

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

3
4 MAJUDDIN JAFFER, PAT JAFFER,
5 JEAN ASTRINSKY, MIKE BILLMAN,
6 JASON BROWN, ANGELA BUCKHOLZ,
7 BOB RICE, JANINE RICE and JACK SLOAN,
8 *Petitioners,*

9
10 and

11
12 GARTH ELIASON, LENOR ELIASON
13 and DENNIS EBERLY,
14 *Intervenor-Petitioners,*

15
16 vs.

17
18 CITY OF MONMOUTH,
19 *Respondent,*

20
21 and

22
23 BENSON SAINSBURY,
24 *Intervenor-Respondent.*

25
26 LUBA No. 2005-123

27 ORDER

28 **MOTIONS TO INTERVENE**

29 **A. Eliason**

30 Garth Eliason and Lenor Eliason move to intervene on the side of petitioners. There
31 is no opposition to the motion, and it is allowed. Under our rules, intervenors Eliason were
32 required to designate a lead intervenor. OAR 661-010-0050(2). They did not do so.
33 However, both intervenors have the same mailing address. Documents filed with LUBA in
34 this matter maybe served on intervenors Eliason by mailing a single copy of the document to
35 their address, addressed to both intervenors. Although status as an intervenor is recognized
36 as soon as the motion is filed, it does not appear from the certificates of service attached to
37 documents that respondent and intervenor-respondent have filed with LUBA that they have

1 been served on intervenors Eliason. Respondent and intervenor-respondent shall
2 immediately serve on intervenors Eliason any documents that they filed with this Board that
3 post-date intervenors' motion to intervene. Certificates of such service shall be filed with
4 LUBA.

5 **B. Eberly**

6 Dennis Eberly moves to intervene on the side of petitioners in this appeal. There is
7 no opposition to the motion, and it is allowed. As with intervenors Eliason, respondent's and
8 intervenor-respondent's certificates of service do not indicate that documents filed with
9 LUBA have been served on intervenor Eberly. Respondent and intervenor-respondent shall
10 do so immediately. Certificates of such service shall be filed with LUBA.

11 **C. Sainsbury**

12 Benson Sainsbury, the applicant below, moves to intervene on the side of respondent
13 in this appeal. There is no opposition to the motion, and it is allowed.

14 **RECORD OBJECTIONS**

15 **A. Petitioners' October 9, 2005 Record Objections**

16 Petitioners object that (1) a number of items are improperly omitted from the record,
17 (2) the document that appears at page 282 of the record should not be included and (3) the
18 minutes of the planning commission and city council hearings are inadequate.

19 **1. Items Identified as Improperly Omitted From the Record**

20 **a. Objections 1 through 3, 6, and 8**

21 After petitioners' record objections were filed, they later conceded that the documents
22 identified in these record objections were not placed before the city decision makers. These
23 objections are denied.

24 **b. Objection 4**

25 Objection 4 concerns a petition that petitioners contend was submitted to the city.
26 The city agrees to include the petition in a supplemental record.

1 **c. Objection 5**

2 Objection 5 concerns a handout that petitioners contend was prepared by petitioner
3 Janine Rice and placed before the city at the June 7, 2005 hearing. A copy of the handout is
4 attached to petitioners' November 3, 2005 Reply to Response to Objection to the Record.
5 The city has not disputed petitioners' representation.

6 Objection 5 is sustained. A copy of that handout will be included in the supplemental
7 record.

8 **d. Objection 7**

9 Objection 7 concerns a site development plan. Respondent and intervenor respond
10 that this is an oversize exhibit that is available for review at city hall and will be provided to
11 LUBA at oral argument. Based on that clarification and understanding, petitioners withdrew
12 objection 7.

13 **e. Objection 9**

14 Page 52 of the record is missing. When the city submits the supplemental record, it
15 will also submit a copy of page 52 of the record so that LUBA and all parties may insert that
16 page in their copy of the record.

17 **f. Objections 10 and 11**

18 These objections concern a 10-page document. Apparently fax cover pages that
19 accompanied the document when it was transmitted appear at pages 129 and 130 of the
20 record, but not all of the pages of the document that accompanied those fax cover pages are
21 included in the record. The city has agreed to include a complete copy of the document in
22 the supplemental record.

