

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 LORENE NASH (AKA LORENE HALE),  
5 LORENE NASH (HALE)), as trustee of the  
6 Lorene Hale Trust and DAN NASH,  
7 *Petitioners,*

8  
9 vs.

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11 CITY OF MEDFORD,  
12 *Respondent,*

13  
14 and

15  
16 TRF REAL ESTATE CORP.,  
17 *Intervenor-Respondent.*

18  
19 LUBA No. 2004-070

20 ORDER

21 **MOTION TO INTERVENE**

22 TRF Real Estate Corp., the applicant below, moves to intervene on the side of  
23 respondent. There is no opposition to the motion, and it is allowed.

24 **RECORD OBJECTIONS**

25 Petitioners filed record objections in this appeal on May 27, 2004. Intervenor  
26 responded to those record objections on June 10, 2004. Since then, the parties have  
27 stipulated to delay settling the record and filing briefs to allow the parties an opportunity to  
28 negotiate an agreement to resolve this appeal. Those efforts have not been successful, and  
29 intervenor requests that we reactivate this appeal, resolve petitioners' record objections and  
30 establish a briefing schedule.

31 **A. Documents Improperly Omitted From the Record**

32 In their first objection, petitioners object that the record omits two documents that  
33 petitioners believe should be included in the record. The first document is a "Disposition and

1 Development Agreement” (DDA) between intervenor, the city and the Medford Urban  
2 Renewal Agency. The parties entered into the DDA in 1992, and the DDA has been  
3 amended a number of times over the years. Petitioners contend that the DDA and all its  
4 amendments should be included in the record because it was repeatedly referred to by the  
5 parties and the city council during the proceedings below. Petitioners also object that the  
6 record does not include a deed that petitioners’ attorney used to illustrate an argument he  
7 presented to the city council below.

8 OAR 661-010-0025(1) is our rule governing the content of the record in a LUBA  
9 appeal. It is not clear what part of that rule petitioners rely on in arguing the DDA should be  
10 included in the record. We assume petitioners rely on OAR 661-010-0025(1)(b). Among  
11 other things, OAR 661-010-0025(1)(b) requires that a local government include all “materials  
12 specifically incorporated into the record or placed before, and not rejected by, the final  
13 decision maker, during the course of the proceedings before the final decision maker.”  
14 However, petitioners do not claim the city council formally incorporated the DDA into the  
15 record or that the DDA was ever placed before the city council during the local proceedings  
16 in this matter. As intervenor points out, mere references to a document, without more, are  
17 not sufficient to make the document a part of the record. *Hillsboro Neigh. Dev. Comm. v.*  
18 *City of Hillsboro*, 15 Or LUBA 628, 629 (1987). Petitioners’ objection regarding the DDA is  
19 denied.

20 According to intervenor, the deed that petitioners assert should be included in the  
21 record was not submitted to the City Site Plan and Architectural Commission, which  
22 conducted the evidentiary hearing in this matter. Intervenor contends that the City Council’s  
23 review of the City Site Plan and Architectural Commission decision was limited to the  
24 evidentiary record that was compiled by the City Site Plan and Architectural Commission.  
25 Intervenor argues petitioners’ attorney’s use of the deed for “illustrative purposes” in  
26 presenting legal arguments to the city council are not sufficient to place that document before

1 the city council, within the meaning of OAR 661-010-0025(1)(b). We agree with intervenor.  
2 Petitioners' objection concerning the deed is denied.

3 Petitioners' first objection is denied.

4 **B. Document that Should not be Included in the Record**

5 Petitioners' final objection concerns a January 27, 2004 letter from a city attorney to  
6 intervenor's attorney. At the conclusion of the City Site Plan and Architectural  
7 Commission's January 16, 2004 public hearing in this matter, the record was held open for  
8 seven days, until January 23, 2004. Because the January 27, 2004 letter was not entered into  
9 the record before January 23, 2004, petitioners argue it should not be included in the record.

10 If we understand the procedure the city followed in this matter correctly, the  
11 evidentiary phase of the local proceedings came to an end when the public hearing was closed  
12 on January 16, 2004, and the seven-day period the record was held open expired on January  
13 23, 2004. It not clear to us why the city accepted the January 27, 2004 letter after the close of  
14 the evidentiary record or for what purpose it was accepted. However, we do not understand  
15 petitioners to contend that the January 27, 2004 letter was not placed before the City Site Plan  
16 and Architectural Commission before it made its January 30, 2004 decision in this matter,  
17 and we understand intervenor to argue that it was. The record is not limited to documents  
18 that are placed before the local decision maker before the close of the public hearing or  
19 before the close of the evidentiary record. *Reagan v. City of Oregon City*, 39 Or LUBA 738,  
20 740-41 (2000); *Von Lubken v. Hood River County*, 19 Or LUBA 548, 551 (1990); *Eckis v.*  
21 *Linn County*, 17 Or LUBA 1117, 1118 (1989). Therefore, without reaching the question of  
22 whether the January 27, 2004 letter was *properly* placed before the City Site Plan and  
23 Architectural Commission, it is properly included in the record under OAR 661-010-  
24 0025(1)(b).

25 Petitioners' second objection is denied.

1           The record is settled as of the date of this order. The petition for review shall be due  
2 21 days from the date of this order. The response briefs shall be due 42 days from the date of  
3 this order. The Board's final opinion and order shall be due 77 days from the date of this  
4 order.

5           Dated this 8<sup>th</sup> day of December, 2004.  
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12 Michael A. Holstun  
13 Board Chair