

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                                   JEANNE LOFTIS and BLAIR LOFTIS,

5                                                           *Petitioners,*

6  
7                                                           vs.

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9                                   CITY OF BEAVERTON,

10                                                           *Respondent,*

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12                                                           and

13  
14                                   MIKE BIGGI,

15                                                           *Intervenor-Respondent.*

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17                                   LUBA No. 2017-011

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19                                                           ORDER

20   **MOTION TO INTERVENE**

21                   Mike Biggi, the applicant below, moves to intervene on the side of the  
22   respondent in this appeal. There is no objection to the motion and it is allowed.

23   **RECORD**

24                   The decision challenged in this appeal is the city’s decision to approve a  
25   nine-lot subdivision.

26                   **A.   Resolved Objections**

27                   On March 8, 2017, petitioners filed objections to the original record filed  
28   by respondent in this appeal. On March 16, 2017, the Board received a  
29   supplemental record from respondent that addressed some of petitioners’  
30   objections, and a response to the record objections. On March 17, 2017,

1 petitioners filed an objection to the supplemental record. On May 17, 2017, the  
2 Board received a second supplemental record and a response to the remaining  
3 objection not resolved by the supplemental and second supplemental records.  
4 The supplemental record and the second supplemental record resolve all but  
5 one of petitioners' objections. We now resolve the remaining objection and  
6 settle the record.

7 **B. Objection 5 to the Original Record**

8 Petitioners object that the record does not include a memorandum titled  
9 "Traffic Impact Analysis Requirements," dated August 2008. According to  
10 petitioners, petitioners discussed the memorandum during the planning  
11 commission hearing. In a Motion to Supplement Record filed after their  
12 objections to the record were filed, petitioners take the additional position the  
13 memorandum was "offered to the commissioners for consideration." Motion to  
14 Supplement Record 7.

15 The city disputes that petitioners offered the memorandum for inclusion  
16 in the record, and responds that petitioners' reference to the document during  
17 the planning commission hearing is not sufficient to make the memorandum  
18 part of the record.

19 The memorandum is included in the record if it was "placed before, and  
20 not rejected by, the final decision maker[.]" OAR 661-010-0025(1)(b). The  
21 transcript of the planning commission hearing that is the Second Supplemental  
22 Record includes the following summary of petitioner Jeanne Loftis' testimony:

1           “J. LOFTIS: Part of the problem was there hasn’t been a valid  
2 traffic study done and it was under the premise that they expected  
3 there would be less than 200 cars that travel on Southwest Terrace  
4 -- 75th Terrace and they were wrong about that assumption. There  
5 was more than 200 cars in their own projections. So they base their  
6 conclusion that it wasn’t required falsely. It’s not correct. And  
7 then they put one together that doesn’t even meet the requirements  
8 of the City of Beaverton. I’ve got a document here dated August  
9 2008 by the city transportation engineer, the same gentlemen that  
10 performed the traffic study and it’s inconsistent with his own  
11 memo in terms of what’s required.” Second Supplemental Record  
12 24.

13 Items are placed before a decision maker by physically putting items before a  
14 decision maker at a meeting, or otherwise providing the item to the decision-  
15 maker in a manner consistent with the local governments’ applicable  
16 procedures and practices. Documents that are only referred to in testimony but  
17 not actually placed before the decision maker are not part of the record.  
18 *Homebuilders Ass’n of Metro Portland v. Metro*, 41 Or LUBA 616, 617  
19 (2002). The transcript does not support petitioners’ contention that petitioners  
20 offered the memorandum to the planning commission or otherwise physically  
21 put it before the planning commission at the hearing. At most, the transcript  
22 supports that petitioners possessed a copy and referred to it in their testimony.  
23 Accordingly, the memorandum was not “placed before” the planning  
24 commission within the meaning of OAR 661-010-0025(1)(b), and therefore is  
25 not a part of the record.

26           The objection is denied.

1 **BRIEFING SCHEDULE**

2           The record is settled as of the date of this order. The petition for review  
3 shall be due 21 days after the date of this order. The respondent’s brief shall be  
4 due 42 days after the date of this order. The final opinion and order shall be  
5 due 77 days after the date of this order.

6           Dated this 19<sup>th</sup> day of May, 2017.

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Melissa M. Ryan  
Board Member