards for retrofitting URM buildings for earthquake safety.

20 Beginning in the mid '90s, the City also began to create a
21 database of URM buildings. And Your Honor will hear from
22 former Engineering Plan Review Supervisor Michael Hagerty about
23 how the City created that database and took steps to ensure its
24 accuracy.

25 You will also hear from Structural Engineer

1 Shelly Duquette about how the City has since updated and
2 verified that database and continues to update it as owners
3 retrofit their buildings.

4 At this time, however, about 85 percent of URM buildings
5 in the city, so approximately 1,500 buildings, have had no
6 retrofits, and that includes over 240 multifamily buildings in
7 which over 7,000 Portland households live.

8 Your Honor will hear from several witnesses, including
9 Jonna Papaefthimiou, the Planning, Policy, and Community
10 Manager for the City's Bureau of Emergency Management that the
11 more than 15,000 URM buildings remaining in the city posed
12 significant concern for public health and safety.

13 One of those concerns is that persons who work, shop,
14 worship, or for any reason spend time in or are near or enter
15 URM buildings generally have no way of knowing that a
16 particular building is URM.

17 A related concern is that prospective tenants generally
18 have no way of knowing that an apartment they're considering
19 for lease or rental is a URM building. Some of those
20 prospective tenants reside outside of Oregon, outside the city,
21 and may never realize that they're applying to reside in a
22 dangerous building, or they may come to that realization after
23 they have already become financially invested in the rental
24 process.

25 Your Honor will hear that to address those concerns the

1 City eventually adopted this ordinance which has since been
2 abandoned several times, and that, as Mr. DiLorenzo noted,
3 provides three separate requirements for owners of URM
4 buildings.

5 Those requirements each address a slightly different set
6 of the public safety concerns that I've just mentioned, and
7 each one of those three requirements has to be looked at
8 individually in this case.

9 The first requirement applies to all URM buildings, and it
10 requires them to post this sign stating "This is an
11 unreinforced masonry building. Unreinforced masonry buildings
12 may be unsafe in the event of a major earthquake."

13 DEPUTY COURTROOM CLERK: Slow down.

14 THE COURT: Slow down.

15 MR. VANNIER: Oh, I'm sorry. I apologize.

16 And Portland City Code Section 24.85.065.

17 It requires them to post this sign in a conspicuous place
18 outside the main entrance of a URM building. Publicly owned
19 buildings had until the 1st of this year to comply with the
20 posting requirement, and all other buildings, including
21 plaintiffs' buildings in this case, have until November 1st of
22 next year to affix this sign to their building.

23 Your Honor will hear that the purpose of this placarding
24 requirement is to promote public safety by informing the people
25 who work, who shop, who worship, or for any reason spend time

1 in or enter or are near a particular URM building, that that
2 particular building is URM and may be dangerous in the event of
3 a major earthquake.

4 Those people will then be able to knowingly accept the
5 risk of working in or spending time in or near those buildings.

6 And Your Honor will hear that that crucial public safety
7 purpose cannot be accomplished in any other reasonable or
8 practical way than through a placard, this placard, affixed to
9 a particular URM building itself.

10 The second requirement applies to -- only to commercial
11 URM buildings and only to commercial URM buildings that supply
12 lease or rental applications to prospective tenants. And,
13 again, that requirement is that those lease or rental
14 applications state "This is an unreinforced masonry building.
15 Unreinforced masonry buildings may be dangerous in the event of
16 a major earthquake." And that requirement is scheduled to come
17 into effect on June 1st of this year. So basically two weeks
18 from today.

19 And Your Honor will hear that the purpose of that
20 requirement is to promote public safety by informing
21 prospective tenants, including tenants who reside outside
22 Oregon or the City or who may be applying for an apartment
23 sight unseen. It will allow those people to know before they
24 have already invested significant time or money in an
25 application or incurred the expense of moving or traveling to

1 the city that the particular building that they are considering
2 to live in is a dangerous building.

3 And, again, Your Honor will hear that that public safety
4 purpose cannot be accomplished in any other reasonable or
5 practical way than through a simple warning in the lease
6 application itself.

7 And, finally, the third requirement of the ordinance is a
8 simple one-time reporting requirement. And like the placarding
9 requirement, that reporting requirement will only come into
10 effect on November 1st of next year, and it requires owners of
11 URM buildings to report to the Bureau of Development Services,
12 on a form provided by the bureau, that they have complied with
13 the placarding and rental application requirements of the
14 ordinance.

15 And Your Honor will hear that the purpose of that
16 requirement is to facilitate the administration of the
17 placarding and rental application requirements of the
18 ordinance.

19 Now, Your Honor, it's important to bear in mind, again,
20 the procedural posture of this case as it stands before you
21 today. This is a preliminary injunction hearing, and
22 plaintiffs are asking Your Honor to enjoin all three
23 requirements of the ordinance. And as Your Honor knows, a
24 preliminary injunction is an extraordinary -- extraordinary
25 remedy, and plaintiffs bear the burden of proof and persuasion

1 today.

2 And as Your Honor will note from the City's brief in this
3 case, the City code expressly provides that the separate
4 provisions of the ordinance are severable from each other. And
5 that means that plaintiffs must therefore prove their
6 entitlement to preliminary relief and satisfy the *Winter*
7 factors as to each of the three requirements of the ordinance:
8 The placarding requirement, the rental application requirement,
9 and the reporting requirement.

10 And at the close of the hearing, we believe that
11 plaintiffs will not have met their burden of proving any of the
12 *Winter* factors as to any of the three requirements of the
13 ordinance.

14 First, plaintiffs will not demonstrate that they're likely
15 to succeed on the merits on their claim that the ordinance
16 compels speech in violation of the First Amendment.

17 First, the placarding requirement of the ordinance
18 constitutes government speech, which generally does not raise
19 First Amendment concerns. Governments have long used and
20 required signs on buildings, like these lighted Exit signs, to
21 convey important safety information to the public. And
22 plaintiffs will not be able to point to any factual or binding
23 legal authority that would suggest that these placards that
24 expressly refer to the City code provision are not permissible
25 government speech, and they, therefore, will not be able to

1 prove a likelihood of success on the merits as to that
2 requirement.

3 Moreover, the rental agreement disclosure requirement of
4 the ordinance is a permissible regulation of commercial speech
5 that is subject to a lower level of First Amendment scrutiny
6 under *Zauderer*.

7 Unlike what plaintiffs argue, *Zauderer* does not simply
8 pertain to advertising. And there are cases cited in our brief
9 in which courts -- numerous courts throughout the country have
10 applied the *Zauderer* test to the commercial context more
11 generally and to health and safety warnings.

12 And here the evidence will show that the rental agreement
13 disclosure requirement of the ordinance is factual,
14 uncontroversial, within the meaning of *Zauderer*, meaning
15 there's no reasonable dispute about the accuracy of the
16 statement, and not unduly burdensome.

17 And so the disclosure requirement of the ordinance
18 satisfies all the requirements for a valid regulation of
19 commercial speech under the First Amendment, and plaintiffs
20 will not be able to prove otherwise.

21 And turning to the reporting requirement, as we point out
22 in our brief, that requirement is similar to numerous reporting
23 requirements, such as tax filing, registering for the draft or
24 Selective Service, that have been upheld against First
25 Amendment challenges.

1 Finally, even if this Court were to apply the highest
2 level of First Amendment scrutiny to the requirements of the
3 ordinance, they still would pass constitutional muster. Again,
4 public safety is the ultimate compelling governmental interest.
5 And the evidence will show that the ordinance here advances
6 compelling governmental interest, informing prospective tenants
7 and persons who enter a particular URM building that that
8 building is a URM and may be unsafe in the event of a major
9 earthquake, thus allowing them to make an informed choice
10 whether to accept the risk and reside in or spend time in such
11 buildings.

12 And the evidence will show that the requirements of the
13 ordinance, the three separate requirements, are narrowly
14 tailored to advance those interests, and therefore those three
15 requirements would survive even strict scrutiny under the First
16 Amendment.

17 Turning to plaintiffs' vagueness claim, that is really a
18 facial claim, purely, and the record will show that the City
19 code defines unrevised -- unreinforced masonry, provides clear
20 requirements for URM owners, and the ordinance is therefore not
21 unconstitutionally vague, and plaintiffs will not be able to
22 show otherwise.

23 Finally, aside from not being able to demonstrate a
24 likelihood of success on the merits, plaintiffs will not be
25 able to show that they will suffer imminent, irreparable harm,

1 absent a preliminary injunction, or that the public interest
2 lies with enjoining the ordinance.

3 And for those reasons, at the close of this hearing, the
4 City will be asking this Court to deny plaintiffs' request for
5 preliminary injunction.

6 Thank you.

7 THE COURT: Thank you. Mr. DiLorenzo, plaintiffs'
8 first witness, please.

9 MR. DiLORENZO: Thank you, Your Honor. Before we
10 call witnesses, a word about the exhibits.

11 THE COURT: All right.

12 MR. DiLORENZO: The parties have stipulated to
13 authenticity with respect to each and every one of the exhibits
14 on both of our lists. We have reserved our -- and I don't
15 believe we have any hearsay objections either. We have
16 reserved our relevancy objections exhibit by exhibit.

17 What I plan to do this morning is offer exhibits on a
18 per-witness basis. I think after the break Ms. Moynahan and I
19 can caucus, and we can determine to what extent we will offer
20 some of these exhibits into evidence on a wholesale basis.

21 About Exhibit 3. Exhibit 3, the Glade Hotel feasibility
22 study, is unnecessary, and Ms. Moynahan and I have taken a look
23 at it, and it is -- sorry. I think it's number 4. Sorry.
24 Seismic review. Is that right? Yeah. Seismic review.
25 Number 4. It is messed up, and so I am, for the time being,

1 going to withdraw it. It's got lots of extraneous materials in
2 it that are not relevant here. So we will withdraw 4, and we
3 may substitute something later for that.

4 So we will call our first witness, with the Court's
5 permission.

6 THE COURT: As far as any of you who came in while
7 the lawyers were presenting their opening remarks, if you have
8 been notified that you are to testify here in this hearing,
9 witnesses have been excluded, and you'll need to wait in the
10 lobby. Otherwise, if you are not a witness, you may stay.

11 MR. DiLORENZO: We'll call our first witness.
12 Walter McMonies.

13 THE COURT: All right. Come forward, please, and be
14 sworn as a witness.

15
16 WALTER McMONIES,
17 called as a witness on behalf of the Plaintiffs, being first
18 duly sworn, is examined and testified as follows:

19

20 THE WITNESS: I do.

21 DEPUTY COURTROOM CLERK: Please step up and have a
22 seat.

23 THE WITNESS: Right up there?

24 DEPUTY COURTROOM CLERK: Right around here.

25 THE WITNESS: Oh, okay.

McMonies - D

1 DEPUTY COURTROOM CLERK: There's some water there if
2 you would like it.

3 Please state your name for the record and spell your last
4 name.

5 THE WITNESS: Walter McMonies. M-c-M-o-n-i-e-s.

6 DEPUTY COURTROOM CLERK: Thank you.
7

8 DIRECT EXAMINATION

9 BY MR. DiLORENZO:

10 Q. Good morning, Mr. McMonies. Can you share with the Court
11 your occupation.

12 A. I'm a semiretired attorney. I was a real estate
13 transactions attorney, and I -- at this point in my life I'm
14 managing my apartment buildings and working on this seismic
15 issue.

16 Q. And are you also president of the Masonry Building Owners
17 of Oregon --

18 A. I am.

19 Q. -- organization?

20 And does that organization represent owners of brick
21 buildings throughout the state?

22 A. Yes. Mostly in Portland, but definitely owners of brick
23 buildings.

24 Q. And is it a plaintiff in this litigation?

25 A. Yes, it is.

McMonies - D

1 Q. Do you personally own brick buildings?

2 A. Yes, I do.

3 Q. Is one of those the Trinity Apartments in Portland?

4 A. Trinity Place Apartments, yes.

5 I only correct you because there's a building next door
6 called the Trinity Apartments, I think.

7 Q. Thank you.

8 Did you file a declaration in support of this motion for a
9 preliminary injunction?

10 A. Yes, I did.

11 MR. DiLORENZO: Your Honor, does the witness have
12 available the booklet of the -- of the exhibits?

13 THE COURT: Mr. Gale?

14 BY MR. DiLORENZO: (Continuing)

15 Q. Mr. McMonies, I want to refer you all the way to the back,
16 to Exhibit No. 71.

17 Can you take a look at 71?

18 A. I'm doing so, yes.

19 Q. Sir, is that the declaration that you filed in this case?

20 A. Yes, it is.

21 Q. Okay. And this morning you handed me a sheet about two
22 points that you wanted to elaborate on. One was with respect
23 to paragraph 3 of the -- of the declaration. Can you tell the
24 Court how you would like to expand on that paragraph?

25 A. Well, to clarify, *The Oregonian* newspaper itself didn't

McMonies - D

1 state that our building was a beautiful building. It was the
2 reporter in question, whose name is on the errata sheet. I'm
3 trying to think. Eastman?

4 Q. Janet Eastman?

5 A. Janet Eastman.

6 And the architectural librarian at U of O was not the --
7 specifically the author of a similar representation. It was
8 the editor -- or, excuse me, the head of the library, whose
9 name is Edward -- I'm getting -- getting -- what is that name?
10 Edward Easton? No. It's Edward Teague. Edward Teague, who's
11 an author of a book that's called *Portland Apartment House*.
12 He's basically compiled pictures and information on all the
13 apartment houses in Portland, going back to the first ones in
14 the late 19th Century -- 18th Century.

15 Q. At paragraph 8 you mentioned that the seismic retrofit
16 project for the Trinity took approximately three years, and
17 you've taken a look at some of your receipts and you wanted to
18 expand on that?

19 A. Yeah. I wanted to say we actually got started in this in
20 about 2009 with feasibility studies and discussions, and we
21 started work in 2010. There was a burst of work in 2010. And
22 then for various reasons, we -- we laid off for a couple of
23 years, and it was very incremental.

24 Then we did some more things. In the last three or four
25 things, we did most of the work. So it was -- it was miss -- I

McMonies - D

1 misspoke when I said it was only three years. It was really
2 more like five years with a gap there after the first burst of
3 construction.

4 Q. Okay. And other than with that elaboration, is your
5 declaration true and complete?

6 A. Yes, it is.

7 Q. Okay. How much did the retrofit project that you engaged
8 in cost you?

9 A. Well, out of pocket was 1.1 million.

10 Q. And did you incur other costs as a result?

11 A. Well, when you're doing a project like this, if -- in our
12 case, we were able to do this while the building was still
13 occupied, which is an extremely difficult task because of lead
14 paint issues and asbestos issues and so on, so we -- we lost
15 some rental income. Probably between the rental income and
16 some of the professional fees, we didn't count the first time
17 around. It was another hundred thousand dollars. So probably
18 we are -- it cost us more like \$1.2 million to get to where we
19 are right now.

20 Q. Okay. I would like to refer you to Exhibit 55, if I may.
21 It -- and these are a series of pictures. What I'm going to do
22 is ask you to very briefly identify what they are and then tell
23 us basically what they depict. So what is number 55?

24 A. That's just a picture of one of the two entrances to the
25 building.

McMonies - D

1 Q. This is the Trinity Apartments?

2 A. Trinity Place Apartments.

3 Q. Apartments. And what is number 56?

4 A. Another picture of one of the entryways. This shows the
5 skylight above, which was seismically challenged, so we had to
6 reinforce that substantially.

7 Q. And when was this picture taken?

8 A. You know, I'm going to say I don't know exactly. It would
9 be in the last three or four years. These came out of the
10 files of the engineer.

11 Q. Was it during the course of the work?

12 A. Oh, yes.

13 Q. Okay. And was it an accurate depiction of what was taking
14 place at the time?

15 A. In this particular case, I think it's been -- it's
16 finished; but, yes, it's an accurate depiction of what it looks
17 like when it's finished.

18 Q. Can you explain to the Court what number 57 is?

19 A. I think that's -- this is, again, not my photo. I think
20 this is a picture of the -- you have the roof diaphragm and you
21 have the parapet walls, and this is a picture, I think, of
22 securing the roof diaphragm to the parapet walls.

23 Actually, it's a before picture, because it looks like
24 someone was using cobblers nails to fix it, and I know we
25 didn't do that in the final analysis.

McMonies - D

1 Q. And why did the roof diaphragm have to be secured to the
2 parapet walls?

3 A. Well, of course, as mentioned in the opening arguments,
4 there's a problem with unreinforced masonry buildings that if
5 the -- the -- the roof -- the roof joists and the floor joists
6 are not secured to the exterior bearing walls, they are merely
7 put in little notches. Now, why they did that, God knows, but
8 they -- they did it that way.

9 So what we had to do and what we're doing here is we go
10 into each one of those attachments, and we -- we put a bracket
11 on it and sort of a Simpson Strong-Tie, basically as you use in
12 your own house, but a bigger version, and we epoxy and bolt
13 that to the -- to the bearing walls.

14 Q. Okay. And once that is accomplished, does that remedy
15 the -- the issue?

16 A. Well, it remedies the issue of affixing the roof joists
17 and the floor joists in that particular place, and if we do
18 that to the whole building, then this problem of pancaking is
19 pretty much solved.

20 Q. Okay. And then number 58, what is that?

21 A. That's a picture of the roof of the building when they
22 were doing the parapet wall tieback and the roof diaphragm
23 attachment. Basically, just, you're destroying your existing
24 roof. We had a fairly new roof on this building. We were
25 destroying it and doing this work.

McMonies - D

1 Q. And what was the purpose of doing that?

2 A. Again, to attach the -- well, you want to strengthen the
3 roof diaphragm so it doesn't flex, and you want to attach the
4 roof diaphragm to the parapet walls so it -- and you're
5 securing the parapet walls so they don't fall off and kill
6 people below, but you're also securing the roof diaphragm to
7 the -- to the exterior walls.

8 Q. Okay. How about number 59? What is that a depiction of?

9 A. That's one of the brackets. And that was -- before we
10 were talking about the roof diaphragm. Now we're talking about
11 the floor diaphragms. And this is individual units -- when
12 individual units cut into the ceilings of the units, and we
13 found the -- the roof joists, attached them to the bearing
14 walls by this -- by this bracket, which I analogized to a
15 Simpson Strong-Tie bracket.

16 Q. So this is all part of the process of attaching roofs to
17 walls; is that correct?

18 A. Correct. Correct.

19 Q. Okay. And 60?

20 A. This is back -- back again up on the roof, and it's
21 securing -- it's strengthening the roof attachment to the
22 bearing walls.

23 Q. Okay. And tell us about 61.

24 A. Well, those are the parapet walls unclothed, in -- in all
25 their beauty.

McMonies - D

1 Q. Okay. They're much different today, I imagine.

2 A. They look much nicer. Yes, they do.

3 Q. Okay. And the reason for attaching the parapet walls is
4 to prevent them from falling below?

5 A. Pitching -- pitching over and landing on people exiting
6 the building.

7 Q. Okay. And number 62, what is that?

8 A. That's a picture of the completed parapet wall attachment.
9 It doesn't look very impressive, but, actually, there's, you
10 know, things under -- under the roof surface that have been
11 attached, and -- and this is all carefully modulated to make
12 sure that it's -- it can bear the weight of the parapet walls.

13 We don't actually have terribly high parapet walls, so it
14 probably doesn't have to hold as much weight as it would in
15 another building.

16 Q. Number 63. What's that?

17 A. That's, again, the open roof up for -- for the parapet
18 wall attachment and the diaphragms' strengthening.

19 Q. And there are braces there that are going from the roof to
20 the parapet wall. What's the purpose of those braces?

21 A. I don't see the braces on -- is this on --

22 Q. Number 63?

23 A. Oh, 63. Going back. Okay. Sorry.

24 Yeah, the purpose is to -- is attachment, to prevent them
25 from pitching forward out over the exterior of the building.

McMonies - D

1 Q. Okay. And number 64?

2 A. That's, again, opening up the roof and the parapet walls
3 for attachment of the roof diaphragm to the -- well, in this
4 case, there isn't really much of a parapet wall. This is the
5 backside of the building. There isn't much of a parapet wall,
6 so it's really just attaching the roof diaphragm to the -- to
7 the exterior bearing walls.

8 Q. Okay. And tell me about 65.

9 A. It's another example of attaching a floor joist to the
10 bearing wall.

11 Q. 66?

12 A. It's just the opened-up -- I'm not sure if this is in the
13 unit or the roof area, but it's -- we open these things up so
14 we can do the attachment.

15 Q. Okay. How about 67?

16 A. It's another picture of the parapet wall attachments on a
17 roof.

18 Q. Now, what's going on in number 68?

19 A. Well, what we did in this building because of the -- the
20 aesthetics, the State Historic Preservation people and the
21 National Trust -- not the National Trust, but the National
22 Parks Service, they regulate what we can do with these
23 buildings. And they don't like moment frames and X boxes, and
24 so on, that engineers like because they tend to disfigure the
25 building. So they want us to -- one solution is central

McMonies - D

1 coring, which is what we did here.

2 We basically had a crew of guys up on the roof for two
3 summers, and they were drilling down on the -- from the top of
4 the parapet wall down into the big footing of the building, so
5 it'd be like 75 or 80 feet, and we had a hole that's maybe 4 or
6 5 inches in diameter, which is then filled with very major
7 rebar and epoxy.

8 And what you've got, then, is every 4 feet, going around
9 the roof you've got a strengthening upright that prevents the
10 walls from collapsing inward, or otherwise, because brick walls
11 tend to be very strong for vertical forces, but they're not
12 real strong for lateral forces. So this strengthens the brick
13 wall from lateral -- lateral forces.

14 Basically, it's used like an oil drilling rig, and you
15 drill down from the top of the roof down to the footings.
16 That's what these guys are doing.

17 Q. Okay. How about 69? This is also part of that process?

18 A. Yeah, believe it or not this is when -- when you get the
19 hole drilled, then you are putting the -- the liquid down in
20 it. I mean the resin.

21 The problem is if there's a hole someplace, you can fill
22 it in -- and you have kind of the classic cartoon of the
23 apartment -- water up to the lady's neck or something. We
24 literally had a couple of situations like that. Much, much
25 less. We caught it quickly.

McMonies - D

1 This is a prophylactic that goes down into the hole and
2 prevents the resin from creeping out into the building. Just
3 stays in the hole.

4 Q. I see. So you then pour the resin into that -- that sock,
5 I guess?

6 A. Right. Into the sock. And it stays inside the sock, not
7 outside.

8 Q. How involved of a process was that?

9 A. Well, there was a crew of four or five guys that was up on
10 the roof for two summers, so we're probably talking maybe
11 eight weeks for each of two summers, and it cost -- you know,
12 it cost 3- or \$400,000 to do that.

13 Q. Just to that -- just that part?

14 A. Just that part.

15 Q. Okay. Let's take a look at number 70. And would you tell
16 me what that is?

17 A. That's a letter to me from my engineer, dated a couple of
18 days ago, describing what we have -- what we've done and what
19 we have left to do, and where that -- where that leaves us with
20 the City.

21 Q. In paragraph 2, your engineer says, "The calculated PML
22 showed that Trinity Place Apartments would not perform well
23 during a seismic event. The PML was 38 percent."

24 What is a PML?

25 A. Probable maximum loss.

McMonies - D

1 Q. What does that mean?

2 A. Well, it's a measurement that's proprietary. You -- you
3 call up these people, apparently. I've never done it, but my
4 engineers have done it zillions of times. You call up and you
5 give various data to the PML administrator, and they put it
6 into a black box, and they come out with a number. It's
7 basically a prediction of the likelihood of a -- of a fatal
8 event -- or event that would basically kill the building off.

9 And so we're 38 percent. 38 percent PML is a pretty
10 high PML, which means the likelihood of in the next 50 years of
11 an event that would basically wipe out any equity in the
12 building is 38 percent -- percentage.

13 Q. Okay. So let me get this right. So in an earthquake, a
14 PML at 38 percent means that there's a 38 percent chance of
15 collapse of the building; is that right?

16 A. Well, the building would be a total. Yeah, it would be a
17 total. I'm not sure it would be a collapse, but it would be a
18 total.

19 It'd be like your car, if you get in an accident with your
20 car, the -- they -- the insurance adjustor says, "Well, we've
21 totaled your car because there's no value. We can't afford to
22 give you enough money out of the policy to cover your loss."

23 Q. Okay. So that was the probable maximum loss of your
24 building -- 38 percent -- prior to undertaking any of the
25 retrofitting; is that right?

McMonies - D

1 A. Correct.

2 Q. Now, if you can turn the page. Right below, you know,
3 paragraph 6, there's a heading that says Seismic Upgrade
4 Program.

5 A. Correct.

6 Q. Does that box describe what was the seismic upgrades that
7 were undertaken for your building?

8 A. Yes.

9 Q. Okay. And was that accomplished?

10 A. All those were -- the only glitch we had is there were a
11 couple of places on the roof where we didn't have an ability to
12 bore our holes down to the footings. But with the exception of
13 those several places, we -- we -- as far as I know, everything
14 we -- we had in our plans, that were approved by the City, was
15 done.

16 Q. Did the City issue permits for all this work?

17 A. Yes.

18 Q. On the next page there's a heading called Unfinished
19 Seismic Upgrade Items.

20 Do you see that?

21 A. Correct.

22 Q. What are those?

23 A. Those are items that the City came back to us with and --
24 and this has been a very collegial process, actually, going
25 back and forth and back and forth, but came back with "We would

McMonies - D

1 like you to do all of these things to get you in compliance
2 with ASCE 41-13 Tier 2."

3 Q. Okay. We'll talk about that in a minute.

4 There's a summary on the last page above your professional
5 engineering stamps, and I see you have two registered
6 professional engineers who have stamped this. And the summary
7 says, "Over the last ten years, the Trinity Place Apartment
8 building has slowly transformed from a very hazardous to a much
9 safer structure. The building should be a model for volunteer
10 seismic upgrading of multifamily URM buildings."

11 Has your building been recognized as such?

12 A. Well, the Historic Preservation League of Oregon, which is
13 now called Restore Oregon, gave us an honorable mention for
14 best renovation project of the year. That was a couple of
15 years ago.

16 We were, of course, in the -- in the City's -- in the
17 newspaper article of the most beautiful buildings in Portland.
18 We were rated in that one.

19 We've got Ed Teague at Oregon's Architectural School
20 library rating us as one of the -- one of the most impressive
21 buildings in Portland.

22 Basically, yes, we -- we have gotten some acknowledgment.

23 Actually, even going back to 2013, the Zoning Department
24 of the City authored a treatise on unreinforced masonry
25 buildings, and our building was mentioned at length. It was

McMonies - D

1 discussed at three or four pages. I think actually one of the
2 exhibits is in -- is in here.

3 Q. Okay. And then the -- in the summary, the engineers
4 continue. "Using any metric, the building is safer, will
5 resist property damage better, and the PML went from 38 to
6 approximately 20."

7 Is 20 a good score?

8 A. 20 is a great score. And I say that with more knowledge
9 than -- I'm certainly not an engineer, but I was a real estate
10 lawyer for years, and both Fannie Mae and Freddie Mac, who were
11 the preeminent quasi governmental entities that financed
12 apartment buildings, they won't look at an apartment building
13 in a high earthquake zone, such as Oregon is now -- western
14 Oregon is now, unless it has a PML of 20.

15 So if you make 20, you're suddenly in heaven with these
16 wonderful lenders who have good rates, very competitive rates.
17 Longer-term amortizations and so on and so forth.

18 Q. Great. And then your engineer continues and says, "Sure
19 there is more work to be done to meet ASCE 41-13 BPOE
20 standards, but this would be a building I would feel safe
21 living in."

22 Do you see that?

23 A. Uh-huh.

24 Q. Okay. ASCE, is that American Society of -- what?

25 A. Civil Engineers.

McMonies - D

1 Q. Civil Engineers.

2 What is the ASCE 41-13 standard?

3 A. Well, it's the rehabilitation standard, as opposed to the
4 new building standard. I think ASCE 7 is the new building
5 standard. ASCE 41 is the -- it used to be 31, now it's 41 --
6 is the renovation standard. 13 is the year when the most
7 recent version of this was -- was adopted. I think there's one
8 pending adoption, which is 17.

9 You're going to have engineers on the stand later today,
10 and they will be much more able to describe this than I am.
11 But this is basically the hoop we have to get through to get
12 the City to say we're -- we're a reinforced building.

13 Q. All right. So, Mr. McMonies, notwithstanding all this
14 work, the Trinity is still on the City's URM list, isn't it?

15 A. Yes, it is.

16 Q. And it's therefore still subject to the ordinance?

17 A. Well, I haven't checked in the last two months, but I have
18 no reason to think they took it off.

19 Q. Now, if the injunction is not issued, you will have to
20 say, quote, "This is an unreinforced masonry building" on your
21 rental applications and on your historic building itself. Is
22 that your understanding?

23 A. Correct. Yes.

24 Q. And you will have to post the placard that is described --
25 that Mr. Vannier held up.

McMonies - D

1 Did you see that?

2 A. Yes, I did see that.

3 Q. You will have to put that disclosure in all your rental
4 applications; is that right?

5 A. Correct.

6 Q. Now, do you use rental applications for advertising?

7 A. Not for advertising.

8 Q. What are they used for?

9 A. To basically check out the potential tenant and make sure
10 that they're who we think they are.

11 Q. In fact, is there any advertising in your rental
12 application?

13 A. Not to my knowledge.

14 Q. Do you believe your building is unreinforced?

15 A. I understand where the engineers are coming from because
16 their definition of "unreinforced" means it doesn't comply with
17 ASCE 41-13. But we're 85 percent there. It's certainly not
18 unreinforced.

19 In my mind, it's well reinforced but just not to a
20 standard that happens to be a moving target.

21 Q. Would your tenants understand what ASCE 41-13 is?

22 A. I doubt it.

23 Q. Do you think any common person would believe that your
24 building is somewhat reinforced?

25 A. If we took them through the photos and walked them through

McMonies - D

1 the building, I think they would feel it had been reinforced.

2 Q. So if you post that placard and you place that notice in
3 your lease application, are you telling the truth?

4 A. I think I'm lying.

5 Q. And you're being forced to make these statements, are you
6 not?

7 A. I would be, yes.

8 Q. Okay. Now, at paragraphs 9 and 10 of your declaration you
9 mentioned your service on the City's URM Taskforce; is that
10 right?

11 A. Yes, I -- I was on the policy committee, and before that I
12 was on the finance -- what I call the finance committee.

13 Q. Did the task force ever recommend placarding or tenant
14 notification?

15 A. We -- we recommended attaboy placarding, which is
16 honorific placarding. When someone finished up a job, we
17 thought having a placard on the building that says the
18 Schmegmeier Apartments has been fully upgraded and is blessed
19 or honored by the City for having accomplished that blah, blah,
20 blah, that's the kind of placarding we discussed.