23 **2. Items Identified as Improperly Included in the Record**

24 This objection concerns a drawing that appears at page 282 of the record.
25 Respondent and intervenor-respondent explain that the drawing was removed from a bulletin

1 board and placed before the city council. Petitioners accept that explanation. This objection
2 is denied.

3 **3. Adequacy of Minutes**

4 Petitioners object to the adequacy of the minutes “of meetings or hearings” included
5 in the record. It is not clear to us which “meetings or hearings” petitioners are referring to.
6 Objections based on the adequacy of minutes included in a local government record are
7 governed by OAR 661-010-0026(3), which provides in part:

8 “An objection on grounds that the minutes or transcripts are incomplete or
9 inaccurate shall demonstrate with particularity how the minutes or transcripts
10 are defective and shall explain with particularity why the defect is material.”

11 Petitioners have not adequately identified the minutes that they contend are defective.
12 Neither have petitioners demonstrated “with particularity” why the minutes are defective or
13 why those defects are material. This objection is denied.

14 Petitioners have requested that the city provide them with copies of the meetings and
15 hearings in this matter. Under OAR 661-010-0030(5) petitioners may prepare verbatim
16 transcripts of portions of those tapes if they wish and attach those transcripts to their petition
17 for review.

18 **B. October 19, 2005 Record Objection**

19 On October 12, 2005 LUBA received a letter from the city planning department.
20 That letter states:

21 “Enclosed please find supplement: Traffic Impact Analysis, to the record in
22 Majduddin Jaffer v. City of Monmouth * * *, LUBA No. 2005-123.”

23 The referenced enclosure is traffic impact analysis (TIA) dated January 21, 2005 that is made
24 up of 54 double-sided pages. Although the copy of the TIA that was sent to LUBA is three-
25 hole punched, it is unbound. The certificate of service that accompanied the letter and TIA

1 states that copies were served on the attorneys for the city and intervenor respondent, but
2 does not state that petitioners were served with a copy of the letter and TIA.¹

3 The city's initial record was received by LUBA on September 26, 2005. We treat the
4 October 12, 2005 letter and enclosure as a proposed supplemental record. That supplemental
5 record was received on October 13, 2005, 17 days after the initial record was received.
6 Petitioner Bob Rice objects to the supplemental record and argues that the supplemental
7 record should not be allowed, for two reasons. We address those reasons separately below.

8 **1. The Deadline for Filing Record Objects Expired**

9 Under OAR 661-010-0026 any objections to the initial record that the city filed on
10 September 26, 2005 were due 14 days later, or October 10, 2005. Because no record
11 objection regarding the TIA was filed on or before October 10, 2005, petitioner contends the
12 supplemental record that LUBA received on October 13, 2005 should not be allowed.

13 OAR 661-010-0026(1) provides in part that "[b]efore filing an objection to the
14 record, a party shall attempt to resolve the matter with the governing body's legal counsel."
15 Intervenor-respondent contends that it contacted the city attorney regarding the TIA, and the
16 city attorney agreed that the record should be supplemented to include the TIA and thereafter
17 took steps to have the supplemental record transmitted to LUBA. Intervenor-respondent and
18 the city contend this procedure complies with LUBA's rules, and the fact that the
19 supplemental record arrived three days after the deadline for filing a record objection expired
20 provides no basis for rejecting the supplemental record. We agree with intervenor-
21 respondent and the city.

22 **2. The TIA Was Not Placed Before the City Council**

23 Petitioner contends that the TIA was not "placed before" "the final decision maker,"
24 and therefore should not be included in the record.²

¹ The October 12, 2005 letter itself indicates a copy of the letter was provided to lead petitioner Majduddin Jaffer, but does not indicate that the copy of the letter included the enclosure.

1 Intervenor-respondent answers that the TIA was submitted to the city council at its
2 June 7, 2005 hearing in this matter. In support of that position, intervenor-respondent notes
3 (1) the minutes of the June 7, 2005 hearing show the TIA was discussed by both proponents
4 and opponents, (2) petitioners Bob Rice and Janine Rice submitted a document on June 14,
5 2005, in which they specifically critique the January 21, 2005 TIA, and (3) the city's findings
6 specifically refer to that TIA. Intervenor-respondent also submitted two affidavits. In one of
7 those affidavits, intervenor-respondent states that he handed a copy of the TIA to city planner
8 during the June 7, 2005 hearing for inclusion in the record, and no party objected. The other
9 affidavit corroborates that statement.

