

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 MARK REAGAN and LINDA LORD,  
5 *Petitioners,*

6  
7 vs.

8  
9 CITY OF OREGON CITY,  
10 *Respondent,*

11 and

12  
13 JAMES McKNIGHT,  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2000-125

17  
18 ORDER

19 **MOTION TO INTERVENE**

20 James McKnight, the applicant below, moves to intervene on the side of respondent.  
21 There is no opposition to the motion, and it is allowed.

22 **RECORD OBJECTIONS**

23 Petitioners object to the local government record that was filed by the city in this  
24 proceeding. We address each of petitioners' record objections separately below.

25 **A. Audiotapes**

26 We understand petitioners to object that the record does not include audiotape  
27 recordings of the city commission meetings where it considered an appeal of a planning  
28 commission decision granting a variance. In response, the city filed an amended table of  
29 contents designating the audiotapes of the June 21, 2000 and July 19, 2000 city commission  
30 meetings as part of the record. As allowed by OAR 661-010-0025(2), the city indicates that  
31 it will provide the tapes to LUBA at the time of oral argument. The city also indicates that it  
32 has provided a copy of the tape of the June 21, 2000 public hearing in this matter to  
33 petitioners.

1 We understand the city’s response and the amended table of contents to satisfy  
2 petitioners’ first objection and, therefore, do not consider it further.

3 **B. Bias Objection**

4 The city commission conducted a public hearing in this matter on June 21, 2000.<sup>1</sup> At  
5 the conclusion of the applicant’s rebuttal, the minutes indicate the mayor “closed the public  
6 hearing portion of the meeting, and opened the floor for discussion by the Members.”  
7 Record 31. Thereafter, the city commission voted to approve a tentative decision to (1) grant  
8 the appeal, (2) reverse the planning commission and (3) grant the requested variance. Record  
9 35-36. The applicant’s attorney was directed to prepare a draft order for review by the city  
10 attorney. At its July 19, 2000 meeting, the city commission adopted the written decision that  
11 is challenged in this appeal.

12 On July 18, 2000, one day before the city commission adopted its written decision,  
13 petitioners submitted a letter to the city.<sup>2</sup> In that letter, petitioners contend the city  
14 commission is biased in this matter. Petitioners argue that Oregon City Municipal Code  
15 (OCMC) 17.50.180 specifically allows parties to raise procedural objections “at any time  
16 prior to a final decision.”<sup>3</sup>

17 The city responds that the disputed letter “was never placed before the decision  
18 maker” because “the letter does not specifically request inclusion in the record.” Response to  
19 Record Objections 2. The city also responds that the record was closed on June 21, 2000,  
20 and argues that petitioners’ submission of the letter after that date would not be sufficient to

---

<sup>1</sup>The city attorney “explained that this is an ‘on the record hearing’ which means that the Members are limited to the record that is before them and he would ask that they disregard anything that is inadvertently placed before them that is new.” Record 24.

<sup>2</sup>The copy of the July 18, 2000 letter that is attached to petitioners’ objections to the record is addressed to the city commission and is stamped to indicate the city received the letter at 9:19 a.m. on July 18, 2000.

<sup>3</sup>Petitioners argue that under the OCMC the city’s decision became final when it was reduced to writing, signed and “written notice [was] mailed to those entitled to notice of the decision.” OCMC 17.50.020. Petitioners argue, and the city does not dispute, that written notice of the decision was not given until July 24, 2000.

1 comply with ORS 197.763(1).<sup>4</sup>

2 The city does not identify any legal requirement that the July 18, 2000 letter must  
3 include a specific request that it be included in the record, and we are aware of none. It is  
4 obvious from reading the letter that it concerns the disputed variance and that petitioners  
5 were submitting the letter for the city commission's consideration. The letter's failure to  
6 include a specific request that it be included in the record provides no basis for excluding the  
7 letter from the record.

8 The content of the local government record is governed by OAR 661-010-0025(1).  
9 Under OAR 661-010-0025(1)(b), the local record includes the following:

10 "All written testimony and all exhibits, maps, documents or other written  
11 materials specifically incorporated into the record *or placed before, and not*  
12 *rejected by, the final decision maker during the course of the proceedings*  
13 *before the final decision maker."* (Emphasis added.)

14 The city does not claim that petitioners' July 18, 2000 letter was "rejected by \* \* \* the final  
15 decision maker during the course of the proceedings before the final decision maker."  
16 Therefore, the only question that must be answered under OAR 661-010-0025(1)(b) to  
17 resolve this record objection is whether the July 18, 2000 letter was "placed before \* \* \* the  
18 final decision maker during the course of the proceedings before the final decision maker."

19 For whatever reason, OCMC 17.50.180 specifically allows parties to submit  
20 procedural objections until notice of the final written decision is given. Therefore, under  
21 OCMC 17.50.180, the "proceedings before the final decision maker" remain open for receipt  
22 of procedural objections until the city gives written notice of the final decision. The July 18,  
23 2000 letter was addressed to the city council and received by the city six days before the

---

<sup>4</sup>ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

1 deadline specified in OCMC 17.50.180 expired. Therefore, under OAR 661-010-025(1)(b),  
2 the July 18, 2000 letter is part of the local government record in this matter.

3 The city attempts to avoid this straightforward reading of OCMC 17.50.180 by  
4 arguing that OCMC 17.50.180 may be inconsistent with ORS 197.763. The city suggests  
5 that the language in ORS 197.763(1), *see* n 4, is intended to recognize that the close of the  
6 local government record can be extended past the close of the initial evidentiary hearing only  
7 as provided in ORS 197.763(6).<sup>5</sup> We see no basis for reading such a limit into ORS  
8 197.763(1) and decline to do so.

9 Petitioners' objection that the July 18, 2000 letter should be included in the record is  
10 sustained.

### 11 C. Inaccurate Minutes and Findings

12 Petitioners first argue that the minutes are inaccurate in three ways. However, under  
13 OAR 661-010-0026(3), petitioners must "explain with particularity why the defect[s are]  
14 material." We agree with the city that petitioners fail to do so.

15 Petitioners' final objection is that the challenged decision incorrectly states the  
16 application that led to the challenged decision was submitted on June 24, 1999. Petitioners  
17 argue the application was actually first submitted on September 14, 1999.

18 The city responds, and we agree, that the alleged error in the findings the city adopted  
19 to support the challenged decision may provide a basis for challenging the findings on the  
20 merits in the petition for review, but it does not provide a basis for requiring that the record  
21 be amended.

---

<sup>5</sup>For example, prior to close of the initial evidentiary hearing, any party may request an opportunity to submit additional evidence. ORS 197.763(6)(a). Where such a request is made, the hearings authority must grant the request by continuing the hearing or holding the record open for at least seven days. *Id.*

1  
2  
3  
4  
5  
6  
7  
8

Dated this 30<sup>th</sup> day of November, 2000.

---

Michael A. Holstun  
Board Member