

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CITIZENS FOR RESPONSIBLE

5 AREA PLANNING,

6 *Petitioner,*

7
8 vs.

9
10 CITY OF WILSONVILLE,

11 *Respondent,*

12 and

13
14 ARGYLE CAPITAL, LLC,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2002-130

18
19 ORDER

20 **MOTION TO INTERVENE**

21 Argyle Capital, LLC (intervenor), the applicant below, moves to intervene on the side
22 of respondent. There is no opposition to the motion and it is allowed.

23 **RECORD OBJECTIONS**

24 The challenged quasi-judicial decision (02DB09(1)) is the city's approval of a plan
25 map amendment from Industrial to Commercial and a zoning map amendment from Planned
26 Development Industrial (PD-I) to Planned Development Commercial (PD-C) for 13.99 acres
27 of land located at the Elligsen Road/I-5 interchange in the City of Wilsonville. In addition,
28 the decision approves the deletion of the 13.99 acres from the Parkway Center Master Plan,
29 and approves a Stage I Preliminary design plan. A Stage II design plan approval request was
30 initially part of the application that led to the challenged decision, however, that Stage II
31 design plan approval request was later deleted from the application that led to the decision
32 that is subject to this appeal. Stage II design plan approval was granted in a separate decision
33 (02DB09(2)), which is not the subject of this appeal. Petitioner and intervenor object to the

1 record filed by the city in this appeal, and dispute the extent to which the documents
2 pertaining to 02DB09(2) are properly included in the record in this appeal.

3 **A. Preliminary Matter**

4 Intervenor argues that petitioner’s record objection should be denied in whole
5 because petitioner failed to make a good faith effort to resolve its record objections before
6 filing its record objections. According to intervenor, “[p]etitioner’s only attempt to resolve
7 [its record objections] was a letter faxed to the [city’s attorney’s] office” late in the afternoon
8 on the last day to file record objections. Intervenor’s Response to Petitioner’s Objection to
9 the Record 3.

10 In *Casey Jones v. City of Lowell*, 33 Or LUBA 812 (1997), we stated that parties to a
11 LUBA appeal have an obligation to attempt to resolve record objections prior to filing a
12 record objection. We also stated that the obligation to attempt to resolve record objections is
13 an ongoing obligation that continues even after the record objection is filed. 33 Or LUBA at
14 812. Here, while we agree with intervenor that it is preferable that petitioner’s attorney
15 communicate with the city prior to the last day to file record objections with LUBA, it is
16 apparent that petitioner has since communicated with the city so that a majority of its record
17 objections have been resolved or have been withdrawn. Accordingly, we do not believe it is
18 appropriate in this case to deny petitioner’s record objection merely because petitioner did
19 not communicate earlier with the city about its objections to the record.

20 Intervenor also argues that petitioner’s objections should be denied because petitioner
21 has failed to allege the basis for its belief that each of the items is properly included in the
22 record. According to intervenor, petitioner merely lists the disputed items and arbitrarily
23 claims that they were improperly excluded from the record.

24 Petitioner’s record objection alleges that all of the items that it claims were
25 improperly omitted from the record were

1 “submitted to the City prior to any final decision being entered, were not
2 rejected and were a part of the decision making process in this case[.]”
3 Petitioner’s Record Objection 2.

4 We do not believe it is necessary for a party to reiterate separately for each individual
5 item the party’s basis for alleging that those items are properly included in the record. Here,
6 it is apparent that petitioner contends that the disputed documents were placed before the city
7 as part of the process for reaching the challenged decision and therefore should be included
8 in the record. To the extent that petitioner’s argument is inadequate to establish a basis for
9 sustaining an individual objection, in the face of the city’s and intervenor’s response to the
10 contrary, we address that inadequacy in our resolution of each individual objection. We
11 therefore decline to reject petitioner’s record objections wholesale. We now turn to the
12 parties’ specific objections.

13 **B. Petitioner’s Record Objections**

14 Petitioner’s record objection originally included 23 items that it argues were
15 improperly omitted from the record. The city concedes that four items were improperly
16 omitted, and has agreed to file a supplemental record that includes items identified as Items
17 K, L, U and W in petitioner’s record objection. In a reply to the city’s response, petitioner
18 withdrew its objections with respect to Items A, B, C, F, G, I, J, M, N, P, Q, R, S, T and V.
19 We address petitioner’s remaining objections below.

20 **1. Items D and E**

21 Petitioner contends that the city improperly omitted

22 “D. Additional information requested by the city from [the Department of
23 Land Conservation and Development (DLCD)] regarding the
24 [Transportation System Plan (TSP)] [and]

25 “E. DLCD responses to comments and findings in request for
26 information.” Petitioner’s Record Objection 1.

1 The city responds that the disputed items were not placed before the city council or
2 otherwise incorporated into the city council record within the meaning of OAR 661-010-
3 0025(1) and, therefore, petitioner’s record objection should be denied.¹

4 Petitioner’s description of the disputed items is not specific enough for us to conclude
5 that the city erred in omitting them from its record. Also, in the absence of some argument
6 from petitioner that the disputed items were in fact “placed before” the decision maker within
7 the meaning of OAR 661-010-0025(1), we agree with the city that they are not part of the
8 record. Petitioner’s objections regarding Items D and E are denied.

