

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ZIAN LIMITED PARTNERSHIP,
5 *Petitioner,*

6
7 vs.

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9 CITY OF TUALATIN,
10 *Respondent,*

11 and

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14 CENTERCAL PROPERTIES, LLC
15 and CABELA’S WHOLESAL, INC,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2013-088

19 ORDER

20 **MOTIONS TO INTERVENE**

21 Centercal Properties, LLC and Cabela’s Wholesale, Inc. move to intervene on the side
22 of respondent. There is no opposition to the motions and they are allowed.

23 **RECORD OBJECTION**

24 The decision that is the subject of this appeal is a city resolution that grants
25 conditional use approval for the Nyberg Rivers Master Plan. The record is 2,488 pages long.
26 The application appears at Record 679-817. The application includes a number of
27 appendices. One of those appendices is a lengthy transportation impact analysis (TIA)
28 prepared by Kittelson and Associates, Inc. (Kittelson) dated April 2013. At the city’s request,
29 Kittelson supplemented that TIA on May 16, 2013 (May TIA Supplement).¹ Kittelson

¹ The May TIA Supplement is addressed to two persons at the “City of Tualatin” and states:

“At your request, we have prepared the following traffic analysis to supplement our April 2013 Nyberg Rivers Transportation Impact Analysis (TIA). The request for supplemental information was initially outlined in your May 6, 2013 e-mail and discussed in more detail at our follow up meeting on May 7, 2013. * * *” Supplemental Record 1.

1 prepared a second TIA supplement dated June 21, 2013 (June TIA Supplement). The
2 original TIA is included in the record that was transmitted by the city on October 8, 2013
3 (Record 873-1132), as is the June TIA Supplement (Record 1267-1279). The May TIA
4 Supplement was not included in the October 8, 2013 record. On October 21, 2013 the city
5 transmitted a supplemental record that includes the May TIA Supplement. Supplemental
6 Record 1-28.

7 Under LUBA's rules, the record includes "[a]ll written testimony and all exhibits,
8 maps, documents or other written materials specifically incorporated into the record or placed
9 before, and not rejected by, the final decision maker, during the course of the proceedings
10 before the final decision maker." OAR 661-010-0025(1)(b).

11 Petitioner objects to the supplemental record, arguing the May TIA Supplement was
12 neither "incorporated into the record" nor "placed before" "the final decision maker."
13 According to petitioner the May TIA Supplement should not be included in the record for the
14 following reasons:

- 15 • The letter was not submitted during a public hearing or during an open
16 record period under 197.763(6)(a).
- 17 • The letter is not addressed to city council and does not expressly
18 request that it be made part of the record.
- 19 • The letter was not included in the packets of materials that were
20 provided to city councilors by planning staff.
- 21 • The letter was not discussed during public hearings.
- 22 • The letter was not included with other support documents that were
23 posted on the city website.

24 The May TIA Supplement itself states that it was submitted to supplement the original TIA,
25 which was part of the application. *See* n 1. The June TIA Supplement expressly references
26 the May TIA Supplement:

27 "The City reviewed the TIA to ensure that internal circulation is consistent
28 with the TSP and that the new development improves traffic circulation on

1 Martinazzi, the City’s portion of Nyberg, Boones Ferry and other nearby
2 roadways. After the Master Plan was submitted, a list of questions and
3 concerns was sent and a meeting was held with Kittelson & Associates to
4 review the issues. Kittelson submitted information to address some of those
5 concerns on May 16, 2013. * * *” Record 1268.

6 The May TIA Supplement is referred to elsewhere in the June TIA Supplement and in other
7 documents in the record.

8 The applicant, intervenor-respondent Centercal Properties, LLC (Centercal),
9 responds:

10 “While it is unclear why the May [TIA] Supplement was inadvertently omitted
11 from the shipment to LUBA, what is clear that the May [TIA] Supplement is
12 in the record and referenced throughout the record.

13 “* * * * *

14 “Material[s] included in the record were submitted to the City by e-mail, staff
15 submission, public hearing, regular mail, and hand delivery. Materials were
16 submitted to various people, including Kaaren Hoffmann,² Mayor Ogden,
17 Will Harper, Tualatin City Council, Alice Rouyer, Aquilla Hurd-Ravich and
18 Sherilyn Lombos. Despite the various means by which the materials were
19 sent, and despite the fact that the materials were delivered to no less than
20 seven different people, all of these documents made it into the local record. It
21 is readily apparent that the City did not have any formal procedures governing
22 the submission of documents into the record.

23 “In the absence of any formal procedure, the test that LUBA applies to
24 determine whether a document is ‘placed before’ the decision maker is
25 ‘whether the conduct of staff and the decision maker could reasonably lead
26 [the submitting party] to believe that the documents included in the planning
27 department’s official file were being included as part of the record.” *Bogan v.*
28 *Coos County*, 37 Or LUBA 1032, 1036 (2000). * * *” Centercal Properties,
29 LLC’s Response to Petitioner’s Record Objection 2-3 (document and record
30 citations omitted).

31 The city adds the following:

32 “* * * At the time [the May TIA Supplement] was received, and consistent
33 with City practice, it was placed into and retained in the record along with the
34 other materials the City received from the applicant, Petitioners and others in

² Kaaren Hoffman is one of the two city staff persons to which the May TIA Supplement was addressed.

1 this case. Materials such as the traffic analysis are periodically removed by
2 staff for review but at all times remained part of the local land use file.

3 “* * * * *

4 “* * * [T]he May 16 Kittelson letter was maintained by the City and available
5 for review by Petitioners and all other parties throughout the proceedings. The
6 failure to submit it as part of the LUBA record was simply an oversight. * * *”
7 City of Tualatin’s Response to Petitioner’s Record Objection 1-2.

8 There does not appear to be any serious question that the May TIA Supplement was
9 submitted to the city as part of the application and included in the planning department file in
10 this matter. In *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 785 (1999), we
11 explained that items in the planning department file were properly included in the record
12 where “the decision maker’s conduct, or acquiescence in the conduct of staff, regarding those
13 items is such that participants in the proceedings reasonably should expect that those items
14 are part of the local evidentiary record.” We agree with Centercal and the city that parties in
15 this proceeding would reasonably expect that the May TIA Supplement is part of the record
16 in this quasi-judicial land use proceeding where that document (1) was submitted to city staff
17 to supplement the application in that proceeding, (2) was submitted in the same way that
18 many documents in the record were submitted, (3) was available to all parties throughout the
19 proceedings, and presumably also available to the city council, and (4) is referred to in a
20 number of documents in the record and the findings adopted to support the decision. Such a
21 document was “placed before * * * the final decision maker, during the course of the
22 proceedings before the final decision maker,” within the meaning of OAR 661-010-
23 0025(1)(b).

24 Petitioner’s objection is denied, and the record is settled as of the date of this order.

25 **BRIEFING SCHEDULE**

26 The petition for review shall be due 21 days from the date of this order. The response
27 briefs shall be due 42 days from the date of this order. The Board’s final opinion and order
28 shall be due 77 days from the date of this order.

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Dated this 19th day of December, 2013.

Michael A. Holstun
Board Chair