II. "FOR THE RECORD"

C. LUBA Opinions and Headnotes

The Term "Placed Before" Is a Term of Art. As used in OAR 661-010-0025(1)(b), the term "placed before" is a term of art and does not merely describe the act of setting documents in front of the decision maker. Legislative decision making often involves less precisely defined procedures for compiling an evidentiary record than quasi-judicial decision making. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

1. Testimony Period During Course of the Proceedings Before the Final Decision Maker

a) Course of the Proceedings: Application to Appealable Record

For purposes of determining the composition of the local record of a decision on a land use application, the local land use proceedings begin when the application is submitted. The "course of the proceeding" is from the application point until after the local decision is reduced to written, signed and final decision for the purposes of a LUBA appeal.

ORS 197.763(1), in relevant part, provides:

> "(1) 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. . . ."

OAR 661-010-0025(1)(b) provides:

> "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." [Emphasis added].

For purposes of determining the composition of the local record of a decision on a permit application, the local proceedings begin when the permit application is submitted. *Forest Highlands Neigh. Assoc. v. Lake Oswego*, 23 Or LUBA 723 (1992).

The record includes all written testimony and documents "placed before and not rejected by", the final decision maker, during the course of proceedings before the final decision maker. OAR 661-010-0025(1)(b). *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005). LUBA in *Kane* ruled:

> "**Generally, the local record submitted to LUBA is not limited to materials submitted to the local decision maker prior to the close of the public hearing or the close of the evidentiary record.** *Rochlin v. Multnomah County*, 25 Or LUBA 783 (1993); *Joines v. Linn County*, 24 Or LUBA 588 (1992); *Wissusik*

> *v. Yamhill County*, 19 Or LUBA 571, 573 (1990); *Eckis v. Linn County*, 17 Or LUBA 1117, 1118 (1989). **If items submitted after the close of evidentiary proceedings are "placed before and not rejected by" the final decision maker, such items are part of the local record.**" [Emphasis added].

LUBA ruled in *Nash v. City of Medford*, 48 Or LUBA 647 (2004) that:

> "If we understand the procedure the city followed in this matter correctly, the evidentiary phase of the local proceedings came to an end when the public hearing was closed on January 16, 2004, and the seven-day period the record was held open expired on January 23, 2004. It not clear to use why the city accepted the January 23, 2004 letter after the close of the evidentiary record or for what purpose it was accepted. However, we do not understand petitioners to contend that the January 27, 2004 letter was not placed before the City Site Plan and Architectural Commission before it made its January 30, 2004 decision in this matter, and we understand intervenor to argue that it was. **The record is not limited to documents that are placed before the local decision maker before the close of the public hearing or before the close of the evidentiary record.** *Regan v. City of Oregon City*, 39 or LUBA 738, 740-41 (2000); *Von Lubken v. Hood River County*, 19 or LUBA 548, 551 (1990); *Eckis v. Linn County*, 17 Or LUBA 1117, 1118 (1989). **Therefore, without reaching the question of whether the January 27, 2004 letter was properly placed before the City Site Plan and Architectural Commission, it is properly included in the record under OAR-010-0025(1)(b).**" [Emphasis added].

The local record can include materials submitted to the local decision maker during the public hearing process, but also other materials placed before the local decision maker prior to adoption of the final appealable decision.

LUBA's rules do not permit expansion of the record of a land use decision to include documents that were created **after the appealed land use decision was reduced to writing, signed, and became final for the purposes of appeal**. Findings adopted by reference as part of a local land use decision are properly included in a local record only if they were created and adopted prior to or at the same time as the land use decision that they support. Findings supporting a local land use decision are not part of a city's record if they are created after the local decision was reduced to writing, signed and became final for purposes of a LUBA appeal. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002).

The Court of Appeals has held that the findings that are required by law to support a quasi-judicial land use decision may not be prepared and adopted **after the quasi-judicial land use decision is adopted and become final for purposes of appeal**. *Heilman v. City of Roseburg*, 39 Or App 71, 74-76, 591 P2d 390 (1979). *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002).

The time period <u>"during the course of the proceedings"</u> includes the following periods:

- From the date a land use application is submitted to the date noticed for a public hearing.
- All public hearings before the final decision maker.
- The local record is not limited to materials submitted to the final decision maker prior to the close of the public hearing(s).
- Continued public hearing(s).

. Periods for leaving the record open after public hearing(s).
. Through the date there is a written, signed, and final decision for purposes of appeal.

Most documents created after a local government issues the **final decision on appeal** are not part of the local record. Certain documents that are created after a local decision is reduced to writing, signed, and becomes final for purposes of appeal may be included in the local government's record before LUBA. Those documents include: minutes of the meeting where the challenged decision was adopted, copies of post-acknowledgment plan amendment notice to DLCD (ORS 197.615), and affidavits of published, posted or mailed notice of the challenged decision. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002).

. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005).
. *Nash v. City of Medford*, 48 Or LUBA 647 (2004).
. *West Coast Media v. City of Gladstone*, 43 Or LUBA 585 (2002).
. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002).
. *Reagan v. City of Oregon City*, 39 Or LUBA 738 (2000).
. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).
. *Nicholson/Keever v. Clatsop County*, 31 Or LUBA 535 (1996).
. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).
. *Leathers v. Marion County*, 30 Or LUBA 437 (1995).
. *Matrix Development v. City of Tigard*, 26 Or LUBA 606 (1993).
. *Rochlin v. Multnomah County*, 25 Or LUBA 783 (1993).
. *Joines v. Linn County*, 24 Or LUBA 588 (1992).
. *Forest Highlands Neigh. Assoc. v. Lake Oswego*, 23 Or LUBA 723 (1992).
. *Schatz v. City of Jacksonville*, 22 Or LUBA 799 (1991).
. *Barr v. City of Portland*, 20 Or LUBA 531 (1991).
. *Wissusik v. Yamhill County*, 19 Or LUBA 571, 573 (1990).
. *Eckis v. Linn County*, 17 Or LUBA 1117, 1118 (1989).

The record includes all written testimony and documents "placed before and not rejected by", the final decision maker, during the course of proceedings before the final decision maker. OAR 661-010-0025(1)(b). *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005). LUBA in *Kane* ruled that generally, the local record submitted to LUBA is not limited to materials submitted to the local decision maker prior to the close of the public hearing or the close of the evidentiary record. If items submitted after the close of evidentiary proceedings are "placed before and not rejected by" the final decision maker, **prior to the appealed land use decision being reduced to writing, signed, and became final for the purposes of appeal,** such items are part of the local record.

. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005).
. *Nash v. City of Medford*, 48 Or LUBA 647 (2004).
. *Regan v. City of Oregon City*, 39 or LUBA 738, 740-41 (2000).
. *Rochlin v. Multnomah County*, 25 Or LUBA 783 (1993).