9 **2. Item H**

10 Petitioner argues that the first two pages of a March 4, 2002 memorandum from
11 Blaise Edmonds to Bruce Burns are missing from the record. The city responds that the item
12 petitioner describes is found at Exhibit 30 in Volume II of the city’s record. LUBA’s copy of
13 the record at Exhibit 30 includes a 12-page memorandum that appears to be the document
14 described by petitioner. The memorandum that is included in LUBA’s copy of the record
15 includes all 12 pages and seems to be a complete copy of the disputed document. Absent a

¹ OAR 661-010-0025(1) provides, in relevant part:

“Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

- “(a) The final decision including any findings of fact and conclusions of law;
- “(b) All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.
- “(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. A verbatim transcript of audiotape or videotape recordings shall not be required, but if a transcript has been prepared by the governing body, it shall be included. * * *
- “(d) Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed during the course of the land use proceeding, including affidavits of publication, posting or mailing. Such notices shall include any notices concerning amendments to acknowledged comprehensive plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1) and (2).”

1 more detailed explanation by petitioner as to what it believes is missing from the document
2 referred to as Item H, we agree with the city that Exhibit 30 is Item H, and Exhibit 30 is
3 complete. Petitioner’s objection is denied.

4 **3. Item O**

5 Petitioner alleges that the city’s decision improperly omits the “[n]otice of final
6 decision in 02DB09(2).” Petitioner’s Record Objection 2. The city responds that the notice is
7 not part of the city’s record in this appeal. Again, absent some focused argument from
8 petitioner that the record includes the notice of final decision in 02DB09(2) for one of the
9 reasons set out in OAR 661-010-0025(1), we agree with the city that it is properly excluded
10 from the record. Petitioner’s objection is denied.

11 **C. Intervenor’s Record Objections**

12 Intervenor argues that the city’s record improperly omits seven items and improperly
13 includes one item.² The city concedes that three items were improperly omitted and that one
14 letter that appears at Record 175 was improperly included in the city’s record. The city has
15 agreed to submit a supplemental record that includes Items 2, 3 and 4. We now turn to
16 intervenor’s remaining objections.

17 **1. Item 1**

18 Intervenor argues that the record should not include all documents pertaining to
19 02DB09(2), but only those documents that were actually placed before the city council and
20 not rejected. In addition, intervenor argues that the record improperly attributes a notebook as
21 a document being placed into the record by intervenor’s attorney. Intervenor concedes that
22 the notebook that is listed as Item 7 in the city’s record is properly included in the record.
23 However, according to intervenor, its attorney placed a different notebook into the record,
24 not the one attributed to him, and the notebook intervenor’s attorney placed in the local
25 record has not been included in the record before LUBA. Intervenor requests (1) that the

² The last item is described in Item 8 of intervenor’s record objections.

1 record be amended to include the excluded notebook; and (2) that the record table of contents
2 be amended to correct the identification of the two notebooks.

3 The city does not respond to this objection. We have held that where a party alleges
4 that documents have been placed before a decision maker and not rejected, and the local
5 government fails to respond to the record objection, we will sustain the record objection.
6 *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990). We therefore sustain intervenor's
7 objection with respect to the missing notebook. The city shall include a copy of the notebook
8 submitted by intervenor's attorney in its supplemental record and shall amend its table of
9 contents to properly identify the two notebooks.

10 With respect to those documents pertaining to 02DB09(2), intervenor does not clearly
11 identify which items should be stricken. In these circumstances, we do not believe that the
12 city must comb through the record to separate out documents pertaining to 02DB09(2), when
13 it is clear that the initial application included both 02DB09(1) and 02DB09(2), and intervenor
14 does not identify specific items or a particular point in the record where only those items that
15 pertain solely to 02DB09(1) are properly part of the record. Therefore, intervenor's objection
16 to the inclusion of unspecified documents pertaining to 02DB09(2) is denied.

17 **2. Items 5, 6 and 7**

18 Intervenor alleges that three documents submitted to the city were improperly omitted
19 from the record. The first document (Item 5) is a March 20, 2002 letter from a representative
20 of the applicant to city staff responding to staff's "first letter of incompleteness." Intervenor's
21 Record Objection 3. The second document (Item 6) is a March 22, 2002 letter from a
22 representative of the applicant to the city pertaining to "signage waivers." *Id.* The third
23 document (Item 7) is a June 13, 2002 letter from intervenor's attorney regarding "Smart
24 Parking." *Id.* Intervenor alleges that these three documents were "sent to the city and made a
25 part of the local record." *Id.* The city responds that those items were not included in the

1 record of proceedings before the city council and, therefore, are not properly part of the
2 record before LUBA.

3 The city council's first hearing on the challenged decision was held on July 15, 2002.
4 Intervenor does not argue that the disputed documents were physically placed before the city
5 council so as to be included in the record before LUBA pursuant to OAR 661-010-
6 0025(1)(b). Nor does intervenor allege that the city procedures for adopting quasi-judicial
7 decisions require that all documents that were presented to planning staff or lower level
8 decision makers must be included in the record. *See Union Gospel Ministries v. City of*
9 *Portland*, 21 Or LUBA 557 (1991) (where city procedures provide that evidence presented to
10 lower level decision makers is part of the city's legislative record, all documents that were
11 presented during the course of the legislative proceedings are to be included in the record
12 submitted to LUBA). Because intervenor has not established a basis for requiring that the
13 disputed items shall be included in the record, intervenor's objections pertaining to Items 5, 6
14 and 7 are denied.

15 **D. Conclusion**

16 The city shall submit a supplemental record that includes Items K, L, U and W as
17 described in petitioner's objections, and Items 2, 3, 4 and the notebook submitted by
18 intervnor's attorney described in intervenor's first objection. The city shall also submit a
19 revised table of contents that corrects the misidentification of the notebooks and identifies
20 those items relating to the parties' record objections that it will retain until oral argument
21 pursuant to OAR 661-010-0025(2). Intervenor's objection to the letter at Record 175 is
22 sustained. The Board and the parties will disregard the item located at Record 175.

23 Dated this 10th day of December, 2002.

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Anne Corcoran Briggs
Board Member