

Appendix C. LUBA Procedures/Rules: Headnotes 27.3.1 - Record Generally

27.3.1 LUBA Procedures/Rules – Record – Generally. While mere reference to a document in testimony is an insufficient basis to conclude that the referenced document is incorporated into the record, where the decision itself refers to a document in a manner that suggests the **document was considered** by the decision maker, absent some reason to conclude otherwise the document is part of the record. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where the challenged decision refers to and requires specific changes to existing storm water management manuals, that is some indication that the **decision maker reviewed those manuals**, and the burden shifts to the respondent to substantiate its assertion that the manuals were not in fact before the decision maker. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. **Documents may be incorporated** into a land use decision only if the decision maker clearly indicates the intent to do so and adequately identifies the document incorporated. Statements that a stormwater permit includes “best management practices” does not mean that documents described under federal regulations as “best management practices” are incorporated into the permit. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where the final decision maker dictates that the city will accept additional written submissions only until a prescribed date, and city staff acts under that dictate to reject a document submitted after the prescribed date, the final **decision maker has “rejected” the document**, for purposes of determining the content of the record. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where the evidentiary record has closed and a local appeal to the city council is limited to the evidentiary record that was compiled before the initial local hearings body, an attorney’s reference to a deed to “illustrate” his argument to the city council **is not sufficient to place the deed before the decision maker**, so that it would become part of the city’s record under OAR 661-010-0025(1)(b). *Nash v. City of Medford*, (2004).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a local government concedes that documents identified by petitioners **are properly included in the record**, LUBA will require that the city submit a supplemental record to include the documents. Petitioners may not submit a supplemental record; only the respondent may submit the record in a LUBA appeal. *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).

27.3.1 LUBA Procedures/Rules – Record – Generally. Under OAR 661-010-0025(4)(b) the record in a LUBA appeal may be incorporated by reference in the record of a subsequent LUBA appeal. However, where this is done, any parties in the subsequent LUBA appeal who did not receive a copy of the record in the first LUBA appeal must be provided a copy of that record. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

27.3.1 LUBA Procedures/Rules – Record – Generally. A county attorney's decision to forward certain letters from petitioners' attorney to the county attorney to the board of county commissioners is not sufficient to establish either a common practice that all letters to the county attorney are included in the record or a reasonable expectation on the part of petitioners' attorney that such letters would be included in the local record. *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. Petitioners' attorney's letter to the county's attorney is properly excluded from the record where the letter is not submitted for the record in the manner specified in the notice of hearing, and the letter does not include a request that the letter be included in the record. *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. A local government is not required to include a verbatim transcript of tape recordings in the record if such a transcript was not actually prepared for the proceedings below. *Beaman v. City of Hillsboro*, 34 Or LUBA 779 (1998).

27.3.1 LUBA Procedures/Rules – Record – Generally. A local government may specify the methodology for making documents that are not submitted at the local hearings part of the local record in the local code, or may identify the methodology during the course of the local proceedings. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

27.3.1 LUBA Procedures/Rules – Record – Generally. The local record consists of those items physically placed before and not specifically rejected by the local decision maker. *Forest Highlands Neigh. Assoc. v. Lake Oswego*, 23 Or LUBA 723 (1992).

27.3.1 LUBA Procedures/Rules – Record – Generally. Words spoken during the proceedings before the local decision maker are considered part of the local record, even where tapes of the local proceedings are not submitted to LUBA with the local record. Transcripts of the tapes of such local proceedings may be submitted to LUBA by the parties. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where there is no dispute concerning the authenticity or identity of a document a party believes was **improperly excluded** from the record by the local government, **the parties may stipulate that the document be included in the LUBA record for the limited purpose of reviewing the correctness of the local government's decision to exclude the document from the local government record.** Alternatively, the document may be attached to a party's brief, and if any party objects to LUBA's consideration of the document, the party offering the document may move for an evidentiary hearing. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).