

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HOME DEPOT U.S.A., INC.,
5 *Petitioner,*

6
7 vs.

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9 CITY OF PORTLAND,
10 *Respondent,*

11 and

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14 TMT DEVELOPMENT COMPANY, INC.,
15 *Intervenor-Respondent..*

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18 LUBA No. 99-078

19 ORDER ON RECONSIDERATION

20 Petitioner moves for reconsideration of our order on record objections dated July 29,
21 1999. In that order, we denied petitioner’s record objections to the city’s inclusion of certain
22 items into the local record. The disputed items were, according to the city, located in the
23 city’s planning files and transported by city staff to the city council hearings that led to the
24 decision on appeal. According to the city, the items were in the hearing room, were available
25 to the decision makers and interested members of the public and, therefore, are properly part
26 of the record.

27 In our July 29, 1999 order, we determined that the disputed items had been “placed
28 before” the final decision maker within the meaning of OAR 661-010-0025(1)(b).¹ Our
29 determination was based in part on the city’s representation that staff had made the disputed
30 items “available” to the city council and the public in a manner that would indicate to a

¹OAR 661-010-0025(1)(b) provides that the record shall include:

“All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.”

1 person reasonably knowledgeable of the city's processes that the items were part of the
2 record. Our determination was also based in part on our understanding that petitioner did not
3 dispute the city's representation regarding the presence and availability of the disputed items.
4 Rather, we understood petitioner to argue, as a matter of law, that the city's actions were
5 insufficient to place the disputed items before the decision maker within the meaning of OAR
6 661-010-0025(1)(b). *Home Depot, Inc. v. City of Portland*, ___ Or LUBA ___ (Order on
7 Record Objections, July 29, 1999) slip op 3-4.

8 Petitioner's motion for reconsideration argues that the statements in its earlier
9 motions should not be read to concede that the disputed documents were in fact brought to
10 the hearing. Petitioner also argues that there was no indication by the planning staff or by the
11 city council that any evidence, other than that contained in the city auditor's file, would be
12 considered part of the record. In its motion for reconsideration, petitioner contends that in its
13 earlier motions it argued that there

14 "is no way for any decision maker or participant to know whether the disputed
15 materials were in the hearing room, constitute the entire file of the Planning
16 staff, or were edited or supplemented at a later date. Petitioner also argued that
17 there is no indication anywhere in the record of hearings held on this matter
18 that the disputed materials were ever 'available' to anyone, or even that they
19 existed." Petitioner's Motion for Reconsideration 2.

20 We do not read its earlier motions to allege the facts petitioner now alleges in its motion for
21 reconsideration. However, we address petitioner's arguments in light of the factual
22 allegations in the motion for reconsideration.

23 In response to petitioner's motion for reconsideration, the city states that the planning
24 file was "physically present, visible, available to and not rejected by the planning
25 commission and city council at [the] public hearings" regarding the ordinance on appeal.
26 Response to Motion for Reconsideration 1. However, the city does not describe the staff
27 conduct that made the disputed items available or explain why that conduct would indicate
28 that the items were to be included in the record. Where a party alleges that certain documents

1 were not “placed before” the decision maker, the proponent of their inclusion bears some
2 burden to support its contention to the contrary. Here, the city alleges no facts that undermine
3 petitioner’s allegations that nothing that occurred at the hearing indicated that the disputed
4 files were “made available” in such a manner that they were “placed before” the decision
5 maker within the meaning of OAR 661-010-0025(1)(b). We agree with petitioner that a
6 planning file does not become part of the local record simply because it is physically present
7 and visible. Something more must be done to place it before the decision maker.

8 Petitioner further argues that there is no evidence that all of the disputed items were
9 present at the hearing. Petitioner argues that it is not clear from the city’s response if the
10 contents of the files were culled or supplemented by staff after the city council hearings.
11 According to petitioner, there is no way for petitioner, or any party to the proceedings below,
12 to know what was in the files at the time they were in the presence of the city council, if
13 indeed they were in the presence of the city council. The city does not respond to that aspect
14 of petitioner’s argument.

15 Based on the facts as alleged by petitioner, we agree with petitioner that the city has
16 not demonstrated that the disputed items were in fact located in the files brought to the city
17 council, and presented in such a way at the hearing as to make it reasonably clear that the
18 items would become part of the record.

19 Petitioner’s motion for reconsideration is granted, and our order dated July 29, 1999,
20 is modified as follows. The following items shall not be considered part of the record: Record
21 506 through 990 and the four oversized exhibits referred to in the table of contents. In
22 accordance with the stipulation of the parties, the petition for review is due 21 days from the
23 date of this order. The response brief is due 42 days from the date of this order.

24 Dated this 1st day of December, 1999.
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Anne Corcoran Briggs
Board Member