

1 documents were physically present in the hearings room before the city council, but argues
2 that bringing a file into a room, with nothing more, is not sufficient to place it before a
3 decision maker within the meaning of OAR 661-010-0025.

4 OAR 661-010-0025 provides, in relevant part:

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

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

12 The city responds that the disputed documents are properly part of the record, because
13 "[t]hey are a part of the planning staff's files in this matter, which were physically present and
14 available to the planning commission and city council members during the public hearings on
15 the challenged ordinance." City's Response to Record Objections 1. Petitioner does not
16 dispute that the documents at issue were "available" to city council members during the
17 relevant public hearings, but argues that without some affirmative indication by planning
18 staff or city council members regarding the contents of the record, the mere physical
19 presence and availability of the materials during the proceedings below is not sufficient to
20 include the disputed documents in the record.

21 Determining whether documents have been "placed before" the final decision maker
22 for purposes of OAR 661-010-0025(1)(b) is often problematic. Wicks v. City of Reedsport,
23 28 Or LUBA 739, 740 (1994). The term "placed before" is a term of art, and describe
24 conduct that is not limited to the act of setting documents on the desk in front of the final
25 decision maker. See e.g. DeShazer v. Columbia County, 30 Or LUBA 472, 473 (1996)
26 (documents discussed at the hearing, and that the secretary to the board of commissioners
27 indicated she would copy for the board, are "placed before" the decision maker);
28 Redland/Viola Fischer's Mill CPO v. Clackamas County, 27 Or LUBA 645, 647 (1994)

1 (wetland maps displayed during the hearing and discussed in the testimony of planning staff
2 were "placed before" the decision maker); Veatch v. Wasco County, 23 Or LUBA 676, 677
3 (1992) (documents that the county court "took notice of" were properly part of the record,
4 even though not placed before the court). In the absence of established procedures governing
5 how items are submitted into the record before the final decision maker, whether items in the
6 planning file are "placed before" the decision maker within the meaning of OAR 661-010-
7 0025(1)(b) turns on whether the decision maker's conduct, or acquiescence in the conduct of
8 staff, regarding those items is such that participants in the proceedings reasonably should
9 expect that those items are part of the local evidentiary record. Redland/Viola/Fischer's Mill
10 CPO; see also Wicks, 28 Or LUBA at 741 (it is not reasonable for participants to expect that
11 oversize aerial photographs permanently affixed to hearing room walls will become part of
12 the record simply because they are within view of the decision maker and are referred to in
13 testimony).

14 In the present case, the parties appear to agree that planning staff brought the entire
15 contents of the planning file, including the disputed documents, to the hearing before the city
16 council, and made that entire file "available" in some unspecified manner to the city council,
17 to planning staff who testified and, presumably, to other participants to the proceeding. We
18 understand the city to contend that participants to that proceeding should have reasonably
19 expected from that conduct, or more importantly, the city council's acquiescence in that
20 conduct, that the decision makers considered the entire planning file to be part of the record.
21 We understand petitioner to argue, conversely, that without more definitive action by staff or
22 the council, such as physically placing the planning file before the city council, no participant
23 could form any reasonable expectations regarding whether the contents of the planning file
24 were included in the record.

25 We agree with the city that participants to a land use proceeding, particularly a
26 legislative proceeding such as the one at issue here, should reasonably expect that the record

1 will include the contents of the planning file that staff brings to the proceeding and makes
2 available to staff, the decision maker and participants for reference and discussion during the
3 proceeding. Accordingly, we conclude that the disputed documents were "placed before" the
4 final decision maker within the meaning of OAR 661-010-0025(1)(b) and thus are properly
5 part of the record before LUBA.

6 Home Depot's remaining objections (Objection 1, Objection 2 (part), Objection 4) to
7 the record are therefore denied.

8 The record will be settled upon receipt of the supplemental record.

9 Dated this 29th day of July, 1999.

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Anne Corcoran Briggs
Board Member