

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

3  
4                                   MEL STEWART,  
5                                   *Petitioner,*

6  
7                                   vs.

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9                                   CITY OF SALEM,  
10                                  *Respondent.*

11  
12                                 LUBA No. 2009-052

13                                 ORDER

14   **MOTION TO CORRECT RECORD**

15             Petitioner applied to partition an approximately one-third of an acre parcel into two  
16   parcels. The planning director issued an administrative approval, but the city council elected  
17   to review the director’s approval and held a public hearing. After the public hearing, the city  
18   council closed the record but continued deliberations until a future meeting. At the future  
19   meeting, the city council voted to deny the partition application and directed staff to prepare  
20   findings to that effect. The city provided petitioner with a copy of the proposed findings, and  
21   petitioner prepared a written argument in response to the proposed findings. The city  
22   attorney prepared a memorandum in response to petitioner’s written argument, and the city  
23   council determined it would not consider petitioner’s written argument in making its  
24   decision, and then denied the partition application.

25             The city included petitioner’s written argument and the city attorney’s memorandum  
26   in response to that argument in the record submitted to LUBA. Record 28-32. The city,  
27   however, included a note at the beginning of the record stating that Record 28-32 was for  
28   reference purposes only:

29             “The Memorandum and Argument are included in the record submittal for  
30   purpose of reference only. The Argument was specifically rejected by the  
31   Salem City Council as untimely, and was not considered by the Salem City  
32   Council in its decision, and is NOT part of the record below.”

1           Petitioner filed a “Motion to Correct Record” requesting “an order [from] the board  
2 directing that petitioners argument (Record 30-32) was placed before the decision maker and  
3 improperly rejected in violation of ORS 197.763(6)(e) and should be accepted in to the  
4 record on appeal by the board.”<sup>1</sup> Motion to Correct Record 4. The city has not responded to  
5 petitioner’s motion.

6           In *Indian Creek v. City of Lake Oswego*, 14 Or LUBA 519, 520 (1985), LUBA held  
7 that where a local government accepts a letter during a land use proceeding, but later rejects  
8 the letter, the letter is part of the record that must be submitted to LUBA in the event of an  
9 appeal of the land use decision that results from that land use proceeding. We held in *Indian*  
10 *Creek* that such a letter is only relevant in determining whether it was legal error to reject the  
11 letter. In *Bloomer v. Baker County*, 19 Or LUBA 482, 490-91 (1990), the county similarly  
12 rejected letters as untimely filed, but instead included the rejected letters in the record with  
13 the understanding that they were not considered in making the decision below. We sustained  
14 an objection to the record arguing that the letters should be omitted from the record,  
15 overruling *Indian Creek* and holding that when a local government accepts evidence during a  
16 land use proceeding but later specifically rejects the evidence, the evidence is not part of the  
17 local government record in the event of an appeal. OAR 661-010-0025(1) now specifically  
18 provides that the record includes documents that have not been “rejected by \* \* \* the final  
19 decision maker.” Under OAR 661-010-0025(1) and the reasoning in *Bloomer*, the city was  
20 not required to include the letters in the record. But petitioner does not argue that the city  
21 improperly included the disputed documents in the record that was filed with LUBA.

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<sup>1</sup> ORS 197.763(6)(e) provides:

“Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant’s final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.”

1 Instead, petitioner’s dispute is with the city’s decision not to consider the document based on  
2 the city’s determination that the document was untimely filed. That argument is not a record  
3 objection, but rather an argument that can be advanced in the petition for review.<sup>2</sup>

4 Petitioner’s motion to correct the record is denied.

5 **BRIEFING SCHEDULE**

6 The record is settled as of the date of this order. The petition for review is due 21  
7 days from the date of this order. The response brief is due 42 days from the date of this  
8 order. The Board’s final opinion and order is due 77 days from the date of this order.

9 Dated this 6<sup>th</sup> day of August, 2009.

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Tod A. Bassham  
Board Chair

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<sup>2</sup> LUBA thus will consider Record 28-32 only for the limited purpose of determining whether the city properly rejected the documents.