

27.3.1 LUBA Procedures/Rules – Record – Generally. Notes taken by the recording clerk at a hearing conducted by a hearings officer are not “minutes” of the hearing for purposes of the OAR 661-010-0025(1)(c) requirement to include minutes of the local proceedings in the record. *Ford v. Jackson County*, 54 Or LUBA 434 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA’s scope of review is not limited to the local government record under ORS 197.835(2)(a) when LUBA is considering whether the decision on appeal is a land use decision that is subject to LUBA review. Making that threshold jurisdictional inquiry does not entail “[r]eview of the decision,” within the meaning of ORS 197.835(2)(a). *Home Builders Association v. City of Eugene*, 54 Or LUBA 692 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. OAR 661-010-0025(2), which allows local governments to “retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument,” attempts to strike a balance between the parties’ need to have easy and convenient access to the record to prepare their briefs and the difficult and costly burden a local government may face in making the required number of copies of a record that includes documents that for some reason cannot be duplicated or cannot easily be duplicated using standard office copying equipment. *Walker v. Deschutes County*, 54 Or LUBA 752 (2007).

27.3.1 LUBA Procedures/Rules - Record - Generally. Although OAR 661-010-0025(1)(b) allows a local government to incorporate documents into the record, even though those documents are not physically placed before the local government in a land use proceeding, the local government must actually incorporate such documents. Acknowledging that a party has requested that a document be incorporated as part of the record is not the same thing as granting that request. *Rhinhart v. Umatilla County*, 53 Or LUBA 601 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Proceedings after remand from LUBA are a continuation of the original proceedings. Therefore, if the local government has already served the petitioners with a copy of the record from the previous LUBA appeal, the general rule is that the local government is not required to re-serve the petitioners with another copy of the previous LUBA record. *Foland v. Jackson County*, 53 Or LUBA 629 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will make an exception to the general rule that a local government does not need to re-serve petitioners with a copy of the previous LUBA record when the local government already served those petitioners a copy of the previous LUBA appeal, when the decision on remand was made more than 10 years after LUBA remanded the local government’s decision. *Foland v. Jackson County*, 53 Or LUBA 629 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a motion to take evidence is filed regarding an outstanding record objection and the content of the local record, the motion will be denied as moot where the motion and pleadings provide

sufficient information to determine the content of the record. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Under OAR 661-010-0026(1), before filing a record objection, a party is required to consult with the governing body’s legal counsel. Where a party does so and the local government thereafter submits a supplemental record three days after the 14-day deadline for filing record objections expires, the party’s failure to file a record objection provides no basis for rejecting the supplemental record. *Jaffer v. City of Monmouth*, 51 Or LUBA 803 (2006).

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 record was mailed to and received by petitioner and LUBA, the deadline for filing the petition for review expires 21 days after the record is received by LUBA, and petitioner’s claim that he did not receive a letter from LUBA advising him of the date LUBA received the record does not affect that deadline. *Cunningham v. Josephine County*, 50 Or LUBA 58 (2005).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will not summarily deny record objections based on the objectors’ failure to first consult with the local government’s counsel under OAR 661-010-0026(1), where although it appeared that one of the objecting parties consciously violated the consultation requirement, it was not clear that another of the objecting parties was aware of the consultation requirement, and the county had already caused a 77-day delay by filing the record late. *Lindsey v. Josephine County*, 50 Or LUBA 756 (2005).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where LUBA can understand a party’s presentation and arguments, the local government’s failure to provide oversized

exhibits for use at oral argument does not prejudice the party's substantial rights. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

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 a local government conducts a single combined hearing on two separate permit applications, documents that clearly relate to only one application are not part of the record of the other application. *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. Although the local government record may be necessary to determine whether a city improperly failed to follow applicable procedures in issuing a building permit, the local record may not be needed to determine whether LUBA has jurisdiction to consider an appeal challenging that building permit. Where the local government moves to dismiss the appeal contending that LUBA lacks jurisdiction to review the building permit and petitioner makes no attempt to explain why the record is necessary to determine whether that building permit is a land use decision or limited land use decision, LUBA will not require that the local government file the record until after LUBA rules on the jurisdictional question. *Wetzel v. City of Eugene*, 47 Or LUBA 631 (2004).

27.3.1 LUBA Procedures/Rules – Record – Generally. That LUBA may take judicial notice of an ordinance, comprehensive plan or enactment pursuant to OEC 202(7) does not mean that that item is or should be part of the record. *Wal-Mart Stores, Inc. v. City of Medford*, 47 Or LUBA 650 (2004).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA's rules do not specify whether the copy of the record that local governments are required to file and serve must be paper copies. Where petitioner does not contend that he is unable to access a part of the record that is provided in electronic format only or that the electronic format of part of the record hampers his ability to prepare for the appeal, LUBA will allow a record that is provided, in part, on a compact disk. *Ramsey v. Multnomah County*, 44 Or LUBA 828 (2003).

