

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HOLGER T. SOMMER and LISA BERGER,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF GRANTS PASS,
10 *Respondent,*

11 and

12
13 SISKIYOU PROPERTIES, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2006-130

17
18 ORDER

19 **MOTION TO INTERVENE**

20 Siskiyou Properties, LLC, the applicant below, moves to intervene on the side of
21 respondent. There is no opposition to the motion, and it is granted.

22 **RECORD OBJECTION 1**

23 Petitioners object to the record filed by the city in this appeal. Petitioners initially
24 objected that the city did not provide complete minutes of all of the hearings related to the
25 decision. In response, the city filed a Supplemental Record including complete minutes of
26 all of the hearings, including complete minutes of the June 21, 2006 city council meeting.
27 Petitioners have accepted the Supplemental Record.

28 Record objection 1 is moot.

29 **RECORD OBJECTION 2**

30 Petitioner Sommers (petitioner) argues that a document he submitted to the city
31 council during the "Citizen Comment" portion of its June 21, 2006 meeting, after the public

1 hearing on the decision under appeal had concluded, should be included in the record.¹ On
2 June 21, 2006, during its regularly scheduled meeting, the city council held a public hearing
3 on an appeal of the planning commission's denial of intervenor-respondent's application for
4 a tentative subdivision plan for Summerfield Estates subdivision. Petitioner testified during
5 the hearing, and also submitted written comments, which are included at Record 102-103. At
6 the conclusion of the public hearing on the appeal, the mayor closed the public portion of the
7 hearing, and the council deliberated on the appeal. The council voted to overturn the
8 planning commission's decision, and added certain conditions of approval.

9 Later the same evening, petitioner testified during the "Citizen Comment" portion of
10 the city council meeting, expressing his disappointment with the vote from earlier in the
11 evening. Supplemental Record 798. Petitioner asserts, and respondents do not dispute, that
12 Petitioner gave copies of a document to each city council member during the citizen
13 comment period. Petitioner's Correction to Respondent's Supplemental Record 1.

14 Petitioner argues that such document should be included in the record.² Petitioner's
15 Correction to Respondent's Supplemental Record 1. Respondent and intervenor-respondent
16 (respondents) answer that the submitted document was not a part of the public hearing record
17 on the appeal because it was submitted during the citizen comment part of the city council
18 meeting. Respondent's Response to Supplemental Record Objections 1, 2.³

¹ Petitioner included a copy of the disputed document as an attachment to the Petitioner's Correction to Respondent's Supplemental Record.

² There is no dispute between the parties that the minutes of the citizen comment portion of the city council meeting have been included in the record at Supplemental Record 797-799, and respondents do not argue that petitioner's statements made during the citizen comment period as they appear in the minutes are not part of the record.

³ Intervenor-respondent incorrectly describes the submission of the disputed document as occurring "after the public hearing was closed and the findings of fact were adopted." Intervenor-Respondent's Objection to Petitioner's Correction to Respondent's Supplemental Record 1. However, the city council did not adopt the findings of fact or issue a final decision until the city council meeting held on July 5, 2006. Record 12.

1 OAR 661-010-0025(1)(b) provides that the record shall include “all written testimony
2 and all exhibits, maps, documents or other written materials specifically incorporated into the
3 record or placed before, and not rejected by, the final decision maker, *during the course of*
4 *the proceedings before the final decision maker*” (emphasis added). Communications made
5 during a public comment portion of a meeting do not occur “during the course of the
6 proceedings before the final decision maker,” and are not part of the record under OAR 661-
7 010-0025(1)(b). *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808, 813
8 (1998) (petitioner’s comments about a challenged decision made during several citizen
9 comment portions of various meetings are not part of the record). Only one public hearing
10 on the appeal occurred during the June 21, 2006 city council meeting. That petitioner chose
11 to comment on the appeal during the citizen comment portion of the city council meeting,
12 after the public hearing on the appeal had ended, does not mean that the public hearing on the
13 appeal was somehow re-opened.⁴

14 In addition, the fact that each member of the city council apparently received a copy
15 of the disputed document during citizen comment does not mean that the disputed document
16 was “placed before” the city council under OAR 661-010-0025(1)(b). As used in that
17 section, the term “placed before” is a legal term of art and does not merely describe the act of
18 setting documents in front of a decision maker. *Witham Parts and Equipment Co. v. ODOT*,
19 42 Or LUBA 589, 593 (2002). Materials submitted to the local decision maker are part of
20 the record only if they were submitted during the proceedings leading to the appealed
21 decision. *Adkins v. Heceta Water District*, 22 Or LUBA 826, 828 (1991). The public
22 comment portion of the June 21, 2006 city council meeting was not part of the “proceedings
23 before the final decision maker” as that phrase is used in OAR 661-010-0025(1)(b).

⁴ Petitioner asserts that “***[o]ne important Exhibit submitted during the June 21, 2006 public *hearings* is missing***” (emphasis added). Petitioner’s Correction to Respondent’s Supplemental Record. However, petitioner’s use of the plural “hearings” to describe the proceedings that took place on June 21, 2006 on the decision under review is inaccurate.

1 Record objection 2 is denied.

2 **BRIEFING SCHEDULE**

3 The record is settled as of the date of this order. The petition for review is due 21
4 days from the date of this order, the response briefs are due 42 days from the date of this
5 order, and the Board's final opinion and order is due 77 days from the date of this order.

6 Dated this 9th day of October, 2006.

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Melissa M. Ryan
Board Member