. *Joines v. Linn County*, 24 Or LUBA 588 (1992).
. *Wissusik v. Yamhill County*, 19 Or LUBA 571, 573 (1990).
. *Von Lubken v. Hood River County*, 19 or LUBA 548, 551 (1990).
. *Eckis v. Linn County*, 17 Or LUBA 1117, 1118 (1989).

b) Final Decision Maker

Evidence that is presented to lower-level local decision making bodies need not be included in the record of the final decision maker unless that evidence is (1) placed before the final decision maker or (2) incorporated into the record by the final decision maker. OAR 661-010-0025(1)(b) OAR 661-010-0025(1)(c), and OAR 661-010-0026(2) refer to the final decision maker.

OAR 661-010-0025(1)(b) provides:

> "(b) 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**." [Emphasis added].

OAR 661-010-0025(1)(c), in relevant part, provides:

> "(c) Minutes and tape recordings of the meetings conducted by the **final decision maker** as required by law, or incorporated into the record by the **final decision maker**." [Emphasis added].

OAR 661-010-0026(2), Objections to the Record, provides:

> "(2) An objection to the record or an objection to an amendment or supplement to the record shall be filed with the Board within 14 days of the date appearing on the notice of record transmittal sent to the parties by the Board. A party may file a precautionary record objection while continuing to resolve objections with the governing body's legal counsel. Objections may be made on the following grounds:"
>
> "(a) The record does not include all materials included as part of the record during the proceedings **before the final decision maker**. The omitted item(s) shall be specified, as well as the basis for the claim that the item(s) are part of the record." [Emphasis added].
>
> "(b) The record contains material not included as part of the record during the proceedings before the **final decision maker**. The item(s) not included as part of the record during the proceedings before the final decision maker shall be specified, as well as the bases for the claim that the item(s) are not part of the record." [Emphasis added].

Under OAR 661-010-0025(1)(b), evidence that is presented to lower-level local decision making bodies need not be included in the record of the final decision maker unless that evidence is (1) placed before the final decision maker or (2) incorporated into the record by the final decision maker. *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000).

> "Although our rule could be clearer, we do not agree with respondent. Under OAR 661-010-0025(1)(b), *evidence* that is presented to lower-level local decision making bodies need not be included in the record of the final decision maker *unless* that evidence is (1) placed before the final decision maker or (2) incorporated into the record by the final decision maker. Similarly OAR 661-010-0025(1)(c) only requires that the record include the minutes and tape recordings of meetings conducted by the final decision maker. Under OAR 661-010-0025(1)(c), the minutes and tape recordings of lower-level local decision makers must be included in the record only if they are incorporated into the record by the final decision maker."

OAR 661-10-025(1)(c) requires that the "minutes * * * of the meetings conducted by the governing body" be included in the record, but does not require that the minutes of planning commission deliberations be included where the planning commission is not authorized to render a final decision and for that reason is not properly considered a "governing body." *Carlson v. Benton County*, 33 Or LUBA 767 (1997)

> ". . . Under OAR 661-10-010(4) "'Governing body' means a city, county or special district governing body or a state agency or a person, commission or other entity authorized by the governing body to make a final decision." Accordingly, LUBA will accept appeals from any of the specified decision makers, after a petitioner has exhausted all local appeals. It is the record before and created by the final local decision makers that forms the basis for the decision. As such, it is the minutes and tape of the record on appeal to LUBA."

> "OAR 661-10-025(1)(c) allows certain additional materials to be included in the record. However, what is allowed depends on how "governing body" in OAR 661-10-025(1)(c) is interpreted. Because the planning commission is not authorized to make a final decision in the event of an appeal, we question the interpretation in *Champion*. Upon reconsideration, we conclude "governing body" does not include a planning commission if the planning commission decision is subject to appeal locally. . ."

> "It is the petitioner's responsibility to ensure that all relevant evidence is place before the decision maker. If petitioner disputed the adequacy of the planning commission's record which was placed before the board, petitioner should make that objection to the board or reintroduced that evidence during the board's appeal hearing."

Where the planning commission is not authorized by the city council to make a final decision, it is not a "governing body" under OAR 661-10-010(4), and OAR 661-10-025(1)(c) does not require the planning commission minutes be included in the record. However, minutes placed before the city governing body are properly included in the record under OAR 661-10-025(1)(b). *City of Gresham v. City of Wood Village*, 33 Or LUBA 779 (1997).

> "The definition of "governing body" in our rules at OAR 661-10-010(4) is different from the definition in ORS 192.610(3). Although the planning commission was a governing body in this proceeding under ORS 192.610(3), it was not a governing body under OAR 661-10-010(4), because the planning commission was not authorized by the city council to make a final decision. The city council, not the planning commission, made the challenged final decision amending the city comprehensive plan text and plan and zoning maps."

> ". . .Although OAR 661-10-026(2)(c) speaks nonspecifically of "minutes or transcripts of meetings or hearings," OAR 661-10-026(2)(c) record objections must be limited to the minutes of the "governing body," as that is defined in OAR 661-10-010(4): the public body that makes the final decision appealed to LUBA."

Where the challenged decision is that of the governing body, made on appeal from a planning commission decision, allegations of procedural error in the manner in which the planning commission adopted its order and findings do not provide a basis for reversal or remand. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

OAR 660-10-025(1)(c) requires the local record submitted to LUBA to include minutes and tape recordings of the proceedings conducted by the governing body, regardless of whether such minutes and tapes were actually placed before the decision maker below. Under OAR 660-10-010(4), "governing body" includes a commission whose decision would become the local government's final decision if no local appeal were filed. *Champion v. City of Portland*, 28 Or LUBA 742 (1994). [LUBA later reverses this opinion in *Carlson*].

The general rule is that the record compiled at one stage of a local government land use proceeding must actually be placed before the decision maker in subsequent stages of that land use proceeding, if that earlier record is to become part of the record subject to review by LUBA. Where local code provisions require that the record of proceedings before initial decision makers be placed before the **final decision maker** the record of those earlier proceedings automatically become part of the record subject to review by LUBA, without the necessity of actually placing the record compiled before initial decision makers before the **final decision maker**. *Leonard v. Union County*, 23 Or LUBA 664 (1992).

> "With limited exception our review is limited to the local government record. ORS 197.830(13). Where, as in this case, there is more than one step in the local government decision making process, a question may arise as to whether the "entire record" includes only the record considered by the **final decision maker** or the record complied at each step in the local decision making proceeding." [Emphasis added].