21 Q. Right. But there was no recommendation for this type of
22 placarding?

23 A. For negative placarding? No.

24 Q. And is it correct that the task force essentially
25 recommended that there be a schedule for retrofits to attach

McMonies - D

1 roofs to walls and walls to floors; is that right?

2 A. Correct.

3 Q. Okay. Did the City Council accept that recommendation?

4 A. Well, I don't know the inner workings of the City Council,
5 but we were sitting in a room and talking to some of the City
6 officials a couple of days before the Mayor -- the Council was
7 going to take up our proposal, which was, you know, for
8 basically mandatory upgrades, but to a slightly lower standard
9 than what's called life safety, which is what's in ASCE 41-13,
10 and they said, "Oh, no, actually, we're doing -- we're doing
11 negative placarding." It was like -- we said, "What? You're
12 doing negative placarding?"

13 So that went -- that's what Council took up, and that's
14 what Council passed -- was negative placarding.

15 Q. Okay. And as far as you know, is Trinity in compliance
16 with all other City building codes?

17 A. As far as I know, yes.

18 MR. DiLORENZO: Your Honor, I would like to offer 71
19 and 55 through 70.

20 MS. MOYNAHAN: No objection.

21 THE COURT: They are received.

22 MR. DiLORENZO: Thank you, Your Honor. That's all I
23 have for this witness.

24 THE COURT: Thank you. Cross-exam.

25 MS. MOYNAHAN: Thank you, Your Honor.

McMonies - X

1 CROSS-EXAMINATION

2 BY MS. MOYNAHAN:

3 Q. Good morning, Mr. McMonies.

4 A. Good morning.

5 Q. While you have Exhibit 71 in and the rest of plaintiffs'
6 exhibits in front of you, I would like to start there.

7 First of all, can you please turn back to Exhibit 57?

8 A. That's the one I couldn't characterize.

9 Q. Do you have any idea why there seems to be a broken -- my
10 perception -- a broken brace there? Something with a piece of
11 wood?

12 A. You know, the engineer who took the picture will not be
13 testifying, but his colleague will; so maybe he can explain it.
14 I can't.

15 Q. Okay.

16 A. That was the one I said that it looked like somebody's
17 hobnail boot nail was falling out.

18 Q. It does. Thank you.

19 I understood when you were reviewing those exhibits that
20 you said that some of this work is attaching the roofs to the
21 walls; is that correct?

22 A. The roof joists to the -- yes, to the parapet walls.

23 Q. And do you consider that to be an important retrofit or
24 upgrade?

25 A. Sure. My -- my recollection from the many presentations

McMonies - X

1 made by Amit Kumar to our committee was that in little diagrams
2 you're attaching the -- the roof joists to the parapet wall and
3 the bearing wall. That's very important because otherwise the
4 roof diaphragm can basically detach from the side walls, and
5 the parapet walls fall off. Not good things.

6 Q. And that would be dangerous; correct?

7 A. Correct.

8 Q. Okay. And, similarly, you mentioned, while reviewing the
9 photographs, that the floor joists have to be connected to the
10 bearing wall to avoid pancaking. Am I correct?

11 A. Correct. Well, I mean, one -- in the worst case, if you
12 had no attachments, you could well have a pancaking phenomenon
13 occur in a major earthquake.

14 Q. And are -- if you had a URM building that had never been
15 retrofitted, would you assume that, in fact, those floor joists
16 wouldn't be connected to a bearing wall; is that correct?

17 A. Typical of a building built sometime between 1900 and 1930
18 that they wouldn't attach. Yes, they would not attach. They
19 would just have the joists sit in a little pocket, a little
20 niche.

21 Q. Okay. Thank you.

22 With respect to Exhibit 70, if you could please turn to
23 that -- I'm sorry. Yes. 70. And the very last page of
24 Exhibit 70, in the summary area, where -- the quote from the
25 engineers -- the very last line was sure there's more work to

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1 be done to meet ASCE 41-13 BPOE standards, but this building
2 would be safe to live in.

3 Your building, in fact, still has numerous deficiencies
4 before it can attain the life safety or the 41-13 standards?

5 A. I wouldn't say "numerous." You have four of them listed
6 there.

7 And my comment to my engineers was, "We're down to the
8 minor things." One -- one of these is major. That's the --
9 the -- since we couldn't do the drill -- top-to-bottom
10 drilling, we would have to do a moment frame in one area of the
11 building. That's a major undertaking. It'll probably cost a
12 couple hundred thousand dollars at the least.

13 Q. You plan to do that work?

14 A. Yes.

15 Q. And after you complete the work that you have been doing
16 for many years now, you plan to petition BDS, Bureau of
17 Development Services, to get your building off of the database;
18 correct?

19 A. Correct.

20 Q. Okay. And then none of these regulations in this
21 ordinance would apply to your building, would they?

22 A. Well, I wouldn't have to post. You're right. I wouldn't
23 have to post the placard or the -- put language in the
24 application or -- yeah.

25 Q. Exactly.

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1 A. Record it. Record something.

2 Q. And when do you expect your building to be fully brought
3 to the life safety standard?

4 A. Well, assuming we can do it this summer, we would --
5 hopefully, by next fall we'll be good.

6 Q. Okay. Now, you understand that the City code adopts the
7 life safety standard -- again, referred to as ASCE 41-13 -- as
8 the cutoff line to no longer be considered a URM; correct?

9 A. Correct. But that has been a moving target.

10 Q. How has that been a moving target?

11 A. It's been -- I'll let the engineers go into it later, but,
12 I mean, it started out at 31 -- ASCE 31 something or other, and
13 then it became 40. There have been increments where it's been
14 changed. Well, anyway, just, my understanding is -- and I'm
15 not an expert, obviously -- is that it has been a moving target
16 that has gotten tougher.

17 Q. But you're very well-versed in that area; correct?

18 A. For a layman who doesn't have any background in
19 engineering, yes.

20 Q. Well, you did a research paper on URMs that you presented
21 to the Portland State Center for Real Estate; isn't that true?

22 A. Yes. That's true. But that was to inform a bunch of real
23 estate lawyers.

24 Q. Right. And you've written what you have termed to be
25 "quasi scholarly articles" about URM buildings; correct?

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1 A. Well, heavy on the "quasi." Yes, I have written a couple.
2 The one -- they're both for the Portland State Center.

3 Q. Right. And you also sat on the City's URM policy
4 committee as well as the URM, I believe, support committee;
5 isn't that true?

6 A. Yeah. There's different names for it. I sat on both of
7 those. I learned a lot sitting at the feet of the engineers
8 and architects who are on those committees.

9 Q. Right. So you understand that the City's standard of
10 building upgrades is tied to FEMA standards that change over
11 the years; isn't that correct?

12 A. I don't think it's FEMA, although FEMA is involved. They
13 do change over the years. As I understand it, it's a very
14 intricate process where you have a committee of structural
15 engineers all over -- from all over the West Coast and even
16 down in Chile and New Zealand who meet periodically and
17 recommend changes to ASCE 41-13.

18 Q. Sure. When those changes are made, you agree that, in
19 fact, there need to be changes to local codes so buildings can
20 be brought up to the more stringent standards?

21 A. Well, yeah. The hope is, apparently, on structural
22 engineers, is that there will be uniformity in what is applied
23 all the way down in New Zealand and all the way up to
24 Vancouver, Canada.

25 Q. Do you disagree that ASCE 41-13 is a reasonable standard

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1 to apply to buildings?

2 A. Well, again, I'm not knowledgeable enough to say. I will
3 say that I understand it's much more scrupulously adhered to
4 here than in other places. There's a little more flexibility.
5 And, in fact, I -- I understand that the rest of Oregon was not
6 imposing quite as strict a standard as Portland is.

7 Q. Could that possibly be because Portland has many more
8 older URM buildings?

9 A. I'm sure there's a reason for it, but I -- well, anyway,
10 my understanding is -- and the engineers should be questioned
11 on this, but my understanding is it's -- it's a tough --
12 Portland is tougher on these buildings than other places are,
13 including San Francisco and Seattle.

14 Q. Okay. But, in fact, San Francisco has already required
15 mandatory retrofits of URMs; correct?

16 A. Mandatory retrofits, but not to -- I think it's to -- they
17 call it bolts -- bolts plus standard.

18 Q. Okay. And you also mentioned that you didn't think
19 that -- that by putting the placard up, that you believe you
20 would be lying; isn't that correct?

21 A. I would be making an untrue statement.

22 Q. Okay. But there's nothing in the ordinance that would
23 prevent you from putting a second placard up saying, "My
24 building has had a lot of upgrades and is deemed safe by
25 engineers," or --

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1 MR. DiLORENZO: Objection, Your Honor. Calls for a
2 legal conclusion.

3 THE COURT: Overruled.

4 You can answer.

5 THE WITNESS: It's a pretty sloppy way of handling a
6 situation. I would prefer to put something up there that was,
7 you know, not here's something that the City wants us to say
8 that isn't true, and here is something we want to say that is
9 true. I would rather have something up there, if I -- if I was
10 going to voluntarily say it, that was accurate.

11 BY MS. MOYNAHAN: (Continuing)

12 Q. As president of the Masonry Building Owners of Oregon --

13 A. Just say "MBOO."

14 Q. MBOO. Thank you.

15 As president of MBOO, are you aware of whether there are
16 many other building owners who are in your situation where they
17 have done significant retrofits to their buildings?

18 A. There are five or six people that I'm aware of, yes, but
19 not hundreds of people.

20 Q. Okay. So that concern that you have regarding your
21 building almost being to completion would probably not apply to
22 more than just a handful of building owners; correct?

23 A. Correct. A handful, but a handful who tend to be more
24 forward-thinking and to be more wealthy so they are able to
25 afford these enormously expensive retrofits.

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1 Q. I'm going to ask if you would --

2 MS. MOYNAHAN: Mr. Gale, does Mr. McMonies have the
3 defendants' exhibits? Oh, he does. Thank you. And we have
4 two volumes of defendants' exhibits. We really only need to
5 look at our second volume, which begins at --

6 THE COURT: Paul, those binders aren't up there.
7 Just plaintiffs.

8 MS. MOYNAHAN: It begins at 106.

9 THE COURT: Hang on, please.

10 MS. MOYNAHAN: Sure.

11 DEPUTY COURTROOM CLERK: Which one do you want?

12 MS. MOYNAHAN: The ones that begin at 106. Thank
13 you.

14 THE WITNESS: Thank you.

15 DEPUTY COURTROOM CLERK: Do you know if you'll be
16 coming back to plaintiffs' at all?

17 MS. MOYNAHAN: No. Thank you.

18 I was trying to avoid that.

19 THE WITNESS: Okay. This is the resolution. 37, 36,
20 4.

21 BY MS. MOYNAHAN: (Continuing)

22 Q. I think it was the next.

23 A. I'm sorry. That's 106.

24 Q. I just meant that volume, not that particular exhibit.
25 Sorry about that.

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1 If you could just sit tight with the exhibits, I'll be
2 referring to those in just a minute.

3 So do you believe URMs are dangerous?

4 A. Well, they weren't dangerous in Philadelphia, but they
5 might be more dangerous in Portland, yes.

6 Q. Well, how about generally speaking? You've reviewed many
7 studies and referred to them. New Zealand, San Francisco.

8 A. I think that URMs are dangerous, yes.

9 Q. Do you think they're highly dangerous?

10 A. Not if they're dealt with, as I think people are willing
11 and happy to deal -- deal with them. If they're retrofitted,
12 they do quite well, actually.

13 THE COURT: Mr. McMonies, could you -- yes.

14 THE WITNESS: Sorry.

15 THE COURT: Thank you.

16 THE WITNESS: Paso Robles is an example where
17 upgraded URMs did quite well in a major earthquake. San Luis
18 Obispo earthquake. I think it was early '90s.

19 BY MS. MOYNAHAN: (Continuing)

20 Q. Exactly.

21 And with respect to the event in San Luis Obispo, you
22 referenced a FEMA study that 50 -- there were some 50 URMs and
23 most of the ones that hadn't been retrofitted had collapsed;
24 correct?

25 A. I don't know about collapsed, but they were significantly

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1 impaired.

2 Q. And the nine that were retrofitted were --

3 A. Breezed through, apparently.

4 Q. Breezed through. Correct.

5 And in Council testimony in the past, haven't you referred
6 to the fact that the URMs are highly dangerous?

7 A. I'm not sure I used the phrase "highly dangerous." But if
8 you say I did, I respect your opinion.

9 Q. Okay. Do you believe that society has a responsibility to
10 deal with problems presented by URMs?

11 MR. DiLORENZO: Objection.

12 THE COURT: Sustained.

13 BY MS. MOYNAHAN: (Continuing)

14 Q. Now, the paper that you presented for Portland State
15 Center for Real Estate, did you express concern in that
16 statement that URMs were going to be, quote, "fatally flawed"
17 and would not make it through a Cascadia earthquake?

18 A. I think I did, yes.

19 Q. And what did you mean by that?

20 A. Well, I was -- it was a plea for people to take these --
21 the dangers seriously. And my perspective is that these old
22 buildings are beautiful. They're important parts of our
23 cultural heritage, and we need to preserve them. And so
24 dangerous -- I don't think the -- dangerous was one element,
25 but it's also the loss of an important cultural artifact, you

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1 know, of the -- our cities.

2 Q. Would you please turn to Exhibit 121 in the book before
3 you.

4 A. Okay. It's a memo -- email from me to Carmen Merlo,
5 et cetera.

6 Q. Correct.

7 And if you look at the third paragraph down, second
8 sentence, you state, "We know that the City's URM's are
9 dangerous and need to be fixed"; is that correct?

10 A. It certainly reads that way.

11 Q. Okay. And you also state in the one, two, three, four,
12 five -- sixth paragraph down, the one that begins with "to
13 protect the building," that to protect the building and its
14 tenants, in all caps, the big one, achieving life safety would
15 cost -- and you give some numbers that it would cost. This
16 work should be done within 15 years.

17 So is it your opinion that URM's need to be upgraded to
18 protect a building and its tenants in a large earthquake?

19 A. Yes.

20 Q. Okay. And how about the last paragraph? "I think tenants
21 and building buyers need notice of the URM status of a building
22 before move-in or purchase."

23 Why do you think that?

24 A. Because it's a question they -- they need to go in with
25 their eyes open.

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1 Q. Why should they have to go in with their eyes open?

2 A. Because there's a danger implicit in these buildings.

3 Q. And how do you think that prospective tenants would learn
4 about those dangers and have their eyes opened? How do you
5 think they learn that?

6 A. Well, I think they learn it from their attorney or from
7 their title -- or realtor. It's pretty common knowledge on the
8 street that you go up -- you look for -- go to the web page of
9 the City and you pull up the list of URMs. So it's -- it
10 doesn't take a rocket scientist to know how to check out a
11 building.

12 Q. Mr. McMonies, do you -- in your experience, do most
13 prospective tenants go to a website first to see if a building
14 is a URM in Portland?

15 A. I would not be able to give you an opinion on market
16 behavior of tenants, but --

17 Q. Right. And so your comment that it's common knowledge
18 that you go to a website and look to see if a building is URM,
19 it's probably not based on any factual --

20 A. Well, I was speaking as a former real estate attorney
21 because I know the real estate attorneys are aware of the URM
22 situation and would apprise their clients of that -- that
23 information pretty quickly.

24 Q. Correct. And most people who want to rent a residential
25 building, in fact, aren't going to use a real estate attorney,

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1 are they?

2 A. You're probably right.

3 Q. And they probably are not even going to use an agent, are
4 they?

5 A. Well, yeah, when you get down to that, I don't know
6 whether they would or not.

7 I mean, there are these web -- web agents that tell you
8 what -- what buildings have available space in them and so on.

9 Q. Now, in your deposition, when I asked you about providing
10 notice to tenants, you had commented about folks coming up from
11 California actually do ask those questions; correct?

12 A. That's my understanding from -- anecdotally, from people
13 that work with my buildings, yeah.

14 Q. And that stands out because people who aren't from
15 California don't ask that question, do they?

16 A. If they are from Christchurch, New Zealand, they would
17 definitely ask.

18 Q. Exactly.

19 And what if they were from Gresham, Oregon? Do you think
20 they're as likely to ask?

21 A. Well, I don't want to demean people from Gresham.

22 Q. No. I did not mean to demean them. I was really just
23 speaking geographically.

24 A. Well, if you come from an area where there's no evidence
25 or where earthquakes are not very frequent, then you don't

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1 worry about that too much.

2 Q. Right. Okay. How do you reach those prospective tenants
3 and let them know, as you say, they need notice of that? How
4 do you reach them?

5 A. Well, I wouldn't have any problem putting information in
6 marketing materials, but I -- I wouldn't put them in a lease --
7 a lease application.

8 Q. And do you think that most -- as president of MBOO, do you
9 think that most URM building owners in Portland would also
10 agree with you that they would have no problem giving that
11 information to prospective clients?

12 MR. DiLORENZO: Objection. Lack of foundation.
13 Witness doesn't know what most people would --

14 THE COURT: Sustained.

15 You can rephrase.

16 MS. MOYNAHAN: Sure.

17 BY MS. MOYNAHAN: (Continuing)

18 Q. You are the president of MBOO. Do you have conversations
19 with the other building owners?

20 A. Yes.

21 Q. And do you discuss with them the City's requirement of
22 requiring a notice in the lease application?

23 A. Well, I think they uniformly don't like the notice in the
24 lease applications.

25 Q. And do you know why?

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1 A. Well, I think they feel it's inappropriate. It's forced
2 speech.

3 Q. Have you had conversations with the members to find out if
4 other people are as conscientious about telling prospective
5 tenants as you are?

6 A. I think there's a spectrum of opinion, and I think I'm on
7 the full disclosure end of the spectrum and other people are on
8 the less disclosure end of the spectrum. You know, that's
9 totally understandable how people would have a different
10 opinion.

11 Q. Now, you agree that the City's efforts on its URM
12 committee was to address a public safety issue; correct?

13 A. Well, I -- I think it was -- for me, it's both a public
14 safety issue and it's a cultural resource issue as well.

15 Q. I'm sorry. A what?

16 A. A cultural resource issue.

17 Q. And you don't agree that the purpose of the City's URM
18 ordinance was, quote, "economic blackmail," do you?

19 MR. DiLORENZO: Objection, Your Honor. The --

20 THE WITNESS: I'm not sure who --

21 THE COURT: Hang on, please. Wait.

22 Go ahead.

23 MR. DiLORENZO: Objection. Irrelevance.

24 The purpose of the ordinance is gleaned from the
25 legislative history and the ordinance itself, not what

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1 Mr. McMonies thinks.

2 THE COURT: Ms. Moynahan?

3 MS. MOYNAHAN: Mr. McMonies sat through the Council
4 hearings and he sat through many committee meetings, and I
5 assume he has an understanding as to what he thought the
6 Council purpose was.

7 THE COURT: You can ask that question.

8 BY MS. MOYNAHAN: (Continuing)

9 Q. Do you have an understanding as to what Council's purpose
10 was in adopting a URM regulations ordinance?

11 A. Well, not in the placarding, no, because we never
12 discussed that.

13 Q. Okay. How about generally with the -- you attended the
14 Council meeting when the ordinance was adopted, didn't you?

15 A. I think I did, yes.

16 Q. And do you have an understanding, then, as to what the
17 purpose was for the ordinance?

18 A. I really didn't. I -- it seemed to be coming out of the
19 blue, out of left field, and I was mystified, really.

20 Q. Now, you agree also that safety and saving lives is more
21 important than the inconvenience or expense imposed on a
22 building owner, don't you?

23 A. Well, yes. But it's all relative. I mean, if -- if you
24 spent an extra million dollars to save one person from having a
25 broken arm, is that justified? To me, on a cost -- maybe it

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1 isn't, but with the same amount of money you could preserve a
2 facade that isn't going to injure anybody but is a cultural
3 resource of our city.

4 Q. But the ordinance isn't requiring anyone to do any work,
5 is it?

6 A. The ordinance is just scaring the bejesus out of people,
7 forcing the owners to go and retrofit their buildings for fear
8 of losing an asset.

9 Q. But, in fact, it's only required of people to put a
10 placard on their building and provide tenant notification?

11 A. Correct. It is only doing that. But by doing that,
12 it's -- it's causing a ripple effect, which is going to result
13 in lenders and insurance companies delisting these buildings,
14 cause a frantic effort for people to upgrade their buildings to
15 keep off the list.

16 Q. Well, with respect to lenders, do you have a loan on
17 Trinity Place Apartments?

18 A. Yes.

19 Q. And does your lender know that your building is made of
20 masonry?

21 A. Yes. We have had long discussions about the fact that we
22 have done a lot of masonry upgrades to the building and that
23 there's an issue with the City, but we -- we think we will get
24 through it, and we're going to be approved.

25 Q. Did you get a loan before you started your upgrades?

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1 A. I got a loan a couple of years before I started the
2 upgrades. Well, no. No. Before the most recent -- the loan
3 is only three or four years old. We started the upgrades five
4 or six years ago.

5 Q. Okay. Did you have a loan on the building perhaps by
6 another lender?

7 A. Oh, yes.

8 Q. And did that lender know that your building was made of
9 unreinforced masonry?

10 A. I don't know. I can't put myself back five, six years to
11 when that loan was -- when we had that loan. I'm drawing a
12 blank as to who the lender was.

13 Q. But you're a real estate -- a long career as a real estate
14 attorney. Do you understand that before a bank will issue a
15 loan on a building they do some homework as to the structure of
16 the building?

17 A. They generally do. Although, there are exceptions.

18 Q. But the exceptions are not the rule; correct?

19 A. Correct.

20 Q. And they -- because they need to protect an asset, they
21 are looking at the structure?

22 A. It's collateral. It's collateral to them.

23 Q. It's collateral.

24 And so they're going to take a hard look at the
25 collateral, aren't they?

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1 A. Correct.

2 Q. Okay. And, yet, you achieved a loan when you had an
3 unreinforced masonry building?

4 A. Well, I didn't have an unreinforced masonry building. I
5 had a marginally -- I mean, a reinforced building that didn't
6 quite meet the City's somewhat picky standards. But it was
7 certainly not an unreinforced masonry building. We had done
8 all the basic things you are supposed to do. Attach the floors
9 to the walls, attach the roof to the parapet walls, brace the
10 parapet walls, strengthen the exterior walls.

11 We did -- in all the major areas, we had done what we were
12 supposed to do. We just fell short by a fairly minor amount in
13 a couple of areas.

14 Q. Okay. Would you please turn to Exhibit 123.

15 A. 123?

16 DEPUTY COURTROOM CLERK: 123?

17 MS. MOYNAHAN: 123. I'm sorry.

18 BY MS. MOYNAHAN: (Continuing)

19 Q. And it's called "The testimony of Walt McMonies." Is
20 this, in fact, the testimony you prepared?

21 A. Yes.

22 Q. Would you please turn to the second page. And the third
23 full paragraph not indented. It's a single line. "For this
24 reason, City support should extend to upgrades up to life
25 safety."

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1 Do you see that?

2 A. Yes.

3 Q. And your position is that the City should be requiring
4 upgrades to life safety; isn't that --

5 A. No. The whole context needs to be brought into play.
6 Here, you had a situation where there were various ways that we
7 could -- there was SB-311 and HB-00 -- whatever. There were
8 some bills that the City had managed to get passed in the
9 legislature, which promised some benefits and some incentives
10 to building owners for upgrading.

11 And there was a dispute between the engineers, in
12 particular an engineer from KPFF, who said these incentives
13 shouldn't kick in until after you get to life safety versus
14 people who said, "No, I want the incentives to kick in on day
15 one for the first dollar of work we're doing."

16 The issue was whether or not you should get the -- the
17 incentives earlier versus later. So I was saying we should --
18 the incentive should be applied earlier.

19 Q. Okay. But you don't disagree that life safety is the
20 appropriate standard for upgrades?

21 A. Well, you know, to tell you the truth --

22 MR. DiLORENZO: Objection, Your Honor. Relevance.

23 This is getting pretty far afield from whether -- from
24 this First Amendment case as to whether the placards are forced
25 speech.

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1 THE COURT: Ms. Moynahan?

2 MS. MOYNAHAN: Well, Your Honor, one of the elements
3 that the City has to show is that the -- that the, quote,
4 "forced speech" and the government speech is factual, and this
5 placard itself says this building is a URM and URMs are
6 dangerous. One of the issues that is being disputed here is
7 whether a building, such as Mr. McMonies', that's been upgraded
8 almost to the life safety level, is still a URM, and that's
9 exactly what Mr. McMonies has been concerned about.

10 He's done these upgrades, and it's not quite at life
11 safety, and the City has to draw the line somewhere.

12 THE COURT: Overruled.

13 You can answer.

14 THE WITNESS: Could you repeat the question?

15 THE COURT: Jill, would you read back the question,
16 please.

17 (The court reporter read as follows: "Question: But
18 you don't disagree that life safety is the appropriate standard
19 for upgrades?")

20 THE WITNESS: I think the committee -- the policy
21 committee came down on collapse prevention as opposed to life
22 safety, and that's where we thought it should be. The
23 engineers on the committee thought life safety was where it
24 should be, and we kind of agreed to disagree.

25 ///

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1 BY MS. MOYNAHAN: (Continuing)

2 Q. Okay. Thank you.

3 THE COURT: Ms. Moynahan, for cross, how much longer?

4 MS. MOYNAHAN: Oh, I'm sorry, Your Honor, this is
5 also direct. We've agreed that --

6 THE COURT: Right. So how much longer for
7 questioning?

8 MS. MOYNAHAN: Ten minutes.

9 THE COURT: We'll take a break. We'll be in recess
10 for about ten minutes or so.

11 MR. DiLORENZO: Thank you, Your Honor.

12 DEPUTY COURTROOM CLERK: Court is in recess.

13 (Recess taken.)

14 DEPUTY COURTROOM CLERK: All rise.

15 MS. MOYNAHAN: Thank you.

16 THE COURT: We seemed to have lost a lot of people in
17 the gallery. We have to -- you'll have to pep it up, I guess.

18 MS. MOYNAHAN: I hope it's not a reflection on me,
19 Your Honor.

20 Your Honor, I have been reminded to move to admit
21 Exhibit 121.

22 THE COURT: Any objections?

23 MR. DiLORENZO: Relevance, Your Honor.

24 THE COURT: Okay. Go ahead.

25 MS. MOYNAHAN: Uhm --

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1 THE COURT: No. Mr. DiLorenzo, go ahead.

2 MR. DiLORENZO: Your Honor, this is -- this is an
3 email from Mr. McMonies complaining to the City about why
4 they're not listening to him with respect to his recommended
5 standard. We already know that the City Council did not adopt
6 the committee's recommendations. These are pretty much
7 legislative proposals.

8 If the Court is interested in them, I can see why you
9 might want to reference them, but I really feel that they're
10 totally irrelevant to the issues here, which are did the City
11 have an opportunity to do X directly? Did they not do that and
12 instead impair speech as a way of indirectly accomplishing what
13 they chose not to accomplish directly?

14 That's what the case is about, so I think this is all
15 irrelevant.

16 THE COURT: Ms. Moynahan?

17 MS. MOYNAHAN: Yes, Your Honor.

18 Your Honor, I think they're exactly on point. The --
19 Mr. McMonies gives his opinion in this memo that city URMs that
20 are dangerous need to be fixed. That goes to the accuracy of
21 the placard, as well as his statement that he thinks tenants
22 and building buyers need notice of URM status of the building,
23 which goes to the necessity for the lease application
24 notification.

25 Whether or not plaintiffs agree that that is the most

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1 narrow way to inform tenants is a different issue.

2 THE COURT: Thank you. One of the issues in the
3 case, of course, is whether and to what extent being required
4 to advise members of the public that a building is a URM
5 building and what that entails is a question here. The City
6 contends that a URM building is a risk, at a minimum, if not
7 dangerous in an earthquake. The plaintiffs' position is, on
8 that point, that it is a requirement that imposes a burden on
9 owners of some buildings whose buildings are reinforced.
10 There's a question whether and the extent to which any
11 reinforcement brings the building into a safety risk area or it
12 stays outside the zone of acceptable risks, and that is
13 something for the Court ultimately to determine later. So the
14 exhibit is received.

15 You cited also 107, I think. 106 and 121 and 123.

16 MS. MOYNAHAN: Your Honor, 106 is simply when I was
17 referring to which book it was.

18 THE COURT: Okay. Thank you.

19 MS. MOYNAHAN: But I am going to offer 123 as well.
20 I do offer it.

21 THE COURT: All right. Mr. --

22 MR. DiLORENZO: Your Honor, I understand your
23 position that -- may I just have a continuing relevance
24 objection?

25 THE COURT: Yes, you may.

McMonies - X

1 MR. DiLORENZO: Okay. Thank you.

2 THE COURT: And you can renew it as you need to when
3 other exhibits are offered.

4 All right. Thank you.

5 Ms. Moynahan, go ahead.

6 MS. MOYNAHAN: Thank you, Your Honor.

7 BY MS. MOYNAHAN: (Continuing)

8 Q. Mr. McMonies, as an attorney, do you -- you understand you
9 know that warnings about asbestos and lead in a building are
10 required in the application process; is that correct?

11 A. We all do it. It must be required. We would do it even
12 if it weren't required because you would want to put your
13 tenants on notice.

14 Q. In fact, do you -- do you have lead and asbestos in your
15 buildings?

16 A. Not that we can help. When we can help it. I mean,
17 sometimes it's impregnated into the plaster, and it's hard to
18 remove, so we have to encapsulate it.

19 Q. Okay. So in your application process, are you required to
20 inform your prospective tenants of lead and asbestos in your
21 buildings?

22 A. I think we would be crazy not to, but I don't know. I
23 can't cite you the statute that says I have to inform them, but
24 everybody, certainly, out of an abundance of caution, does
25 that.

McMonies - X

1 Q. Okay. And as an attorney, would you consider a warning --
2 a warning that lead and asbestos are in a building is forced
3 speech?

4 MR. DiLORENZO: Objection. Calls for a legal
5 conclusion.

6 THE COURT: Sustained.

7 MS. MOYNAHAN: Your Honor, he's a real estate
8 attorney, and he's a landlord. He would, I believe, have a
9 basis for answering the question.

10 THE COURT: Well, if you're attempting to qualify him
11 as an expert, I'm not sure that he would meet the
12 qualifications for a First Amendment expert. And even if he
13 did, it's the Court's role to determine whether it is forced
14 speech or not, not the witness's.

15 MS. MOYNAHAN: Thank you, Your Honor.

16 THE COURT: Sustained.

17 MS. MOYNAHAN: Thank you, Your Honor.

18 BY MS. MOYNAHAN: (Continuing)

19 Q. You testified that if you had to put a placard up on your
20 building saying that the building was a URM building that that
21 would be untrue. Would you feel the same way if the placard
22 said, "This building does not meet the ASCE 31- -- or 41-13
23 standard"?

24 A. I would have to think about it, but I would be more
25 willing to accept that than the former.

McMonies - X

1 Q. And it's your opinion, is it not, that a URM building that
2 has not been retrofitted at all should be, quote, "red tagged"
3 by the Bureau of Development Services?