27.3.1 LUBA Procedures/Rules – Record – Generally. A city’s motion to extend the time for filing the record pending LUBA’s resolution of its motion to dismiss for lack of jurisdiction will be denied, where LUBA determines that the city’s record is necessary to resolve the jurisdictional question. *Dean v. City of Springfield*, 43 Or LUBA 632 (2002).

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. Mail service of the notice of intent to appeal is complete on deposit in the mail. That the county did not receive the notice does not waive its obligation to file the record with LUBA, particularly when it had actual knowledge that the notice had been filed with LUBA. *Petersen v. Columbia County*, 39 Or LUBA 799 (2001).

27.3.1 LUBA Procedures/Rules – Record – Generally. A lengthy delay in filing the local record with LUBA does not substantially prejudice petitioner’s right to the speediest practicable review, where the delay was partially attributable to petitioner’s failure to bring the local government’s noncompliance to LUBA’s attention. *Petersen v. Columbia County*, 39 Or LUBA 799 (2001).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA may consider evidence outside of the local record for the limited purpose of determining whether it has jurisdiction without the necessity of granting motions to take evidence outside of the record. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (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. LUBA will consider documents that are not included in the record in deciding whether an appeal is moot. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will deny a motion to consider evidence that is not included in the record, where the moving party fails to demonstrate that any of the criteria for granting such a motion under OAR 661-010-0045(1) are met and the evidence the moving party seeks to have included does not render the appeal moot. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (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 motion to supplement the record filed after the petition for review and respondent’s brief have been filed will be denied where it is not clear whether the document to be added to the record was placed before the decision maker, and no “unique circumstances” are identified to warrant supplementing the record at such a late state of the appeal. *Root v. City of Medford*, 36 Or LUBA 778 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will reject a supplemental record submitted after the petition for review has been filed, where the city fails to explain why the material in the supplemental record is properly part of the local record, and fails to establish that any “unique circumstances” exist justifying untimely filing of the supplemental record. *Terra v. City of Newport*, 36 Or LUBA 754 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will grant a motion to strike documents attached to the petition for review, where those documents are neither part of the record submitted to LUBA nor documents of which LUBA may take official notice. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. In addressing a substantial evidence challenge, where the response brief provides no transcripts or partial transcripts and provides no assistance in locating the portion of the audio tapes in the record where relevant testimony is located, LUBA will not search for testimony on audio tapes. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. Under OAR 661-010-0025(2) and (3), a local government is not required to include copies of audiotapes with the record served on petitioner. The local government is only required to make the tapes available to petitioner for copy or transcription at petitioner’s expense. *Beaman v. City of Hillsboro*, 34 Or LUBA 779 (1998).

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. In deciding jurisdictional challenges, LUBA will consider material attached to the parties' briefs if no party objects. If a party does object, the appropriate means to introduce evidence from outside the record is through a motion for an evidentiary hearing. *Mazeski v. Wasco County*, 31 Or LUBA 126 (1996).

27.3.1 LUBA Procedures/Rules – Record – Generally. A request to supplement the local government record made at the time of oral argument is untimely and will be denied. *Lyon v. Linn County*, 28 Or LUBA 402 (1994).

27.3.1 LUBA Procedures/Rules – Record – Generally. The local record must be submitted to LUBA by the local government, rather than by other parties to an appeal. OAR 660-10-025(2). *Jackman v. City of Tillamook*, 28 Or LUBA 749 (1994).

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. If LUBA allows the record to be supplemented after the petition for review is filed, petitioners must be given an opportunity to file a new petition for review. *Salem Golf Club v. City of Salem*, 27 Or LUBA 715 (1994).

27.3.1 LUBA Procedures/Rules – Record – Generally. In determining whether it has jurisdiction over an appeal, absent some objection from the parties, LUBA will consider materials from the record of a related LUBA appeal that are attached to parties' briefs, as well as other material in the record of that related appeal. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

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. LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b). Therefore, local government enactments of which LUBA takes official notice under OEC 202 do not thereby become part of the local record which may provide evidentiary support for the challenged decision. *Ramsey v. City of Portland*, 23 Or LUBA 291 (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 respondent's motion to dismiss for lack of jurisdiction is based solely on the legal nature of the challenged decision, and petitioner does not explain why the local government record would provide any assistance in determining the legal nature of the challenged decision, LUBA will grant respondent's motion to delay filing the record until after the motion to dismiss is resolved. *Goose Hollow Foothills Assoc. v. City of Portland*, 21 Or LUBA 555 (1991).

27.3.1 LUBA Procedures/Rules – Record – Generally. Local governments may list record items which are difficult to duplicate, such as photographs, slides, maps and videotapes, as "exhibits" in the record table of contents and submit them to LUBA at the time of oral argument. Local governments are not required to serve petitioners with a copy of such items. OAR 661-10-025(2),(3) and (4)(a)(B). *Eckis v. Linn County*, 20 Or LUBA 589 (1991).

27.3.1 LUBA Procedures/Rules – Record – Generally. A document appended to a party's petition for review or brief becomes part of the record of LUBA's proceeding. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

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).