> "With limited exceptions which do not apply in this case, the Board has determined that the entire record considered by the final decision maker is the "entire record" subject to our review. The general rule is that the record compiled at one stage of a local government land use proceeding must actually be placed before the decision maker in subsequent stages of that land use proceeding, if that earlier record is to become part of the record subject to review to our review. *McGinty v. Curry County*, 17 Or LUBA 1051 (1989); *Krueger v. Josephine County*, 17 Or LUBA 1019 (1988); *Lovejoy v. City of Depot Bay*, 16 Or LUBA 1070 (1988). We have recognized an exception to this general rule where local code provisions require that the record of proceedings before initial decision makers be placed before the final decision maker and, therefore, obviate the necessity of actually placing the record complied by initial decision makers before the final decision maker. See *Union gospel Ministries v. City of Portland*, 21 Or LUBA 557, 560 (1991); *League of Women Voters v. Coos County*, 13 Or LUBA 311 (1985). However, we are cited no such provisions in the county's plan or land use regulations."

Alleged errors in the manner in which the findings of a lower level local decision maker were adopted, are harmless if the final decision was properly adopted by the final decision maker. *Rath v. Hood River County*, 23 Or LUBA 2000 (1992).

. *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000).
. *Carlson v. Benton County,* 33 Or LUBA 767 (1997)
. *City of Gresham v. City of Wood Village,* 33 Or LUBA 779 (1997).
. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995)
. *Champion v. City of Portland*, 28 Or LUBA 742 (1994). [LUBA questioned in *Carlson*].
. *Leonard v. Union County,* 23 Or LUBA 664 (1992).
. *Rath v. Hood River County*, 23 Or LUBA 200 (1992)

2. Testimony Submitted in Manner Specified in the Notice of Hearing and/or Identified Methodology

ORS 197.763(3)(g) and (j) provide:

> "(3) **The notice provided by the jurisdiction shall**:" [Emphasis added].
>
> "(g) Include the name of a **local government representative** to contact and the telephone number where additional information may be obtained;" [Emphasis added].
>
> "(j) Include a general explanation of the **requirements for submission of testimony** and the procedure for conduct of hearings." [Emphasis added].

a) Local Government Methodology: No Established Procedures for How Documents must Be Submitted into the Record in Land Use Proceedings

LUBA ruled in *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002) that:

> "Legislative decisions, . . . often involve less precisely defined procedures for compiling an evidentiary record, as compared to quasi-judicial decision making procedures. ". . . **in the absence of established procedures governing how items are submitted into the record**, whether items were "placed before" the decision maker turns on whether the decision maker's conduct regarding those items is such participants in the proceedings should reasonably expect those items to be included in the record. *Home Depot, Inc.*, 36 Or LUBA at 785, citing *Redland/Viola Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 645, 647 (1994)." [Emphasis Added].
>
> "The current appeal does not involve the more typical city or county legislative land use proceeding that will generally end with one or more public hearings before the city or county legislative body and an enacting ordinance."

Where a local government has no established procedures for how documents must be submitted into the record in land use proceedings, the LUBA standard is whether the conduct of staff and the final decision maker could reasonably lead a party to believe the documents are being included in the record. *Bogan v. Coos County,* 37 Or LUBA 1032 (2000).

> "No one called our attention to **any established procedures** that govern how the county allows documents to be submitted into the record. Therefore the test that this Board applies under *Home Depot II* is whether

the conduct of staff and the decision maker could reasonably lead petitioners' attorney to believe that the documents included in the planning department's official file were being included as part of the local record. [Emphais Added].

LUBA ruled in *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 785 (1999) that:

"**In the absence of established procedures** governing how items are submitted into the record before the final decision maker, whether items in the planning file are "placed before" the decision maker within the meaning of OAR 661-010-0025(1)(b) turns on whether the decision maker's conduct, or acquiescence in the conduct of staff, regarding those items is such that participants in the proceedings reasonably should expect that those items are part of the local evidentiary record."

Where a county has no adopted procedure for submitting documents prior to permit hearings and (1) a party delivers a document to the county attorney in advance of the hearing, (2) the document includes a request that it be made part of the record and (3) the party verbally requests at the hearing that the document be made part of the record, the party's actions are sufficient to place the document before the decision maker. *Tri-River Investments Co. v. Clatsop County*, 35 Or LUBA 820 (1998).

"Here the petitioner specifically requested in the body of the August 26, 1998 letter that it be included in the record and repeated that request orally at the August 26, 1998 hearing. The only question is whether the letter was place before the board of commissioners."

"Petitioner's attorney did not physically hand a copy of the letter to the board of commissioners during the August 26, 1998 hearing. However, he did hand a copy of that letter to county counsel shortly before the August 26, 1998 hearing began, and in that letter asked county counsel to include the letter in the record. County counsel was present at the hearing, but apparently did not give the board of commissioners a copy of the letter and did not include the letter in the record, even thought petitioners made a second verbal request at the August 26, 1998 hearing that the letter be made part of the record."

"We conclude that petitioner's actions were sufficient to place the letter before the board of commissioners. The city does not argue that it has a **specific procedure for submitting documents for the record in its land use hearings or that a person other than county counsel is specifically designated to receive evidence that is submitted in advance of a land use hearing**. *Cf. Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 688, 691 (1992) (**city auditor identified as custodian of all records in city council proceedings**); *Blatt v. City of Portland*, 20 Or LUBA 572, 574 (1991) (same). In the **absence of such procedures**, petitioner did not fail to follow established procedures for **submitting evidence prior to the hearing**. Because the county has not adopted procedures that dictate a particular protocol for placing document before the board of commissioners prior to land use hearings, the actions taken by petitioner were sufficient to place the document before the board of commissioners. *Wade v. Lane County*, 20 Or LUBA 499, 502-03 (1990)." [Emphasis added].

"As we cautioned in *Wade*, we do not mean to suggest that delivery of a document to a local government's attorney prior to a land use hearing will invariably be legally sufficient to place that document before the local government decision maker. *Wade*, 20 Or LUBA at 503 n 7.

In the **absence of local regulations** to the contrary, oversize aerial photographs permanently affixed to the walls of a local government hearing room do not become part of the record simply because they are in the view of the decision maker and are referred to in testimony during a local land use hearing. *Wicks v. City of Reedsport*, 28 Or LUBA 739 (1994). The critical factors in this appeal are (1) the **lack of a code-specific procedure for submitting documents prior to the hearing,** (2) petitioner's delivery of a copy of the letter

to county counsel, (3) petitioner's written request in the letter that the letter be made part of the record, and (4) petitioner's verbal request at the hearing that the letter be included in the record. In view of these efforts by petitioner to place the letter before the board of commissioners, and the board of commissioners' **failure to specifically reject** the August 26, 1998 letter, it is included in the record." [Emphasis added].