4 MR. DiLORENZO: Objection, Your Honor. Irrelevant.

5 Calls for another launch into Mr. McMonies' legislative
6 proposals.

7 THE COURT: Ms. Moynahan?

8 MS. MOYNAHAN: Your Honor, Mr. McMonies has opined
9 that he believes that people should not live in a URM building,
10 and, again, I think that goes to the nature of the City's
11 public safety purpose for these -- this ordinance.

12 THE COURT: Overruled.

13 You can answer.

14 THE WITNESS: Can you repeat the question?

15 THE COURT: Jill, read back the question, please.

16 (The court reporter read as follows: "Question: And
17 it's your opinion, is it not, that a URM building that has not
18 been retrofitted at all should be, quote, "red tagged"
19 by the Bureau of Development Services?")

20 THE WITNESS: I'm not quite sure what a red tag
21 means. If that means you can't occupy it or enter it, I
22 believe that's a little bit of an overkill. Certainly, a
23 building that has not been renovated at all, certainly the
24 owner should look into what can be done to bring it up, you
25 know, to a safer standard.

McMonies - X

1 BY MS. MOYNAHAN: (Continuing)

2 Q. And you wouldn't let your daughter live in a URM; correct?

3 A. My daughter lives in Trinity Place Apartments.

4 Q. Would you allow your daughter to live in a URM that hasn't
5 been upgraded?

6 A. Well, of course I'd have to look at the building and find
7 out, you know, what -- there are different -- there are
8 differences in buildings. You know, some have more things that
9 were done to them than others. Buildings that were built in
10 1898 are going to be less safe than those built in 1928. So I
11 would want to look at the individual building.

12 Q. Your daughter is fairly savvy, correct, with respect to
13 URM buildings?

14 A. I think, like all people under the age of 30 or 40,
15 they -- they think they're going to live forever and nothing is
16 going to touch them; but unfortunately there aren't enough of
17 those people to fill a good building up.

18 Q. Well, by that question, I meant would she be able to
19 recognize a URM building?

20 A. Yes.

21 Q. Yes.

22 And what if -- if you had another family member or a loved
23 one who wasn't so lucky as to have a father who's taught her
24 about URM buildings? If that person didn't know to ask about a
25 building, you wouldn't want -- you would want someone to tell

McMonies - X

1 them if they were about to rent, wouldn't they -- wouldn't you?

2 A. Yes.

3 Q. And, in fact, the folks in this courtroom so far this
4 morning have heard about the horrors of URM buildings, but no
5 one yet knows whether the building they're sitting in is a URM;
6 correct?

7 A. This building here?

8 Q. Right.

9 A. I'm pretty sure it isn't.

10 Q. Right. My point is we know that URMs are dangerous, but
11 unless someone tells us, most of us don't know if we are
12 entering into a URM. Is that correct?

13 A. I can't speak for everybody, but I'm really relatively
14 conscious of it when I go into a building. I go, "Gee, I
15 wonder what this is?"

16 Q. Do you do anything differently when you walk into a URM?
17 Do you make any observations?

18 A. I duck and cover. No. I'm -- I'm careful about buildings
19 I spend time in if they seem to be seismically, you know,
20 challenged.

21 Q. And if you happen to be in a URM building, let's say the
22 old Lotus building, during -- which is demolished, during an
23 earthquake, what would you do?

24 MR. DiLORENZO: Objection. Lack of foundation.

25 It isn't established that Mr. McMonies has been in such a

McMonies - X

1 building during an earthquake.

2 THE COURT: Overruled.

3 You can answer.

4 THE WITNESS: Well, I know the Lotus building was an
5 old brick building, and probably if an earthquake started, I
6 would probably wish I weren't in there. But I'm not sure I
7 would be bolting out into the street because there probably is
8 a parapet wall that would fall on me.

9 BY MS. MOYNAHAN: (Continuing)

10 Q. And you said you're not sure you would bolt into the
11 street?

12 A. Yes. Because that's actually one of the less advisable
13 things to do in an earthquake is to run out of a building that
14 has parapet walls.

15 Q. Could you please turn to Exhibit 110 in your book?

16 Do I have the placard?

17 Do you recognize Exhibit 110?

18 A. If I'm as fast at bolting out of buildings as I am at
19 changing pages in this booklet, I'll be in real trouble.

20 Q. Sorry. It's real cumbersome.

21 A. Okay. I have the notice.

22 Q. Do you recognize the language and the font of the notice?

23 A. I think that's the statute or the language that the
24 ordinance authorizes, and it's citing 24.85, which is the City
25 code, so I recognize it.

McMonies - X

1 Q. Okay. And I'll just -- this is a demonstrative of that,
2 that I'm holding. It's a placard that has been photocopied for
3 the book for your purposes.

4 Now, if this sign were hanging in the main entrance of a
5 building, maybe a favorite restaurant or a bar, wouldn't that
6 take the guesswork out of whether the build you were entering
7 was a URM?

8 A. Well, if I believe that the underlying testing had been
9 done, I probably would -- would take some comfort in seeing the
10 sign and -- not comfort, but I would feel informed.

11 The trouble is I don't think that we have that much
12 confidence in the City's methods for determining which
13 buildings are unreinforced and which aren't.

14 Q. Can you --

15 MS. MOYNAHAN: Oh, I move to admit 110, please.

16 THE COURT: Any objection?

17 MR. DiLORENZO: Not to 110.

18 THE COURT: It's received.

19 MS. MOYNAHAN: Thank you, Your Honor.

20 BY MS. MOYNAHAN: (Continuing)

21 Q. Do you have any government-required signs on any of your
22 buildings?

23 A. You know, I meant to go around and look this weekend to
24 see what I had, but I don't think -- I don't know of any.

25 Q. Could you please turn to Exhibit 128? I am not

McMonies - X

1 representing that this is your building. It is not. Have you
2 ever seen a similar placard to this affixed --

3 A. No. I honestly don't know what "FDC" means.

4 Q. Have you ever seen this type of placard on a building?

5 A. No.

6 Q. Okay. Have you ever seen a sign that says, "No Minors"
7 and below an OLCC logo?

8 A. Yes.

9 Q. And how about No Smoking signs with a -- with a state logo
10 on them?

11 A. I think I've seen those as well.

12 Q. Okay. Would you recognize a No Smoking sign with a logo
13 or an OLCC sign that says, you know, "No Minors Allowed?"
14 Would you recognize those as government-required placards?

15 A. I'm not on top of the definition of "government-required
16 placards," so I don't know whether I would recognize them as
17 that or not.

18 Q. When you see a sign that says "No Minors" and has a logo
19 and reference to a state statute, is it your assumption that
20 the tenant or the owner has put that sign up voluntarily, or
21 that they're doing it to comply with a law?

22 A. The latter.

23 Q. Okay. And what would make -- what would make you draw
24 that conclusion?

25 A. Just from my familiarity with OLCC practice.

McMonies - X

1 Q. How about other observations that you've made? Exit
2 signs, illuminated Exit signs in a building, or maybe a --

3 A. There's a very clear safety purpose in having an Exit
4 sign.

5 Q. Okay. Finally, would you please turn to Exhibit 120.
6 Do you recognize Exhibit 120?

7 A. Yes.

8 Q. What is that?

9 A. It's the engineers -- excuse me. It's the City's response
10 to one of our periodic applications for approval of the Trinity
11 Place seismic.

12 Q. Okay. And I know this is extremely difficult to read, but
13 if you turn the page, I believe that the email includes the
14 same language in greater font.

15 A. Let me look at the -- this is the -- the email with DCI's
16 logo on the bottom?

17 Q. Yes. Yes.

18 A. What's the language here?

19 Q. I wanted to draw your attention to the very bottom of the
20 email. "The level of analysis is based on BPOE," and the --

21 A. We agreed that was an Elk's Club.

22 Q. You and I did agree that that was the Elk's Club.

23 The very last sentence reads, "Known deficiencies, which
24 may not meet ASCE 41-13, remaining are listed below." And
25 there are one, two, three, four -- five bullet points.

McMonies - X

1 A. Correct. I think this is an earlier iteration of what --
2 the letter that we looked at before to me from the two
3 engineers.

4 Q. Exactly.

5 And is this a correspondence between one of your engineers
6 and BDS regarding, among other things, the deficiencies that
7 still exist in your building or did at the time of this email?

8 A. They're, yes, known deficiencies. This is the City's
9 stated position that we should bring it up to ASCE 41-13, and
10 they're specifying these particular type too, and they're
11 specifying these things fall short.

12 And I think the engineers don't disagree they fall short.
13 More the argument here is are we talking about something
14 trivial or not?

15 Q. And do you happen to know whether these remaining
16 deficiencies are trivial?

17 A. I think a couple of them are fairly minor, and one of them
18 is extremely major.

19 Q. Which one is --

20 A. It will cost a couple hundred thousand dollars.

21 Q. Which one is major?

22 A. Well, I'm not sure which one it is in this list, but it's
23 the moment -- need for a moment frame in the capacity of a URM
24 wall. I think in-plane or out-of-plane capacity of the URM
25 wall. We're talking basically that that's -- we can't do the

McMonies - X/ReD

1 center core drilling and installation because of the lack of a
2 wall in the right place. So we -- so it's basically we're
3 going to have to do moment frames.

4 MS. MOYNAHAN: Okay. I move to admit 120.

5 MR. DiLORENZO: No objection.

6 THE COURT: 120 is received.

7 MS. MOYNAHAN: No further questions.

8 MR. DiLORENZO: I just have very few, Your Honor --

9 THE COURT: Thank you.

10 MR. DiLORENZO: -- on redirect.

11

12

REDIRECT EXAMINATION

13 BY MR. DiLORENZO:

14 Q. Mr. McMonies, do you recall the series of questions in
15 which Ms. Moynahan asked you about your views on tenant
16 notification?

17 A. I'm -- I recall those.

18 Q. Do you recall Ms. Moynahan asking you about your views on
19 whether tenants should be notified about certain building
20 conditions?

21 A. Yes.

22 Q. You remember those?

23 Prospective tenants could learn a lot about the building
24 directly from the City, couldn't they?

25 A. Yes. From the web page.

McMonies - ReD

1 Q. And if the City chose to allocate enough of a budget and
2 had the will, it could establish its own website, couldn't it?

3 A. Yes.

4 Q. And it could do mailers?

5 A. Oh, yes.

6 Q. And it could speak directly to tenants if it had the will
7 to do so, couldn't it?

8 A. Yes.

9 Q. It could author pamphlets about what to do in an
10 earthquake?

11 A. Definitely.

12 Q. Depending on what the pamphlets said, if they were made
13 available on a volunteer basis, would you consider having those
14 pamphlets in your lobby?

15 A. Certainly.

16 Q. It would just all depend on what the pamphlet said; right?

17 A. I think if it was truthful and accurate, I would have no
18 problem providing those pamphlets to tenants.

19 Q. These placards do not say, "This building fails to meet
20 ASCE 41-13."

21 A. No. That would be more accurate.

22 Q. They say it's unreinforced, and your building is not
23 unreinforced; is that right?

24 A. Well, it's their own little Alice in Wonderland world of
25 you're not reinforced.

McMonies - ReD

1 THE COURT: Mr. McMonies, don't editorialize in your
2 answers. Give factual responses. No argument.

3 THE WITNESS: Okay. It seems that -- I sort of lost
4 my train of thought.

5 BY MR. DiLORENZO: (Continuing)

6 Q. Well, let me rephrase. Would it be fair to say that
7 "unreinforced masonry," as used in the placard, is a term of
8 art?

9 A. Yes. Definitely.

10 Q. Not one that would be generally recognized by the public?

11 A. I would think if you saw the sign that said it's
12 unreinforced masonry, you would say, "Oh, it's unreinforced
13 masonry." But, in fact, what that means is you haven't quite
14 achieved -- you've completely blown off or you come really
15 close but you missed doing all the things that ASCE 41-13 would
16 require.

17 Q. Okay.

18 A. My case is a good example. We have done tons of things.
19 It's cost lots of money. The things that were authorized by
20 the City, had been fitted by the engineering, and, yet, we're
21 unreinforced. I mean --

22 Q. You recall the discussions about Paso Robles -- that
23 earthquake?

24 A. Yes.

25 Q. I think it was either that or the San Luis Obispo one

McMonies - ReD

1 where you said that buildings that were upgraded did quite well
2 and that buildings that -- that URM buildings that were not did
3 not fare well in the earthquake.

4 Do you remember that?

5 A. Yes. Same thing. Paso Robles is the nearby town where
6 the earthquake center was. About 20 miles away -- 24 miles
7 away from Paso Robles.

8 Q. Those buildings that did well, that were retrofitted, were
9 they not retrofitted per the early '90s standards?

10 A. Well, it happened in -- the earthquake happened in 2003.
11 It was a magnitude 6.6. I think it was -- would have been
12 upgraded to the standards applicable before 2003.

13 Q. Okay. And as your Trinity apartments sit right now, do
14 they exceed the retrofitting standards that those buildings in
15 2003 would have had?

16 A. That would be my understanding, yes.

17 Q. But you have to post a sign that says "unreinforced
18 masonry" nevertheless?

19 A. Yes.

20 Q. Okay. Counsel talked to you about signs. A No Smoking
21 sign apprises people of the law, doesn't it?

22 A. Yes.

23 Q. And No Minors sign apprises people as to the law?

24 A. Yes.

25 Q. Exit signs are not controversial, are they? They're

McMonies - ReD/ReX

1 either exits or not?

2 A. Yeah, I would say they are not controversial at all.

3 Q. Does the placard -- that is Exhibit 110 -- apprise the
4 public as to the law?

5 A. No. It seems to apprise them of an untruth which is that
6 it's an unreinforced masonry building.

7 MR. DiLORENZO: Thank you, Your Honor. I have no
8 further questions.

9 THE COURT: Any recross?

10 MS. MOYNAHAN: Just a couple, Your Honor.

11 THE COURT: Go ahead.

12 MS. MOYNAHAN: Thank you.

13

14

RE CROSS-EXAMINATION

15 BY MS. MOYNAHAN:

16 Q. Mr. DiLorenzo asked if people could learn from a City web
17 page about a URM building, but if someone doesn't know that
18 they're entering a URM building, how would they know to make
19 the leap between what they have learned on a website and this
20 particular building?

21 A. That's a good question. I think they need to have some
22 information.

23 Q. All right. So would a City website also have to educate
24 the public as to what to look for in a URM building?

25 A. I would think it would need to, yes.

McMonies - ReX

1 Q. And aren't there, in fact, many upgrades that are hidden
2 from a layperson's eye when they walk into a building?

3 A. Hidden from everybody's eye. I mean, most of the changes
4 we did to the Trinity you wouldn't be able to find unless you
5 cut into plaster.

6 MS. MOYNAHAN: Exactly.

7 No further questions.

8 THE COURT: All right. Mr. McMonies, you may step
9 down.

10 THE WITNESS: Thank you.

11 MR. DiLORENZO: Thank you, Your Honor. Our next
12 witness is Jim Atwood.

13 THE COURT: Mr. Atwood, if you would come forward,
14 please.

15

16

JIM ATWOOD,

17 called as a witness on behalf of the Plaintiffs, being first
18 duly sworn, is examined and testified as follows:

19

20 THE WITNESS: I do.

21 DEPUTY COURTROOM CLERK: Please step up and have a
22 seat. There's water here if you would like it.

23 Please state your name for the record and spell your last
24 name.

25 THE WITNESS: Jim Atwood, A-t-w-o-o-d.

Atwood - D

1 DEPUTY COURTROOM CLERK: Thank you.

2

3

DIRECT EXAMINATION

4 BY MR. DiLORENZO:

5 Q. Good morning, Mr. Atwood. Are you one of the plaintiffs
6 in this case?

7 A. Yes, I am.

8 Q. And do you own any brick buildings?

9 A. Yes, I do.

10 Q. Is one of those buildings known as the Glade Hotel?

11 A. Yes.

12 Q. Can you turn to Exhibit No. 2.

13 A. I don't have any exhibits.

14 Q. Oh, you have a book of them up there.

15 THE COURT: Not yet.

16 BY MR. DiLORENZO: (Continuing)

17 Q. Oh. Mr. Gale will first get it to you.

18 A. Thank you.

19 Yes, I see Exhibit No. 2.

20 Q. Does the picture on the front page represent your hotel?

21 A. It does.

22 Q. And if you could turn to Exhibit No. 3, is that also an
23 accurate depiction of your building?

24 A. It is.

25 We have a bigger one on the board behind you.

Atwood - D

1 MR. DiLORENZO: Your Honor, we have two posters here
2 which replicate two of our exhibits. If I can have permission
3 to hand those to the witness?

4 THE COURT: Go ahead.

5 THE WITNESS: Yes, this is Exhibit No. 3.

6 BY MR. DiLORENZO: (Continuing)

7 Q. And you filed a declaration in this case; is that right?

8 A. Correct.

9 Q. Could you turn to Exhibit 72.

10 A. 7-2?

11 Q. 7-2.

12 DEPUTY COURTROOM CLERK: Would you like these back?

13 MR. DiLORENZO: He's going to hold those for a
14 minute. Thank you.

15 BY MR. DiLORENZO: (Continuing)

16 Q. Let me know when you're there.

17 A. I'm at 72.

18 Q. Okay. How long have you owned the Glade?

19 A. Roughly, since 1976.

20 Q. Okay. And you talk about the Glade Hotel in your
21 declaration?

22 A. Yes, I do.

23 Q. And 72 is the declaration that you filed in support of
24 your motion for preliminary injunction?

25 A. Yes, it is.

Atwood - D

1 Q. And, sir, are the statements contained therein true?

2 A. Yes, they are.

3 Q. Okay. In the declaration, you mention that the Portland
4 Development Commission wanted you to participate in a seismic
5 demonstration grant.

6 A. That's correct.

7 Q. Can you tell us a little bit about how that transpired?

8 A. Yes. In 2014 I was approached by a fellow by the name of
9 Damian Crowther, who was an employee of the Portland
10 Development Commission, asking me if I would be interested in
11 upgrading the Glade to its highest and best use if the Portland
12 Development Commission did the seismic upgrade to the building.

13 Q. Okay. Were you interested in that proposal?

14 A. Absolutely.

15 Q. Okay. And what did the Portland Development Commission
16 hope that -- did the Portland Development Commission undertake
17 a study of the potential seismic retrofitting of your building?

18 A. They -- they did, and we did a joint feasibility study. I
19 think the -- one of the previous exhibits you had me look at
20 was a feasibility study to determine the highest and best use,
21 and that was a joint project between myself and PDC.

22 And the seismic component PDC did on their own at an
23 additional expense. I had nothing to do with that.

24 Q. What was the highest and best use that was determined for
25 your building?

Atwood - D

1 A. Well, the feasibility study came up with different
2 options. Essentially, all the options said that the ground
3 floor should continue to be a restaurant and bar, which it is
4 currently. The upper floor is currently communal living, and
5 they considered that possibility; plus a boutique hotel, which
6 was the original use; office use; and SRO housing, which is
7 single-room occupancy housing.

8 I don't think that we came to a conclusion of what was the
9 highest and best use of those four options.

10 Q. Okay. At some point did you hear PDC's conclusions as to
11 whether the building could be economically retrofitted?

12 A. Over time, the -- they got back the numbers sometime in
13 2015, and the project just sort of stalled, and they weren't,
14 frankly, responding to my phone calls or emails, and I found
15 out sometime later, sometime in 2016, after repeated requests,
16 I got the -- the numbers, the cost of the seismic upgrade, and
17 Damian was -- well, we were both -- I mean, I was quite shocked
18 at the -- how much it would cost, and we looked for a second
19 opinion, and the second opinion more or less confirmed the
20 first opinion.

21 And Damian just said in view of -- and I also had the
22 replacement cost of the building, and in view of the
23 replacement cost, he concluded it just wasn't worth spending
24 the PDC's money to do a seismic upgrade to the building.

25 Q. And this is the Portland Development Commission, which is

Atwood - D

1 a branch of the City of Portland; is that right?

2 A. That's correct.

3 Q. Okay. Now, can you take a look at Exhibit 1?

4 A. Yes.

5 Q. What is Exhibit 1?

6 A. Exhibit 1 is a copy of a picture that I took of this
7 board, which I took with me to my testimony before City Council
8 with regard to their consideration of mandating seismic
9 upgrading for unreinforced masonry buildings.

10 Q. Where did the numbers come from?

11 A. The top number is full building replacement value.

12 By coincidence, in October of 2015, I had switched
13 insurance companies, and the new company took down the
14 information of the square footage, the size, the level of
15 finish, the use, and came up with a replacement value, a full
16 replacement value. If the building was a total loss, it could
17 be replaced with a new building, similar in size and similar in
18 function, for \$940,000.

19 Q. Okay.

20 A. Then we went through the -- if they did a mandatory URM
21 building seismic upgrade, what those expenses would be. And
22 the hard costs -- and this is per the consultant that PDC
23 hired, which they were -- told me they would upgrade the
24 building as inexpensively as possible to demonstrate to the
25 world how simple it would be to do a seismic upgrade, and their

Atwood - D

1 consultant came up with hard costs of \$907,369.

2 Now, this was in 2015. The consultant also admonished
3 that those costs would have to be compounded at between 6 and
4 7 percent per year if not done immediately. That was the
5 current cost. And of course absent any extraordinary demand
6 for seismic upgrades.

7 It also excludes the -- just repairs and replacements
8 necessary. The seismic upgrading itself is extremely invasive
9 and involves displacing the current occupants and more or less
10 gutting the building, installing the seismic reinforcements.
11 And then this \$400,000 would be simply to put it back --
12 actually, just to put the ground floor tenant back into
13 business with the way they were before the renovation, and that
14 would be \$400,000.

15 This cost also does not include any geotechnical analysis
16 or design.

17 You know, we're in a liquefaction area. All of downtown,
18 I think, where we're sitting, we're in the liquefaction zone.
19 Here in the courthouse. This geotechnical analysis was not
20 part of this cost estimate and -- nor any design or placement
21 of any geotechnical support subsurface.

22 Q. Okay. So you have a hard cost subtotal of \$1,307,369?

23 A. That's correct.

24 Q. And that's not counting geotechnical costs?

25 A. No geotechnical or reinforcing, like getting down to

Atwood - D

1 bearing soil or deep enough that it wouldn't be affected by the
2 liquefaction.

3 Q. Can you explain "soft costs" to the Court?

4 A. Yeah. So the soft costs we have, we put in 25,000, which
5 would be just for the assessment. For a geotechnical
6 assessment, not for any remediation of any geotechnical
7 deficiencies.

8 The cost of professional services for the upgrade,
9 architectural engineering, historic -- it's in a historic
10 district, and it would have to be approved by the historic
11 folks. There's a contingency of 10 percent, financing costs of
12 5 percent, legal and accounting of 2 percent. We assumed for
13 the purpose of the analysis that they would waive the permits,
14 which we don't know if that would or wouldn't occur. Even if
15 it did occur, you know, the City folks still would provide --
16 you know, have a cost of those services. And then we estimated
17 vacancy and loss of use at \$96,000.

18 So the soft cost subtotal would be 500 and -- \$571,357,
19 which makes a total of the hard and soft costs for a seismic
20 upgrade of the building to be on the order of a million, eight
21 seventy-eight.

22 Q. Down below that you mention Senate Bill 311, which I
23 believe is a law that was passed by --

24 A. Yeah. So throughout the process, the proponents of the
25 seismic upgrading referred to the S Bill 311, which was

Atwood - D

1 supposed to provide some tax relief to the property owner for
2 doing seismic upgrades.

3 Now, I believe Senate Bill 311 requires the local
4 jurisdictions to ratify their participation in SB-311, which
5 Portland hasn't done. And if it is done, it's speculated that
6 it would only apply to the increased cost -- valuation, if any,
7 due to the seismic upgrade.

8 But for the purpose of -- to try to be totally fair to
9 City Council, I assume that if we abated 100 percent of my
10 property taxes for 15 years, which is the proposed period for
11 SB-311, that cost savings would be -- amount to about \$105,000.

12 Q. Okay. But that isn't -- that option is not available
13 today because the other local governments have not ratified?

14 A. It is not available and may never be available, and if it
15 is available, it would perhaps be little or none of the
16 \$105,000. But because they were not only doing SB-311 -- I
17 wanted to include it in this analysis. So after subtracting --
18 let's say I paid zero property taxes for the next 15 years.
19 The costs, including soft costs and hard costs, to do a full
20 upgrade, is a million, seven seventy-three. Roughly, on the
21 order of twice the cost to replace the building with a new
22 building.

23 Q. Okay. So -- excuse me. So the Glade Hotel is currently
24 on the URM database; is that right?

25 A. It is.

Atwood - D

1 Q. Okay. And if this Court does not grant an injunction, you
2 will be subject to the ordinance; correct?

3 A. That's correct.

4 Q. And you'll have to put a placard on the building that
5 says, "This is an unreinforced masonry building"?

6 A. That is correct.

7 Q. And you object to making statements that the City wishes
8 to compel you to make; is that correct?

9 A. That's correct.

10 Q. Now, if you are compelled to place the placard on your
11 building, what will be your cost to remove the placard?

12 A. Well, in 2015 dollars, it would be roughly a million,
13 eight, plus the cost of the geotechnical remediation.

14 Q. Let me make sure I understand this. Your cost to remove
15 the placard would almost be twice the cost of knocking down
16 what you have and replacing the building; is that correct?

17 A. That's correct.

18 Q. Is your building otherwise compliant with all City
19 building codes?

20 A. Yes. To the best of my knowledge.

21 Q. Okay. So the only time your building would be a hazard is
22 if a significant earthquake occurred. Is that fair?

23 A. Potentially.

24 MR. DiLORENZO: Thank you.

25 Your Honor, that's all I have for this witness. I would

Atwood - X

1 like to offer 72 and 1, and 3, if I may.

2 THE COURT: Any objection?

3 MS. MOYNAHAN: No objections, Your Honor.

4 THE COURT: 72, 1, and 3 are admitted.

5

6

CROSS-EXAMINATION

7 BY MS. MOYNAHAN:

8 Q. Good morning, Mr. Atwood.

9 A. Good morning.

10 Q. Are the -- is the roof of the Glade Hotel secured to the
11 parapets?

12 A. I'm a little hard of hearing.

13 Q. I'm sorry. Is the roof of the Glade Hotel secured to the
14 parapets?

15 A. I have no idea.

16 Q. Are the floor joists secured to the bearing walls?

17 A. I don't know about secured. They are connected.

18 Q. Okay. Now, you heard Mr. McMonies testify this morning,
19 did you -- didn't you?

20 A. I'm a little hard of hearing, but I -- I saw him up here
21 and saw his lips moving.

22 Q. Do you -- do you share Mr. McMonies' concern regarding
23 safety in a URM building that has not been retrofitted?

24 A. I don't -- I didn't hear that part of his testimony. I'm
25 sorry.

Atwood - X

1 Q. Okay. Do you believe that a URM building that has not
2 been retrofitted at all could be dangerous in the event of an
3 earthquake?

4 A. I think any building could be dangerous in the event of an
5 earthquake.

6 Q. And do you think that -- do you know whether URM buildings
7 are highly vulnerable in an earthquake?

8 A. I'm not an engineer. I don't know that. I mean, I've
9 heard it, but I don't know that.

10 Q. Do you tell the tenants in the Glade Hotel -- and,
11 actually, you also have the Dante's Hotel that's also a URM
12 that hasn't been retrofitted; correct?

13 A. You know, it's funny. You asked me if I could go through
14 my records looking for an appraisal, and so I went through my
15 records, and I found a note from the City that said that
16 Dante's is actually not a URM building.

17 Q. Okay.

18 A. So I don't know about Dante's. I think it's -- apparently
19 it's poured-in-place concrete with just brick facade over it.
20 I thought it was URM until I read this note from the Bureau of
21 Development Services, manager of plans examining, or something
22 like that.

23 Q. Do you know why they sent you that note -- what the
24 occasion was to tell you?

25 A. The note?

Atwood - X

1 Q. Sure.

2 A. Actually, they didn't send it to me. The -- they wrote
3 the note to my roofer, because I reroofed the building, and he
4 was concerned about the seismic requirements for reroofing, and
5 so we went down to, I assume, apply for a permit, and the plans
6 examiner said -- wrote a note to the roofer that said, "This is
7 not a URM building."

8 Q. Okay. Thank you.

9 Do you have any reason to believe that that note from the
10 City isn't accurate?

11 A. I do not know one way or the other, but I'm assuming
12 it's -- in retrospect, it does appear to be accurate.

13 Q. So do you tell the tenants in the Glade Hotel that the
14 building is made of unreinforced masonry?

15 A. I have not.

16 Q. And do you oppose putting -- do you oppose notifying
17 tenants or prospective tenants in the Glade Hotel that the
18 building is a URM?

19 A. I oppose putting a placard on the building.

20 Q. And do you oppose giving them notice in some form prior to
21 them signing a lease?

22 A. I haven't thought about it.

23 Q. Well, in fact, you don't even use lease agreements, do
24 you?

25 A. Pardon?

Atwood - X

1 Q. You don't use lease applications for your buildings, do
2 you?

3 A. I do not.

4 Q. So you don't oppose the City's requirement that notice be
5 given in a lease application, do you?

6 A. I do. I mean, I don't think the City should tell -- force
7 other people to make speech they don't want to make.

8 Q. Okay. Now, Mr. McMonies testified that he would want a
9 family -- a family member or a loved one to know if they were
10 going to rent in a URM building; but, in fact, you don't think
11 it's your business, do you?

12 A. I've had that building for 46 years. I've been in it
13 plenty of times. I've never had any fear of any injury or
14 safety problems being in the building.

15 Q. And are you interested in measures that promote public
16 safety?

17 MR. DiLORENZO: Objection, Your Honor. Irrelevant.

18 THE COURT: Sustained.

19 You can rephrase.

20 MS. MOYNAHAN: Sure.

21 BY MS. MOYNAHAN: (Continuing)

22 Q. Can you please look at Exhibit 127. There should be --
23 I'll ask Mr. Gale if he would give you the proper book.

24 A. Okay.

25 Q. Do you recognize Exhibit 127?

Atwood - X

1 A. Is it marked Atwood 11?

2 Q. Yes, that's the one.

3 A. Yes, I believe you brought it to the deposition.

4 Q. And is this a -- an article in the press about this
5 particular lawsuit?

6 A. Is it an article about the lawsuit? Well, that's the
7 headline.

8 Q. Okay. Do you remember being interviewed for this article?

9 A. I believe so.

10 Q. And I would turn your attention to what's marked at the
11 bottom of the page as page 3 of 4. Actually, at the top of the
12 page as well.

13 A. Okay.

14 Q. And about midway down there's a paragraph in quotes.

15 "'Nobody really recognized the true costs involved,' Atwood
16 said."

17 Do you see that sentence?

18 A. Yes, that's correct.

19 Q. And the next sentence is, "We're all interested in
20 safety." You said that?

21 A. Yeah, we are. Everybody is interested in safety.

22 Q. Well, what did you mean when you say, "There's a point of
23 diminishing returns particularly when your buildings are
24 already up to current code"?

