

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HOMEBUILDERS ASSOCIATION OF

5 METRO PORTLAND,

6 *Petitioner,*

7
8 vs.

9
10 METRO,

11 *Respondent,*

12 and

13
14 1000 FRIENDS OF OREGON,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2001-197

18
19 ORDER

20 **MOTION TO INTERVENE**

21 1000 Friends of Oregon moves to intervene on the side of respondent. There is no
22 opposition to the motion, and it is allowed.

23 **RECORD OBJECTIONS**

24 On February 7, 2002, petitioner filed a precautionary record objection, setting forth
25 nine objections. On February 13, 2002, Metro filed a supplemental record that resolves some
26 of those objections. Metro also filed a response stating that all other objections have been
27 resolved by the parties, with one exception.

28 The parties disagree on whether the document at Record 719-67 is properly included
29 in the record. Record 719-67 is a Metro hearings officer's recommendation in an unrelated
30 case. Petitioner argues that there is no evidence that the recommendation was "specifically
31 incorporated into the record or placed before, and not rejected by, the final decision maker,
32 during the course of the proceedings before the final decision maker." OAR 661-010-
33 0025(1)(b).

1 Metro responds that the document at Record 719-67 was “placed before” the final
2 decision maker, the Metro Council, within the meaning of OAR 661-010-0025(1)(b). Metro
3 explains that the decision challenged in this case is a legislative decision to adopt an
4 ordinance amending the procedures and standards in Metro’s code governing urban growth
5 amendments. Metro states that, at the December 13, 2001 public hearing on the ordinance,
6 Metro legal counsel brought a copy of the document at Record 719-67 to the hearing, and
7 referred to it in the course of a dialogue with the Metro Council. Citing *Home Depot, Inc. v.*
8 *City of Portland*, 36 Or LUBA 783 (1999), Metro argues that because the document was
9 carried to the hearing room by Metro staff and brought to the council’s attention, the
10 document should be part of the record.

11 We have held on many occasions that mere references in testimony to documents do
12 not suffice to place such documents before the decision maker, within the meaning of
13 OAR 661-010-0025(1)(b). *Henderson v. Lane County*, 26 Or LUBA 603 (1993) (simply
14 referring to documents does not place such documents before the local decision maker);
15 *Mannenbach v. City of Dallas*, 24 Or LUBA 618, 619 (1992) (same). That is so even if the
16 testimony is from local government staff. *Matrix Development v. City of Tigard*, 26 Or
17 LUBA 606, 610 (1993) (documents reviewed by local government staff who communicated
18 the results of such review to the decision maker are not part of the local record); *Hoffman v.*
19 *City of Lake Oswego*, 19 Or LUBA 607, 610 (1990) (same). Even if the testimony includes
20 an express request to include the referenced document in the record, that request, at least in
21 the absence of an affirmative response by the decision maker, is no more than a reference to
22 those items and does not make those items part of the local record. *Ramsey v. City of*
23 *Portland*, 22 Or LUBA 845, 846 (1992). Here, it appears that Metro legal counsel referred to

1 the disputed document in a dialogue with the Metro Council, but did nothing else to “place”
2 the document before the council.¹

3 *Home Depot, Inc.* provides no assistance to Metro. In that case, we understood the
4 undisputed facts to be that planning staff brought the entire planning file regarding a
5 proposed legislative decision to the public hearing on that decision, and made the entire file
6 available to the decision makers and participants, in a manner that communicated to the
7 decision makers and participants that the entire file was part of the local record. In that
8 circumstance, we held, the file had been “placed before, and not rejected by” the final
9 decision maker.² In the present case, nothing Metro cites us to indicates that Metro legal
10 counsel or planning staff acted in any manner that communicated to the decision makers and
11 participants that the disputed document was part of the local record.

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¹Metro cites to the following portion of the minutes of the December 13, 2001 hearing, as evidence that Metro legal counsel “placed” the disputed document before the Metro Council. In response to a question concerning whether the proposed ordinance complied with state law, Metro legal counsel stated, in relevant part:

“[T]he state law said that if a local government was conducting periodic review or any other legislative review of its Urban Growth Boundary then it had to do all of the work that was set forth in the statute. * * * If a major [UGB] amendment came before the council and it would make a significant addition of land to the UGB or housing that would constitute a legislative amendment regardless of the name put on it, it would be a legislative amendment to the UGB under [ORS] 197.296 and would require Metro to do the kind of work they were currently doing in order to look at the capacity of the UGB and determine how to satisfy that need. This is not just his interpretation. He noted Metro recently had a major amendment working through Metro’s process and the determination made by the hearings officer in recommending that Metro deny it was that this quasi-judicial major amendment was in fact a legislative amendment under [ORS] 197.296 and you could only make the amendment if you went through the full [ORS 197.]296 analysis.” Record 171.

²We subsequently reconsidered that conclusion and sustained petitioner’s record objection, based on petitioner’s clarification that it *did* dispute that the planning file had been made “available” to the decision makers or participants in a manner that communicated that the file was part of the record, and the city’s subsequent failure, as the proponent of inclusion, to allege any facts demonstrating that the entire file had been “placed before” the decision makers within the meaning of the rule. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 994, 996 (1999).

1 The foregoing record objection is sustained. The Board will disregard the document
2 at Record 719-67. The record is settled as of the date of this order. The petition for review is
3 due 21 days, and the response briefs due 42 days, from the date of this order.

4 Dated this 26th day of February, 2002.
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11 Tod A. Bassham
12 Board Member