In *Redland/Viola Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 645 (1994) LUBA held that in the absence of established procedures for formally admitting documents displayed during a local government land use hearing into the record, wetland maps that were displayed during a local hearing and discussed in the testimony of local government staff are part of the record of the local proceedings.

"Intervenor argues that even if these maps were not given an exhibit number, they were displayed before the planning commission as part of the testimony of county planning staff, and should be included in the record."

'The county does not dispute petitioner's contention that a number of wetland maps were displayed before the planning commission, and explained and referred to during staff member Borge's testimony. Rather, the county contends it does not know of any Statewide Wetland Inventory maps, and argues that the USFWS National Wetland inventory maps "were not presented or admitted as exhibits in [the county] proceedings."'

"The local record consists of those materials actually placed before, and not specifically rejected by, the local decision maker during the local proceedings. *Bloomer v. Baker County*, 19 Or LUBA 482, 483 (1990). Apparently, a number of wetlands maps were displayed during the August 9, 1993 planning commission hearing and were discussed in the testimony of a county staff member. The county does not cite any local **regulations establishing procedures for formally admitting documents** displayed during a county land use hearing into the record of that hearing. In the absence of such established procedures, we believe it is reasonable for participants in county proceedings to expect that maps in the county's possession which are displayed before the county decision maker and discussed by county staff members during their testimony are part of the record of the proceedings." [Emphasis added].

Petitioner's delivery of evidence to the county counsel's office is adequate to place those materials before the county decision maker and make them part of the local record subject to LUBA review, where (1) the procedures for submitting evidence at times other than during county hearings are not specified in the county code or regulations and were not identified during the course of the proceedings below, (2) the county failed to respond to petitioners' previous request for information regarding the proper procedure for submitting evidence, and (3) petitioner had previously submitted evidence to the county counsel's office, and that material was included in the local record. *Wade v. Lane County*, 20 Or LUBA 499 (1990).

"With regard to whether in this case delivery of documents to the Office of Legal Counsel placed those documents before the commissioners, we first consider whether the county identified, in the Lane Code of Lane Manual, or during the course of the proceedings below, **how a party could submit documents to the board of commissioners at times other than during the board of commissioners' hearings on the proposed plan amendments.** We conclude that neither LC Chapter 12 (Comprehensive Plan) nor LM Sections 3.900 to 3.935 (Board Land Use Hearing Rules) identifies **how to place documents before the board of commissioners outside of an actual hearing, or the custodian of documents placed before the board of commissioners during a legislative land use proceeding.** Furthermore, we are not cited to any identification in the record of such a process or **custodian** during the course of the plan amendment proceedings leading to this appeal." [Emphasis added].

"However, the record does show that on April 19, 1990, the county received petitioners' attorney's April 18, letter to the county counsel, which is captioned "Re: Metro Area Plan Amendments," and states in relevant part:"

> "I am uncertain regarding the process for filing written testimony and objections to the proposed amendments to the Metro Area Plan regarding the extension of sewer services by the City of Eugene to the River Road/Santa Clara area."
>
> "It is my intention to have this letter serve as my written testimony and objections. I would appreciate it if you could file this letter in the appropriate place for inclusion in the record of the proceedings."
>
> "I would appreciate it if you could inform me how the written record is being prepared and where it may be reviewed."

"Petitioners' attorney's letter clearly indicates petitioners submitted the letter to the county counsel to be included in the record of the county proceedings and includes a request for information on the acceptable procedures for submitting written material to be included in the county record. Petitioners received no response to this letter. Under these circumstances we can only conclude, as did petitioners, that submitting material to the Office of Legal Counsel is an acceptable means of placing that material before the county decision maker. *Cf. Club Wholesale Concepts, Inc. V. City of Salem*, 19 Or LUBA 576, 581 (1990) (absent city rules to the contrary, a request for notice of a city final decision which is directed to the city attorney is sufficient)."

. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).
. *Bogan v. Coos County*, 37 Or LUBA 1032 (2000).
. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 994,996 (1999) (*Home Depot II*).
. *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 784-85 (1999).
. *Tri-River Investments Co. v. Clatsop County*, 35 Or LUBA 820 (1998).
. *Wicks v. City of Reedsport*, 28 Or LUBA 739 (1994).
. *Redland/Viola Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 645 (1994).
. *Wade v. Lane County*, 20 Or LUBA 499 (1990).

b) Local Government Methodology: Some Procedures Established for How Documents must Be Submitted into the Record in Land Use Proceedings

The test applied by LUBA is not entirely clear, but in general items are "placed before" the local decision maker if they are submitted to the final decision maker through means specified in local regulations, or local regulations require that the item be placed before the decision maker. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).

The decision maker 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). In general, local ordinance provisions which require certain items to be placed before the governing body have the effect of making those items part of the record of the governing body's proceedings, irrespective of whether the items were physically placed before the governing body. *Schrock Farms, Inc. v. Linn County*, 22 Or LUBA 836 (1992). LUBA has not always supported this approach and has ruled that a code provision requiring that the local record include all materials submitted by any party and reviewed in reaching the "local decision under review" does not require that documents that were submitted to and considered by staff be included in the local record, where those documents were not "placed before" the final decision maker. *Hribernick v. City of Gresham*, 35 Or LUBA 751 (1998).

The final decision maker can authorize a person to receive evidence on the decision maker's behalf. *Opp v. City of Portland*, 33 Or LUBA 772 (1997).

Where a local government designates a particular planner as the person to whom comments on a proposal should be directed, comments so directed are effectively "placed before" final decision maker and are required to be included in the local record. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

Where local code provisions require that the record of proceedings before initial decision makers be placed before the final decision maker the record of those earlier proceedings automatically become part of the record subject to review by LUBA, without the necessity of actually placing the record compiled before initial decision makers before the final decision maker. *Leonard v. Union County*, 23 Or LUBA 664 (1992).

Where city procedures for adopting legislative amendments require planning commission review and recommendation before those amendments are considered for adoption by the city council, the record at LUBA must include the planning commission record as well as the record before the city council. *No Tram to OHSU, Inc. v. City of Portland*, 43 Or LUBA 634 (2002).

A procedural objection that is filed after the close of the final local hearing, but before the final decision is adopted and written notice of the decision is given, must be included in the local record, where the city's code allows procedural objections to be filed any time before written notice of the final decision is given. *Reagan v. City of Oregon City*, 39 Or LUBA 738 (2000).

Where the city charter identifies the City Auditor as custodian of all records of city council proceedings, and petitioners neither cite city regulations recognizing the delivery of documents concerning pending city council proceedings to the offices of the mayor or individual council members as a means of submitting documents for the record, nor claim the city council specifically authorized use of such a procedure, the delivery of documents to the offices of the mayor and city council members does not constitute placing those documents before the city council. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 688 (1992).