25 A. Just that.

Atwood - X

1 Q. Can you explain that, please?

2 A. Yeah. I explained it to you the other day. For example,
3 people get killed in car crashes on the freeway, and one way to
4 avoid car crashes on the freeway is to rip up all the freeways.
5 That's beyond the point of diminishing return.

6 Q. But the City isn't asking you to make any upgrades in your
7 building, is it?

8 A. Well, in a sense, they are. If I want to get rid of the
9 placard, I have to tear the building down, essentially, or
10 spend double what it's worth to replace it. So, yes, the City
11 is asking me to rip up the Glade Hotel.

12 Q. Well, the City is just asking you to place a placard;
13 isn't that correct?

14 A. Well, if I don't want the placard, they're asking me to
15 rip up the hotel.

16 Q. Okay.

17 THE COURT: Stop. Hang on.

18 Jill, strike that as nonresponsive.

19 Mr. Atwood, answer the questions that's asked. You'll
20 have a chance to answer questions that Mr. DiLorenzo --

21 THE WITNESS: Sorry.

22 THE COURT: Answer the question that was asked.

23 THE WITNESS: Maybe I misunderstood the question.

24 THE COURT: Jill, read back the last question,
25 please.

Atwood - X

1 (The court reporter read as follows: "Question:
2 Well, the City is just asking you to place a placard; isn't
3 that correct?")

4 THE WITNESS: Well, I don't look at it that way. I
5 think this is just the beginning, the tip of the iceberg.

6 BY MS. MOYNAHAN: (Continuing)

7 Q. Okay. And do you have concerns that tenants won't want to
8 live in your building if there's a placard?

9 A. Not particularly.

10 MS. MOYNAHAN: Okay. I move to admit Exhibit 127.

11 THE COURT: Any objection?

12 MR. DiLORENZO: No objection, Your Honor.

13 THE COURT: 127 is received.

14 MS. MOYNAHAN: Thank you, Your Honor.

15 BY MS. MOYNAHAN: (Continuing)

16 Q. Now, Mr. Atwood, you don't even make repairs for your
17 tenants in your buildings, do you?

18 A. My buildings are generally leased as is, and the tenants
19 make improvements to the buildings generally. I have done some
20 improvements, but I don't do them typically on a day-to-day
21 basis.

22 Q. And you don't even know if you have lead or copper pipes
23 in your building, do you?

24 A. I actually don't.

25 Q. Okay. Now, PDC, when you were working with PDC, they

Atwood - X/ReD

1 wanted to do a seismic upgrade; correct?

2 A. Yes.

3 Q. What was the purpose of the seismic upgrade? Do you know?

4 A. Again, my understanding was it was to demonstrate to the
5 world how inexpensive it would be to seismically upgrade a
6 building such as the Glade.

7 Q. And did you understand the purpose was also to make your
8 building safer?

9 A. That actually was never brought up.

10 Q. Okay. And, Mr. Atwood, you're a licensed real estate
11 agent, aren't you?

12 A. I am.

13 Q. Okay. Do you have any understanding as to whether a
14 seismic upgrade would make a building safer?

15 A. I don't think that that's part of the real estate
16 regulations.

17 MS. MOYNAHAN: I have no further questions.

18 THE COURT: Redirect?

19

20 REDIRECT EXAMINATION

21 BY MR. DiLORENZO:

22 Q. So, Mr. Atwood, you object to placing the placard on your
23 property on principle grounds; is that correct?

24 A. Yes.

25 Q. You don't believe the City should force you to speak in

Atwood - ReD

1 this way; is that right?

2 A. That's correct.

3 Q. The City could speak all it wants if it did so itself, as
4 far as you're concerned; isn't that right? If the City wanted
5 to speak directly, there's nothing you could do to stop them,
6 is there?

7 A. I guess I don't understand how the City would speak
8 directly.

9 Q. Well, for instance, could the City publish brochures
10 educating people on the relative dangers of URMs in
11 earthquakes?

12 A. Absolutely.

13 Q. Right. And the City could do many other things to educate
14 people about their surroundings; isn't that right?

15 A. Yes.

16 Q. And because you have a principled objection to speaking
17 the way the City wants you to speak, to stop speaking, you will
18 have to incur twice the cost of replacing your building; is
19 that right?

20 A. That's correct, to my understanding.

21 MR. DiLORENZO: That's all I have, Your Honor.

22 THE COURT: Any redirect -- recross?

23 MS. MOYNAHAN: No, Your Honor. Thank you.

24 THE COURT: Mr. Atwood, you may step down.

25 MS. MOYNAHAN: Thank you.

Beardsley - D

1 MR. DiLORENZO: Your Honor, our next witness is
2 Mr. Beardsley.

3 Could we have a two-minute break in between?

4 THE COURT: Sure. We'll be in recess briefly.

5 (Recess taken.)

6 MR. DiLORENZO: Your Honor, we next call
7 John Beardsley.

8 THE COURT: Mr. Beardsley, if you'd come forward,
9 please.

10

11

12 JOHN BEARDSLEY,
13 called as a witness on behalf of the Plaintiffs, being first
14 duly sworn, is examined and testified as follows:

14

15 THE WITNESS: It will be.

16 DEPUTY COURTROOM CLERK: Please step up and have a
17 seat.

18 MR. DiLORENZO: Paul, we're going to reference
19 Exhibit 73.

20 DEPUTY COURTROOM CLERK: Okay.

21

22 DIRECT EXAMINATION

23 BY MR. DiLORENZO:

24 Q. Good morning. It's still morning. Good morning,

25 Mr. Beardsley. You're the managing member of Fountain Village

Beardsley - D

1 Development; is that right?

2 A. That's correct.

3 Q. And is Fountain Village Development one of the plaintiffs
4 in this case?

5 A. It is.

6 THE COURT: Hang on, please.

7 Mr. Beasley, if you would sit closer to the microphone --
8 thank you -- so everybody can hear you, including the court
9 reporter and counsel. Thank you.

10 THE WITNESS: All right.

11 BY MR. DiLORENZO: (Continuing)

12 Q. And Fountain Village is one of the plaintiffs in this
13 case; is that right?

14 A. It is.

15 Q. And does it own a brick building?

16 A. It owns a number of brick buildings.

17 Q. Okay. Is one of those buildings known as Western Rooms?

18 A. Yes.

19 Q. Could you take a look at Exhibit No. 73. Let me know when
20 you get there.

21 A. I'm here.

22 Q. Okay. Is this the declaration that you filed in this case
23 in support of your motion for a preliminary injunction?

24 A. Yes.

25 Q. And are the statements contained therein true?

Beardsley - D

1 A. They are.

2 Q. Mr. Beardsley, if I can call your attention to paragraph 5
3 of the declaration, you mention that after the building was
4 acquired by your company it underwent a complete seismic
5 upgrade.

6 Do you see that?

7 A. Yes.

8 Q. And that was what year?

9 A. 1979, '80.

10 Q. Okay. And what was involved in that complete seismic
11 upgrade?

12 A. Well, all of the parapets were tied to the roof with L
13 bracing. All the floors were tied to the walls with L bracing.
14 The walls were reinforced. X bracing was put in place in the
15 ground floor in a couple of places that are visible from the
16 sidewalk.

17 That's about all that you can see visually of the seismic
18 upgrading we did.

19 Q. Okay. Did the City of Portland approve all of the work?

20 A. Yes. We did the work according to the 1977 seismic code,
21 which I believe was the first seismic code that Portland ever
22 enforced.

23 Q. Okay. Did the City require steel bracing as part of the
24 seismic retrofitting?

25 A. The steel bracing is what I referred to as X bracing.

Beardsley - D

1 Q. Okay. What else did the City require you to do to the
2 building?

3 A. Well, as I said, the parapet walls tied to the roof. The
4 floors tied to the walls. That's done with L bracing, and then
5 you bolt into the wall, and the bolts are secured by epoxy.
6 And then you have an independent testing agency that comes and
7 checks on the adherence of each bolt, whether it's strong
8 enough, such that it doesn't just rip out of the wall.

9 So it's pretty extensive activity.

10 Q. Do you recall how long the project took?

11 A. About six months.

12 Q. And was that of constant work?

13 A. Yes, it was.

14 Q. Okay. And approximately how much did it cost you to
15 complete the retrofit?

16 A. It was in excess of a million dollars.

17 Q. Okay. And after the retrofit was complete, did the
18 building meet all of the City's seismic standards, then, in
19 effect?

20 A. It did.

21 Q. Mr. Beardsley, if an injunction does not issue from this
22 court, will Western Rooms, nevertheless, be subject to the
23 placarding ordinance?

24 A. That's my understanding.

25 Q. And will it have to post a placard like that in

Beardsley - D

1 Defendants' Exhibit 110?

2 A. Yes.

3 Q. Will you have to also print similar language in your
4 rental application?

5 A. I understand that to be the case.

6 Q. Do you use your rental applications for advertising?

7 A. We do not.

8 Q. What do you use your rental applications for?

9 A. Basically to get a history of the applicant, including
10 their credit, to determine whether they would be a safe tenant
11 for the other tenants to be occupying the premise with.

12 Q. Do you believe your building is unreinforced?

13 A. Absolutely not.

14 Q. So if you place a placard on your building and include the
15 city-mandated language in the rental applications, will you be
16 telling the truth?

17 A. No. They're making me a liar.

18 Q. And you object to being forced to make those statements;
19 is that right?

20 A. I do.

21 Q. And as far as you know, is the building in compliance with
22 all other City building codes?

23 A. It is.

24 MR. DiLORENZO: Your Honor, I offer number 73.

25 THE COURT: Any objection?

Beardsley - X

1 MS. MOYNAHAN: No objection.

2 THE COURT: 73 is admitted.

3 MR. DiLORENZO: That's all I have for this witness,
4 Your Honor.

5 THE COURT: Cross-exam.

6 MS. MOYNAHAN: Thank you, Your Honor.

7

8

CROSS-EXAMINATION

9 BY MS. MOYNAHAN:

10 Q. Mr. Beardsley, do you have other URM buildings that have
11 never been retrofitted?

12 A. No.

13 Q. Do you have other buildings made of masonry that have
14 never been retrofitted?

15 A. All of my buildings that are masonry have been retrofitted
16 to some degree.

17 Q. And, in fact, you believe that all masonry is reinforced,
18 don't you?

19 A. Would you repeat that?

20 Q. Sure. You believe that all masonry, by its very nature,
21 is reinforced, don't you?

22 A. Yes.

23 Q. So you don't believe there's any such thing as
24 unreinforced masonry; correct?

25 A. It's all in the interpretation.

Beardsley - X

1 Q. You understand that the City has code regulations that
2 specify what unreinforced masonry is, however, don't you?

3 A. I do.

4 Q. Okay. And do you believe that people have a right to know
5 if they're entering a unreinforced masonry building?

6 A. I don't believe it's my obligation.

7 Q. My question is do you think they have a right to know?

8 A. No.

9 Q. And you said that you don't want to put up a placard
10 because that makes you a liar, but do you know of any reason
11 why you couldn't put up a second placard that says you disagree
12 with this message?

13 A. And then I -- I disagree with the premise. I don't want
14 my building littered with signs debating your sign then my sign
15 then your sign then my sign.

16 MS. MOYNAHAN: Okay. Mr. Gale, would you please give
17 defendants' exhibits to Mr. Beardsley? The same volume. Thank
18 you.

19 BY MS. MOYNAHAN: (Continuing)

20 Q. And would you please turn to Exhibit 128. Do you
21 recognize Exhibit 128?

22 A. I do.

23 Q. What is that?

24 A. It's a sign that is on -- above a sprinkler at my building
25 at 824 Southwest First Avenue.

Beardsley - X

1 Q. Was that sign posted at the requirement of the fire
2 department?

3 A. I -- I don't know.

4 Q. So have you attempted to take that plaque down?

5 A. No. I -- it's not -- it's not unattractive. It's not
6 intrusive.

7 Q. Do you have other signs on any of your buildings that are
8 up because the government has required it? For example, a
9 No Minors entry sign, that sort of thing?

10 A. Yes. They're within my tenants' premises.

11 Q. Do you object to having those signs hanging in your
12 building?

13 A. Well, generally, they are stuck on the window glass, but
14 I -- I do not.

15 Q. You don't object?

16 A. I do not, no.

17 MS. MOYNAHAN: Okay. I move to admit 128, please.

18 THE COURT: Any objection?

19 MR. DiLORENZO: No objection.

20 THE COURT: 128 is received.

21 MS. MOYNAHAN: Thank you, Your Honor.

22 BY MS. MOYNAHAN: (Continuing)

23 Q. Mr. Beardsley, how much will it cost you to print new
24 rental applications if you have to do that?

25 A. I have no idea. I get the rental applications from the

Beardsley - X/ReD

1 local management group, so I -- I don't know.

2 Q. Do you order them -- get big boxes, or is this something
3 you print off the internet?

4 A. You know, I don't -- I'm pretty sure we don't print off
5 the internet. They're a standard form. I don't know if
6 they're a Stevens Ness form or what form they are, but they're
7 a form.

8 Q. Okay. This is a local vendor?

9 A. I believe.

10 Q. So, in fact, if the lease application notification
11 ordinance is upheld, that local vendor, in theory, would be
12 able to make this change in the applications for a widespread
13 group of building owners; isn't that correct?

14 A. I suppose.

15 MS. MOYNAHAN: Thank you. I have no further
16 questions. Thank you.

17 THE COURT: Redirect?

18 MR. DiLORENZO: Yes.

19 ///

20 REDIRECT EXAMINATION

21 BY MR. DiLORENZO:

22 Q. Mr. Beardsley, if you can take another look at 128.

23 A. Yes.

24 Q. Was that sign on your building when you purchased it?

25 A. It was.

Beardsley - ReD

1 Q. Ms. Moynahan talked about a No Minors sign. There's a
2 No Minors sign in the window for one of your tenants?

3 A. Actually, a number of tenants.

4 Q. A number of tenants?

5 A. Yes.

6 Q. That No Minors sign is not your sign, is it?

7 A. It is not.

8 Q. It's your tenant's sign; right?

9 A. Yes.

10 Q. And is that something your tenant chooses to do?

11 A. I believe it's required of him to do it.

12 Q. Right. But your tenant has the right to do whatever your
13 tenant wants to do with their space?

14 A. Yes.

15 MR. DiLORENZO: That's all I have. Thank you.

16 MS. MOYNAHAN: Nothing further, Your Honor.

17 THE COURT: You may step down.

18 MR. DiLORENZO: Your Honor, I'm going to use the
19 allotted time to admit or to offer number 5, which is the
20 declaration of Jeff Reingold, and then I would like to just
21 call your attention to a couple portions of it as if it were
22 his direct examination.

23 Number 5.

24 THE COURT: Yes. Are we going to have Ms. Merlo
25 testify this morning?

Beardsley - ReD

1 That's what the list says.

2 MR. DiLORENZO: I'm prepared to call Ms. Merlo, but
3 she's not here right now.

4 MS. MOYNAHAN: Your Honor, if I may, we conferred at
5 various times this morning trying to determine if she needs to
6 be here, and we agreed she wouldn't.

7 THE COURT: Okay.

8 MS. MOYNAHAN: So she's --

9 THE COURT: Will she not be?

10 MS. MOYNAHAN: She isn't going to come now until
11 after lunch. We have been conferring about the schedule.

12 THE COURT: That's fine. Thank you. Go ahead.

13 MR. DiLORENZO: Your Honor, at first we thought that
14 given the length of Mr. McMonies' cross-examination, we thought
15 we were going to proceed a little slower. So it looks like we
16 made up a lot of time for the last two witnesses.

17 THE COURT: Seems like it. Go ahead.

18 MR. DiLORENZO: So number 5 is a declaration from
19 Jeff Reingold in support of the motion. Mr. Reingold is the
20 president of Income Property Management Company. He speaks
21 about how long his company has been in business -- over 45
22 years. They manage approximately 7,500 residential units and
23 600,000 square feet of commercial office. And then in order to
24 determine whether a lease agreement with a prospective tenant
25 is -- is advisable from the landlord's point of view, they

1 require the tenant to complete a lease application.

2 He attaches a lease application that is in general use.
3 It is the Multifamily NW lease application, and he makes it
4 clear in paragraph 4 that the function of a lease application
5 is not to advertise any of the properties that his company
6 manages, nor does it solicit or propose a transaction to a
7 tenant. Rather, its function is to allow the landlord to
8 receive sufficient information from the prospective tenant to
9 make an informed decision about the financial risks involved in
10 leasing to that tenant.

11 And it's not industry standard to make applications
12 available to prospective tenants with whom they have not
13 already met or spoken. So, generally, a prospective tenant
14 will contact a landlord in response to an ad or an
15 advertisement or their own research.

16 It is at the end of the process where the lease
17 application is presented to the tenant. So there is nothing in
18 the lease application designed to advertise or encourage a
19 transaction.

20 And that's all it basically says.

21 THE COURT: All right. Thank you.

22 MR. DiLORENZO: So I offer it.

23 MS. MOYNAHAN: Your Honor, I only have one objection,
24 and that is the first sentence of paragraph 4. "The function
25 of a lease application is not to advertise any of the

1 properties IPM Company manages, nor does it solicit or propose
2 a transaction to a tenant."

3 I think this really is limited to individual property
4 owners -- that particular concept. We don't know what the
5 function of the lease application is for each building owner
6 for which this company manages property. I think that
7 statement is overbroad for the purpose of this declaration.

8 Otherwise, I have no objection.

9 THE COURT: Go ahead.

10 MR. DiLORENZO: Well, he limits it to IPM. He says
11 it's not to advertise any of the properties that IPM manages.

12 So we've had each one of our witnesses say the same thing,
13 and we can't interview the world, of course.

14 THE COURT: Ms. Moynahan, it seems that it's
15 restricted to the witness's personal knowledge with respect to
16 his particular operation and duties and not to the world
17 generally. So if the Court accepts it for that purpose, is
18 there any objection then?

19 MS. MOYNAHAN: No, Your Honor.

20 THE COURT: All right. Then 5 is received in its
21 entirety.

22 Mr. DiLorenzo, where does that leave us?

23 MR. DiLORENZO: Well, Your Honor, our next witness is
24 Ms. Merlo, and it's ten to noon. I'd like to propose maybe we
25 break for lunch and have her here as soon as the lunch break

Merlo - D

1 concludes.

2 THE COURT: Will that be possible?

3 MS. MOYNAHAN: Oh, absolutely, Your Honor.

4 THE COURT: Come back at 1:15. We'll reconvene at
5 1:15. We'll be in recess until then.

6 (Recess taken.)

7 MR. DiLORENZO: Our next witness is Carmen Merlo.

8

9 CARMEN MERLO,

10 called as a witness on behalf of the Plaintiffs, being first
11 duly sworn, is examined and testified as follows:

12

13 THE COURT: Please state your name for the record and
14 spell your last name.

15 THE WITNESS: Carmen Merlo. M-e-r-l-o.

16 DEPUTY COURTROOM CLERK: Thank you.

17

18 DIRECT EXAMINATION

19 BY MR. DiLORENZO:

20 Q. Good afternoon, Ms. Merlo.

21 A. Good afternoon.

22 Q. You were the Deputy Chief Administrative Officer for the
23 City; is that right?

24 A. Correct.

25 Q. And you are currently assigned to the City's Bureau of

Merlo - D

1 Finance; is that correct?

2 A. The Office of Management and Finance.

3 Q. Okay. And you have been there for about how many months?

4 A. 16 months.

5 Q. Okay. Prior to that, you were the director of Bureau of
6 Emergency Management; is that right?

7 A. Correct.

8 Q. And what did your duties there entail?

9 A. So as the director, we established the strategic goal and
10 plan for the City, and that includes developing policies,
11 programs, procedures to mitigate the risk of any hazard to the
12 city of Portland.

13 Q. Okay. Did your responsibilities also entail public
14 education and outreach?

15 A. It did.

16 Q. How about emergency response plans?

17 A. Correct. Yes.

18 Q. And while you were with the bureau, you also staffed the
19 policy advisory committees created by the City Council to
20 examine URM building policy; is that right?

21 A. Correct.

22 Q. And the policy committee was chaired by Margaret Mahoney?

23 A. Yes.

24 Q. And she was the former director of the Bureau of
25 Development Services?

Merlo - D

1 A. Correct.

2 Q. And there were other committees too. Standards and
3 support; is that right?

4 A. Yes.

5 Q. Can you explain to the Court what those other committees
6 did?

7 A. Sure. The retrofit standards committee was there to make
8 recommendations regarding the retrofit standards for
9 unreinforced masonry buildings. We had different classes of
10 buildings. Class 1 being the most critical, high occupancy
11 buildings, and Class 4 being the smaller and usually one-story
12 buildings.

13 The supports committee was there to make recommendations
14 regarding both financial and other kinds of mechanisms that
15 would make it easier for owners to retrofit their building. So
16 anything from waiving permit fees, coming up with property
17 abatement, property tax abatement programs, et cetera.

18 Q. But you didn't staff those committees?

19 A. Not me personally, no.

20 Q. You personally staffed the policy committee?

21 A. Correct.

22 Q. And what was the function of the policy committee?

23 A. The policy committee was there to take the recommendations
24 from both the retrofit standards and the support committee and
25 ultimately make the final recommendations to City Council.

Merlo - D

1 Q. Okay. And that policy committee met for about two years,
2 didn't it?

3 A. It did.

4 Q. When did it come to an end?

5 A. I don't know exactly when. It was, I want to say, in -- I
6 was there until 2017, and there was still -- they had just
7 finished a meeting in 2017.

8 Q. Okay. And I understand your role was to put together
9 agendas, identify policy issues, and ultimately draft a report
10 for the City Council. Is that fair?

11 A. Correct.

12 Q. And all that work culminated in a final report?

13 A. Yes.

14 Q. Okay. Could you take a look at what should be up there as
15 Exhibit 13? Plaintiffs' Exhibit 13.

16 Mr. Gale is getting it for you.

17 A. Okay. Thank you.

18 Q. You can take a moment to navigate there.

19 A. Okay. Got it.

20 Q. Okay. Is Exhibit 13 familiar?

21 A. Yes.

22 Q. Is that, in fact, the final report?

23 A. I can't tell you it's the "final" final, but it looks like
24 a report that I recall seeing, yes.

25 Q. Okay. And you had charge with finalizing that report; is

Merlo - D

1 that correct?

2 A. Yes.

3 Q. Okay. And it was -- one of your last official acts at the
4 bureau before you took your present job; is that true?

5 A. On this project, yes.

6 Q. Okay. Jonna Papaefthimiou --

7 P-a-p-a-e-f-t-h-i-m-i-o-u for the court reporter.

8 -- she was one of the people who you supervised at the
9 bureau; is that right?

10 A. Correct.

11 Q. And what was her title?

12 A. Jonna was the community resilience manager -- planning and
13 community resilience manager.

14 Q. She was responsible for most of the policy committee's
15 written work product; is that correct?

16 A. Correct.

17 Q. Okay. I would like you to take a look at Exhibits 8
18 and 9.

19 Let's look at Exhibit 8 first. Can you tell us what that
20 is?

21 A. This is an excerpt from, I think, some notes that we
22 provided to the policy committee regarding items where there
23 wasn't consensus on -- on the part of the policy committee.

24 Q. Okay. And what about number 9?

25 A. I'm sorry. I was looking ahead. Item -- document 8,

Merlo - D

1 Exhibit 8, is where there was consensus reached, and document 9
2 is where consensus was not reached by the policy committee.

3 Q. Okay. And 8 and 9 appear to be PowerPoint slides.

4 A. Oh, sure.

5 Q. Did you have charge of preparing those slides?

6 A. Yes.

7 MR. DiLORENZO: Your Honor, I'm going to offer things
8 as I go. I would like to offer numbers 13, 8, and 9 with your
9 permission.

10 THE COURT: Any objection?

11 MS. MOYNAHAN: No objection.

12 THE COURT: They are received.

13 MR. DiLORENZO: Thank you, Judge.

14 BY MR. DiLORENZO: (Continuing)

15 Q. Now, the committee wanted owners to avoid paying
16 relocation fees to tenants when retrofits were undertaken; is
17 that right? Is that your recollection?

18 A. Yes.

19 Q. Okay. Is that what "tenant relocation fee waiver" means?

20 A. Correct.

21 Q. Can you tell the judge what a tenant relocation fee is?

22 A. Under new regulations that were in front of Council, if an
23 owner evicted a tenant, I think it was less than 60 -- I don't
24 remember the exact time period, but then they were forced to
25 pay the relocation fee for the tenant.

Merlo - D

1 Q. Okay. And the committee wanted to waive that in the case
2 of a retrofit?

3 A. Correct.

4 Q. Okay. How about voluntary placarding? Do you see
5 established standards for voluntary placarding there?

6 A. Yes.

7 Q. Did the committee discuss standards for voluntary
8 placarding?

9 A. Not standards themselves. We talked about possible kinds
10 of placarding, but not standards.

11 Q. So would that be something like LEED certification, that
12 type of thing?

13 A. That would be one type. Correct.

14 Q. What other types did the committee discuss?

15 A. There are standards in place by the U.S. Resiliency
16 Council. They assign -- instead of a color, like you would
17 with LEED -- like LEED Gold, LEED Silver -- you would have
18 stars.

19 So in this case, it would be one to four stars based on
20 the seismic resilience of the building.

21 Q. Have you heard the term "attaboy placarding"?

22 A. No.

23 Q. Okay. Is this the kind of voluntary placarding that a
24 building owner would want to place on their building?

25 A. Correct. It would be celebrating the fact that the owner

Merlo - D

1 had made retrofits to the building.

2 Q. Okay. Let's turn to number 9.

3 A. Okay.

4 Q. This is consensus not reached.

5 Tenant notification. What was that about?

6 A. This had to do with putting a provision in the leasing
7 document that would notify the tenant that the building was
8 unreinforced masonry.

9 Q. Okay. And the committee did not want to include that
10 feature; is that right?

11 A. There was no consensus reached on that, correct.

12 Q. Right. So there was no recommendation to do it?

13 A. Correct.

14 Q. Okay. How about URM building placarding. Explain that.

15 A. This is, I guess, the opposite of the voluntary
16 placarding. This is where we would -- the City would require
17 owners to attach a placard to the front of the building
18 notifying both occupants and passersby that the building was
19 unreinforced masonry.

20 Q. And the committee did not want to include that in its
21 recommendation either?

22 A. Again, there was no -- no consensus reached. Some did;
23 some didn't.

24 Q. So as a committee, there was no recommendation to do that;
25 is that right?

Merlo - D

1 A. Correct.

2 Q. Can you turn to Exhibit 7. These purport to be summary
3 minutes, dated November 8, 2017, of the committee.

4 Do you see that?

5 A. I do.

6 Q. Okay. In the minutes, did the committee refer to a
7 recommendation for voluntary placarding?

8 A. I'm sorry. Can you repeat the question?

9 Q. Did the committee reference a recommendation for voluntary
10 placarding?

11 A. Yes.

12 Q. Okay. Was there any recommendation in these minutes for
13 any type of placarding like that which this ordinance provides?

14 A. I'm sorry. Can you repeat the question?

15 Q. Was there a recommendation in the minutes for the
16 committee for the type of placarding which the current
17 ordinance provides?

18 A. The type. I'm sorry. Okay. No.

19 MR. DiLORENZO: Your Honor, I would like to offer 7.

20 MS. MOYNAHAN: No objection.

21 THE COURT: 7 is received.

22 BY MR. DiLORENZO: (Continuing)

23 Q. Let's look at Exhibit 10.

24 Exhibit 10 is dated July 2017 and it says "Draft." Is
25 that familiar?

Merlo - D

1 A. Yes.

2 Q. Is that a prior draft of the committee report that you
3 just identified?

4 A. It is.

5 Q. If you can turn to page 25 of that document, and let me
6 know when you're there.

7 A. I'm there.

8 Q. On the right-hand side, there's a section entitled
9 "Voluntary Placarding."

10 Do you see that?

11 A. I do.

12 Q. Okay. And so that was a part of the -- of the draft
13 report; is that right?

14 A. Yes.

15 Q. And if you can also turn to page 32.

16 A. Okay.

17 Q. You see "Other Risky Buildings;" is that right?

18 A. Yes.

19 Q. Tell me about that section. Why was that section Other
20 Risky Buildings included in the draft?

21 A. Sure. This acknowledges that URMs are just one type of
22 building that we consider dangerous to public health and
23 safety. There are other kinds of buildings, specifically soft
24 story, non-ductile concrete that we also believe posed life
25 safety risk. The intent was to include those buildings in here

Merlo - D

1 as kind of a sign that we would, in turn, pursue policies that
2 would also establish retrofit standards for those kinds of
3 buildings as well.

4 Q. Okay. And these two sections that I -- that we just
5 looked at, the one on page 25 and the one on page 32, those
6 reflected the -- the viewpoint of the committee?

7 A. At that time, yes.

8 Q. Okay. And at the time the draft was produced, the
9 committee discussion also concerned some form of mandatory
10 retrofits; is that correct?

11 A. Yes.

12 Q. Okay. And what kind of mandatory retrofits were under
13 discussion at the time?

14 A. We had talked about things like bracing the parapets,
15 tying the roof to the walls and floors, those kinds of
16 retrofits.

17 Q. Okay. Turn to page 34, the top of the page of the draft,
18 there's a section Liquefaction?

19 A. Yes.

20 Q. Was the committee also concerned about liquefaction zones?

21 A. We did discuss the -- yes, the significant areas of
22 liquefiable soils in Portland.

23 Q. Why was liquefaction a concern for the committee?

24 A. Because buildings that perform even on -- perform poorly
25 on solid ground are going to perform even worse on soils that

Merlo - D

1 liquefy.

2 Q. Let's compare what we just looked at to Exhibit --

3 MR. DiLORENZO: Before we do that, Your Honor, I
4 would like to offer 10.

5 THE COURT: Any objection?

6 MS. MOYNAHAN: No objection.

7 THE COURT: 10 is received.

8 BY MR. DiLORENZO: (Continuing)

9 Q. Let's compare Exhibit 10 now to Exhibit 13, which we
10 talked about, which is the final report.

11 A. Okay.

12 Q. All right. Can you turn to the table of contents?

13 A. On 10 or 13?

14 Q. On 13.

15 A. Okay.

16 Q. Okay. Do you see where it says "other risky buildings"?

17 A. Yes.

18 Q. And it notes that the discussion of other risky buildings
19 is at page 32?

20 A. Yes.

21 Q. Could you turn to page 32.

22 A. Yes. I'm there.

23 Q. Can you tell me where that section on other risky
24 buildings is?

25 A. It is not there.

Merlo - D

1 Q. Why is it not there?

2 A. Because we had a policy committee member that had
3 recommended we take that section out.

4 Q. One policy committee member?

5 A. Correct.

6 Q. And who was that?

7 A. Reid Zimmerman.

8 Q. And who is Reid Zimmerman?

9 A. Reid Zimmerman is an engineer that was on our policy
10 committee.

11 Q. Is Mr. Zimmerman associated with KPFF Engineering?

12 A. He is.

13 Q. Okay. If the City adopted mandatory retrofit standards,
14 would engineering companies like KPFF obtain significant
15 business?

