

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 CITIZENS FOR PROTECTION OF
5 NEIGHBORHOODS, LLC, ROBERT THOMPSON
6 and RODNEY STUBBS,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF SALEM,
12 *Respondent,*

13
14 and

15
16 SUSTAINABLE FAIRVIEW ASSOCIATES, LLC,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2003-201

20 ORDER ON MOTION TO TAKE EVIDENCE

21 Petitioners move for LUBA to take evidence not in the record pursuant to OAR 661-010-
22 0045(1).¹ Specifically, petitioners seek to establish that a master plan commissioned by the Land
23 Conservation and Development Commission (LCDC study), including a transportation analysis
24 report, was submitted to the city during the proceedings resulting in the decision challenged in this
25 appeal. Attached to petitioners’ motion is an affidavit from petitioner Stubbs, averring that

26 “* * * In preparation for testimony before the Salem Planning Commission
27 beginning May 20, 2003 and continuing to June 3 and July 1, 2003, I reviewed
28 documents prepared by consultants in cooperation with the City of Salem and the
29 Morningside Neighborhood Association, among others, and I obtained copies from
30 the City of Salem of numerous documents that were represented to me to be part of
31 the record [of the disputed decision]. One of the documents that I received was
32 entitled ‘Fairview Training Center: A Masterplan for Redevelopment,’

¹ OAR 661-010-0045(1) provides, in relevant part:

“*The Board may * * * upon motion * * * take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.*” (Emphasis added.)

1 commissioned by LCDC in June of 1999 (LCDC Study), which included Technical
2 Appendices. I believe that these documents, including the Transportation Analysis
3 Report * * * were produced for me by the City of Salem.

4 “* * * I transmitted a copy of the LCDC Study to the attorney for Petitioners * * *
5 who used this study to prepare her written submissions to the City Council. She also
6 referred to the LCDC Study and its appendices numerous times during her
7 testimony before the Salem City Council on August 11, 2003.

8 “* * * On August 11, 2003, I also testified in opposition to the proposed Fairview
9 Development before the Salem City Council. At the time of my testimony, I
10 understood that the LCDC Study already was part of the official record and I relied
11 on the fact that the report clearly identifies the City of Salem as a stakeholder in the
12 preparation of the LCDC Study, which had been commissioned in part by the State
13 of Oregon.

14 “* * * I have reviewed the tape of the Salem City Council meeting on August 11,
15 2003 and although City of Salem planning staff were present at the hearing and
16 answered other questions, no one from City planning staff ever suggested that either
17 the LCDC Study or its appendices had not been made part of the record before the
18 City Council * * * If anyone from the City had ever indicated that the LCDC Study
19 was not part of the record * * * I would have asked that it be made part of the
20 record when I testified on August 11, 2003.” Affidavit of Rodney Stubbs 1-2.

21 If we deny petitioners’ motion to take evidence, petitioners request that we reconsider our order on
22 record objections where we denied petitioners’ objection that the city wrongfully omitted the
23 appendices from the LCDC study from the record filed in this appeal.²

24 The city responds that petitioners are attempting to use the procedures set out in OAR 661-
25 010-0045 to present to LUBA evidence that should have been placed before the city during the
26 local proceedings. The city concedes that one or more of the petitioners may have assumed that (1)
27 city staff provided petitioner Stubbs with a copy of the complete LCDC study, and (2) the files held
28 by city staff were presented in their entirety to the city council. However, the city argues that those

² In response to petitioners’ record objection, the city agreed to include the body of the LCDC study in the record because the city could not definitively establish that the LCDC study had *not* been included in the record. However, the city argued that there was no evidence to show that the appendices to the LCDC study, including the transportation analysis report, were placed before the decision maker or otherwise included in the record. We agreed with the city that, in those circumstances, the city was not obliged to include the disputed appendices in the city’s record. *Citizens for Protection of Neighborhoods v. City of Salem*, __ Or LUBA __ (LUBA No. 2003-201, Order, February 18, 2004) slip op 3.

1 assumptions do not establish that the appendices to the LCDC study were in fact placed before the
2 city council within the meaning of OAR 661-010-0025(1)(b).³

3 Reduced to its essentials, petitioners argue that the LCDC study appendices are properly
4 included in the record before the city because (1) a petitioner reviewed the staff file prior to
5 testifying before the city planning commission, (2) that petitioner understood that the staff file would
6 be forwarded in its entirety to every level of local decision makers, (3) that petitioner provided a
7 copy of the LCDC study to petitioners' attorney, who referred to the LCDC study and appendices
8 during her testimony before the city, (4) petitioners referred to the study during their individual
9 presentations to the city council, and (5) petitioners would have placed a copy of the complete
10 LCDC study in the record if they had any idea that the entire study *had not* been placed in the
11 record at some point during the local proceedings. In the alternative, petitioners contend that those
12 same appendices should be considered by the Board because even if those documents were not
13 included in the record, that evidence supports the assertion made in the petition for review that the
14 city erred in concluding that the proposal approved in the challenged decision is consistent with Goal
15 12 (Transportation) and that the standards set out in administrative rules implementing Goal 12 have
16 been met.

17 OAR 661-010-0045(1), quoted in n 1, provides that we may consider affidavits regarding
18 the circumstances surrounding a record objection to determine what may be included in the record.
19 *Laurance v. Douglas County*, 32 Or LUBA 489, 490 (1997). However, petitioner Stubbs'
20 affidavit does not provide a basis for reconsidering our prior conclusion that the LCDC Study
21 appendices were not placed before the local decision maker within the meaning of OAR 661-010-
22 0025(1)(b). Petitioners do not explain how an statement by an employee of the city that a document

³ OAR 661-010-0025(1)(b) provides, in relevant part, that the local record filed with LUBA shall include

“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.”

1 is “part of the record” of a particular application incorporates that document into the local record
2 when the local proceedings to address that application have yet to begin. There is no assertion that
3 city staff requested that the city council accept all documents included in staff files into the city
4 council’s record. Nor does Stubbs’ affidavit indicate that the disputed documents were presented to
5 the planning commission and were then forwarded on to the city council to be included in the local
6 record before the city council. The most we can assume is that city files include background
7 information, including the LCDC study, that predate the proceedings leading to the challenged
8 decision. None of the facts alleged provide a basis for LUBA to consider the LCDC study
9 appendices, either as extra-record evidence under OAR 661-010-0045, or as part of the record.
10 Accordingly, petitioners’ motion is denied.

11 We have received the petition for review. Pursuant to OAR 661-010-0045(9), response
12 briefs are due 21 days from the date of this order. Oral argument is rescheduled for May 6, 2004 at
13 11 a.m. in the Small Hearings Room, 2nd Floor Public Utility Commission Building, 550 Capitol
14 Street NE, Salem, Oregon.

15 Dated this 7th day of April, 2004.

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Anne Corcoran Briggs
Board Member