. *No Tram to OHSU, Inc. v. City of Portland*, 43 Or LUBA 634 (2002).
. *Reagan v. City of Oregon City*, 39 Or LUBA 738 (2000).
. *Hribernick v. City of Gresham*, 35 Or LUBA 751 (1998).
. *Opp v. City of Portland*, 33 Or LUBA 772 (1997).
. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).
. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).
. *Schrock Farms, Inc. v. Linn County*, 22 Or LUBA 836 (1992)
. *Leonard v. Union County*, 23 Or LUBA 664 (1992).
. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 688 (1992).

c) Notice of Hearing Invites Comments

ORS 197.763(3)(g) and (j) provide:

> "(3) **The notice provided by the jurisdiction shall**:" [Emphasis added].
>
> "(g) Include the name of a **local government representative** to contact and the telephone number where additional information may be obtained;" [Emphasis added].
>
> "(j) Include a general explanation of the **requirements for submission of testimony** and the procedure for conduct of hearings." [Emphasis added].

Written comments are "placed before" the final decision maker where the notice of a land use hearing invites written comments and parties submit written comments in the manner set forth in the notice.

OAR 661-010-0025(1)(b) provides that the local record include:

> "(b) 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." [Emphasis added].

LUBA in *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005) provided (also see Section II.C.4.a)):

> "We have had a number of occasions to consider whether particular efforts were sufficient to place written material before the final decision maker. We summarized the three most common ways to place documents before a decision maker in *ONRC v. City of Oregon City*, 28 Or LUBA 775, 778 (1994):"
>
> > "Items are placed before the local decision maker if (1) they are physically placed before the decision maker prior to the adoption of the final decision; (2) they are submitted to the decision maker through means specified in local regulations or through appropriate means in response to a request by the decision maker for submittal of additional evidence; or (3) local regulations require that the item (e.g., record of a lower level decision maker's proceedings) be placed before the decision maker."
>
> "The second of the above-described methods is potentially applicable here. The city apparently does not have generally applicable **rules that govern pre-hearing submittal of comments** to the city in its land use proceedings. But both the written and published notice of the July 5, 2005 hearing specified how comments were to be submitted, who they were to be submitted to and the deadline for submitting such written comments:" [Emphasis added].
>
> > "Written comments may be submitted at Veneta City Hall; * * * mailed to City of Veneta, * * * sent by FAX (541) 935-1838; or sent by e-mail message to dwalters@lane, cog.or.us. Written comments must be received by 5:00 p.m. on Friday, July 1st. * * *"
>
> "If the dispupted e-mail message had been sent to and received by the city before 5:00 p.m. on Friday, July 1, 2005, and city staff thereafter failed to provide that e-mail message to the city council and planning commission, we likely would agree with petitioners that the e-mail message would nevertheless have been placed before the final decision maker, within the meaning of OAR 661-010-0025(1)(1). In that circumstance, the **sender would have followed the instructions in the notice of hearing** and therefore would have placed the e-mail message before the final decision maker under the second method describe in *ONRC*. . . ." [Emphasis added].

In *Neighbors 4 Responsible Growth* the sender did not submit the e-mail message before the July 1, 2005. Where a city's notice of hearing specified a date and time for submitting comments before the city's public hearing and an e-mail message was sent after the date specified in the notice and was not actually placed before the decision maker at the noticed hearing, the e-mail message is properly excluded from the record. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

Several LUBA rulings address the notice of a land use hearing inviting written comments. Written comments are "placed before" the final decision maker within the meaning of OAR 661-010-0025(1)(b) **where the notice of hearing invites written comments and parties to the case submit written comments in the manner set forth in the notice**. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 579 (2002). 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). An ambiguous statement from the county chair that the "hearing is limited to correcting the findings based on the existing record and thus the record is closed" is insufficient to clearly reject written comments that were submitted to the county pursuant to the procedure described in the notice of hearing. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 579 (2002). **Where a local government designates a particular planner** as the person to whom comments on a proposal should be directed, comments so directed are effectively "placed before" final decision maker and are required to be included in the local record. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

LUBA provided in *Central Klamath County CAT* where the notice of hearing invites written comments and parties to the case submit written comments in the manner set forth in the notice:

> "Petitioner explains that, on remand, the county board of commissioners held a public hearing on July 24, 2001. **The notice provided for the July 24, 2001 hearing stated that "[a]ll written comments to the record must be received" by 5:00 p.m. the day prior to the hearing.** Record 50. The notice further states that "[o]ral testimony will be accepted at the public hearing." [Emphasis added].
>
> "As for the notice of the hearing at Record 50, the county argues that its invitation to submit written comments was simply boilerplate."
>
> ". . . **the county's notice of hearing invited written comments**, and parties to the case accordingly submitted written comments in the manner se forth in the notice. The county does not explain what further step is necessary to "place" those comments before the commissioners, under either county legislation or our rule. Consequently, those comments are properly included in the record, unless the final decision maker rejected them during the course of the proceedings before the final decision maker." [Emphasis added].

LUBA provided in *Western States* where a petitioner objected that the record should include a letter from petitioner's attorney to the county's attorney:

> "The June 8, 1999 letter was not sent to the Planning Division and does not include a request that the county attorney include the letter as part of the record or provide a copy of the letter to the board of county commissioners."
>
> "The June 8, 1999 letter was not placed before the board of commissioners. Neither was the letter submitted for inclusion in the record through a means specified by the county during the proceedings. Finally, the county's land use regulations do not make communications between parties and the county's attorney part of the record as a matter of law."
>
> "In *Wade v. Lane County*, 20 Or LUBA 499 (1990), we concluded that delivery of letters to the county attorney was sufficient, in the circumstance presented in that case, to include the letters in the local record. However, the circumstances in *Wade* were quite different. In *Wade*, the county had not explained how to submit documents for the record. In Wade, the petitioners' attorney had requested information from the county on how to submit documents for the record and had received no answer from the county. *Id.* At 500. No such exchange is alleged to have occurred in this appeal. In Wade, the petitioners' attorney asked that the letter be include in the record, and again asked for information concerning how the record was being compiled. Id. At 503. In this case, petitioner's letter makes no such requests."