16 A. It's possible.

17 Q. Were any conflict of interest statements signed by members
18 of the committee while you supervised it?

19 A. No.

20 Q. Conflict of interest disclosures were required by the
21 auditor at that time, were they not?

22 A. They were.

23 Q. Why weren't the conflict of interest provisions signed?

24 A. It was an inadvertent oversight.

25 Q. Okay. Let's take a look at Exhibit 10, which is the draft

Merlo - D

1 again.

2 A. Okay.

3 Q. At page 25.

4 A. I'm there.

5 Q. Now, the draft advocated for voluntary placarding of
6 upgraded buildings as opposed to penalizing owners of buildings
7 that had not yet been retrofitted; is that right?

8 A. Yes.

9 Q. And that's explained in the draft on voluntary placarding;
10 is that right?

11 A. Yes.

12 Q. Okay. Can you turn back to the final report?

13 A. Okay.

14 Q. Does the final report even mention voluntary placarding
15 any longer?

16 A. Not that I can readily tell, no.

17 Q. So that was taken out, too, wasn't it?

18 A. Correct.

19 Q. And why was that section taken out?

20 A. After additional conversations with the policy committee,
21 that, in fact, turned out to be another area where there wasn't
22 consensus reached.

23 Q. How -- how many members of the policy committee were
24 consulted to take out the section on voluntary placarding?

25 A. Well, we would distribute new drafts of the policy

Merlo - D

1 committee to the members so they had an opportunity to review
2 the new draft and make comments.

3 Q. Was there a vote taken on that point?

4 A. We didn't run the committees by vote. It was run through
5 consensus, so we didn't typically -- we didn't typically vote
6 on things.

7 Q. Was there a meeting held to discuss whether voluntary
8 placarding that appeared in the draft would be taken out for
9 the final?

10 A. Again, we -- when we sent -- typically, when we sent out a
11 new draft of the report, we would also send out a quick summary
12 describing the changes from the brief draft. So it is possible
13 that we sent out a memo explaining what the changes from the
14 previous draft were.

15 Q. Which members of the advisory committee approved taking
16 voluntary placarding out of the proposal?

17 A. I don't remember offhand.

18 Q. Do you remember how many did?

19 A. I really don't.

20 Q. Okay. All right. Let's take a look at Exhibit No. 11.

21 A. All right.

22 Q. This appears to be an email from you, dated December 12,
23 2017, at 5:53 p.m.

24 Do you recall that email?

25 A. I do.

Merlo - D

1 Q. Was that addressed to all the members of the policy
2 committee?

3 A. Yes.

4 Q. And what was the purpose of this email?

5 A. This was to get final feedback on the -- the draft of the
6 policy committee report.

7 Q. Okay. And you received a number of responses to the
8 email?

9 A. I recall that I did, yes.

10 Q. And was one of the responses from Mr. Zimmerman?

11 A. Yes.

12 Q. And are his comments up above?

13 A. Yes.

14 Q. All right. I noticed that he responded on the same day at
15 10:01 p.m. in the evening; is that right?

16 A. Yes.

17 Q. Did you get this in the evening or the next morning?

18 A. I don't remember when I opened it. It could have been
19 that evening; it could have been the next day.

20 Q. Okay. His comments are in red.

21 So if you turn the page, it looks like he's crossing out
22 the section of the draft on other risky buildings or at least
23 proposing to do that?

24 A. Correct.

25 Q. And in his comment he says, quote, "Recommend removing

Merlo - D

1 this section entirely. It detracts from the URM-specific
2 message and could become a lightning rod to be used by those
3 opposing the mandate as a reason to do nothing for URM
4 buildings," paren "(i.e. the argument that URM buildings are
5 being," quote, "'picked on'", unquote "when there are other
6 vulnerable building types,)" end paren.

7 Did you agree with that rationale?

8 A. It's really not so much for me to agree or disagree. We
9 weren't in the habit of second-guessing the feedback from our
10 policy committee members.

11 So, in general, we accepted, I would say, 92 percent of
12 all comments and feedback that were given to us by the policy
13 committee members.

14 Q. Okay. If you can flip the page, this section on
15 Liquefaction and the section on Modified Bolts Plus are also
16 taken out?

17 A. Uh-huh.

18 Q. And that was another one of Mr. Zimmerman's suggestions?

19 A. Yes.

20 Q. Okay. If you can turn the page again, the section on
21 Type E Soils was taken out?

22 A. Yes.

23 Q. That was one of his suggestions?

24 A. Correct.

25 MR. DiLORENZO: Your Honor, I would like to offer

Merlo - D

1 number 11.

2 MS. MOYNAHAN: No objection.

3 THE COURT: 11 is received.

4 BY MR. DiLORENZO: (Continuing)

5 Q. Do you -- did you run Mr. Zimmerman's suggestions in
6 section -- in -- I'm sorry -- in Exhibit 11 by the other
7 members of the committee to deliberate?

8 A. I didn't do it for Reid, and I didn't do it for anybody
9 else's.

10 Q. You just accepted his changes?

11 A. Correct.

12 Q. If you take a look at number 12, this is an email from
13 Jonna Papaefthimiou to you. I believe it's the next day,
14 December 19th, and it's at 8:00 a.m. So we have the suggestion
15 made at 10:00 p.m., and this is at 8:00 a.m. the next day, and
16 is this the email in which Ms. Papaefthimiou tells you she has
17 accepted Reid's changes?

18 A. Yes.

19 Q. So it wasn't even a matter of hours before his changes
20 were included in the report.

21 Were the other members of the committee notified about the
22 changes before the final report was printed?

23 A. Well, again, we typically sent out a memo summarizing the
24 changes from the last draft, so it's -- it's not as if we would
25 have sent a communication out to the policy committee members

Merlo - D/X

1 notifying them each time we received a proposed change to the
2 draft.

3 Q. Okay. Now, do you recall during the deposition when I
4 asked your counsel to see if she could locate any further
5 inquiry that was made to the policy committee about these
6 recommendations?

7 A. I do.

8 Q. And is it a correct statement that the City has been
9 unable to locate any such communication?

10 A. That is true.

11 MR. DiLORENZO: Thank you.

12 Your Honor, that's all I have.

13 THE COURT: Cross-exam.

14 MS. MOYNAHAN: Thank you, Your Honor.

15

16 CROSS-EXAMINATION

17 BY MS. MOYNAHAN:

18 Q. Ms. Merlo, would you please turn to Exhibit 13.

19 A. Okay.

20 Q. And turn to page 1 of 37 of that exhibit.

21 A. Okay.

22 Q. And can you please tell us were there URM building owners
23 on the policy committee?

24 A. Yes, there were.

25 Q. And who in this committee list of policy committees are

Merlo - X

1 building -- URM building owners? Do you know?

2 A. I do. We have Tom Carrollo and Walter McMonies who were
3 direct owners, but we had other members on here that
4 represented building owners, and so we had Tom Sjostrom from
5 BOMA. We had Jen Sohm with Portland Public Schools. They are
6 a large owner of unreinforced masonry buildings. Javier Mena
7 with Portland Housing Bureau. We do a lot of work with
8 affordable housing properties, many of which are URM buildings.
9 And Pastor Andersen, with St. James Lutheran, who also was
10 there representing religious institutions.

11 Q. And Tom Carrollo, it says he works for Beardsley Building
12 Development. Would you happen to know if that's related to
13 John Beardsley?

14 A. Yes.

15 Q. And did Tom Carrollo -- was he on the committee in his
16 personal capacity, or was he there on behalf of Beardsley
17 Building Development? Do you know that?

18 A. He was there in his role as Beardsley Building
19 Development.

20 Q. Do you know if any of these committee members completed
21 conflict of interest forms?

22 A. They did not.

23 Q. Okay. And, in fact, there may be many committee members
24 here who may have conflicts of interest, depending upon the
25 recommendations of the policy committee; isn't that correct?

Merlo - X

1 A. It's possible.

2 Q. Okay. I'll ask you to --

3 MS. MOYNAHAN: Mr. Gale, would you please give
4 Ms. Merlo the City's exhibits, or are they already up there?

5 DEPUTY COURTROOM CLERK: They are right here.

6 THE WITNESS: Thank you.

7 BY MS. MOYNAHAN: (Continuing)

8 Q. Would you please turn to Exhibit 106.

9 A. Okay.

10 Q. And do you recognize Exhibit 106?

11 A. Yes.

12 Q. Were you involved -- and it's a -- is this a resolution?

13 A. It is a resolution, yes.

14 Q. Right. Were you involved at all in the drafting of this
15 resolution?

16 A. In part, yes.

17 Q. And I see that it's -- it was submitted -- it was prepared
18 May 9, 2018.

19 A. Oh, I'm sorry. Not -- I was -- not this one. My regrets.
20 No, not this one.

21 Q. Okay. Can you please look at the third -- I'm sorry, the
22 fourth "whereas" on the first page?

23 A. Yes.

24 Q. Does this "whereas" direct the Bureau of Emergency
25 Management to do anything with respect to the URM buildings?

Merlo - X

1 A. Well, it's asking them to consult with members of the
2 interested public.

3 Q. All right. And when you were working on the URM policy --
4 I'm sorry, staffing the URM policy committee, did you have an
5 understanding as to what Council's directive to the committee
6 members was?

7 A. Generally speaking, the direction was to coordinate
8 activities with Prosper Portland and the Bureau of Development
9 Services to provide policies, not just mandatory retrofit, but
10 other kinds of policies that would incent building owners to
11 make retrofits to their building.

12 Q. These were all types of building owners?

13 A. Very specific to unreinforced masonry.

14 Q. Okay. And so a few minutes ago, when Mr. DiLorenzo
15 referred to a comment made by Reid Zimmerman, part of the --
16 well, let's just look at it. Exhibit 11 in the plaintiffs'
17 book, if you still have that handy.

18 A. Okay.

19 Q. And that would be page 32 of 37. It's really just the
20 second page. It says 32 of 37.

21 A. On Exhibit 11?

22 Q. Yes.

23 A. Exhibit 11 is just the email. Oh, sorry. The next page.

24 Q. If you turn to the next page?

25 A. Sure. Yes.

Merlo - X

1 Q. Right. There were -- hang on. The comment box that
2 apparently Mr. Zimmerman had written says, "It detracts from
3 the URM-specific message."

4 Could you explain what "the URM-specific message" means?

5 A. The direction from Council was to make policy
6 recommendations specific to unreinforced masonry buildings.

7 Q. And, again, why was "other risky buildings" originally
8 included in the draft policy?

9 A. Well, we wanted to acknowledge that URMs were just one
10 kind of vulnerable building, that there were other kinds of
11 dangerous buildings, and we wanted to set a roadmap for future
12 policy work.

13 Q. Okay. But the actual policy report that was submitted to
14 Council -- I'm sorry, you weren't there when it was
15 submitted -- that was prepared only focused on URMs, then?

16 A. Correct.

17 Q. In accordance with Council's directive?

18 A. Correct.

19 Q. Now, do you know if the final report went to Council while
20 you were still the director of the Bureau of Emergency
21 Management?

22 A. I don't believe it did.

23 Q. So do you have any idea when that final report finally
24 made it to Council?

25 A. I think it was May of 2018.

Merlo - X

1 Q. Okay. So after Mr. Zimmerman's edits were made to the
2 document on December 19, 2017, according to the emails that we
3 just read, the Council final report didn't go out until at
4 least, what, four or five months later; is that correct?

5 A. Correct.

6 Q. Do you know why single-family or dual-family residential
7 buildings are not subject to the placarding requirements?

8 A. Unlike other buildings, the only people at risk are the
9 homeowners themselves. So if the homeowner opts to not do
10 those retrofits, then they're only placing themselves in
11 danger, as opposed to building owners who have a responsibility
12 to their tenants.

13 Q. Do you have any knowledge as to whether the risk factor
14 for a single-family or a dual-family residential building is
15 lower than for a larger commercial building?

16 A. It should be. Typically, single-family, smaller
17 residential homes tend to fare better than larger multistory
18 buildings.

19 Q. And do you know why that is? Have any idea?

20 A. Just the engineering. The loads of the weight.

21 Q. But you're not a technical person?

22 A. I'm not an engineer.

23 Q. When did you personally become interested in unreinforced
24 masonry buildings?

25 A. This has been a topic that's come up before at the City.

Merlo - X

1 This is not the first time the City has attempted to pass a
2 mandatory retrofit policy for unreinforced masonry buildings.

3 My particular interest in it is that unlike other kinds of
4 buildings, these do pose tremendous life safety risks. When
5 they fail, they tend to do so catastrophically, injuring or
6 killing not just the building occupants, but passersby, and do
7 damage to neighboring properties. And because of the rubble
8 that's created, they block transportation routes. So it
9 prevents ambulances, fire, police vehicles from getting around
10 in the city.

11 If we're serious about mitigating the impact from
12 earthquakes, this was one of probably the most meaningful ways
13 to make a difference.

14 Q. And was this particularly interested -- were you
15 particularly interested because you were the director of the
16 Bureau of Emergency Management?

17 A. Yes.

18 Q. And did you have any occasion yourself to ever visit an
19 area that had damage caused by an earthquake?

20 A. I have been to both Napa, after their earthquake in 2014,
21 and I was in Christchurch, New Zealand, also, after their
22 earthquake.

23 Q. And --

24 A. 2016 in Napa. I'm sorry.

25 Q. Okay. Do you believe that URMs are the most vulnerable

Merlo - X

1 type of building in an earthquake?

2 A. Absolutely.

3 Q. What is the basis of your conclusion?

4 A. Both firsthand accounts and reports from those cities and
5 areas of the world that have experienced significant
6 earthquakes.

7 Q. And have you read studies?

8 A. Plenty.

9 Q. And can you name a few of them?

10 A. Some are done by the Department of Geology and Mineral
11 Industries. Some are done by the U.S. Geological Survey; by
12 FEMA; by professional organizations that send engineers,
13 architects, planners out to earthquakes all over the world.

14 Q. One of those studies that you mentioned was the Department
15 of Geology and Mineral Industries. Can you please turn to
16 Defendants' Exhibit 119?

17 A. Okay.

18 Q. Do you recognize that document?

19 A. I do.

20 Q. And is that the Department of Geology and Mineral
21 Industries report that you were referring to?

22 A. Not this specific one. This one is in 2018. But DOGAMI,
23 as they're also known, has previously issued reports on
24 earthquake risk.

25 Q. Is that a reliable source of information regarding

Merlo - X

1 earthquake risk?

2 A. Absolutely.

3 MS. MOYNAHAN: I move to admit Exhibit 119,
4 Your Honor.

5 MR. DiLORENZO: That's fine, Your Honor. No
6 objection.

7 THE COURT: Admitted.

8 DEPUTY COURTROOM CLERK: 106 or --

9 MS. MOYNAHAN: Thank you.

10 BY MS. MOYNAHAN: (Continuing)

11 Q. Ms. Merlo, what is the overarching reason why the City
12 would be interested in measures to abate risk from earthquakes?

13 A. There's a significant life safety risk here and not just
14 injuries and deaths to building occupants and passersby, but
15 these buildings house very important city functions. They
16 provide affordable housing. They are, you know, bars,
17 restaurants, hairdressers, churches. They represent functions
18 that the City will need to maintain after an earthquake. So
19 the loss of use of these buildings is critically important to
20 the city of Portland.

21 Q. Okay. And how do placards on buildings protect the
22 public?

23 A. They provide awareness about the building construction
24 type.

25 Q. And what would a person do with that awareness? How can

Merlo - X

1 that protect a person?

2 A. Hopefully, the person would -- would prompt that person to
3 do more research, look into what -- what does it mean to be an
4 unreinforced masonry building and learn about the protective
5 actions they can take.

6 Q. If a person were so inclined to educate him or herself
7 about URM buildings and protections they should take, would
8 they be able to identify a URM building when they came upon
9 one?

10 A. Most people probably wouldn't, no.

11 Q. Are you able to identify a URM building when you see one?

12 A. Not with a hundred percent certainty; but, yes, I think,
13 generally speaking, I could tell the difference.

14 Q. And so would a placard on a building give someone that
15 particular -- that certainty that that building is a URM?

16 MR. DiLORENZO: Objection.

17 THE COURT: Sustained.

18 BY MS. MOYNAHAN: (Continuing)

19 Q. So how would that placard assist that person?

20 A. For those people that aren't able to tell or don't know
21 what an unreinforced masonry building is, this would provide
22 general awareness.

23 Q. Ms. Merlo, you were deposed a few weeks ago by
24 Mr. DiLorenzo, and I believe I recall that you stated that
25 placards wouldn't save a life. Is that correct?

Merlo - X

1 A. I don't recall saying that.

2 Q. Oh, okay.

3 Do you -- do you -- have you always been a believer in
4 placards being valuable for life safety?

5 A. I'm not a proponent of placarding.

6 Q. And can you tell us why?

7 A. I believe that if you're serious about mitigating the risk
8 from these buildings, you make the retrofits. I don't believe
9 placarding is a sufficient mitigation.

10 Q. Do you believe that it's second best in lieu of?

11 A. I believe that it -- in the absence of anything else, it's
12 better than nothing.

13 Q. Okay. Do you believe that there are other ways to alert
14 people in the public that they're entering a building that is a
15 URM other than putting a placard on a building?

16 A. Yes.

17 Q. What would those ways be?

18 A. One would be to notify the people that are occupying the
19 building through some kind of tenant notification.

20 Q. But what if the people are just visiting? You mentioned
21 hairdressers or going to visit the building on a daily basis.

22 A. Uh-huh.

23 Q. How about someone who's not a tenant but works in an
24 office --

25 A. Yes.

Merlo - X

1 Q. -- of a URM, how would they know if they didn't see a
2 placard?

3 A. They wouldn't know otherwise.

4 Q. They wouldn't know.

5 And with respect to notifying tenants who live in a
6 building, have you had any experience with trying to mail to --
7 do group mailings to people who live in buildings?

8 A. We did do, I think, two or three mailings to occupants of
9 unreinforced masonry buildings.

10 Q. Do you know if they opened the letters?

11 A. I can't say for sure whether or not they did.

12 Q. Would you live in a URM?

13 A. No.

14 Q. Have you taken any measures to retrofit your own home?

15 A. I have.

16 Q. And what have you done?

17 A. I have a 1906 home in Northeast Portland. I didn't know
18 it when I bought the house, but it turns out that I had
19 something called a brick cripple wall, so my -- my home is my
20 biggest investment, and a few years ago I made the decision to
21 retrofit -- bolt my house to the foundation.

22 Q. And was that expensive?

23 A. It was \$25,000.

24 Q. Do you believe people have a right to know when they're
25 about to sign a lease to live in a URM building?

Merlo - ReD

1 MR. DiLORENZO: Objection.

2 The witness's belief as to what the law should be are not
3 part of this case, Your Honor.

4 THE COURT: Sustained.

5 MS. MOYNAHAN: I have no further questions. Thank
6 you.

7 THE WITNESS: Thank you.

8 MR. DiLORENZO: I have a few on redirect.

9 First, Your Honor, Mr. Swift informed me that I forgot to
10 offer number 12. So at this time I offer 12.

11 THE COURT: Any objection?

12 MS. MOYNAHAN: Oh, no objection. Sorry.

13 THE COURT: All right. 12 is received.

14 MR. DiLORENZO: Thank you, Judge.

15

16 REDIRECT EXAMINATION

17 BY MR. DiLORENZO:

18 Q. Ms. Merlo, I heard you to say that the final report, which
19 is Exhibit 13, dated December 2017, did not -- I'll use your
20 words -- go out to the City Council until May of 2018; is that
21 right?

22 A. I believe that's true.

23 Q. Okay. But the final report was published by the City on
24 its website long before then, wasn't it?

25 A. It was on the City's website, yes.

Merlo - ReD

1 Q. And when was it placed on the City's website?

2 A. I don't know the exact date.

3 Q. Was it shortly after it was issued?

4 A. Likely, yes.

5 Q. So it was -- it went out to the world, maybe not directly
6 to the City Council, right after it was published; isn't that
7 right?

8 A. Yes.

9 Q. Okay. Then we talked about single-family and dual-family
10 homes, and you gave an explanation as to why single-family URM
11 homes and dual-family URM homes did not need to be placarded.

12 Do you recall that conversation?

13 A. I do.

14 Q. Okay. I think you said for the homeowner, the homeowner
15 is at risk just for themselves; right?

16 A. Sure.

17 Q. All right. So you don't anticipate that homeowners would
18 ever have guests?

19 A. I -- yes, of course homeowners have guests.

20 Q. And do you think it's realistic that homeowners who have
21 guests, who lack placards, would say, "Oh, by the way, I want
22 you to know this is a URM house, and a URM house might be
23 unsafe in the case of an earthquake"? Do you think that's
24 realistic?

25 A. I don't think that's realistic.

Merlo - ReD

1 Q. Okay. So for a two-story residential URM home and a
2 two-story residential URM apartment building, one has the
3 placard and the other does not?

4 A. Correct.

5 Q. Okay. What is the risk difference between a two-story
6 residential home and a two-story residential apartment if they
7 are both of identical URM construction?

8 A. It's the occupancy load. Typically, apartment buildings
9 have more people in them, even though they're single-family
10 apartments; so it's both the occupancy and the weight of
11 commercial buildings. The load of those buildings don't absorb
12 the shaking from earthquakes as well as a single-family home.

13 Q. So you think it's more a matter of degree as opposed to
14 one of a kind?

15 A. Yes.

16 Q. Okay. Now, you talked about the devastation that occur --
17 can occur to URMs in a significant earthquake.

18 A. Uh-huh.

19 Q. And I think you gave Christchurch, New Zealand, as an
20 example.

21 A. Correct.

22 Q. And you were there personally to witness the devastation?

23 A. The aftermath, yes.

24 Q. Okay. Were there soft story and non-ductile concrete
25 buildings present in the New Zealand earthquake?

Merlo - ReD

1 A. Yes.

2 Q. Now, I don't know if you've explained to the Court what
3 soft story or non-ductile concrete construction is. It's -- my
4 understanding of soft story is construction that has, for
5 instance, garages on the first floor so that there's primarily
6 air on the first floor. Is that your understanding?

7 A. Generally speaking, that's correct.

8 Q. Okay. And non-ductile concrete buildings are what?

9 A. They are concrete buildings with very little steel
10 reinforcement.

11 Q. Okay. And the ordinance at issue here does not require
12 owners of soft story or non-ductile concrete buildings to
13 placard; is that right?

14 A. Correct.

15 Q. But in the Christchurch, New Zealand, earthquake, those
16 buildings suffered devastation also, did they not?

17 A. Yes.

18 Q. In fact, the devastation was as bad as the URM
19 devastation, wasn't it?

20 A. In one particular case, yes.

21 Q. You also talked about the advantage to public awareness
22 from the placards.

23 So I get -- I take it that it's your position that if
24 citizens see URM placards on -- on URM buildings, that they
25 will at least be aware that those buildings can -- well, might

Merlo - ReD

1 not fare well in the case of earthquakes; is that right?

2 A. Correct.

3 Q. But soft story buildings and non-ductile buildings, as
4 you've just discussed, would not fare well in an earthquake
5 either?

6 A. Correct.

7 Q. And those don't have to be placarded?

8 A. Correct.

9 Q. Do you think there is a chance that by virtue of
10 placarding URM buildings and not placarding the equally
11 dangerous buildings that the public will have a false sense of
12 security as to the safety of the buildings that are not
13 placarded?

14 A. I -- I do think that because of the number of unreinforced
15 masonry buildings there is a higher need to -- to placard those
16 buildings. But, certainly, ideally, we would placard all
17 dangerous -- we wouldn't have any dangerous buildings, but we
18 should placard all of them.

19 Q. Right. But I want to get to the bottom of this. So
20 you've got two buildings, both dangerous, in the case of an
21 earthquake.

22 A. Uh-huh.

23 Q. One has to be placarded and one doesn't. Isn't it
24 reasonable to assume that a person of normal understanding will
25 regard the one that does not have to be placarded as safer than

Merlo - ReD

1 the one that does?

2 A. Yes.

3 Q. Okay. Then we were talking about Exhibit 119 that I think
4 is the DOGAMI report.

5 It's the -- for the benefit of the Court and the court
6 reporter, that's the -- that's the Oregon Department of
7 Geologic and Mineral Industries?

8 A. Yes.

9 Q. We were referencing a recent report,
10 Defendants' Exhibit 119, that was dated 2018; is that right?

11 A. Correct. Uh-huh.

12 Q. Okay. And I would like to have you turn to page 33 --

13 A. Okay.

14 Q. -- of 90 if you would.

15 You see the table there in the -- Table 5-1?

16 A. Yes.

17 Q. It's called "Residential Buildings by Building Type"?

18 A. Yes.

19 Q. Okay. And now this -- this is DOGAMI's count for certain
20 construction of buildings for the tri-county area; is that
21 correct?

22 A. Yes.

23 Q. Okay. So, for instance, under single-family
24 residential --

25 A. Uh-huh.

Merlo - ReD

1 Q. -- unreinforced masonry --

2 A. Yes.

3 Q. -- DOGAMI says there are 1,455 of those buildings; is that
4 right?

5 A. Yes.

6 Q. Conversely, for multifamily residential, which would be,
7 like, apartments, for unreinforced masonry there are 403 of
8 those buildings; is that correct?

9 A. Correct.

10 Q. So there are a larger number of unreinforced single-family
11 residential buildings in the tri-county area than there are
12 apartment buildings; isn't that right?

13 A. Number-wise, yes; but occupancy-wise, it's a much
14 different story.

15 Q. Let's look at permanent residence.

16 A. Okay.

17 Q. Single-family residential reinforced masonry, which is the
18 one, two -- third line down --

19 A. Uh-huh.

20 Q. -- if you go all over to permanent residents, you'll find
21 9,321 permanent residents; is that right?

22 A. For reinforced masonry.

23 Q. Sorry. Unreinforced 3,277.

24 A. Correct.

25 Q. Okay. And if you then look at multifamily --

Merlo - ReD

1 A. Uh-huh.

2 Q. -- for unreinforced, you will see 8,139 residents?

3 A. Correct.

4 Q. Okay. So there's about a third as many -- about
5 30 percent of these are single-family residential?

6 A. Correct.

7 Q. So that's not a small number?

8 A. Not a small number, but the number of people at risk --
9 well, yes. Not a --

10 Q. But not worthy of placarding, in your view?

11 A. Yes.

12 Q. Okay. Let's look at for multifamily residential.

13 A. Okay.

14 Q. We know that unreinforced masonry buildings 403 and 8,139
15 permanent residents.

16 Now look at concrete. Concrete there's 1,206 of those;
17 right? Multifamily residential buildings?

18 A. Yes.

19 Q. And 39,150 residents; right?

20 A. Correct.

21 Q. Okay. And --

22 A. This doesn't say "non-ductile concrete." It just says
23 "concrete."

24 Q. Okay. How many of those concrete buildings is it
25 reasonable to believe are non-ductile concrete buildings?

Merlo - ReD

1 A. I honestly don't know.

2 Q. Okay. But, nevertheless, the concrete buildings, steel
3 buildings don't have the placard, just the unreinforced masonry
4 buildings; is that right?

5 A. Correct.

6 Q. Now, you concluded with your statement that you don't
7 believe, really, in placarding; is that right?

8 A. That's my personal opinion.

9 Q. Okay. And then you said "but it's better than nothing"?

10 A. Yes.

11 Q. But the City that you work for has the authority to compel
12 retrofits like your committee requested; right?

13 A. They do have the authority, yes.

14 Q. And they have the authority, depending on the amount of
15 the budget that they -- that they dedicate, to ultimately
16 contact each and every tenant and tell them for themselves what
17 the risks of various buildings are, don't they? They have the
18 authority to do that?

19 A. Sure.

20 Q. They just lack the will; right?

21 A. I don't know if it was lack of will. Yeah, sure.

22 Q. Politics?

23 A. Yeah.

24 MR. DiLORENZO: No further questions.

25 THE COURT: Recross?

Merlo - ReX

1 MS. MOYNAHAN: Yes, Your Honor. Thank you.

2

3

RECROSS-EXAMINATION

4 BY MS. MOYNAHAN:

5 Q. The table you were just looking at, page 33 of 90, on
6 Exhibit 119 --

7 A. Yes, ma'am.

8 Q. -- first of all, you astutely pointed out that concrete
9 doesn't necessarily mention or apply just to non-ductile.

10 Do you see an asterisk after concrete?

11 A. I do.

12 Q. What does that footnote say?

13 A. "Concrete includes the precast concrete building type."

14 Q. And is precast concrete building type also highly
15 vulnerable in the event of an earthquake?

16 A. I honestly don't know.

17 Q. Okay. And this chart doesn't include commercial retail
18 type buildings, does it?

19 A. No.

20 Q. So this is just a small sample, actually --

21 A. Correct.

22 Q. -- of URM buildings?

23 A. Correct.

24 Q. Okay. Mr. DiLorenzo asked you if the final report went on
25 the website shortly after this draft was -- well, did it go out

Merlo - ReX

1 into the website while you were still at PBEM?

2 A. I believe it did.

3 THE COURT REPORTER: I'm sorry. While you were still
4 at?

5 MS. MOYNAHAN: PBEM. Portland Bureau of Emergency
6 Management.

7 BY MS. MOYNAHAN: (Continuing)

8 Q. And, yet, it wasn't presented to Council until May.

9 Do you know if the bureau received any complaints from any
10 of the policy committee members between January and May
11 regarding the edits that were made?

12 A. Not to my knowledge.

13 Q. Okay. And, also, were you ever involved in any
14 discussions or was the policy committee ever involved in
15 discussions about the future regulation of soft story and
16 non-ductile concrete buildings?

17 A. We had some discussions at the committee level; but,
18 admittedly, we were focused on unreinforced masonry, so we
19 didn't -- we didn't get there.

20 Q. So in the perfect world, I think you've said Council would
21 regulate so all non- -- so all URMs would be retrofitted;
22 correct?

23 A. Correct.

24 Q. And it is not a perfect world, and so where we are now is
25 Council's mandating that the public be notified or tenants be

Merlo - ReX

1 notified that they're entering a URM building; is that correct?

2 A. Correct.

3 Q. And do you believe that -- as the former director of the
4 Bureau of Emergency Management, do you believe that that step
5 will -- will affect public safety?

6 A. I do.

7 Q. And why is that?

8 A. Again, I think it provides a level of awareness to people,
9 many of whom are still unaware of the general earthquake risk.
10 We have thousands -- tens of thousands of people moving here
11 every -- every year, and it's a constant education process. So
12 I think it will provide a level of information to people.

