

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NAUMES PROPERTIES, LLC, SOUTH SALEM L.L.C.

5 and WAL-MART STORES, INC.,

6 *Petitioners,*

7
8 vs.

9
10 CITY OF CENTRAL POINT,

11 *Respondent.*

12
13 LUBA No. 2003-107

14 ORDER

15 The challenged decision is a legislative decision amending the city’s Tourist and
16 Office Professional Zone (C-4). Petitioners are the owners and potential developers of a
17 specific property located in a C-4 zone that may be affected by the proposed amendments.
18 Petitioners object to the inclusion of 177 pages at Record pages 95 to 272. The city responds
19 to the record objection and also moves for LUBA to consider an affidavit from the city’s
20 planning director that is not part of the record to establish that the disputed documents should
21 properly be part of the record.

22 **MOTION TO TAKE EVIDENCE NOT IN THE RECORD**

23 OAR 661-010-0045(1) provides in pertinent part:

24 “The Board may also upon motion or at its direction take evidence to resolve
25 disputes regarding the content of the record * * *.”

26 The present case involves a dispute regarding the content of the record. The city
27 seeks to have us consider an affidavit from the city planning director that purportedly
28 establishes that the disputed documents should properly be included in the record. We do not
29 understand petitioners to dispute the veracity of the statements made in the affidavit, merely
30 their legal significance. The proffered evidence assists us in resolving the record objection.
31 Therefore, the motion to take evidence is granted.

1 **RECORD OBJECTION**

2 Petitioners object to the inclusion of documents pertaining to prior land use actions
3 and approvals of their property being included in the record from pages 95 through 272.
4 OAR 661-010-0026(2)(a).¹ According to petitioners, the disputed documents were never
5 made part of the record during the proceedings below.

6 OAR 661-010-0025(1)(b) provides that the record contains:

7 “All written testimony and all exhibits, maps, documents or other written
8 materials specifically incorporated into the record or *placed before, and not*
9 *rejected by, the final decision maker*, during the course of the proceedings
10 before the final decision maker.” (Emphasis added.)

11 The challenged decision is a legislative decision that clarifies the city’s position that
12 “big box” stores in excess of 80,000 square feet are not permitted in the C-4 zone.
13 Petitioners are seeking to develop a “big box” store on their property in the city. Although
14 this is a citywide amendment to the zoning ordinance, all parties were apparently aware of
15 the special significance of the amendment to petitioners’ property. The disputed documents
16 involve prior land use applications, approvals, and associated planning documents for
17 petitioners’ property. Some of those documents go back as far as 1995, when the property
18 was first proposed for annexation into the city. The parties agree that the disputed documents
19 were never individually submitted into the record or specifically incorporated into the record.
20 The parties do dispute whether the documents were “placed before, and not rejected by, the
21 final decision maker.”

22 Determining whether documents have been “placed before” the final decision maker
23 for purposes of OAR 661-010-0025(1)(b) is often problematic. The term “placed before” is a
24 term of art and does not merely describe the act of setting documents in front of the decision

¹ OAR 661-010-0026(2)(b) provides that record objections may be made on the grounds that:

“The record contains material not included as part of the record during the proceedings before the final decision maker. The item(s) not included as part of the record during the proceedings before the final decision maker shall be specified, as well as the bases for the claim that the item(s) are not part of the record.”

1 maker. *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 784-85 (1999). While
2 quasi-judicial land use proceedings generally have specific procedures for submitting
3 evidence into the record, we have recognized that legislative proceedings often have less
4 precisely defined procedures for compiling the evidentiary record. *Witham Parts and*
5 *Equipment Co. v. ODOT*, 42 Or LUBA 589, 593-94, *aff'd* 185 Or App 408, 61 P3d 281
6 (2002). In such cases, whether items were “placed before” the decision maker turns on
7 whether the decision maker’s conduct regarding those items is such that participants in the
8 proceedings should reasonably expect those items to be included in the record. *Home Depot,*
9 *Inc.*, 36 Or LUBA at 785.