10 In response to intervenor-respondent, petitioners Majduddin Jaffer and Bob Rice
11 contend that they contacted three city councilors who advised petitioners "that they did not
12 remember seeing the TIA, and were not aware that the document existed."³ Reply to
13 Response to Objection to the Record 4. In a supplemental response, petitioners submitted
14 two affidavits and a motion to take evidence not in the record pursuant to OAR 661-010-045.
15 Petitioners request that we consider those affidavits in determining whether the TIA was
16 actually placed before the city council. Neither respondent nor intervenor-respondent object
17 to the motion, and we have considered those affidavits in resolving this objection.

18 In one of the affidavits, petitioner Jason Brown states that on June 9, 2005 he
19 requested that the city provide him with all traffic information in this case, and the TIA was
20 not included in the material the city provided. In the second affidavit, the attorney who

² OAR 661-010-0025(1) establishes the required contents of the local government records. OAR 661-010-0025(1)(b) requires that the record 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."

³ Of the three city councilors contacted by petitioners, two voted against the disputed rezoning and one voted to approve the rezoning.

1 represented petitioners before the city council states that he remembers a shorter document
2 dated May 17, 2005 that appears at pages 279-81 of the record, but he does not remember the
3 applicant submitting the TIA.

4 It is not entirely clear that the TIA was submitted on June 7, 2005 or that it was
5 submitted in a way that made it clear to all persons present at that hearing that the TIA was
6 being submitted for the record. The minutes suggest that it was, but we cannot be sure the
7 discussion noted in the minutes is directed at the TIA rather than the May 17, 2005
8 memorandum. Petitioner's former attorney's affidavit suggests it was the May 17, 2005
9 memorandum. Even if we could consider petitioners' representation of what the city
10 councilors allegedly told them, the personal recollections of three of the city councilors that
11 they do not remember the TIA being submitted is not particularly strong evidence regarding
12 whether the TIA in fact was submitted. We are not sure what to make of Petitioner Jason
13 Brown's allegations. Assuming his description of his request of the city is accurate, the TIA
14 was either not included in the record at that time or the city failed to provide him a copy for
15 some reason. Either explanation is plausible.

16 We resolve the question of whether the TIA was submitted on June 7, 2005 in the
17 city's and intervenor-respondents favor primarily based on the June 14, 2005 document that
18 appears at record 158-59. In that document, petitioners Bob Rice and Janine Rice offer a
19 number of criticisms that are expressly directed at the TIA and the subsequent two-page May
20 17, 2005 memorandum which itself refers to the TIA.⁴ No one offers any explanation for
21 why those petitioners would have submitted a critique of the TIA if it had not been submitted
22 for inclusion in the record.

23 Although we agree with the city and intervenor-respondent that the TIA is properly
24 included in the record, the supplemental record that the city sent to LUBA on October 12,

⁴ Other memoranda also refer to the TIA, which suggests that the authors of those letters believed the TIA was included in the record. Record 117-18, 208-09.

1 2005 is not bound in a suitable folder, is not securely fastened and does not have consecutive
2 page numbers, as required by OAR 661-010-0025(4). A copy of the TIA shall be included in
3 the supplemental record that the city will be required to file to satisfy the record objections
4 that we have resolved in petitioners' favor in this order.

5 **C. Conclusion**

6 The city shall have 14 days from the date of this order to submit a supplemental
7 record that includes (1) the petition that is the subject of objection 4, (2) the handout that is
8 the subject of objection 5, (3) the ten-page document that is the subject of objections 10 and
9 11, and (4) the January 21, 2005 TIA. That supplemental record must comply with the
10 specifications for record set out at OAR 661-010-0025(4). Along with that supplemental
11 record, the city will also provide a copy of page 52 of the record. LUBA and all parties will
12 insert that page in the appropriate place in the record that was originally filed in this matter.

13 Finally, some time ago petitioners requested that the city provide them copies of the
14 audio-tapes of the planning commission and city council hearings in this matter. On
15 December 21, 2005, the city advised LUBA that it had complied with that request. On
16 January 3, 2006, petitioners advised LUBA that they have received copies of the tapes of the
17 city council hearings but they have not received the requested tape of the planning
18 commission hearing. Assuming the city has not provided the requested tape of the planning
19 commission hearing, it shall do so immediately and advise LUBA that it has done so.

20 Dated this 9th day of January, 2006.
21
22
23
24
25
26

27 _____
28 Michael A. Holstun
Board Member