13 MS. MOYNAHAN: Okay. No further questions. Thank
14 you.

15 THE COURT: All right. Ms. Merlo, you may step down.

16 THE WITNESS: Thank you.

17 MR. DiLORENZO: Your Honor, our next witness is Jonna
18 Papaefthimiou.

19 MS. MOYNAHAN: Papaefthimiou.

20 MR. DiLORENZO: Papaefthimiou.

21

22 JONNA PAPAETFHIMIOU,

23 called as a witness on behalf of the Plaintiffs, being first
24 duly sworn, is examined and testified as follows:

25

Papaefthimiou - D

1 DEPUTY COURTROOM CLERK: Please state your name for
2 the record, and spell your last name.

3 THE WITNESS: Jonna Papaefthimiou.

4 P-a-p-a-e-f-t-h-i-m-i-o-u.

5

6 DIRECT EXAMINATION

7 BY MR. DiLORENZO:

8 Q. Good afternoon, Ms. Papaefthimiou. How are you today?

9 A. Well, thank you.

10 Q. You are employed by the City of Portland's Bureau of
11 Emergency Management; is that right?

12 A. Yes.

13 Q. And what's your title?

14 A. Planning, Policy, and Community Programs Manager.

15 Q. Okay. And you manage community outreach and communication
16 programs for the bureau; is that right?

17 A. It -- community outreach, planning, and policy, yes.

18 Q. Okay. What about communications programs?

19 A. I supervise our community outreach manager who does
20 outreach to primarily historically underserved communities, but
21 I don't supervise our public information officer who does sort
22 of media work.

23 Q. Okay. So public information officer communicates with the
24 press, and the outreach people do retail; is that right?

25 People to people?

Papaefthimiou - D

1 A. Yeah.

2 Q. Okay. Notwithstanding that, you do some communications
3 work on behalf of the bureau, don't you?

4 A. I --

5 Q. For instance, I -- I think I heard you on the radio
6 talking about this ordinance.

7 A. Oh, I did talk on the radio about this. Really just this
8 project, I guess.

9 Q. Okay. So you also supervise disaster response, recovery,
10 and hazard mitigation plans for the City?

11 A. Yes.

12 Q. And what's involved in doing that?

13 A. Disaster response planning is -- we have a suite of plans,
14 like damage assessment or debris management; so we work with
15 other bureaus in the City and partner agencies to develop an
16 operational concept for how we would respond to that event, and
17 then we document it. So that's response planning.

18 And then we also have hazard mitigation planning, which is
19 sort of being systematic about understanding our natural hazard
20 risks and how we reduce our exposure of those risks over time
21 by investment, like infrastructure.

22 Q. Okay. So among the hazards or the disasters, for
23 instance, the two-week snowstorm that took place when
24 Mayor Wheeler first took office, is that in your bailiwick?

25 A. Yes.

Papaefthimiou - D

1 Q. And you have plans for managing those sorts of events?

2 A. Well, snowstorm is a funny one. PBOT primarily manages
3 response to snow and ice, but we will often activate in support
4 of their work and also in support of the Joint Office of
5 Homeless Services.

6 Q. How about if there were a hurricane? Would that be in
7 your area?

8 A. Well, yes. I mean, again, since we're emergency
9 management, we don't -- we're a small bureau, but we don't pick
10 up hurricane debris or sandbag rivers or something like that,
11 but we help the City be organized in its response. For
12 hurricanes specifically, it would probably be PBOT, because
13 it's a debris-generating event.

14 Q. What kind of emergencies do you plan for?

15 A. We plan the City's response to -- to many kinds of
16 emergency. We just don't -- we don't do the response. We plan
17 it.

18 Q. Okay. So do you have a plan for, for instance, a
19 hurricane?

20 A. I would call that severe weather. We have a severe
21 weather plan, yes.

22 Q. Do you have a plan for earthquake response?

23 A. We do.

24 Q. Okay. And how developed is your plan?

25 A. Well, I would say it's -- it's well developed as a plan.

Papaefthimiou - D

1 We have many risks with respect to earthquake, so it's an
2 incident that's hard to be well prepared for. It would be
3 pretty catastrophic.

4 Q. Okay. Do you have a plan in place for making sure that
5 the bridges, if they collapse in the river, somehow there could
6 be transportation within the city? Do you have plans like
7 that?

8 A. Well, again, we're not the transportation agency, so --
9 and, in fact, usually when people ask about bridges, they think
10 of the Willamette River bridges, but none of those belong to
11 the City; so we -- we coordinate with Multnomah County roads
12 and bridges and with ODOT Region 1, but they have a plan to
13 inspect the bridges and make temporary repairs because those
14 are their bridges.

15 Q. Okay. All right. Between 2014 and 2018 you reported to
16 Ms. Merlo; is that right?

17 A. Say the dates again. Sorry.

18 Q. 2014 to 2018.

19 A. Well, from 2013 to 2018, yes.

20 Q. Okay. And you were also staff to the URM Policy Advisory
21 Committee; is that right?

22 A. Yes.

23 Q. Okay. And I understand you were the primary author of the
24 committee report to the City Council; is that right?

25 A. Yes.

Papaeftimiou - D

1 Q. Okay. And you took the minutes of the advisory committee
2 meetings?

3 A. Yes.

4 Q. And you work directly under Ms. Merlo's supervision in
5 that regard; is that right?

6 A. Yes.

7 Q. And can you take a look at Exhibit 13? That's already in
8 evidence. That should be in your book. Do you have a --

9 A. I don't have a book.

10 Q. Maybe Mr. Gale can be so kind as to hand it to you.
11 He's getting quite a workout today.

12 A. You said 13?

13 Q. Yes, please.

14 A. Unreinforced Masonry Building Policy Committee Report.

15 Q. Right. Is this the report you primarily drafted?

16 A. It looks like it.

17 Q. Okay. And if you can turn to Exhibit 11, which is also in
18 evidence.

19 A. This is an email from Reid Zimmerman to Carmen Merlo.

20 Q. Right. And I think we talked about this when we met
21 earlier in this litigation.

22 A. Uh-huh.

23 Q. The -- this was a response by Mr. Zimmerman to an inquiry
24 by Ms. Merlo dated December 12th at 5:53 p.m.; is that right?

25 A. Yes.

Papaeftthimiou - D

1 Q. And Mr. Zimmerman's response is in the evening at
2 10:01 p.m.?

3 A. Yes.

4 Q. Okay. And he --

5 A. On a different day, yeah.

6 Q. Right. No. Is it? Let me see. 18. Oh, okay. I'm
7 sorry. December 12th, 5:53 p.m., and then December 18th,
8 several days later, but at 10:01 p.m.

9 What was the deadline for responding to this email?

10 A. It says -- I don't remember it, but reading from the
11 email, it says Monday, December 18th.

12 Q. Okay. So he -- he responded just under the deadline?

13 A. Yes.

14 Q. Is that right? Is that correct?

15 A. Yes.

16 Q. Okay. And he wanted to cross out the section in the draft
17 Other Risky Buildings, Liquefaction, Modified Bolts Plus, and
18 then Type E Soils; is that right?

19 A. Yes.

20 Q. Okay. Document No. 12 is an email from you to Ms. Merlo
21 that next morning; is that right?

22 A. Yes.

23 Q. So it looks like you were up bright and early at 8:00 a.m.

24 A. I guess so.

25 Q. Okay. And you tell her at 8:00 a.m. if you take a look at

Papaeftimiou - D

1 the -- under 3 and then the last paragraph and the second
2 bullet point, "I accepted Reid's other changes."

3 Do you see that?

4 A. Yes.

5 Q. By that, did you mean you accepted the changes that
6 Mr. Zimmerman proposed in his email the day before?

7 A. I think so. Yeah, I -- I don't have -- I believe Carmen
8 forwarded this email to me when she -- when she received it and
9 then I incorporated it.

10 Q. Okay. Why did you incorporate his changes?

11 A. Well, I believe that Carmen shared the changes with me
12 because she wanted me to put them in the report.

13 Q. How do you know that she wanted you to put them in the
14 report?

15 A. Well, I made all the changes that she sent me, or if I
16 didn't, then I asked her -- I specifically said, "I didn't make
17 this change" or "I have a question about this change." Those
18 are the first three items. And everything else, I think, I
19 included.

20 Q. So when you made the changes that Mr. Zimmerman suggested
21 here, did you understand that Ms. Merlo was asking you to make
22 those changes?

23 A. I thought that she was.

24 Q. Okay. And you did not consult with any of the other
25 committee members before making the changes?

Papaeftthimiou - D

1 A. No. Well, it doesn't look like it, does it, because she
2 sent it to me late at night, and I did it the next morning.

3 Q. Okay. Now, this final report, the one in 13, this was
4 published on the City's website shortly after it was issued; is
5 that right?

6 A. Yes.

7 Q. Okay. And do you recall when it was forwarded to the City
8 Council? About?

9 A. I -- I don't. The reason is it's -- it's sort of a
10 complicated question. It didn't come to City Council until --
11 I think May was the first -- was the -- was the first meeting
12 that they had about it. But a draft was shared ahead of time
13 with Council staff and the Mayor staff so that they could
14 review it ahead of that meeting, and so they -- and it was on
15 the website, so they may have seen it as early as January, as
16 soon as it was posted.

17 Q. Okay. Can you turn to Exhibit 16?

18 A. Yes.

19 Q. Now, that's a resolution that, if you go to the last page,
20 it appears that it was adopted by the City Council in June of
21 2018.

22 A. Yes.

23 Q. Is -- is this about the time when the final report was
24 shared with City Council?

25 A. No. Because they -- you see how it says, "Date prepared

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1 May 9th"? That was right before they heard it the first time,
2 so -- so it was prepared before the first hearing, which was in
3 May, and I think there were drafts that were developed, even
4 several months before that, that we -- that we worked on quite
5 a bit.

6 Q. Okay. Well, it looks like you prepared this; is that
7 right?

8 A. Yes. Yes.

9 Q. And is -- to the best of your recollection, was the final
10 report also forwarded to the City Council contemporaneously
11 with this resolution?

12 A. I'm sorry. The file report?

13 Q. The final report.

14 A. Oh, the final report. Yes, it was -- I think it was in --
15 it was attached to the resolution when it was filed.

16 Q. Okay. Now I want to ask you a couple of questions about
17 what some of the terms in this resolution mean.

18 A. Okay.

19 Q. The resolution addresses Class 1, Class 2, Class 3, and
20 Class 4 buildings.

21 A. Uh-huh.

22 Q. Can you explain to the Court what are Class 1 and Class 2
23 buildings?

24 A. Sure. I think it's in -- well, for a precise definition,
25 I would look in the unreinforced masonry building policy

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1 committee report.

2 Q. Okay. Let me stop you there. Can you, just in layman's
3 terms, tell us what is a Class 1 building?

4 A. Sure. Class 1 buildings were buildings that were
5 important for public safety, like a fire station or a pump
6 station that was essential to the functioning of our water
7 system. So those were Class 1 buildings.

8 Q. So let's stop there.

9 So in the case of an earthquake, the City wanted to know
10 what large buildings could accommodate large numbers of people
11 after the earthquake; is that right?

12 A. Those weren't Class 1 buildings.

13 Q. What are -- Class 1 buildings are what, then?

14 A. They're public safety buildings, like a fire station or a
15 pump station that's essential to the functioning of the water
16 system. They're buildings that need to function immediately
17 following an earthquake.

18 Q. Okay. So was I describing Class 2 buildings, then? What
19 are Class 2 buildings?

20 A. Class 2 buildings are large public assembly spaces and
21 schools. So schools, I guess, is self-descriptive, and then
22 public assembly spaces would be like a community center or a
23 theater or a church, something that was big and could
24 accommodate a lot of people. So the interest in having it
25 retrofitted to a specific standard was, one, it potentially

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1 posed a lot of risk because there were many people inside and,
2 two, it could also have an important function after an
3 earthquake because it is a place where people could assemble to
4 find shelter or get -- be provided relief efforts.

5 Q. Okay. What's a Class 3 building?

6 A. Class 3 building was almost all the other buildings that
7 were just regular -- mostly commercial URM buildings. Offices,
8 apartment buildings, things like that.

9 Q. Okay. And a Class 4 building?

10 A. That was a group of I think only a few hundred small URM
11 buildings. They were just one story, and they would be things
12 like storage buildings and garages.

13 Q. Okay. So the resolution did not implement the advisory
14 committee's recommendation that Class 3 buildings have
15 mandatory retrofits, did it?

16 A. The resolution -- sorry. Can you say that again?

17 Q. This resolution did not implement the advisory committee's
18 recommendations regarding Class 3 buildings. Isn't that a fair
19 statement?

20 A. No, it didn't.

21 Q. Okay. And they were still subject to what is currently
22 called a soft trigger. Have you heard that term?

23 A. No.

24 Q. Okay. If a Class 3 building owner seeks permission to
25 change the use of the building or proposes to invest a certain

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1 amount of money in the building, that owner has to retrofit
2 anyway; is that right?

3 A. Right. I think I would call that, like, an active
4 trigger. The owner has to do something to trigger it. Got it.

5 Q. If the owner does nothing, keeps the use the same, then
6 there is no requirement per this resolution to have to
7 retrofit?

8 A. Well, this resolution didn't -- it's only a resolution. I
9 mean, it didn't really require anything. What it did was
10 direct staff to go back and do the work to -- to develop the
11 building code. It -- it directed -- it was a resolution, so it
12 directed staff to do a lot of things, like make changes to the
13 building code. Not to Class 3 buildings.

14 If you look -- sorry. So see it directs staff to
15 develop -- if you look on page 2, whereas, whereas, and then it
16 says, "now, therefore, it be resolved," it directs staff to
17 develop code language for adoption of a mandatory seismic
18 retrofit program for Class 1 and Class 2. So this itself
19 didn't change the code at all. It just directed staff to work
20 on that.

21 Q. Okay. But if a resolution directs staff to do something,
22 then staff is expected to do that; is that right?

23 A. Right. But it has to come back to City Council again, and
24 they have to approve it again before it takes effect.

25 Q. Okay. Let's take a look at Exhibit 15. Exhibit 15 is a

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1 report to Council -- to the City Council. It's from
2 Carmen Merlo, only it's got a different title.

3 Do you see that?

4 A. Yes.

5 Q. It says "Deputy Chief Administrative Officer."

6 A. Uh-huh.

7 Q. Was Carmen Merlo sending this document as Deputy Chief
8 Administrative Officer?

9 A. I don't believe Carmen ever sent this document. This is a
10 draft.

11 Q. Okay. And Rebecca Esau, who's here today, she's also on
12 this draft?

13 A. Uh-huh.

14 Q. Okay.

15 A. Yes.

16 Q. And who drafted this?

17 A. I did.

18 Q. Okay. And what was going to be the purpose of this?

19 A. Well, the policy committee report was pretty long, and we
20 needed a cover memo to accompany it to City Council, and it
21 also made some additional recommendations that were different
22 than the -- than exactly what was in the report.

23 So this was drafted -- actually, there were many drafts of
24 this before we eventually went to City Council, which wasn't
25 until May.

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1 Q. Okay. But you never actually sent this to the City
2 Council, is that right, or did you?

3 A. I didn't send anything to the City Council, but I think a
4 subsequent draft of this went to City Council with the Council
5 documents in May.

6 Q. Who gave you direction when you were preparing this draft?

7 A. This particular draft?

8 Q. Yes.

9 A. I worked for Carmen Merlo.

10 Q. Okay. So there are certain statements made in this draft.
11 Were those your points of view, or were those the instructions
12 that you received from your superior?

13 A. We -- I discussed it with Carmen, and also we had a core
14 team within the City that also included staff from other
15 bureaus, including the Bureau of Development Services and
16 Prosper Portland, and -- and it was -- my recollection, it was
17 a consensus of the group. I mean, we didn't vote, but we
18 agreed that this would be the recommendations that would move
19 forward.

20 Q. Okay. Now, when you say "the group" --

21 A. Uh-huh.

22 Q. -- you are no longer referring to the advisory committee?

23 A. No. I'm talking about the staff that continued to --
24 that -- the staff that worked for the advisory committee and
25 that kept working.

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1 Q. Okay. Can you -- let me ask you another question about
2 the draft. I mean, I realize that this draft wasn't issued.
3 It was just a draft.

4 A. Uh-huh.

5 Q. Did this draft recommend the position of the bureau that
6 you worked for at the time it was drafted?

7 A. Yes.

8 Q. Okay. If you would turn to page 2 of the draft, under
9 Public Information Recommendation --

10 A. Uh-huh.

11 Q. -- is it your understanding that the advisory committee
12 did not endorse -- or did endorse waivers for relocation fees
13 for -- for building owners?

14 A. I don't -- I don't remember. I don't remember if they
15 made a recommendation on that.

16 Q. Okay. Let's turn to -- can you take a look at number 8?

17 A. Exhibit 8?

18 Q. Yes, please.

19 A. Yes.

20 Q. Okay. Do you recall that PowerPoint slide? Consensus
21 reached?

22 A. No. I -- I'm willing to believe it came to the policy
23 committee, but they had so many meetings. I don't recall this
24 particular slide.

25 Q. Right. So you don't remember. Okay.

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1 All right. Under public information recommendation, the
2 second paragraph says, "We cannot support exempting property
3 owners from the tenant relocation fees."

4 A. Sorry. I turned the page in my book. What exhibit are
5 you on?

6 Q. I'm back to 15.

7 A. Thank you.

8 Q. "We cannot support exempting property owners from tenant
9 relocation fees since URM retrofitting work is designed and
10 planned over a long period. Usually more than a year," et
11 cetera, et cetera.

12 A. Uh-huh.

13 Q. So is this a circumstance in which the staff decided to
14 reverse a position of the advisory committee?

15 A. I don't think that -- the advisory committee spoke for
16 itself in their report. That was -- that was published and
17 that was intended to be the opinion of the advisory committee.
18 This is a memo that's clearly from -- from two named people
19 that are the directors of the bureaus, and so when I say "we,"
20 I think that they're speaking for themselves and obviously the
21 staff that works for them and that helped them.

22 Q. Okay. Now, isn't it true that the advisory committee did
23 not support the type of placarding that is contained within
24 this ordinance?

25 A. It's -- it's more complicated than that.

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1 They did not support placarding, except for a small group
2 of buildings.

3 When we talked about the Class 2 buildings and I said
4 those were public assembly spaces, including churches -- by the
5 building code, a church and a theater are similar. I mean,
6 they're just big public spaces. And so the initial
7 recommendation was that all those big public spaces should be
8 retrofitted to a relatively high standard.

9 And then through the deliberations of the committee, they
10 decided that for churches, in particular, that would be too
11 great of a financial hardship, and so they recommended that
12 those churches retrofit to a less standard, the standard of
13 other Class 3 buildings, like offices and apartment buildings.
14 But in recognizing that this was a large public assembly space
15 that had many people and had a higher level of, therefore,
16 risk, but it was retrofitting a lower standard, the committee
17 felt that they should acknowledge that, and so they recommended
18 placarding just for -- just for those churches and nonprofit
19 buildings that were public assembly spaces but that they
20 recommended would be retrofit to a lower standard.

21 Q. Okay. Can you turn to Exhibit 9?

22 A. Sure.

23 Q. This is a slide that Ms. Merlo talked about.

24 A. Uh-huh.

25 Q. Consensus not reached. And it says, "Consensus not

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1 reached. URM building placarding."

2 A. Uh-huh.

3 Q. Is that generally true?

4 A. Yes. Well, the report -- I guess the report speaks for
5 itself. Like I said, it's complicated.

6 Q. Okay. Let's narrow to Class 3 buildings because that's
7 what we're talking about --

8 A. Okay.

9 Q. -- in this lawsuit.

10 For Class 3 buildings, the -- the advisory committee did
11 not want to endorse the type of placarding that's present in
12 this lawsuit; right?

13 A. No. Well, there was three committees; right? There was
14 the technical advisory committee, and then there was the
15 financial advisory committee, and then the policy advisory
16 committee.

17 Q. Let's talking about the policy committee.

18 A. Okay.

19 Q. They refused to endorse this type of placarding for
20 Class 3 buildings?

21 A. Right. Except for churches.

22 Q. Right. But they're not Class 3 buildings?

23 A. Well, they moved them to Class 3. That's why they said
24 they should placard them.

25 Q. Okay. Except for churches?

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1 A. Right.

2 Q. Nevertheless, one, two, three -- the third paragraph down
3 from Public Information Recommendation on Exhibit 15, your
4 draft says, "Develop an ordinance to require landlords to
5 disclose to tenants the URM status of a building" and then also
6 "Develop an ordinance to require owners of commercial,
7 nonresidential URMs to post a placard."

8 A. Uh-huh.

9 Q. So why did the -- the bureaus take a position opposed to
10 what the advisory committee submitted?

11 A. Well, the advisory committee was always advisory to
12 staff. It wasn't advisory to the City Council. And so it was
13 always known that the -- the committee would provide a
14 recommendation and would be transparent about the
15 recommendation but that the City staff bureau directors would
16 make their own recommendations to City Council.

17 And also in the paragraph above it suggests why they're
18 making a different recommendation. It says, "Considering the
19 limited participation of URM users in the policy process" --
20 because it was mostly owners and architects and people --
21 professional people, but not tenants or students or people that
22 went in and out of the buildings. "Considering their limited
23 participation and given that the proposed URM retrofit
24 standards will not prevent the collapse of many URM buildings
25 in an earthquake, we recommend two additional steps to protect

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1 the interest of the general public."

2 So that's why.

3 Q. Okay. Were you there from the beginning when the advisory
4 committees were formed?

5 A. I wasn't there for the first City Council meeting, and I
6 remember it well because I was on maternity leave. But I was
7 there after that.

8 Q. Okay. Did you attend the first meetings of the advisory
9 committee?

10 A. Well, yes. All three.

11 Q. Okay. And at any time did you inform the advisory
12 committee that they were not advising the City Council, they
13 were merely advising the staff, and the staff could make
14 whatever recommendation they wanted notwithstanding their
15 advice?

16 MS. MOYNAHAN: Object to the form of the question.

17 THE WITNESS: I --

18 THE COURT: Hold on, please. There's an objection.

19 Mr. DiLorenzo, go ahead, please.

20 MR. DiLORENZO: Other than it being compound,
21 Your Honor, I don't --

22 THE COURT: Rephrase, please.

23 MR. DiLORENZO: All right.

24 BY MR. DiLORENZO: (Continuing)

25 Q. Did you -- you were -- you were staff for the committee?

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1 A. Uh-huh.

2 Q. Okay. And you were present at the committee meetings?

3 A. Yes.

4 Q. Did you or Ms. Merlo advise the committee that they were
5 really not advising the City Council at all? Did you ever say
6 that?

7 A. I didn't. I hardly said anything at the meetings. I was
8 taking notes. I was the note-taker, so I didn't talk.

9 Q. Did any staff person from the City tell those volunteers,
10 who were there assembled as the advisory committee, that they
11 were not advising the City Council?

12 A. I believe that they did, and I believe that it was also
13 written in our charter which was published on the website and
14 distributed to the members at the first meeting.

15 MR. DiLORENZO: Okay. Your Honor, I would like to
16 offer number 15.

17 MS. MOYNAHAN: No objection.

18 THE COURT: 15 is received.

19 MR. DiLORENZO: And number 16.

20 MS. MOYNAHAN: No objection.

21 THE COURT: 16 is received.

22 BY MR. DiLORENZO: (Continuing)

23 Q. So now let's get back to 16. This resolution was adopted
24 by the City Council; is that right? The one you drafted.

25 A. Yes.

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1 Q. Okay. And did you testify in favor of the resolution?

2 A. I -- I presented the resolution, so I -- I gave an
3 informational presentation to Council, but I didn't testify for
4 or against.

5 Q. Okay. Let me ask you a couple of questions about
6 Exhibit 16. If you can turn to the second page after all the
7 whereases.

8 A. Okay.

9 Q. I think you said early on that if a resolution instructs
10 City staff to do something, they're expected to do it; is that
11 right?

12 A. Yes.

13 Q. Okay. The first resolution where, "Now therefore be it
14 resolved," says the City Council directs the staff to develop
15 code language for the adoption of a mandatory retrofit program
16 for Class 1 and Class 2 buildings.

17 Have they done that?

18 A. Well, it says within a year, and it hasn't been a year.

19 Q. Okay. This was adopted when?

20 A. June 13, 2018.

21 Q. So that's about a month away?

22 A. Uh-huh.

23 Q. So has staff done anything to begin the process for having
24 that report ready within a month?

25 A. I don't know because those staff work at the Bureau of

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1 Development Services, and I work at the Bureau of Emergency
2 Management.

3 Q. Have you heard anything from anyone in the City indicating
4 that the Bureau of Development Services is ready to present
5 that directive to the City Council next month?

6 A. I haven't. I asked them, and they said they were trying
7 to get time to work on it. And that was a few months ago, so I
8 really don't know the status of it now.

9 Q. Okay. Next one, "Be it further resolved," the City
10 Council directs staff to develop code language to strengthen
11 triggers in the existing code related to seismic retrofitting
12 of URM buildings and to require mandatory retrofits of Class 3
13 and Class 4 URM buildings as described in the committee's final
14 report.

15 And then later, "Class 3 and Class 4 building owners shall
16 have 20 years to perform prescribed retrofits."

17 A. Uh-huh.

18 Q. Did that language get presented to the City Council?

19 A. I believe that the strengthening of triggers in the
20 existing code was presented to City Council.

21 Q. Okay. Was that incorporated in the later resolution -- in
22 the later ordinance?

23 A. Yes.

24 Q. Okay. So that's one they've done.

25 How about the next one? The City Council directs staff

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1 from the Bureau of Development Services, Prosper Portland,
2 Bureau of Emergency Management --

3 That's your -- that's your department; right?

4 A. Yes.

5 Q. -- to formulate a working group comprised of URM building
6 owners to do various things?

7 A. Yes. I'm working on that right now. I interviewed people
8 for that committee two weeks ago, and I have more interviews
9 scheduled the week after next.

10 Q. Okay. And how long do you have to do this?

11 A. Well, does it say? My expectation is that we'll be ready
12 by June.

13 Q. Okay. The next one is a direction to City staff to
14 convene a working group to develop recommendations for
15 standards, financing options, and timelines.

16 A. Uh-huh.

17 Q. Has that taken place yet?

18 A. It's -- it's funny. This -- yes. It's very similar to
19 the previous "be it further resolved." If you note, I didn't
20 draft either of these. These were amendments that were made on
21 the floor by the City Council, and they were -- they're very
22 similar. So my read is it's the same -- it's the same group.

23 Q. Okay. How about the third one on the next page? "Convene
24 a working group comprised of representatives of nonprofits to
25 develop recommendations for standards, financing options, and

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1 timelines for mandatory seismic retrofit program." Is that
2 true?

3 A. Yes. Yes. I'm working on that together.

4 Q. Are these going to be three committees?

5 A. No. It -- my expectation is that it will be one -- one
6 big group that includes both for-profits and not-for-profits.
7 That they will initially meet together to understand the
8 background and all this that we've already done, and then they
9 will meet separately to focus on the special needs of
10 not-for-profits and their challenges and on for-profits.

11 Q. Who has made the decision to take these three groups and
12 turn them into one?

13 A. Well, we had -- we -- I don't think they were ever
14 intended to be three groups. I think they were intended to be
15 two groups. One for not-for-profits and one for for-profits,
16 and they will be.

17 Q. Okay. But this -- this is your view, is that right, about
18 what was intended?

19 A. Right. Well, I had some discussion with the Council clerk
20 and Council staff after the meeting to understand this so that
21 I would know how to proceed, and that was -- that was
22 ultimately the direction that I understood.

23 Q. Okay. On that page, one, two, three -- four "be it
24 resolves" down, "City Council directs City staff to develop a
25 property staff exemption program for URM building owners and

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1 return to Council for adoption within a year."

2 A. Uh-huh.

3 Q. So that would be next month?

4 A. It would be.

5 Q. Has anything happened on that score?

6 A. A little. It won't be ready next month.

7 The property tax exemption program requires -- the City
8 can't do it by itself, basically. We have to do it in
9 partnership with other recipients of tax receipts with the
10 County and with the school districts, and so that's -- those
11 discussions are still in an early stage.

12 Q. Are the school districts resisting that concept?

13 A. No. I wouldn't -- I wouldn't say that.

14 Q. Okay. Why are you not up to speed on that yet?

15 A. Well, that's something, again, that I wouldn't directly be
16 responsible. It's through the Office of Government Relations.

17 Q. Okay. Next one. "City Council directs City staff to
18 develop a proposal to capitalize and administer a pool of
19 funds."

20 THE COURT REPORTER: I'm sorry. Could you slow down
21 just a little bit.

22 MR. DiLORENZO: I apologize.

23 BY MR. DiLORENZO: (Continuing)

24 Q. "City Council directs City staff to develop a proposal to
25 capitalize and administer a pool of funds to support the

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1 retrofitting of Portland URM buildings through loan
2 subsidiaries or similar mechanisms."

3 What's been done to further that?

4 A. We've had several internal meetings, and I -- they're
5 still working on it. There were some legal questions about the
6 loaning of credit that I'm -- I don't well understand the legal
7 issues around public finance, but I know several meetings have
8 happened, and that's something that's in progress.

9 Q. Okay. One, two, three, four, five, six, seven -- the
10 eighth "further resolve" says that the Office of Management and
11 Finance, in collaboration with the City Budget Office, will
12 develop a financial plan within a year to bring all city-owned
13 Class 1 and Class 4 unreinforced masonry buildings in
14 compliance with the adopted mandatory seismic retrofitting
15 standards.

16 Has that been done?

17 A. I do not know. I do not work in those bureaus.

18 Q. All right. And if you go all the way to the last one, the
19 City Council's directing City staff to basically require
20 placarding, and that was done?

21 A. It was.

22 Q. What's your current involvement in enforcing the
23 ordinance?

24 A. Enforcement? I -- I don't -- I don't enforce the
25 ordinance.

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1 Q. Okay. What's your current involvement with anything
2 concerning the ordinance at issue here in this case?

3 A. The placarding?

4 Q. Yeah.

5 A. I don't have a role in -- in -- in it now.

6 Q. Okay. But you had a role in designing it; is that right?

7 A. Well, I worked on the resolution that directed staff to
8 work on it, but I didn't write the ordinance itself. Once the
9 resolution passed, it was led by the Bureau of Development
10 Services.

11 Q. Okay. Could you turn to 17.

12 A. Sure.

13 Q. And is that, in fact, a copy of the ordinance that was
14 adopted in response to the resolution?

15 A. I think it was -- it is.

16 Q. Did you have any role in drafting this?

17 A. In drafting it? No.

18 Q. Did you testify at the City Council meeting that adopted
19 this?

20 A. I attended it. I didn't make the presentation, and I
21 can't remember -- if I was asked a question, I answered it.

22 Q. Okay. Did your bureau support it?

23 A. What do you mean by "support it"?

24 Q. Did they -- were they in favor of adoption of this
25 ordinance?

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1 A. Well, I suppose. I mean, we don't testify for -- as a
2 staff person, we don't testify for or against things at City
3 Council.