10 According to the affidavit of the city planning director, the planning director brought
11 the entire city file on the proposed amendment to the June 12, 2003 city council hearing.
12 That file apparently contained the disputed documents that are currently located at Record
13 95-272. The planning director admits that the disputed documents were not specifically
14 introduced during the hearing, but states that “they were available to anybody who attended
15 that hearing, including the planning staff, the City Council and all other participants, for
16 reference and discussion.” Affidavit of Tom Humphrey 2. The city further argues that there
17 was extensive discussion at the hearing of petitioners’ property as well as discussion of an
18 earlier proposal for development of the property.

19 While we certainly agree that development of petitioners’ property pervaded the
20 public hearing, that is hardly the same thing as demonstrating that planning materials
21 regarding prior land use actions regarding the property, some more than five years old, were
22 meant to be included as part of the record. The affidavit does not establish that the planning
23 director referenced the disputed documents at the hearing. The affidavit does not illuminate
24 how anyone else present at the hearing would have any reason to know the disputed
25 documents were contained in the file. The affidavit also does not explain how anyone could
26 reasonably be expected to believe the disputed documents were meant to be included in the

1 record. In addition to other participants at the hearing having no reason to expect the
2 disputed documents to be in the record, there is no indication from the city council's conduct
3 that it considered the documents to be part of the record. *Witham Parts*, 42 Or LUBA at 593.
4 A planning file does not become part of the record simply because it is physically present and
5 visible at a hearing. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 994, 996 (1999).
6 The disputed documents may well have been available for reference and discussion, but the
7 fact remains that they were neither referenced nor discussed, much less in a manner that
8 would indicate to a reasonable person that the documents are part of the record.

9 In *Witham Parts*, the challenged decision involved a small portion of an
10 environmental assessment conducted as part of a state and federal review of proposed
11 interstate interchange improvements. We stated that that was substantially different from the
12 usual legislative land use process and found that "as long as documents were created as part
13 of the process" to construct the interchange or were submitted as part of that process, they
14 were properly part of the record. 42 Or LUBA at 595-96. The present case is significantly
15 different, in that the public hearing that is at issue more closely resembles a typical quasi-
16 judicial land use hearing.

17 The staff presented the proposed ordinance and its position on the matter. Both
18 proponents and opponents testified about the proposed ordinance and submitted evidence
19 into the record supporting their positions. In fact, the planning department itself prepared a
20 memorandum, complete with attachments, that was specifically submitted into the record.
21 Record 44-66. That planning staff memorandum contained a map of a proposed footprint
22 from one of petitioners' earlier land use applications. The planning staff memorandum did
23 not include the disputed documents nor has the city directed us to any specific reference to
24 the disputed documents. In short, other participants submitted evidence into the record at the
25 hearing, the planning staff submitted evidence into the record at the hearing, and there is no
26 reason the disputed documents could not have been submitted into the record had the

1 planning director believed they should be included. Something more must be done to include
2 items in the record than merely having the planning file physically present and available.
3 *Home Depot, Inc.*, 37 Or LUBA at 996. The city has not established that “something more”
4 was done to warrant inclusion of the disputed documents in the record.

5 Petitioners’ record objection is sustained.

6 **CONCLUSION**

7 The disputed documents located at Record 95-272 are the only part of the record
8 subject to record objections. We do not believe it is necessary to file a supplemental record
9 to remove the disputed documents. We will not consider pages 95-272 as part of the record.
10 Therefore, the record is settled as of the date of this order. The petition for review is due 21
11 days from the date of this order. The response brief is due 42 days from the date of this
12 order. The Board’s final opinion and order is due 77 days from the date of this order.

13 Dated this 24th day of September, 2003.
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21 Tod A. Bassham
Board Chair