

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 THUNDERBIRD HOTELS, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2006-186

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14 JANTZEN DYNAMIC CORPORATION,
15 *Petitioner,*

16
17 vs.

18
19 CITY OF PORTLAND,
20 *Respondent.*

21
22 LUBA No. 2006-187

23 ORDER ON RECORD OBJECTIONS

24 On December 4, 2006, petitioner Jantzen Dynamic Corporation (Jantzen) filed an
25 objection to the consolidated record filed by respondent in this appeal. On December 14,
26 2006, the city filed a response to Jantzen's record objections.

27 **Record Objections 1 and 2**

28 **A. Record Objection 1**

29 In objection 1, Jantzen argues that page 75 of the record has been modified. The city
30 agrees to submit a Supplemental Record that includes an unmodified copy of the document
31 that appears at Record 75.

32 The city's agreement to submit a Supplemental Record renders objection 1 moot.

33 **B. Record Objection 2**

34 In objection 2, Jantzen argues that the *exhibit* page numbers of the documents that
35 appear at Record 14-58, 92-137, 247-90 and 306-51 were obliterated when the city assigned

1 *record* page numbers. With the exception of Record 92 and 351, the city agrees. The city
2 agrees to submit a Supplemental Record that includes copies of the documents that appear at
3 Record 14-58, 93-137, 247-90 and 306-50. The city’s agreement regarding those pages
4 renders petitioner’s objection concerning those pages moot. Jantzen’s objection regarding
5 Record 92 and 351 is denied.

6 **Record Objection 3**

7 Jantzen contends that portions of pages 397-400 of the record have been lost in
8 photocopying. The city responds that the original document submitted to the city council
9 was a single sheet measuring 11” by 14”, printed on the front and back sides, and that in
10 preparing the record the city merely copied one-half of each side of that sheet separately. The
11 four pages, viewed together, are a complete copy of the original. Record objection 3 is
12 denied.

13 **Record Objection 4**

14 Two meetings potentially related to the adopted ordinance that is the subject of this
15 appeal are identified on City of Portland Commissioner Adams’ calendar as having occurred
16 on October 4, 2006. Record 235. Jantzen contends that any materials used in the meetings
17 should be included in the record of this appeal, along with the minutes of the meetings. The
18 city responds that to be part of the record in this appeal, any such documents or materials
19 must have been specifically incorporated into the record or placed before, and not rejected
20 by, the final decision maker, “during the course of the proceedings before the final decision
21 maker.” OAR 661-010-0025(1)(b). The city contends that, even assuming such meetings
22 actually occurred, the meetings listed on Commissioner Adams’ calendar were not a part of
23 the “proceedings before the final decision maker.”

24 In some circumstances, meetings involving one or more of the final decision makers
25 that occur prior to a local government’s filing of a proposed ordinance may be part of the
26 relevant “proceedings” within the meaning of OAR 661-010-0025(1)(b). *See McKay Creek*

1 *Valley Assoc. v. Washington County*, 19 Or LUBA 500, 503 (1990) (citizen task force and
2 prioritization proceedings that occurred prior to the adoption of the challenged ordinances,
3 and that were identified in the findings as part of the proceedings below, were part of the
4 “proceedings before the final decision maker” within the meaning of OAR 661-010-
5 0025(1)(b)). However, Jantzen does not assert that the adopted ordinance identified
6 Commissioner Adams’ two meetings as part of the proceedings below. Moreover, Jantzen
7 does not assert that any materials used in such meetings, if the meetings actually occurred,
8 were placed before the city council during the public hearing that occurred on October 4,
9 2006 at 6:00 p.m. Finally, the entire city council, not Commissioner Adams individually, is
10 the final decision maker. Therefore, meetings in which Commissioner Adams took part are
11 not “proceedings before the final decision maker,” within the meaning of OAR 661-010-
12 0025(1)(b). Record objection 4 is denied.

13 **Record Objection 5**

14 Jantzen contends that three reports that were cited in a memorandum delivered by the
15 City of Portland Department of Transportation (PDOT), and a report that was referenced in a
16 memorandum delivered by a transportation consultant, should be included in the record. The
17 city responds that the cited reports were referred to and summarized in PDOT’s and the
18 consultant’s reports to the city council, but were not placed before or specifically
19 incorporated into the record during the proceedings below. Jantzen does not allege that the
20 reports were placed before the city council during the public hearing, but does allege that the
21 reports were either specifically incorporated into the record by the city council or placed
22 before the city council when they were referenced in PDOT’s and the consultant’s
23 memoranda, and when they were used as a basis for findings supporting the decision.

24 We disagree with Jantzen’s contention that the reports were specifically incorporated
25 into the record. A decision maker may incorporate another document by reference into the
26 record only if the decision maker clearly indicates its intent to do so and adequately identifies

1 the document incorporated. *See Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992)
2 (describing how documents may be incorporated as findings to support a decision). We also
3 disagree with Jantzen's contention that the city council's reference to the reports in its
4 decision necessarily made the reports a part of the record. Mere reference to a document in
5 testimony or in other documents is insufficient to include a document in the record.
6 *Homebuilders Assoc v. Metro*, 41 Or LUBA 616, 617 (2002).

7 Moreover, even though the city council's final decision references the reports, the
8 decision cites to the consultant's and PDOT's memoranda in its discussion of the reports at
9 issue. The decision makes clear that the reports were not before the city council during
10 the deliberations that led to the challenged decision. Record 6, 7. *See Tualatin Riverkeepers*
11 *v. Oregon Dept of Environmental Quality*, 51 Or LUBA 826, 829 (2006) (when the reference
12 to other documents in the record indicates that the referenced documents must have been in
13 front of the decision makers, those documents should be made part of the record). Record
14 objection 5 is denied.

15 The city shall submit a Supplemental Record, made up of pages 75 and 14-58, 93-
16 137, 247-90 and 306-50. The Board will issue an order settling the record after we have
17 received the Supplemental Record.

18 Dated this 29th day of January, 2007.

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Melissa M. Ryan
Board Member