4 Q. You don't advocate things to staff people?

5 A. I'm not sure I understand what you mean.

6 Q. Do you, as a staff person, view your role as an advocate
7 for policy?

8 A. Sometimes. On this particular issue, we receive direction
9 from Council in the resolution, and I think for myself and
10 other staff, we viewed it as implementing a direction that we
11 had received from the City Council.

12 Q. I see. But before the resolution was passed, your bureau
13 made recommendations to the City Council that were opposed to
14 what the advisory committee said and helped shape the
15 resolution; isn't that right?

16 A. Yeah, I wouldn't say they were opposed, but they were
17 different.

18 Q. Okay. And your different ideas got incorporated into the
19 resolution?

20 A. They did.

21 Q. And so now you are just taking the guidance from the City
22 Council in enforcing the resolution; is that right?

23 A. Yes. Well, yes.

24 Q. Okay.

25 A. Yes.

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1 Q. Okay. Now, after this resolution -- after this ordinance
2 was passed, after 17 was passed --

3 A. Uh-huh.

4 Q. -- for a while you were a public advocate for the
5 placarding ordinance; isn't that right?

6 A. What do you mean by "public advocate"?

7 Q. Well, for instance, you went on the Think Out Loud
8 program --

9 A. Yeah, I did.

10 Q. -- and explained why it was good policy to have the
11 ordinance.

12 A. Yes.

13 Q. Okay. And during that radio show and during your
14 deposition, you said it was necessary to have the ordinance so
15 that people would know to duck, cover, and not leave.

16 Do you recall that?

17 A. We say, "Duck, cover, and hold on."

18 Q. Duck, cover, and hold on?

19 A. Yeah.

20 Q. Okay. And that was, in your view, one of the purposes of
21 the ordinance?

22 A. Yes.

23 Q. Okay. If that was the purpose of the placarding
24 ordinance, to advise people to duck, cover, and hold on, why
25 doesn't the placarding say that?

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1 A. Well, duck, cover, and hold on is always good advice in an
2 earthquake wherever you are, but unreinforced masonry buildings
3 have special risks, and that's why we put the sign just on
4 those buildings.

5 Q. Okay. So people are supposed to read a placard that says,
6 "This is an unreinforced masonry building. Unreinforced
7 masonry buildings may be unsafe in an earthquake"?

8 A. Uh-huh.

9 Q. And they are supposed to figure out that they should duck,
10 cover, and hold on as a result of reading the placard?

11 A. Well, we have other public outreach efforts about duck,
12 cover, and hold on. And many agencies do, and it's taught in
13 public schools.

14 Q. Okay. So you do have other outreach efforts; right?

15 A. Yes.

16 Q. And those other outreach efforts are effective in
17 conveying to people that they should duck, cover, and hold on?

18 A. I hope so.

19 Q. Okay. And the bureau has the ability to make robocalls,
20 for instance, on most landlines because you have all of those
21 numbers; is that right?

22 A. Well, yes. I -- through the community emergency
23 notification system.

24 Q. Okay. And you have approximately 12,000 mobile home --
25 mobile phone numbers which your bureau can call; isn't that

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1 right?

2 A. We do. People register for emergency alerts.

3 Q. And your bureau has access to what's called the BEA
4 Federal Wireless Emergency Alert System; right?

5 A. The BEA?

6 Q. That's what I read from your deposition. Maybe it got
7 transcribed wrong.

8 A. Oh, W -- Wireless Emergency Alerts. Yes. WEA. I --
9 that's -- I suppose we -- that's, like, for like a -- an
10 imminent warning for a tornado. The Weather Service primarily
11 uses that.

12 Q. Right. But you can use it in the case of an emergency,
13 can't you?

14 A. I personally cannot, but through the -- the City could.

15 Q. Okay. I'm sorry. When I say "you," from now on, I mean
16 the City.

17 A. Okay.

18 Q. Okay. Your bureau is developing an informational poster
19 designed to inform people of what to do in an earthquake.
20 Drop, cover, hold on, and don't leave; is that right?

21 A. It just says, "Drop, cover, hold on," yeah.

22 Q. Okay. And how is that poster coming along?

23 A. Oh, you know, a lot of people have opinions about the
24 graphic design, but I'm still working on it.

25 Q. Okay. Is that your project?

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1 A. Well, yes.

2 Q. Okay. And if you get the permission, the green light,
3 your poster -- having those posters all around town would be
4 more effective in communicating to people the need to duck,
5 cover, and hold on than a placard would be; isn't that true?

6 A. I don't know.

7 Q. You don't know?

8 A. Well, it would -- I mean, more effective in conveying
9 duck, cover, and hold on? If the poster says, "Duck, cover,
10 and hold on," yes.

11 Q. Okay. And your bureau has also worked with the Office of
12 Equity to have the poster and other materials in a variety of
13 languages too; right?

14 A. Yes.

15 Q. And why is it important to have the poster in a variety of
16 languages?

17 A. Well, because many Portlanders don't -- English isn't
18 their preferred language.

19 Q. Okay. But the placards aren't in a variety of languages,
20 are they?

21 A. Well, the requirement is only to post them in English;
22 although, I believe the guidance asks building owners to post
23 them in other languages according to the people who use the
24 building, and we did provide them in other languages on our
25 website for that purpose.

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1 Q. But the ordinance doesn't say that?

2 A. To post it in other languages? No.

3 Q. Okay.

4 THE COURT: Mr. DiLorenzo, we'll take our break now.

5 MR. DiLORENZO: Okay. Thank you, Judge.

6 THE COURT: Fifteen minutes, please. We're in
7 recess.

8 (Recess taken.)

9 THE COURT: Mr. DiLorenzo, go ahead, please.

10 MR. DiLORENZO: Your Honor, may I offer 17?

11 THE COURT: Any objection?

12 MS. MOYNAHAN: No objections.

13 THE COURT: 17 is received.

14 BY MR. DiLORENZO: (Continuing)

15 Q. Welcome back, Ms. Papaeftimiou.

16 A. Thank you.

17 Q. I'm getting it. It's taken me a while.

18 Before we broke for our -- for an opportunity to refresh
19 ourselves, we were talking about the various languages, I
20 think, that the City would like to encourage building owners to
21 utilize on their placards.

22 A. Yes.

23 Q. Is that a suggested policy? An official policy? Where is
24 that in the overall --

25 A. In the overall --

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1 Q. -- process?

2 Is that something that the bureau is actively pursuing.

3 A. Well, we're not enforcing -- well, no one is enforcing the
4 ordinance right now, but -- so -- and our bureau doesn't have a
5 role in -- in enforcing any elements of the building code, but
6 we did have posted on our website the -- the required language
7 in English and in all the safe harbor languages in the city
8 with a note asking building owners to use it.

9 Q. Okay. Now, has the City considered purchasing billboards
10 to, in various languages, instruct people what to do in the
11 case of an earthquake?

12 A. Have we considered it? I don't think so.

13 Q. Does your bureau have -- if properly budgeted, does your
14 bureau have the ability to do that?

15 A. Yeah. Yes. Anybody could, I suppose.

16 Q. In fact, your bureau could utilize a whole variety of
17 mechanisms to contact people to help educate them on what to do
18 in case of an earthquake, couldn't it?

19 A. We could.

20 Q. And why aren't you doing that?

21 A. Well, in fact, that's sort of a -- it's always a longer
22 story. We do have a -- we do have a community outreach
23 strategy, and we -- and we do reach out to communities to talk
24 to them about how to be safe in an earthquake and other
25 disasters, fires, and in their households. So we have a whole

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1 program related to that.

2 Q. Now, when we spoke last month, you were excited about the
3 poster project you were working on.

4 A. Yes.

5 Q. Tell us about that. How is that coming along?

6 A. Well, it's gotten sort of bogged down, in terms of graphic
7 design and whether it fits with the City's graphic design
8 standards and different bureaus using it; but, fundamentally,
9 the idea is it's a poster that shows what people should do in
10 an earthquake -- to drop, cover, and hold on -- and it also
11 includes some -- some illustrations of what to do in
12 circumstances -- like, if you're a wheelchair user, and so to
13 drop, cover, and hold on would be difficult -- about how to --
14 how to deal with that situation. That's the poster.

15 Q. Okay. And does the City plan on giving those posters
16 away?

17 A. Well, we'll put it on our website, and we'll print some,
18 yes. I don't know -- yeah, we'll give some away. I don't have
19 a -- I don't know the budget for printing at this moment.

20 Q. Okay. If you had an unlimited budget, what would you do
21 with the posters? If budgetary concerns weren't a concern,
22 what would -- what would you do?

23 A. Oh, I would give them for free to people that wanted them
24 wherever, in places where people come, community centers.

25 Q. Would you offer them to building owners on a voluntary

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1 basis to post?

2 A. Sure.

3 Q. Okay. And would you conduct mailings to residents in the
4 city?

5 A. Well, we might. We might. Mailings are costly. They use
6 a lot of paper, and what we've seen is that people often don't
7 read them. So I think we would still want to be wise with our
8 resources, but we might. We could mail them.

9 Q. Now, recently, the Portland Public Schools sent
10 earthquake-related mailings to each parent of each of their
11 student, didn't they?

12 A. I -- well, not postal mail, or I didn't see it, but they
13 sent an email.

14 Q. Okay. And were those effective in communicating a
15 message?

16 A. Well, I -- to me, as a parent? Yes, I read those
17 messages, but that's also my job.

18 Q. Okay. When we were talking last month about your poster,
19 you told me something, and I would like you to explain it, if
20 you can.

21 A. Okay.

22 Q. Let me first read what you said.

23 MR. DiLORENZO: It was at page 54, at line 6 of her
24 deposition.

25 ///

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1 BY MR. DiLORENZO: (Continuing)

2 Q. And this is you responding to one of my questions. Quote,
3 "I could show you. I have a draft of the poster."

4 A. Uh-huh.

5 Q. "We've been working on it with the Office of Equity and
6 the Office of Civic and Community Life that says, 'Drop, Cover,
7 and Hold On.' It's more -- I think it will be more effective
8 than the placard, really, because it's in color and got people
9 in it and it's a picture."

10 Do you remember telling me that?

11 A. I do. Although, I regret I don't have the transcript in
12 front of me, so I don't -- I don't have the context, but yes.

13 Q. Okay. And what did you mean by "it will be more effective
14 than the placard"?

15 A. Well, I'm not sure because I don't see the question that
16 you asked. I mean, in thinking about it, I think it will be --
17 the placard is -- it's legal language. It's text. And the
18 idea of the poster is that it's colorful, and so children, for
19 instance, that would not read the placard, would still look at
20 the poster.

21 Q. So you think the poster would be more communicative than
22 the placard?

23 A. Well, it communicates a different message, but it's more
24 eye catching, yeah.

25 Q. And the message that it communicates is what you've

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1 identified as the purpose of the ordinance -- to duck, cover,
2 and hold on; right?

3 A. Well, that's one purpose of the ordinance, is to tell
4 people that they should take protective action, so in that
5 case, the Drop, Cover, Hold On poster is also effective in
6 that.

7 MR. DiLORENZO: Pardon me just for a moment.

8 That's all I have, Your Honor.

9 THE COURT: Cross-exam.

10 MS. MOYNAHAN: Thank you, Your Honor.

11

12 CROSS-EXAMINATION

13 BY MS. MOYNAHAN:

14 Q. Ms. Papaefthimiou, the question that had been posed to you
15 in the deposition was actually "Why don't the placards say
16 'Drop, cover and hold on in case of an earthquake'?"

17 And your answer, "Well, I don't know."

18 And then the question was, "It would seem that that's one
19 of the reasons for placarding, that the sign would say that,"
20 at which point you had answered that, yes, a poster might be
21 more effective. Is that correct?

22 A. That -- that sounds right.

23 Q. So, in fact, the -- the comment that you had made about a
24 poster being more effective than a placard actually had to do
25 with conveying a message of drop, cover, and hold on; is that

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1 correct?

2 A. Right.

3 Q. Right.

4 And so do you know what the City's overall purpose, if you
5 know, of -- of enacting the placarding and lease application
6 and acknowledgment ordinances was?

7 MR. DiLORENZO: Objection, Your Honor.

8 I think what is being asked for now is a post hoc
9 rationalization for why the City Council adopted the ordinance.

10 The purpose of the ordinance is divined by the Court by
11 utilizing the rules of construction, consulting legislative
12 history, and to the limited extent that the Court has allowed
13 to inquire of Commissioner Saltzman as to what he meant by the
14 precise words that he uttered during the City Council meeting.

15 I think any evidence from City staff today talking about
16 what the purpose was that is inconsistent with that is
17 objectionable.

18 THE COURT: Ms. Moynahan?

19 MS. MOYNAHAN: Your Honor, I couldn't agree more.
20 It's the City's position that the purpose of the ordinance
21 should be gleaned from looking at the official transcripts from
22 the hearing and from the ordinance themselves. So I do agree,
23 and I'll withdraw the question.

24 THE COURT: All right.

25 MS. MOYNAHAN: Thank you.

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1 BY MS. MOYNAHAN: (Continuing)

2 Q. Ms. Papaefthimiou, you were involved in educating the
3 public about earthquakes generally; is that correct?

4 A. Yes.

5 Q. And you also are -- is it your understanding that a URM
6 building is highly vulnerable in the event of an earthquake?

7 A. Yes.

8 Q. And what would be the basis of that understanding?

9 A. Well, in general, in -- for the field of emergency
10 management, we refer to -- the Federal Emergency Management
11 Agency has standard publications of best practices, and I think
12 it's FEMA Publication No. 154 on unreinforced masonry
13 buildings, and it says that they're the most dangerous building
14 type in an earthquake.

15 Q. So the message of duck, cover, and hold on, that's a
16 message that you want to impart to everyone in any type of
17 building; is that correct?

18 A. That's right.

19 Q. Is there a need from -- from your position, is there a
20 need to specifically alert Portlanders or people entering
21 buildings in Portland or residing in buildings -- is there a
22 need to specially alert them of the fact that a building is an
23 unreinforced masonry building?

24 A. Yes. Because they're much more dangerous than most
25 other -- than all other buildings.

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1 Q. And so with respect to your education awareness, do you
2 educate people regarding how to tell a URM building from a
3 building that's not a URM building?

4 A. It's not -- it's very difficult to tell by visual
5 inspection. An engineer that's familiar might be able to, but
6 it's hard to tell a URM building from a building that just has
7 a brick facade, for instance.

8 Q. And what would you, as someone who works in emergency
9 management, expect the value of a placard to bring with respect
10 to public awareness?

11 A. Well --

12 Q. Can you connect the dots for us, please?

13 A. Sure. So when you put a placard on a URM building, then
14 it lets the users know that it's a URM, and then you can make
15 choices in your own best interest based on that information.

16 But, for instance, you might choose not -- if you're me,
17 you might choose to not rent in a URM apartment building
18 because you'd prefer a different building that was safer, or
19 you might prefer not to send your child to school in a URM
20 building and you prefer to send them to a building every day
21 that was safer.

22 Q. Okay. Do you take any special precautions when you enter
23 a URM building?

24 A. It's funny. There's -- there's a URM building that's a
25 very wonderful Italian restaurant by my house, which I do go

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1 to. But when I go there I always think about, well, it's a URM
2 building, and so I think about where I would go in the room
3 during an earthquake, especially if I'm there with my kids.

4 Q. How do you know it's a URM building?

5 A. Because I looked at the inventory on the internet.

6 Q. And do you expect -- you do a lot of outreach. You work
7 with a lot of people in the community. Do you expect that a
8 lot of the folks you're dealing with on a day-to-day basis know
9 to look at the City's database?

10 A. No. Our outreach program is primarily focused on
11 historically underserved communities because we know from
12 public -- we know from polling and other research efforts that
13 they're the ones who receive those messages the least and I've
14 not -- it's very rare to encounter someone in those communities
15 that's familiar with the -- with the URM building database
16 online.

17 Q. Are you familiar with types of placards -- other placards
18 that the government puts on buildings or requires people to put
19 on buildings that contain a government message?

20 A. Some. I mean, like, the Exit sign.

21 Q. Okay. Can you think of any other examples?

22 A. Maximum Occupancy signs in buildings that say how many
23 people can be in a room.

24 Q. How do you know, when you're looking at a placard or a
25 sign, that it's a government-required message or

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1 government-posted, as opposed to something that a tenant or an
2 owner would voluntarily post?

3 A. Well, they have a similar design, and they have the same
4 language.

5 Q. Do they have a similar message?

6 A. Yes.

7 Q. So uniformity would be one factor?

8 A. Uniformity, yeah.

9 Q. Okay. Are you familiar with the City's requirements with
10 respect to putting notification in a lease application that a
11 building is a URM?

12 A. Yes.

13 Q. And do you happen to know what language is required in
14 that lease?

15 A. Well, I -- I suppose your lease could be in any language,
16 but I think here in Portland they're almost always in English.

17 Q. I'm sorry. Do you know what is the required language to
18 put --

19 A. Oh, English. Yes.

20 Q. No, no. Let me rephrase that.

21 A. Sorry.

22 Q. There's a certain phrase that the City is requiring with
23 respect to lease applications --

24 A. Uh-huh.

25 Q. -- as a result of the ordinance that -- 189201; is that

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1 correct?

2 A. Yes.

3 Q. And do you know what that phrase is?

4 A. It's -- it's right what's in the ordinance; right? "This
5 building which are you renting or leasing is an unreinforced
6 masonry building. Unreinforced masonry buildings have proven
7 to be unsafe in" --

8 THE COURT: Slow down, please.

9 THE WITNESS: Sorry.

10 -- "have proven to be unsafe in the event of an
11 earthquake."

12 BY MS. MOYNAHAN: (Continuing)

13 Q. Okay. Are you familiar with -- generally with what would
14 be called a Council record in a proceeding?

15 A. Yes.

16 Q. And what would that record be comprised of? Do you know?

17 A. It -- it would be all the Council documents that are
18 filed. I mean, there's the ordinance, but there's also a cover
19 sheet, a staff memo, and then there's minutes from the meeting.

20 MS. MOYNAHAN: Okay. There is a second volume of
21 exhibits, Mr. Gale, if you would kindly show them to
22 Ms. Papaefthimiou.

23 DEPUTY COURTROOM CLERK: For plaintiff?

24 MS. MOYNAHAN: I'm sorry. It's for defendants.

25 DEPUTY COURTROOM CLERK: Okay.

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1 MS. MOYNAHAN: It contains 101 through 105, I
2 believe.

3 THE WITNESS: Thank you.

4 BY MS. MOYNAHAN: (Continuing)

5 Q. Ms. Papaefthimiou, would you kindly turn to what's been
6 marked as Exhibit 102.

7 A. Yes.

8 Q. And do you recognize this exhibit?

9 A. I'm looking for the relevant part.

10 Q. Now, there are numerous tabs within this exhibit. The
11 first one reads, "Resolution," then "Resolution" -- I'm sorry
12 "Resolution Agenda." There's various tabs.

13 A. Oh, yes. I do.

14 Q. I've been corrected. You don't have tabs. You just have
15 the exhibit.

16 Do you recognize this exhibit?

17 A. I do.

18 Q. And what is this?

19 A. This is a -- looks like the complete Council record from
20 the Council Item No. 37364.

21 Q. And is this the resolution?

22 A. This is the resolution, yes.

23 Q. Okay. Thank you.

24 MS. MOYNAHAN: I move to admit Exhibit 102.

25 MR. DiLORENZO: No objection.

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1 THE COURT: 102 is admitted.

2 MS. MOYNAHAN: Thank you.

3 BY MS. MOYNAHAN: (Continuing)

4 Q. Can you please look at the next exhibit, 103, and identify
5 it if you may.

6 A. Let me find it.

7 Oh, yes, this is when the City Council -- it was the first
8 reading when the City Council heard the placarding and tenant
9 notification requirements.

10 Q. And is this the complete Council record from --

11 A. Yes, I believe that it is.

12 Q. And that is for Ordinance 189201; is that correct?

13 A. I think so; although, I don't think the number is assigned
14 until it's passed, and so it's not on this.

15 Q. True. Exactly. Okay.

16 MS. MOYNAHAN: I move to admit 103, please.

17 MR. DiLORENZO: No objection, Your Honor.

18 THE COURT: 103 is received.

19 MS. MOYNAHAN: Thank you, Your Honor.

20 BY MS. MOYNAHAN: (Continuing)

21 Q. Would you please look at 104. Exhibit 104?

22 A. Yes.

23 Q. And can you identify Exhibit 104?

24 A. Yes.

25 Q. What is this?

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1 A. This is -- it's changing the timeline requirements for
2 placarding and tenant notification that came in February of
3 this year.

4 Q. And was this ultimately the record for Ordinance 189399?

5 A. Yes, I believe it was.

6 MS. MOYNAHAN: Okay. I move to admit.

7 MR. DiLORENZO: No objection.

8 THE COURT: It's received.

9 BY MS. MOYNAHAN: (Continuing)

10 Q. And, finally, if you would please look at Exhibit 105. If
11 you can identify that.

12 A. Sorry. There was a lot on this agenda. I'm looking for
13 the one I recognize.

14 It's on consent. Yes. This is what became
15 Ordinance 189479. The Council record, it looks like.

16 Q. Okay. Thank you very much.

17 MS. MOYNAHAN: I move to admit 105.

18 MR. DiLORENZO: No objection.

19 MS. MOYNAHAN: Thank you.

20 You may put that book aside.

21 BY MS. MOYNAHAN: (Continuing)

22 Q. Would you please turn to Exhibit 134 of the defendants'
23 exhibits.

24 MS. MOYNAHAN: Mr. Gale, I'm not sure she has our
25 other volume. Do you still have two volumes up there?

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1 DEPUTY COURTROOM CLERK: Yes. But that's
2 plaintiffs'.

3 THE WITNESS: You said 134?

4 MS. MOYNAHAN: Yes.

5 Thank you.

6 BY MS. MOYNAHAN: (Continuing)

7 Q. Do you recognize that exhibit?

8 A. Yes.

9 Q. And what is this?

10 A. This is my -- this is my statement that I signed.

11 Q. And you signed that in support of a motion the City filed
12 recently in this litigation; correct?

13 A. Yes.

14 Q. Okay. And I'd like to point your attention to
15 paragraph -- excuse me -- paragraph 5. You just mention in
16 paragraph 5 that the URM Technical Advisory Committee looked at
17 the measures California implemented to mitigate -- I guess
18 that's URM dangers; is that correct?

19 A. Yes.

20 Q. Okay. And, specifically, the committee looked at
21 California statewide URM building policy, a California report
22 on URM building law, and several California cities' seismic
23 hazard mitigation programs for URM buildings, and a Seattle
24 report on URM buildings.

25 How do you know that?

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1 A. How do -- how do I know that we looked at those?

2 Q. Yes.

3 A. Oh, well, because I attended the meetings where they were
4 reviewed and -- and discussed, and we -- they were posted on
5 our website.

6 Q. And do you happen to know whether those programs were
7 successful?

8 A. In general, yes, for -- in general, yes. There's not very
9 many URM buildings remaining in California.

10 Q. And in paragraph 6 you discuss the City's requirement
11 about lease application notification to tenants informing
12 people who might not otherwise know that a building was a URM
13 or that a URM may be dangerous in a major earthquake. What
14 people might not know that a building is a URM?

15 A. Who might not know?

16 Q. Yeah, who might not know?

17 A. Oh, well, many people might not know. I mean, it's -- it
18 seems kind of wonky probably. I mean, but, in particular,
19 people who are new to Portland and don't know we have
20 earthquake risk might not concern themselves with it or people
21 who have English as a second language or for whatever reason
22 aren't sort of reading *Willamette Week* might not know about
23 URMs.

24 Q. But you maintain a website, do you not, that provides
25 information to people about URMs?

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1 A. Well, the City does, yes.

2 Q. The City does?

3 A. Uh-huh.

4 Q. And these people who might not know who may be moving to
5 Portland, would they know, upon moving to Portland, to look at
6 a City website?

7 A. I don't see why they would. I mean --

8 Q. Okay. And you also mentioned reaching underserved
9 communities. Could you explain how they might not be reached
10 by a City website?

11 A. Sure. Well, let's see. There are a lot of reasons that
12 historically underserved communities, in particular, might not
13 be reached by the City website. One, it's only in English --
14 most of the content; two, it's not like phone friendly, so if
15 you are accessing the internet on your telephone, it's --
16 instead of, you know, a big computer, it's hard to read. If
17 you don't have regular internet service at your house.

18 There's a lot of reasons that those communities, in
19 particular, would be unlikely to look at this, I think.

20 Q. Okay. Now, how about mailings? You mentioned that
21 mailings do not reach many URM building users or potential
22 owners. Why is that?

23 A. Well, a couple of reasons. One, we -- we mail to URM
24 building owners from the property tax assessor's database, I
25 think, five times during this process; and, yet, we still heard

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1 from owners at the end who said they hadn't -- hadn't received
2 the letter, which I think means they probably just tossed it
3 with the junk mail and didn't look at it, or the building
4 changed hands and the mail list wasn't updated.

5 And then for tenants it's even harder because you have to
6 go through a commercial mail house. Like, you give them a list
7 of addresses and you buy the apartment numbers, basically; but
8 those are just commercial address services, and there's no --
9 you hope that they're good, and I think they're pretty good,
10 but they're not -- they're not -- they're imperfect. And also
11 people -- tenants throw away junk mail too.

12 Q. Okay. And with respect to tenants relying upon a
13 commercial service, tenants often move; is that correct?

14 A. That's true. They move or, especially with high rents,
15 there's, like, a roommate situation. So you send it to
16 "Resident." Well, if a bunch of people live there, the first
17 person to see it might read it and recycle it.

18 Q. Okay. And you've mentioned in paragraph 7 -- you attest
19 in paragraph 7 that prospective tenants may reside outside of
20 Portland or Oregon and may not be reached through these
21 mailings and that the best way to reach these individuals
22 before they're locked into a tenancy is to provide that
23 information in the lease application.

24 Can you explain more about this -- your opinion?

25 A. Well, sure. Initially, we said we should put the notice

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1 in the lease. Well, initially, we had an open house, and we
2 mailed to tenants to solicit their input on the policy, and
3 what we saw is the majority of the tenants who attended, we
4 asked them to fill out a little survey, and they said they
5 didn't know it was a URM building when they rented.

6 So that alerted us to the issue that many tenants would --
7 didn't know that it was a URM building when they rented, and so
8 we proposed putting it in the lease agreement. But then, as we
9 discussed it, we realized by the time you're signing a lease,
10 you've already -- it's sort of a formality. Like, you've made
11 a commitment to move into that building, and you paid whatever
12 fee, and you're ready to move in and get the keys. And so we
13 said we should tell them when they apply for the building and
14 they're still considering moving to someplace else.

15 Q. Okay. And you mentioned that you had some open houses.
16 Can you please explain that?

17 A. Sure. We had -- let's see. We had -- how many? We had
18 at least three public open house events as part of the
19 policy-making process after the policy committee had been
20 meeting for a while. We did some public open houses. We did
21 two that were specifically focused to provide information and
22 solicit input from building owners, and we mailed to all the
23 building owners with both dates. And then, as we reflected on
24 it, we realized that tenants also had an interest that might be
25 different, and so we had another open house, and we mailed to

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1 all the tenants and asked them to come.

2 MS. MOYNAHAN: Okay. I move to admit Exhibit 134,
3 please.

4 MR. DiLORENZO: That's the declaration?

5 MS. MOYNAHAN: Declaration.

6 MR. DiLORENZO: Your Honor, I object.

7 THE COURT: Go ahead.

8 MR. DiLORENZO: On relevance. I don't object to all
9 of it. I have no objection to paragraph 1, paragraph 2,
10 paragraph 3, paragraph 4. Paragraph 5 is fine. I object to
11 paragraph 6 to the extent that it purports to comment on the
12 purpose of the ordinance. To the extent it's just her personal
13 views, I -- I would have no objection. So I have a limited
14 objection to paragraph 6. And that goes for 7 and 8.

15 To the extent she's commenting on the purpose of the
16 ordinance, I would object. But because the Court can assign
17 what probative value it wishes to any of this, I -- I would
18 just like to have that limited objection.

19 THE COURT: All right. Thank you. I'll receive 134.

20 MS. MOYNAHAN: Thank you, Your Honor.

21 BY MS. MOYNAHAN: (Continuing)

22 Q. Ms. Papaefthimiou, earlier this afternoon Mr. DiLorenzo
23 compared for you the draft policy report of the policy
24 committee and the final report.

25 Do you recall that?

Papaeftimiou - X

1 A. Yes.

2 Q. And there had been a deletion of other risky buildings at
3 the request of Mr. Reid Zimmerman.

4 Do you recall that?

5 A. Yes.

6 Q. Now, after that final report went onto the City website,
7 did you receive any complaints from the other policy committee
8 meeting -- the members about the final report?

9 A. No.

10 Q. Did anyone get back to you and say, "Hey, we thought other
11 risky buildings was going to be part of this document"?

12 A. No. I can't think of anyone that -- that -- that said
13 that.

14 Q. Would you have been the person to receive that
15 communication?

16 A. Yes. Because it was posted in January, and Carmen had
17 left, then, so it all would have come -- if you email
18 urm@portlandoregon, it comes to me.

19 MS. MOYNAHAN: Okay. I have no further questions.

20 THE COURT: Redirect.

21 MR. DiLORENZO: I just have a few more, Your Honor.

22

23

24

25

Papaefthimiou - ReD

1 REDIRECT EXAMINATION

2 BY MR. DiLORENZO:

3 Q. You said it's difficult to judge a URM building by visual
4 means; is that right?

5 A. In -- for a layperson, yes.

6 Q. Okay. So, for instance, if a person saw a building with a
7 direct facade, they wouldn't necessarily know whether it was
8 all brick or whether there was concrete behind the facade?

9 A. Right.

10 Q. Okay. How about a person with some training with -- what
11 would you have to do, even if it was a person with some
12 training, to determine whether a building was a URM, other than
13 just looking at it?

14 A. Well, I guess that's really a question for an engineer. I
15 think that's -- I don't think I'm qualified to answer that.

16 Q. Okay. So do you think you're qualified to answer any of
17 that series of questions that Ms. Moynahan posed to you about
18 identification of URMs?

19 A. About -- I feel confident that I don't know, so I can
20 answer that question about whether I can recognize it or not,
21 and I -- I work with professionals who can do so more
22 confidentially. But how they know would be a question for them
23 to answer.

24 Q. Okay. You also talked about the committee looking into
25 the California statute and some other ordinances adopted by

Papaefthimiou - ReD

1 local governments in California.

2 A. Yes.

3 Q. And what was the purpose of doing that?

4 A. Well, we would -- we were looking for examples of best
5 practice or programs that we could learn from.

6 Q. And was that with respect to placarding, in particular?

7 A. It was in respect to the complete program. We looked at
8 the financial incentives, the standards that they used,
9 everything.