Where a local government designates a particular planner as the person to whom comments on a proposal should be directed, comments so directed are effectively "placed before" final decision maker and are required to be included in the local record. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

> "To become part of the local record, items must be placed before the local decision maker, and not specifically rejected by it, during the course of the local proceeding. *Breivogel v. Washington County*, 22 Or LUBA 813, 814 (1991); *Bloomer v. Baker County*, 19 Or LUBA 482 (1990). The local government controls the manner in which documents become part of the local record. With regard to the methodology for **making documents that are not submitted at the local hearings part of the local record**, the local government may specify the methodology in the local code, or may identify the methodology during the course of the local proceedings. *Wade v. Lane County*, 20 Or LUBA 499 (1990). Here, the city prepared a formal **"Notice of Proposed Action" stating that the recipient is to "Direct Questions and Comments To" a particular city planner.** Record 104. This notice was hand delivered to DLCD on February 26, 1993 and identified the date of the hearing on the proposal as:" [Emphasis added].
>
> "That the planner failed to place the letter in the planning file does not answer the question of whether submitting documents to that planner was an acceptable method of placing documents before the decision maker under the methodology identified for including documents in the record that were not submitted at a public hearing. **The city designated a particular planner as the person to whom comments on the proposal should be directed. This means that comments so directed are effectively placed before the decision maker and are required to be included in the local record.**" [Emphasis added].

- *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005)
- *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 579 (2002).
- *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).
- *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

3. Request That Testimony Be Included in Record

LUBA rulings on requesting that testimony be included in the record are mixed. Some rulings suggest that a specific request is not needed for written testimony and minutes to be part of the record. For example, a letter that is addressed to and received by a local decision maker may not be omitted from the record of a variance proceeding because the letter did not specifically include a request that it be included in the local record, where there is no local code requirement that the letter include such a specific request and it is obvious that the letter concerns the requested variance. *Reagan v. City of Oregon City*, 39 Or LUBA 738 (2000). Where petitioners requested that the record of proceedings before the planning commission be included in the record before the board of commissioners, that request was discussed at the public hearing before the board and not rejected, and the secretary to the board acknowledged that she would make copies of the requested documents for the board, those documents are properly part of the record. *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996).

Other LUBA rulings suggest that it does not matter whether there is a request to have material be part of the record. What is important is that the materials are physically placed before the final decision maker and/or in a manner specified in the notice of hearing. 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). **A request that documents be make part of the local record is not sufficient** to make those documents part of the local record unless the documents are actually "placed before" the decision maker. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).

Petitioner's request at a local proceeding that a specific document be adopted as part of the record **does not suffice to make that document part of the record** if it is not actually "placed before" the decision maker. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996). Absent local regulations that specifically allow submittal of evidence to the local decision maker through incorporation by reference, a request to incorporate items by reference is not sufficient to make the requested items part of the local record. *Salem Golf Club v. City of Salem*, 25 Or LUBA 768 (1993). Where a participant requests that the local decision maker include certain items in the record, but does not actually "place those items before" the decision maker, **that request**, at least in the absence of an affirmative response by the decision maker, **is no more than a reference to those items** in the participant's testimony and does not make those items part of the local record. *Ramsey v. City of Portland*, 22 Or LUBA 845 (1992).

. *Reagan v. City of Oregon City*, 39 Or LUBA 738 (2000).
. *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).
. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).
. *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996).
. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).
. *Salem Golf Club v. City of Salem*, 25 Or LUBA 768 (1993).
. *Ramsey v. City of Portland*, 22 Or LUBA 845 (1992).

4. Written Testimony or Other Written Materials Specifically Placed Before the Final Decision Maker

a) Specifically "Placed Before" the Final Decision Maker

A major theme which has evolved from LUBA is that testimony and material do not become part of the record unless they are "placed before" the final decision maker and are not rejected. OAR 661-010-0025(1)(b) provides:

> "(b) 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." [Emphasis added].

OAR 661-010-0025(1)(b) recognizes two categories of items that are included in the record: those materials specifically incorporated into the record and those items placed before, and not

rejected by, the final decision maker. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

In *Witham Parts and Equipment Co.* LUBA provided:

> "The term "placed before" is a term of art and does not merely describe the act of setting documents in front of the decision maker. *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 784-85 (1999). Legislative decision making often involves less precisely defined procedures for compiling an evidentiary record than quasi-judicial decision making."

Where a local government has no established procedures for how documents must be submitted into the record in land use proceedings, the test applied by LUBA is whether the conduct of staff and the decision maker could reasonably lead a party to believe the documents are being included in the record. *Bogan v. Coos County*, 37 Or LUBA 1032 (2000).

> "In general, the procedures that are followed in local government quasi-judicial land use proceedings are much less formal than the procedures that are observed in judicial proceedings. *See Boldt v. Clackamas County*, 107 Or App 619, 623-24, 813 P2d 1078 (1991) (comparing "raise it or waive it" rule in local land use hearings with judicial preservation concepts). The procedures for submitting documents for the record during local quasi-judicial proceedings are no exception. In *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 784-85 (1999), we discussed the difficulty of determining whether particular actions during local land use proceedings are sufficient to **place documents before** the local decision maker." [Emphasis added].

LUBA in *Bogan* then quoted *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 785 (1999) that:

> "**Determining whether documents have been "placed before"** the final decision maker for purposes of OAR 661-010-0025(1)(b) **is often problematic**. *Wicks v. City of Reedsport*, 28 Or LUBA 739, 740 (1994). **The term "placed before" is a term of art**, and describe conduct that is not limited to the act of setting documents on the desk in front of the final decision maker. *See e.g. DeShazer v. Columbia County*, 30 Or LUBA 472, 473 (1996) (documents discussed at the hearing, and that the secretary to the board of commissioners indicated she would copy for the board, are "placed before" the decision maker); *Redland/Viola Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 645, 647 (1994) (wetland maps displayed during the hearing and discussed in the testimony of planning staff were "placed before" the decision maker); *Veatch v. Wasco County*, 23 or LUBA 676, 677 (1992) (documents that the county court "took notice of" were properly part of the record, even though not placed before the court). In the absence of established procedures governing how items are submitted into the record before the final decision maker, whether items in the planning file are "placed before" the decision maker within the meaning of OAR 661-010-0025(1)(b) turns on whether the decision maker's conduct, or acquiescence in the conduct of staff, regarding those items is such that participants in the proceedings reasonably should expect that those items are part of the local evidentiary record. *Redland/Viola Fischer's Mill CPO; see also Wicks*, 28 Or LUBA at 741 (it is not reasonable for participants to expect that oversize aerial photographs permanently affixed to hearing room walls will become part of the record simply because they are within view of the decision maker and are referred to in testimony)." [Emphasis added].

