



1 Petitioners object that the motion to supplement the record should be rejected as untimely.  
2 We agree with petitioners and deny intervenor's motion to supplement the record.

3         Allowing the record to be supplemented after the briefs have been filed presents  
4 obvious problems for the parties who filed their brief without the benefit of knowing the  
5 record would subsequently be supplemented. To avoid prejudice to those parties, they must  
6 be given an opportunity to file a new or amended brief, which in turn necessitates a delay in  
7 the appeal proceeding. Leonard v. Union County, 15 Or LUBA 135, 142 (1986). We  
8 recently considered a request to supplement the record that was filed after the petition for  
9 review and respondent's briefs were filed. Terra v. City of Newport, \_\_\_ Or LUBA \_\_\_  
10 (LUBA No. 98-036, Order on Objections to Second Supplemental Record, April 6, 1999). In  
11 Terra, we rejected the supplemental record, and explained:

12         "In Salem Golf Club v. City of Salem, 27 Or LUBA 715 (1994), the city filed  
13 a supplemental record contemporaneously with its response brief, arguing that  
14 the items included in the supplemental record were items included in the  
15 record before the planning commission, and hence included in the record  
16 before the city council as a matter of law under local ordinances. The  
17 petitioners objected both to the merits of the supplemental record and its  
18 untimely filing. We agreed with the city that the items were included in the  
19 record before the city council as a matter of law under applicable local  
20 provisions. 27 Or LUBA at 718. Further, we rejected the petitioners'  
21 objection to the timeliness of the submission, explaining that 'in ordinary  
22 circumstances,' we would not allow a supplemental record to be filed after the  
23 petition for review had been filed, given the mandate in ORS 197.805 that  
24 time is of the essence in LUBA's review proceedings. 27 Or LUBA at 719.  
25 However, we noted that the case had already been delayed over a year due to  
26 the petitioners' failure to submit certain material, and that, under those 'unique  
27 circumstances,' we would allow delayed submission of the supplemental  
28 record. Id." Terra, slip op at 2.

29 We went on to explain in Terra that the supplemental record proposed in that appeal differed  
30 from Salem Golf Club in two ways:

31         "First, in the present case the city provides no explanation why it believes  
32 figure 1 was or should be included in the record before the city council.  
33 Unlike the respondent in Salem Golf Club, the city does not contend that  
34 figure 1 was included in the record before the city council as a matter of law,

1           pursuant to local code requirements, or that figure 1 was included in the  
2           record by any other means.

3           "Second, the city does not cite to any 'unique circumstances' that would justify  
4           acceptance of a supplemental record over petitioners' objection at this late  
5           stage in the appeal, or that would justify a departure from the policy of  
6           expedited review provided in ORS 197.805. Accordingly, we sustain  
7           petitioners' record objections." Terra, slip op at 2-3 (footnote omitted).

8           For similar reasons, we deny the motion to supplement the record in this appeal. As  
9           petitioners point out, even if the complete Hardey Report was submitted to the city, it is not  
10          entirely clear whether the complete report was submitted to the city council, which rendered  
11          the decision challenged in this appeal. More importantly, intervenor identifies no "unique  
12          circumstances" that would justify accepting the supplemental record months after the petition  
13          for review was filed. Neither does intervenor explain why including the complete Hardey  
14          Report is necessary for our consideration of this appeal.

15          Intervenor's motion to supplement the record is denied.

#### 16          **MOTION TO STRIKE**

17          Petitioners move to strike several portions of intervenor's brief because, petitioners  
18          argue, those portions of the brief refer to and rely on evidence that is not in the record.

19          That a brief may include allegations of fact that are not supported by the record is not  
20          grounds for striking those allegations from the brief. Hammack & Associates, Inc. v.  
21          Washington County, 16 Or LUBA 75, 78, aff'd 89 Or App 40, 747 P2d 373 (1987).  
22          However, where allegations of fact in a brief are not supported by the record, we disregard  
23          those allegations of fact. Mannenbach v. City of Dallas, 25 Or LUBA 136, 138, aff'd 121 Or  
24          App 441, 856 P2d 345 (1993); Hammack & Associates, 16 Or LUBA at 78. We consider  
25          petitioners' motion to strike with these principles in mind.

26          We agree with petitioners that the second full paragraph on page 5 of intervenor's  
27          brief includes allegations of fact that rely on "Appendix A" to the Hardey Report, which is  
28          not in the record. Intervenor will have an opportunity at oral argument to identify evidence

1 in the record that supports those allegations of fact. Unless intervenor does so, those  
2 allegations of fact will be disregarded. However, with regard to petitioners' remaining  
3 arguments under its motion to strike, for the reasons explained below, we agree with  
4 intervenor that petitioners' arguments are not well founded.

5 The map included in intervenor's brief, while not included as part of the record, is not  
6 offered by intervenor for its evidentiary value, but rather as a visual aid to understand  
7 evidence that is in the record. With the understanding that our consideration of the disputed  
8 map will be so limited, petitioners' motion to strike the map and references in intervenor's  
9 brief to the map is denied. Contrary to petitioners' argument, the table appearing at page 6 of  
10 intervenor's brief is included in the record. Record 58. With regard to the last sentence on  
11 page 6 of intervenor's brief, petitioners do not identify which portions of the sentence it  
12 believes rely on extra-record evidence. Intervenor argues that sentence merely summarizes  
13 evidence that appears at record 203-04. We agree. The motion to strike the last sentence of  
14 page 6 of intervenor's brief is denied.

15 Dated this 18th day of June, 1999.

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Michael A. Holstun  
Board Chair