10 Q. Okay. Have you read the City's briefs to the Court?

11 A. I -- yes.

12 Q. Okay. Are you familiar with a portion of the brief or the
13 argument that the City -- that the City posits that says,
14 quote, "For example, as of 2017, 98 percent of URM buildings in
15 Berkeley have been reinforced and only six URM buildings
16 remain."

17 Do you recall that statistic?

18 A. I recall that statistic from the -- yes. From the
19 research of the committee also.

20 Q. And was the City using that statistic to justify the
21 placarding ordinance?

22 A. That's not my recollection. Berkeley had other programs
23 also. I mean, it was a -- it was a -- it was a -- it was a
24 suite of policy interventions to achieve that.

25 Q. But, in fact, Berkeley mandated retrofitting, did they

Papaefthimiou - ReD

1 not?

2 A. I believe so.

3 Q. Right. So that is likely why only six URM buildings
4 remain, because Berkeley mandated retrofitting, didn't it?

5 A. It did mandate retrofitting.

6 Q. One more question.

7 When we spoke last -- and I'd like your explanation for
8 this -- you said the placard itself doesn't save any lives.

9 Do you recall saying that?

10 A. Yeah.

11 Q. Okay. And what did you mean by that?

12 A. Well, the placard by itself is just a sign. We started
13 the program -- we were hoping that a lot of buildings would
14 actually be retrofitted and that people would be safe inside
15 them in an earthquake and the placard doesn't achieve that, but
16 what it does do is give people more information that they might
17 choose not to enter those buildings or that they might do that
18 mental experiment and think about "Where am I going to hide
19 when this building starts to come down around me?"

20 MR. DiLORENZO: Okay. No further questions. Thank
21 you, Judge.

22 MS. MOYNAHAN: No further questions, Your Honor.

23 THE COURT: You may step down.

24 MR. DiLORENZO: Our next witness is former
25 Commissioner Dan Saltzman.

Saltzman - D

1 THE COURT: All right.

2 MR. DiLORENZO: He's waiting outside.

3

4

DAN SALTZMAN,

5 called as a witness on behalf of the Plaintiffs, being first

6 duly sworn, is examined and testified as follows:

7

8 THE WITNESS: I do.

9

DEPUTY COURTROOM CLERK: Thank you. Step up and have
10 a seat. There's some water here if you would like it.

11

THE WITNESS: Oh, great.

12

DEPUTY COURTROOM CLERK: Please state your name for
13 the record and spell your last name.

14

THE WITNESS: Dan Saltzman, S-a-l-t-z-m-a-n.

15

DEPUTY COURTROOM CLERK: Thank you.

16

17

DIRECT EXAMINATION

18

BY MR. DiLORENZO:

19

Q. Good afternoon, Commissioner Saltzman. How are you today?

20

A. I'm very good. Thank you.

21

Q. You've recently retired as City Commissioner after 20
22 years in that position; is that right?

23

A. That's correct.

24

Q. And in addition to your legislative responsibilities, you
25 also served as the chief executive authority for city bureaus

Saltzman - D

1 that were assigned to you by a variety of Portland mayors?

2 A. That's correct.

3 Q. Over your tenure, you have run approximately 12 to 14
4 different bureaus?

5 A. Correct.

6 Q. You have headed up almost all the City's bureaus at
7 separate times?

8 A. I have.

9 Q. Prior to retiring, you were commissioner in charge of the
10 Bureau of Emergency Management; is that right?

11 A. Yes. And I told you last week in deposition it was in
12 September of '17 that I became commissioner in charge. It was
13 actually, like, September of '18. 2018.

14 Q. And you were also commissioner in charge of the Portland
15 Fire Bureau; is that right?

16 A. Yes.

17 Q. Okay. And what were your other assignments before you
18 retired?

19 A. Before I retired? Portland Fire and Rescue, the Portland
20 Children's Levy, Bureau of Emergency Management, Bureau of
21 Emergency Communications, and I think that was it.

22 Q. Okay. The Bureau of Emergency Management and the Portland
23 Fire Bureau both had involvement in enforcing the placarding
24 ordinance; is that right?

25 A. Yes.

Saltzman - D

1 Q. Okay. And you were familiar with the URM building policy
2 committee report, were you?

3 A. Yes.

4 Q. Can you take a look at number 13. I just want to make
5 sure that you identify that as the report that I was -- excuse
6 me -- I was referring to.

7 A. Was there a particular exhibit you wanted me to look at?

8 Q. Number 13.

9 A. Oh, 13. Yes, that's the report.

10 Q. Okay. And the -- the report recommended requiring certain
11 levels of retrofits for Class 3 URM buildings. Is that your
12 understanding?

13 A. That's my understanding.

14 Q. Okay. I'd like to refer you to Exhibit 21, if I can.
15 This purports to be an email from Matt Grumm, G-r-u-m-m, dated
16 August 30. And there's no year on it.

17 Mr. Grumm was your chief of staff; isn't that right?

18 A. Yes.

19 Q. And as your chief of staff, he assisted you with both
20 legislative and executive duties?

21 A. Yes.

22 Q. And Mr. Grumm was generally authorized to convey your
23 positions to people outside your government circle; is that
24 right?

25 A. Yes.

Saltzman - D

1 Q. The second paragraph of this exhibit reads, quote,
2 "Commissioner Saltzman made it clear in that spring hearing
3 that he feels Council is not being aggressive enough in
4 requiring retrofits of URM buildings, but he also knew his
5 Council colleagues were not comfortable enacting these
6 regulations, and so he is now focused on requiring the placards
7 and tenant notification."

8 Do you see that?

9 A. This is a very illegible copy, but yes.

10 Q. Can you read it?

11 A. Yes, I can more or less read it.

12 Q. Okay. I have a better copy if you would like to look at
13 that.

14 A. Oh, I know we looked at it last week, so I'm pretty
15 familiar with it.

16 Q. Okay. Mr. Grumm was authorized to send that email; isn't
17 that correct?

18 A. Yes.

19 Q. Okay. Now, Exhibit 17 is a copy of the ordinance which
20 was adopted in October of 2018. Is that your understanding?

21 A. Yes.

22 Q. And you were involved in drafting the ordinance; is that
23 right?

24 A. Yes.

25 Q. It was an outgrowth of an earlier resolution that was

Saltzman - D

1 adopted in June of 2018?

2 A. Correct.

3 Q. Is Exhibit 16 that resolution?

4 A. Yes.

5 Q. Okay. And it also instructed City staff to undertake --
6 and by "it," I mean Exhibit 16 -- instructed City staff to
7 undertake many additional tasks. Is that your reading?

8 A. Yes.

9 Q. Your fire bureau was to develop budget requests to assess
10 seismic efficiencies and costs to retrofit its masonry
11 buildings.

12 Do you recall that?

13 A. Yes.

14 Q. Other than developing the placarding ordinance, were you
15 aware of staff implementing any other task that is stated in
16 Exhibit 16?

17 A. Let's see. I believe the direction to staff was to
18 develop code language, to strengthen triggers in existing code
19 related seismic retrofitting in unreinforced masonry buildings,
20 and I also believe the -- a working group to develop
21 recommendations for standards, financing options, and
22 timelines.

23 I think the direction to the Bureau of Emergency
24 Management was to submit items to the City's 2019 legislative
25 agenda to increase the State of Oregon's financial support for

Saltzman - D

1 retrofitting.

2 Q. Okay. How about the tasks that were given to the City to
3 develop funds to assist URM building owners in furthering the
4 retrofits? Were you aware of any activity that the City
5 undertook to do those sorts of things?

6 A. No, I am not.

7 Q. Okay. How about the tasks to the City staff to develop
8 property tax exemptions and other types of incentives for URM
9 building owners that were required by this ordinance? Are you
10 aware of the City staff doing anything of this sort?

11 A. I'm not sure. I believe it was looked at, yes.

12 Q. Okay. But as far as you know, nothing was developed
13 during your tenure?

14 A. Correct.

15 Q. Okay. Now, your fire bureau was to develop budget
16 requests to assess seismic efficiencies and costs to retrofit
17 its masonry buildings per the resolution.

18 During your last six months as head of the fire bureau,
19 did your staff, as far as you know, develop any of that
20 information?

21 A. I don't recall seeing that.

22 MR. DiLORENZO: Okay. Your Honor, while I'm at it, I
23 would like to offer 21.

24 THE COURT: Any objection?

25 MS. MOYNAHAN: No objection.

Saltzman - D

1 THE COURT: 21 is received.

2 BY MR. DiLORENZO: (Continuing)

3 Q. Commissioner, if you can take a look at number 19, this is
4 a -- these are excerpts of a closed caption file of the City
5 Council meeting of October 3.

6 Now, we had occasion to talk about some of the statements
7 that you made during that meeting. Do you recall that series
8 of conversations we had when your deposition was taken?

9 A. Yes.

10 Q. Okay. We have highlighted on that exhibit, on the second
11 page, several statements that you made. So the red
12 highlighting is ours.

13 One of the statements -- up at the top of the second page
14 of that exhibit, there is a statement in red that says, "Giving
15 Portlanders the placards I believe helps build awareness of
16 seismic risk, about what to do if you're in an unreinforced
17 masonry building, to duck and cover, not to get out, and it
18 also builds market demand for seismic improvements to these
19 buildings."

20 Do you recall saying that?

21 A. Yes.

22 Q. And was this statement made during one of the two meetings
23 that constituted Council deliberations about the ordinance?

24 A. Yes.

25 Q. Okay. All right. So let's -- let's concentrate on the

Saltzman - D

1 first purpose that you outlined. To help build awareness of
2 the seismic risk, about what to do if you're in an unreinforced
3 masonry building, to duck and cover, not to get out.

4 There is nothing in the placard that tells the reader to
5 don't run out, duck and cover; isn't that correct?

6 A. Correct.

7 Q. In fact, there are no instructions in the placard or the
8 notices that are required to be inserted in -- in lease
9 applications at all; is that correct?

10 A. About duck and cover and all that?

11 Q. Yes.

12 A. Yes.

13 Q. Or about what to do in an earthquake?

14 A. Correct.

15 Q. So it is fair to say that there is nothing in the
16 ordinance that further the purpose of making people aware that
17 in an earthquake they should duck, cover, and not get out.
18 Isn't that a fair statement?

19 MS. MOYNAHAN: Objection, Your Honor. Lacks
20 foundation.

21 Mr. Saltzman testified that the purpose -- and it's
22 written here -- the purpose is build awareness of seismic risk.
23 Not -- the purpose is not duck and cover.

24 THE COURT: Jill read back the question, please.

25 (The court reporter read as follows: "Question: So

Saltzman - D

1 it is fair to say that there is nothing in the ordinance that
2 further the purpose of making people aware that in an
3 earthquake they should duck, cover, and not get out. Isn't
4 that a fair statement?")

5 THE COURT: Mr. DiLorenzo?

6 MR. DiLORENZO: Well, Your Honor, the purpose is it
7 helps build awareness of seismic risk about what to do if
8 you're in an unreinforced masonry building, to duck and cover,
9 not to give out -- not to get out. And it also -- and then it
10 goes on with another purpose.

11 So I am asking whether there is anything in the ordinance
12 that furthers that purpose.

13 THE COURT: Overruled.

14 You can answer.

15 THE WITNESS: I believe the ordinance's intent was to
16 build awareness of the seismic risks, through the placards, and
17 that that -- given that information, people who work or live in
18 unreinforced masonry buildings may seek more information about
19 what to do in an earthquake, which includes the specifics of
20 duck and cover and other things.

21 But I think you're quoting from a spoken word here, and so
22 I think if you read the first part that says, "Giving
23 Portlanders the placard -- placards I believe helps build
24 awareness of seismic risks," comma. That's what the intent of
25 the ordinance is.

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1 Q. Okay. So --

2 MR. DiLORENZO: Give me a moment, Your Honor.

3 THE COURT: Yes.

4 BY MR. DiLORENZO: (Continuing)

5 Q. So, Commissioner, do you recall being at the offices of
6 the city attorney on May 7, 2019, when your deposition was
7 taken?

8 A. Yes.

9 Q. And I was there?

10 A. Yes.

11 Q. And Ms. Moynahan was there?

12 A. Yes.

13 Q. And there was a court reporter there?

14 A. Yes.

15 Q. And you swore to tell the truth then; right?

16 A. Yes.

17 MR. DiLORENZO: And at page 39, Counselor, starting
18 at line 11.

19 BY MR. DiLORENZO: (Continuing)

20 Q. I posed this question: "Question: So it is fair to say
21 that there is really nothing in this ordinance that furthers
22 that particular purpose, which is to make people aware that
23 they should duck, cover, and not run out. Is that a fair
24 statement?

25 "Answer: Yeah, that sounds fair."

Saltzman - D

1 Was that the answer you gave?

2 A. "Yes." Because I believe your question was saying there's
3 nothing in the ordinance that gives people a -- what to do in
4 an earthquake, that the ordinance is simply designed to raise
5 awareness of the risk.

6 Q. Okay. Thank you.

7 Now, if the City were interested in maintaining public
8 awareness about what to do in the case of an earthquake, it
9 could maintain a public awareness campaign on its own to let
10 people know what to do in an earthquake; isn't that true?

11 A. Yes.

12 Q. The next purpose you identified was, quote, to build
13 market demand for seismic improvements to these buildings. Do
14 you recall that?

15 A. Yes.

16 Q. And that was made during the City Council hearing during
17 the deliberations of the ordinance; is that right?

18 A. Yes.

19 Q. Okay. So the purpose is to create a circumstance in which
20 tenants and customers consider not living in, working, or
21 frequenting URM buildings. Isn't that one of the purposes?

22 A. The purpose is to build awareness of the risk and to give
23 people that information and -- and the belief that people, when
24 they have information, they make better decisions.

25 Q. Okay. So what is the point of making people aware that

Saltzman - D

1 the buildings are URM buildings from a market perspective?

2 A. Inasmuch as a URM building is considered to be very risky
3 in the event of an earthquake, that's what the purpose is -- to
4 give residents or employees that information.

5 Q. All right. Do you at the same deposition recall giving
6 these answers when I asked this question -- these questions?

7 Page 40, line 14.

8 "If fewer consumers" -- "Question: If fewer consumers
9 decide to move into a building because of a placard, then that
10 decreases the demand for services. Is that a fair statement?

11 "Answer: Yeah, I guess.

12 "Question: Okay. And so this is all to what end? So
13 what is the point of that? In your mind, was this, then, to
14 influence an owner to take action to do something?

15 "Answer: Well, I think -- it is what I'm surmising.
16 That's the market demand. If people are electing not to live
17 in your buildings, then if you are a landlord you probably want
18 to do something about that.

19 "Question: And what would that something be that you
20 would want to do?

21 "Answer: It could be doing the seismic retrofits. It
22 could be demolishing the building and building something
23 different."

24 Do you recall saying that?

25 A. Yes.

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1 Q. And that is, in fact, your testimony here?

2 A. On May 7th?

3 Q. And do you -- do you -- is that still your feeling?

4 A. Yes. Yes, sir.

5 Q. Let's flip to number 20, if that's okay. And it would be
6 the second -- the fourth and fifth page, which we also have
7 highlighted in red.

8 Number 20 is a portion of a closed caption file from the
9 Portland City Council meeting of October 10.

10 And was October 10 the second reading of the ordinance?

11 A. I believe so. Yes.

12 Q. And were these, among other things, your statements that
13 were made just prior to the vote of the ordinance?

14 A. Yes. They look like it.

15 Q. Okay. These pages aren't numbered, so I'm trying to count
16 them for you. One, two, three -- fourth and fifth pages I'm --
17 I'm interested in.

18 At the bottom of the fourth page you say during the City
19 Council meeting, "They are going to have thought about it.
20 What do I need to do in the event of an earthquake? And also
21 be aware of their surroundings. So I do think that this works
22 to help to improve, as I said, the life and safety of
23 Portlanders."

24 And if you flip the page, "And I think this is why the
25 building owners are opposed to it. It will build the market

Saltzman - D

1 demand for seismic improvements to our buildings."

2 Do you see that?

3 A. Yes.

4 Q. Okay. Now, by that, you meant to mean that if owners
5 can't lease their apartments they would have to undertake
6 retrofits or do other things. Isn't that what you meant?

7 A. Well, I meant by giving, again, residents or employees of
8 unreinforced masonry buildings the information, that
9 information would then -- could be factored into decisions
10 about whether to lease in an unreinforced masonry building.

11 Q. Which would, in turn, place economic pressures on building
12 owners; isn't that right?

13 A. It could, yes.

14 Q. And that was your intention?

15 A. That was one of them, yes.

16 Q. Okay. Now you also told the press, quote, "When those
17 types of decisions are made by residents, that helps light a
18 fire under landlords to make those seismic retrofits."

19 Do you recall saying that?

20 A. I believe so, yeah.

21 Q. Okay. And you were referring to these same economic
22 demand issues by that statement?

23 A. Yes. Yeah.

24 Q. Okay. Now, after the ordinance was passed, you made a
25 special arrangement with the Portland Public Schools; is that

Saltzman - D

1 right?

2 A. It was on sort of the eve of the ordinance adoption.

3 Q. Okay. The schools wanted an extension to placard. In
4 other words, they wanted more time than the ordinance provided;
5 is that right?

6 A. Correct.

7 Q. The ordinance provided January 1, 2019, as the deadline
8 for public buildings.

9 A. Yes.

10 Q. And they wanted more time?

11 A. I believe they wanted until August.

12 Q. But the ordinance said they had only until January?

13 A. Yes.

14 Q. Okay. So you administratively decreed that the schools
15 could have until the next school year to placard; right?

16 A. Well, the end of the current -- the end of that school
17 year to placard.

18 Q. Okay. So that --

19 A. It's one of the arguments they made.

20 Q. I'm sorry. I didn't mean to step on your words there.

21 A. Oh, just, you know, one of the arguments they were making
22 in support of more time was that they could have their staff
23 more devoted to it when students aren't in the buildings and
24 things like that. They have staff resources and have more free
25 time.

Saltzman - D

1 Q. Okay. And you -- you granted them your permission?

2 A. Yes.

3 Q. Okay. And you did not take that exception back to the
4 City Council?

5 A. Well, I did mention it on the -- as I said, during the
6 final ordinance adoption.

7 Q. I saw that. But you didn't -- you didn't take any steps
8 to amend the -- the ordinance?

9 A. Correct.

10 Q. Okay. And I think you told me that you doubt you had
11 authority to do what you did; isn't that right?

12 A. I think I said that, yes.

13 MR. DiLORENZO: Okay. I don't have any further
14 questions.

15 Thank you, Your Honor.

16 THE COURT: Cross-exam.

17 MS. MOYNAHAN: Thank you, Your Honor.

18 Bear with me, please.

19 Counsel, would you be kind enough to identify the exhibit
20 with the transcript you were just on?

21 MR. DiLORENZO: Oh, yeah. They are number 19.

22 MS. MOYNAHAN: Thank you.

23 MR. DiLORENZO: And number 20.

24 And while I'm at it, Your Honor, I would like to offer
25 these.

Saltzman - X

1 MS. MOYNAHAN: No objection, Your Honor.

2 THE COURT: They're received.

3

4

CROSS-EXAMINATION

5 BY MS. MOYNAHAN:

6 Q. Mr. Saltzman, if you would turn to Exhibit 20, please.
7 And these pages aren't individually numbered, unfortunately.
8 It would be the fourth of the fifth -- five pages.

9 A. Okay.

10 Q. And at the very -- well, no, about two-thirds of the way
11 down, of the -- of the transcript it says "Saltzman," and I
12 believe it's a long statement that you made at Council.

13 Do you believe that to be correct?

14 A. Statement that starts with, "I want to thank my
15 colleagues"?

16 Q. Exactly.

17 A. Yes.

18 Q. Do you have any reason to think that this statement is not
19 accurate?

20 A. No.

21 Q. Okay. And I draw your attention to, oh, about a third of
22 the way down, just above the red highlighting, it says, "It's
23 our obligation." It reads, "We have this information, and for
24 transparency sake, it's our obligation to provide Portlanders
25 this information through tenant notifications and the placards.

Saltzman - X

1 And to respect their ability to make informed decisions and
2 also to make them be aware of their surroundings. I really
3 believe this, this is really an obligation to today's
4 ten-year-olds."

5 And go on down -- I'm, of course, just skimming this
6 testimony.

7 A couple of sentences down. "So giving Portlanders the
8 placards and the tenant notification language helps to build
9 awareness of seismic risk. I can't help but to think that a
10 tenant that walks in and out of their building every day and
11 sees the placard -- so going to be better prepared if an
12 earthquake hits. They're going to have thought about it. What
13 do I need to do in the event of an earthquake? And be aware of
14 their surroundings. I do think that this works to help to
15 improve, as I said, the life and safety of Portlanders."

16 Is that an accurate statement, to your recollection, as to
17 what you said in Council?

18 A. Yes.

19 Q. And it's part of the Council record?

20 A. Yes.

21 Q. Thank you.

22 MS. MOYNAHAN: Also, if you would, please --
23 Mr. Gale, if you would please return the City's volume of
24 exhibits -- the first one that has Exhibit 101 through 105.

25 ///

Saltzman - X

1 BY MS. MOYNAHAN: (Continuing)

2 Q. If you would please turn to Exhibit 103. And there -- the
3 City's exhibits are numbered at the bottom. This is numbered
4 page 54 of 178. If you could please turn to that page on
5 Exhibit 103.

6 A. 54?

7 Q. 54 of 178.

8 A. Okay.

9 Q. And I will -- I will represent to you that this is the
10 Council minutes of the October 3rd hearing on Ordinance 189201
11 that's been previously identified for this proceeding. I see
12 "Saltzman" there and about probably half of the page is
13 dedicated to your testimony from that day.

14 Do you see that?

15 A. Yes.

16 Q. And as part of your testimony, about a third of the way
17 down, I read, "And I believe this respects Portlanders'
18 intelligence. Give them the information. Let them weigh the
19 risks. They're quite capable of doing that. And I believe
20 they will do that. And they also need to be aware of their
21 surroundings. Think about it. If you live in an unreinforced
22 masonry building or you work in one, as Mr. Klotz said, think
23 about what your exit plan is or whether to exit. Think about
24 where you're going to duck and cover. This is information,
25 fundamental life safety information."

Saltzman - X/ReD

1 Do you recall making that statement?

2 A. Yes.

3 Q. And this is part of the official Council record, is it
4 not?

5 A. Yes.

6 MS. MOYNAHAN: Okay. I have no further questions.
7 Thank you.

8 MR. DiLORENZO: I just have a few, Your Honor.
9 Can you give me just a moment?

10 THE COURT: Yes.

11

12 REDIRECT EXAMINATION

13 BY MR. DiLORENZO:

14 Q. Commissioner, can you refer to Exhibit 30?

15 A. In your book or the City's book?

16 Q. Yes, in my book.

17 A. Oh, okay. I see.

18 Q. Actually, they're all --

19 A. Exhibit 30?

20 Q. 30. This is a page from another exhibit that the City has
21 already introduced into evidence. It's a -- it's an excerpt
22 from the Earthquake Regional Impact Analysis for Clackamas,
23 Multnomah, and Washington Counties. And I would like you to
24 take a look at Table 5-1.

25 As soon as you're there, I just have a couple of

Saltzman - ReD

1 preliminary questions for you.

2 A. Okay. I'm there.

3 Q. Okay. Now, before you were -- before your 20-year career
4 as a Portland City Council member, you were on the Multnomah
5 County Commission; is that right?

6 A. Yes.

7 Q. And prior to that you were an engineer; is that right?

8 A. Yes.

9 MS. MOYNAHAN: Your Honor, objection.

10 Beyond the scope. I simply read from the Council minutes.

11 MR. DiLORENZO: Well, Your Honor, these --
12 Commissioner Saltzman is the City's witness and my witness, and
13 I think we should have a bit of a relaxed policy on within
14 scope. And also I am going to ask a question that directly
15 relates to one of hers, but I first wanted to find out whether
16 Commissioner Saltzman had any experience reading this kind of
17 stuff.

18 THE COURT: Was this covered in deposition?

19 MR. DiLORENZO: No, it was not.

20 THE COURT: Ms. Moynahan?

21 MS. MOYNAHAN: Your Honor, again, I limited -- my
22 direct entirely was limited to reading from the Council
23 minutes.

24 MR. DiLORENZO: I'll get to it a different way,
25 Your Honor, I think.

Saltzman - ReD

1 THE COURT: All right.

2 MR. DiLORENZO: I'll get to it a different way.

3 BY MR. DiLORENZO: (Continuing)

4 Q. During your questioning from Ms. Moynahan, you were
5 talking about the importance of making people aware of their
6 surroundings.

7 Do you recall that series of questions?

8 A. Yes.

9 Q. Okay. And I believe you said that it's important for
10 unreinforced masonry buildings to have a placard so people are
11 aware that they are in an unreinforced masonry building or
12 nearby; is that right?

13 A. Yes.

14 Q. Okay. Now, you're aware that there are other forms of
15 construction that are equally vulnerable in a large earthquake;
16 is that right? Like soft story construction?

17 A. I guess I'm not aware of that.

18 Q. All right. If there were testimony that were adduced here
19 that said that certain types of construction, like soft story
20 construction, was also vulnerable to an earthquake and if URMs
21 were placarded but soft story buildings were not, do you
22 believe that your effort to make people aware of their
23 surroundings by placarding only URMs might mislead them to
24 believe that those other buildings that are not placarded are
25 safer?

Saltzman - ReD

1 MS. MOYNAHAN: Your Honor, objection.

2 Beyond the scope.

3 MR. DiLORENZO: I don't think it's beyond the scope,
4 Your Honor, but --

5 THE COURT: Portions of the transcript that you read
6 include comments about the -- about raising awareness of
7 seismic risk going into a building and the reasons for raising
8 the awareness. It seems to me relevant to the Commissioner's
9 testimony the extent to which he was aware of certain buildings
10 being also at risk in an earthquake and the extent to which it
11 was not when the placarding ordinance was considered.

12 I think it's a fair line of inquiry. Overruled.

13 Go ahead.

14 BY MR. DiLORENZO: (Continuing)

15 Q. Commissioner, did you have occasion to read the report of
16 the advisory committee? Well, actually I think you said you
17 did. It was Exhibit 13.

18 A. Yes.

19 Q. Did you have occasion to see any prior drafts of
20 Exhibit 13?

21 A. No. I believe I saw the final report.

22 Q. Okay. And do you recall anything in the final report
23 about other risky buildings?

24 A. I don't recall.

25 Q. Okay. Well, maybe it was because it wasn't in there.

Saltzman - ReD

1 But you do recall reading the report?

2 A. Yes.

3 Q. Okay. Had there been a provision about other risky
4 buildings in the report that you read, would you have
5 considered whether or not whatever the City Council was going
6 to do should extend to those buildings too?

7 MS. MOYNAHAN: Objection. Requires speculation.

8 THE COURT: Sustained.

9 BY MR. DiLORENZO: (Continuing)

10 Q. Assuming there is testimony here that establishes that
11 other forms of construction, like soft story buildings, are
12 equally vulnerable in an earthquake, do you believe that by
13 placarding URMs only there is the danger that Portlanders could
14 be misled into believing that the buildings that are not
15 placarded are safer?

16 A. Well, I believe -- I guess first I would have to say I've
17 never heard the term "soft story construction" until now. So I
18 am not familiar with what that is. But the point of your
19 question is, yes, if there were other forms that were deemed
20 also to be at high risk, I mean, everything I had learned as a
21 City Commissioner was that unreinforced masonry buildings are
22 the most risky and also have the largest number of residents.

23 But, yeah, had I known there was another form of
24 construction that was equally risky, I would have considered
25 that as well.

Saltzman - ReD/ReX

1 Q. And do you believe that by placarding one and not the
2 other there is the danger of misleading people into believing
3 that the second type of construction is safer even when it's
4 not?

5 A. Well, I don't believe the goal of the placarding ordinance
6 is to say what is safer, but it's to simply say this form of
7 building construction, unreinforced masonry, is particularly
8 unsafe.

9 MR. DiLORENZO: I think I've made my point. Thank
10 you, Your Honor.

11 THE COURT: Ms. Moynahan?

12 MS. MOYNAHAN: One follow-up, Your Honor.

13 THE COURT: Yes.

14

15 RECROSS-EXAMINATION

16 BY MS. MOYNAHAN:

17 Q. Commissioner Saltzman, with respect to the last question
18 regarding other types of risky buildings, wouldn't it be
19 important for you to know all the facts regarding those other
20 types of buildings that you've never heard of before before
21 concluding that you would assume that the placarding would be
22 required for those buildings?

23 A. Yes. Absolutely.

24 MS. MOYNAHAN: Thank you.

25 THE WITNESS: I didn't mean to shortcut my

1 decision-making. It certainly would have included more
2 information.

3 MS. MOYNAHAN: No further questions. Sorry.

4 THE COURT: All right. You may step down. Thank
5 you.

6 MR. DiLORENZO: Your Honor?

7 THE COURT: Yes.

8 MR. DiLORENZO: I think we have exhausted our supply
9 of witnesses, potentially.

10 THE COURT: And perhaps our supply of energy as well.

11 MS. MOYNAHAN: I think we still have that.

12 THE COURT: Do we?

13 MS. MOYNAHAN: We better.

14 THE COURT: My energy needs some reinforcement.

15 But we are out of the listed witnesses for today's part of
16 the hearing, so -- and I understand from my courtroom deputy
17 that the parties asked if we finished early if we could -- with
18 witnesses, whether we could adjourn, recess early, and
19 certainly we can do that.

20 Is there anything else we should cover before we recess?

21 MR. DiLORENZO: Have we -- have we introduced all
22 of our -- oh, Your Honor, could we also offer 30? It's -- it's
23 an excerpt from the very same DOGAMI report.

24 THE COURT: Right.

25 MS. MOYNAHAN: No objection.

1 THE COURT: That's in.

2 MR. DiLORENZO: Thank you.

3 I think that's all we have for today, Your Honor.

4 THE COURT: All right. And, Ms. Moynahan, anything
5 else?

6 MS. MOYNAHAN: Not that I can identify, Your Honor.

7 THE COURT: All right. Let's talk about some
8 housekeeping. We started at 8:30 this morning. It turns out
9 that was probably a good idea. Should we start at 8:30 again
10 tomorrow morning?

11 MS. MOYNAHAN: Yes. I think we need to, Your Honor.

12 THE COURT: Jill, are you available?

13 THE COURT REPORTER: Yes.

14 THE COURT: All right. Well, we'll reconvene at
15 8:30 in the morning. We'll start with our list of witnesses on
16 the list for the Wednesday part of the hearing.

17 We're in recess. Thank you.

18 MR. DiLORENZO: Thank you, Your Honor.

19 MS. MOYNAHAN: Thank you, Your Honor.

20 (Hearing adjourned.)

21

22

23

24

25

C E R T I F I C A T E

Masonry Building Owners of Oregon, et al.

v.

Wheeler, et al.

3:18-cv-02194-AC

ORAL ARGUMENT

May 14, 2019

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 5/29/19
CSR Expiration Date: 9/30/20

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