LUBA, in *Bogan,* then explained:

> "In our order reconsidering our July 29, 1999 order in Home Depot, Inc., we further explained that
>
> > "**a planning file does not become part of the local record simply because it is physically present and visible. Something more must be done to place it before the decision maker.**" *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 994, 996 (1999) (Home Depot II)." [Emphasis added]
>
> "We also cautioned that "[w]here a party alleges that certain documents were not 'placed before' the decision maker, the proponent of [inclusion of those documents] bears some burden to support its contention to the contrary." *Id*. We turn to petitioners' arguments that the something more" that is required under Home Depot II to make the official planning department files part of the record occurred here."
>
> > "In this case, [LUBA] should find that the planning department's files containing the letters were physically before the decision maker[.] * * * Petitioners' affidavit shows that Petitioners attorney expressly asked the Assistant Planning Director, who was in possession of the files, whether they were the official planning department files and whether they contained all documents related to this appeal. The Assistant Planning Director told the Petitioners' attorney 'yes'. (Affidavit of Michael Robinson, paragraph 3). Respondent does not dispute the affidavit." Petitioners' Response to Respondent's Response to Precautionary Record Objection 4."
>
> "No one called our attention to any established to any established procedures that govern how the county allows documents to be submitted into the record. Therefore the test that this Board applies under *Home Depot II* is whether the conduct of staff and the decision maker could reasonably lead petitioners' attorney to believe that the documents included in the planning department's official file were being included as part of the local record. Although it is a close question, we conclude that the above-described exchange was such that petitioners' attorney could reasonably expect that the documents in the official planning department files are part of the record in this matter. **The issue would have been resolved beyond all doubt had petitioners' attorney specifically asked that the files be included in the record and received the same response.** Nevertheless, we conclude that a request that the files be included in the record can be inferred from the exchange.". [Emphasis added]

It is clear that items are "placed before" the local decision maker if (1) they are physically placed before the decision maker prior to the adoption of the final decision; (2) they are submitted to the decision maker through means specified in local regulations or through appropriate means in response to a request by the decision maker for submittal of additional evidence; or (3) local regulations require that the item be placed before the decision maker. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996); *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 601 (1995); *ONRC v. City of Oregon City*, 28 Or LUBA 775 (1994); *Salem Golf Club v. City of Salem*, 27 Or LUBA 715 (1994)

This clear narrow view has been made a bit unclear with another acknowledgment by LUBA that the term "placed before" is a term of art and does not merely describe the act of setting documents in front of the decision maker. Legislative decision making often involves less precisely defined procedures for compiling an evidentiary record than quasi-judicial decision making. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

Testimony or materials sent to, represented by, and/or used by employees of the local government, including county counsel, may not be enough to establish that these materials are part of the record because they were not "placed before" the final decision maker. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005); *Ceniga v. Clackamas County*, 33 Or LUBA 261 (1997); *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996); *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 601 (1995); *Terra v. City of Newport*, 24 Or LUBA 579 (1992); *Eckis v. Linn County*, 20 Or LUBA 589 (1991); *Blatt v. City of Portland*, 20 Or LUBA 572 (1991). [Emphasis added]

Even at a public hearing where planning files are physically present and visible and/or documents are referred to by local government legal counsel may not be sufficient to "place before" the final decision maker within the meaning of OAR 661-010-0025(1)(b) if the final decision maker does nothing to indicate that the documents are meant to be part of the record. *Naumes Properties, LLC v. City of Central Point*, 45 Or LUBA 708 (2003); *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616 (2002). [Emphasis added]

That a party believes a document should have been placed into the record does not establish that it is part of the record. **Nor does a representation by staff that a document was entered into the record establish that it was, in fact, entered into the record.** *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996). [Emphasis added]

Whether an item was made an official exhibit by the local decision maker does not determine whether it was placed before and not rejected by the decision maker. *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996).

It can get even trickier as in some cases written documents were delivered to the final decision makers (i.e., offices of the mayor or individual council members), but this delivery did not constitute being "placed before" the final decision maker as there were local regulations establishing a different procedure to submit testimony. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 688 (1992).

Where planning commission hearings are part of the local government decision making process concerning a proposed comprehensive plan or zoning ordinance amendment, minutes of those proceedings, as required by law, are part of the record of the challenged decision. OAR 661-10-025(1)(c). *Bates v. Josephine County*, 27 Or LUBA 673 (1994). Where the challenged decision was made by the local governing body, after a *de novo* review of a planning commission decision, but the record of the planning commission proceedings was not actually placed before the governing body, the planning commission's record is not part of the local record subject to LUBA review. *Matrix Development v. City of Tigard*, 26 Or LUBA 606 (1993).

An interesting aspect of being "placed before" the final decision maker is that the decision maker does not have to actually examined the material submitted. The relevant inquiry in determining whether documents are properly included in the record is whether the documents were actually

placed before the local government decision maker during the local proceedings leading to the challenged decision. LUBA does not require a showing that the decision maker actually examined each document placed before it. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).

. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).
. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).
. *Bradley v. Washington County*, 46 Or LUBA 805 (2004).
. *Bruce Packing Company, Inc. v. City of Silverton*, 44 Or LUBA 836 (2003).
. *Naumes Properties, LLC v. City of Central Point*, 45 Or LUBA 708 (2003).
. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).
. *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616 (2002).
. *No Tram to OHSU, Inc. v. City of Portland*, 43 Or LUBA 634 (2002).
. *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).
. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 994, 996 (1999) (Home Depot II).
. *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783, 784-85 (1999).
. *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808 (1998).
. *Abadi v. Washington County*, 34 Or LUBA 753 (1998).
. *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808 (1998).
. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).
. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848 (1997).
. *Ceniga v. Clackamas County*, 33 Or LUBA 261 (1997).
. *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996).
. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).
. *ONRC v. City of Oregon City*, 27 Or LUBA 726 (1996).
. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 601 (1995).
. *Cummings v. Tillamook County*, 29 Or LUBA 550 (1995).
. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 601 (1995).
. *Redland/Viola Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 645 (1994).
. *ONRC v. City of Oregon City*, 28 Or LUBA 775 (1994).
. *Churchill v. Tillamook County*, 28 Or LUBA 755 (1994).
. *Salem Golf Club v. City of Salem*, 27 Or LUBA 715 (1994).
. *Churchill v. Tillamook County*, 28 Or LUBA 755 (1994).
. *Forest Highlands Neigh. Assoc. v. Lake Oswego*, 23 Or LUBA 723 (1992).
. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).
. *Wicks v. City of Reedsport*, 28 Or LUBA 739, 740 (1994).
. *Bates v. Josephine County*, 27 Or LUBA 673 (1994).
. Murphy *Citizens Advisory Comm. v. Josephine County*, 27 Or LUBA 651 (1994).
. *Matrix Development v. City of Tigard*, 26 Or LUBA 606 (1993).
. *Henderson v. Lane County*, 26 Or LUBA 603 (1993).
. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).
. *Terra v. City of Newport*, 24 Or LUBA 579 (1992).
. *Veatch v. Wasco County*, 23 or LUBA 676, 677 (1992).

. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 688 (1992).
. *Eckis v. Linn County*, 20 Or LUBA 589 (1991).
. *Blatt v. City of Portland*, 20 Or LUBA 572 (1991).

b) Considered By Final Decision Maker

LUBA has consistently held that mere reference to documents in testimony before the decision maker is an insufficient basis to conclude that the referenced document are incorporated into the record. However, 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); *Wiper v. City of Eugene*, 43 Or LUBA 649 (2002); *Abadi v. Washington County*, 34 Or LUBA 753, 754 (1998); *Santiam Properties v. City of Stayton*, 35 Or LUBA 790 (1998); *Veatch v. Wasco County*, 23 Or LUBA 676 (1992).

Mere reference to documents in testimony or in other documents submitted into the record does not suffice to demonstrate that the disputed documents are part of the record. *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616 (2002); *Downtown Community Assoc. v. City of Portland*, 31 Or LUBA 574 (1996).

Where a local government concedes that certain documents were placed before the local decision maker during the proceeding below, and the parties cite nothing establishing that the local government specifically rejected the documents, the documents are part of the local record. *Heiller v. Josephine County*, 23 Or LUBA 672 (1992); *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).

The general rule is that the record compiled at one stage of a local government land use proceeding must actually be placed before the decision maker in subsequent stages of that land use proceeding, if that earlier record is to become part of the record subject to review by LUBA. *Leonard v. Union County*, 23 Or LUBA 664 (1992).

. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).
. *Wiper v. City of Eugene*, 43 Or LUBA 649 (2002).
. *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616 (2002)
. *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).
. *Abadi v. Washington County*, 34 Or LUBA 753, 754 (1998).
. *Santiam Properties v. City of Stayton*, 35 Or LUBA 790 (1998).
. *Downtown Community Assoc. v. City of Portland*, 31 Or LUBA 574 (1996).
. *Veatch v. Wasco County*, 23 Or LUBA 676 (1992).
. *Heiller v. Josephine County*, 23 Or LUBA 672 (1992).
. *Leonard v. Union County*, 23 Or LUBA 664 (1992).

c) Incorporated by Final Decision Maker

Testimony and material become part of the record when the final decision maker clearly indicates the intent to do so **and adequately identifies the document incorporated.** OAR 661-010 -0025(1)(b) and OAR 661-010-0025(1)(c), in relevant part, provide:

> "(b) 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." [Emphasis added].
>
> "(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, **or incorporated into the record** by the final decision maker. . . ." [Emphasis added].

OAR 661-010-0025(4)(b) provides:

> "(b) Where the record includes the record of a prior appeal to this Board, the table of contents shall specify the LUBA number of the prior appeal, and indicate that the record of the prior appeal **is incorporated into the record** of the current appeal." [Emphasis added]

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. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006); *Waibel v. Crook County*, 39 Or LUBA 749 (2000); *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000); *ONRC v. City of Oregon City*, 29 Or LUBA 547 (1995); *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992). 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. [Emphasis added]

The use of the term "adopts" is sufficient to the meaning of "incorporating" a document into the record for them to have the same practical meaning. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002); *Bates v. Josephine County*, 27 Or LUBA 673 (1994).

Although a decision may incorporate other documents by reference, it cannot incorporate future enactments or the legislative history of those future enactments. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

- *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).
- *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002).
- *Waibel v. Crook County*, 39 Or LUBA 749 (2000).
- *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000).

. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).
. *ONRC v. City of Oregon City*, 29 Or LUBA 547 (1995).
. *Bates v. Josephine County*, 27 Or LUBA 673 (1994).
. *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992).

d) Words Spoken During Public Hearings Before the Final Decision Maker

Words spoken at a public land use hearing are considered to be part of the record. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996); *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992); *Mannenbach v. City of Dallas* 24 Or LUBA 618 (1992); *Columbia Steel Castings v. City of Portland*, 19 Or LUBA 338 (1990).

LUBA's rules do not require that a local government submit tapes of its local proceedings. However, 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. Transcripts not prepared by the county are not properly part of the local record, but may be attached to a party's brief in support of the arguments therein. Other parties may contest the accuracy of such transcript excerpts in their opening brief or in a reply brief. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996); *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992); *Mannenbach v. City of Dallas*, 24 Or LUBA 618 (1992); *Columbia Steel Castings v. City of Portland*, 19 Or LUBA 338 (1990).

. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).
. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).
. *Mannenbach v. City of Dallas* 24 Or LUBA 618 (1992).
. *Columbia Steel Castings v. City of Portland*, 19 Or LUBA 338 (1990).

5. Written Testimony or Other Written Materials Specifically Placed Before the Final Decision Maker <u>And Rejected</u>

If the final decision maker wishes to reject an item and thereby exclude that item from the local record, **it must make it clear during the proceedings that it rejects that item.** Where the record contains equivocal and confusing statements by the final decision maker concerning whether particular evidence was accepted, the decision maker will not be deemed to have rejected such evidence. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 579 (2002); *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 821 (1993). *Beck v. City of Tillamook*, 19 Or LUBA 598 (1990). A general statement by the final decision maker during local proceedings that evidence concerning public need would not be accepted is insufficient to reject documents which address public need and were subsequently submitted during the local proceedings. **The local government must identify, with reasonable particularity, the documents it is refusing to include in the record.** *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990). Where documents are placed in the hands of a local government staff person to forward to the local decision maker, pursuant to local procedures, and

someone thereafter deletes a portion of the document before it is provided to the local decision maker, the deleted portion has not been "specifically rejected" by the final decision maker within the meaning of OAR 661-010-0025(1)(b) and the entire document is properly included in the record. *Dept. of Transportation v. City of Eugene*, 37 Or LUBA 1055 (2000). 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).

Where a planning commission specifically rejects proffered evidence and that evidence is neither submitted by parties to the board of county commissioners on appeal nor forwarded to the board of commissioners by county planning staff, that rejected evidence is not included in the record. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 620 (2004).

. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005)
. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 620 (2004).
. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 579 (2002).
. *Dept. of Transportation v. City of Eugene*, 37 Or LUBA 1055 (2000).
. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 821 (1993).
. Beck v. City of Tillamook, 19 Or LUBA 598 (1990).
. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

6. Written Testimony or Other Written Materials Specifically Placed Before the Final Decision Maker <u>And Erroneously Rejected</u>

Although documents specifically rejected by a local government during its proceedings are not part of the local government record, the erroneous rejection of documents may provide a basis for reversal or remand. A party that wishes to challenge in its brief the propriety of the decision to exclude particular documents may request an evidentiary hearing before filing its brief. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 475 (1996).

The local government record does not include evidence that is specifically rejected by the local government during the local proceedings. That such evidence may have been erroneously rejected may provide a basis for reversal or remand, but it has no bearing on the contents of the record. *Glisan Street Assoc. v. City of Portland*, 24 Or LUBA 600 (1992).

. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 475 (1996).
. *Glisan Street Assoc. v. City of Portland*, 24 Or LUBA 600 (1992).