

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 FRITZ and JOANN VON LUBKEN,)
and VON LUBKEN ORCHARDS, INC.,)
4)
 Petitioners,)
5)
 vs.)
6 HOOD RIVER COUNTY,)
7)
 Respondent,)
8)
 and)
9 BROOKSIDE, INC.,)
10)
 Intervenor-Respondent.)

LUBA No. 89-023

ORDER ON
RECORD OBJECTIONS

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12 Petitioners object that the county record filed in this
13 proceeding does not include a seven page letter, dated
14 February 17, 1989, from petitioners to the board of county
15 commissioners. All parties agree that the letter should be
16 included in the record, and this portion of the petitioner's
17 record objection is sustained.

18 Petitioners also object that certain evidence submitted by
19 the applicant below to the board of county commissioners should
20 not be included in the record. By notice of appeal dated
21 January 5, 1989, petitioners appealed the Hood River County
22 Planning Commission's decision approving a conditional use
23 permit for a golf course. In the notice of appeal, petitioners
24 requested that the board of commissioners hear the appeal
25 de novo and allow additional written evidence and testimony.
26 On January 16, 1989, the board of commissioners denied

1 petitioners' request for a de novo hearing, but allowed
2 petitioners' request to submit additional evidence, provided
3 that evidence was submitted not later than seven days before
4 the board of commissioners' hearing on February 21, 1989.

5 The notice of the board of commissioners' hearing stated in
6 part:

7 "This hearing will be restricted to a review of the
8 Planning Commission record; EXCEPT additional
9 testimony as requested by the appellant in the appeal
10 dated January 5, 1989, will be allowed and this
11 additional testimony must be submitted in writing to
12 the office of the Hood River County Board of
13 Commissioners, Hood River County Courthouse, Hood
14 River, Oregon, not later than seven days prior to the
15 hearing. A copy of the additional testimony will be
16 made available to interested persons. The portion of
17 the hearing pertaining to this new testimony will be
18 heard in accordance with rules and procedures for
19 de novo hearing." Record 103.

20 Petitioners contend that they submitted evidence within the
21 time limit specified in the above quoted notice. The evidence
22 submitted by petitioners was presented to the board of
23 commissioners, and the board of commissioners was advised that
24 no other evidence was submitted in accordance with the above
25 notice.

26 At the February 21, 1989 board of commissioners' hearing,
the applicant was allowed to submit additional evidence over
petitioners' objections "that the acceptance of this new
evidence was error and prejudiced their substantial rights."
Objection to Record 4. Petitioners contend the board of
commissioners closed the record on January 16, 1989, except for
any evidence submitted before February 14, 1989. Therefore,

1 according to petitioners, "even if such material was physically
2 present at the commissioners' hearing," it should not be
3 considered "part of the record." Objection to Record 5, citing
4 State of Oregon Mental Health Division v. Lake County, ___ Or
5 LUBA ___ (LUBA No. 89-004, Order on Record Objection, March 2,
6 1989).

7 Respondents argue the board of commissioners' rules
8 governing hearing for appeals of planning commission's
9 decisions explicitly provide that if new evidence such as that
10 submitted by petitioners is received, other parties must be
11 given an opportunity for rebuttal. Section 3.49 of the board
12 of commissioners' procedural rules for land use hearings
13 provides:

14 "If new testimony or evidence is received, the
15 proponent, opponent and other persons with standing
16 shall be allowed to testify as pertains to the new
evidence or testimony and shall be allowed to
cross-examine and to rebutt."

17 Intervenor-respondent argues

18 "[Section 3.49] contemplates evidentiary rebuttal.
19 Intervenor-Respondent submitted what is now pages 36
20 through 62 of the record in rebuttal to petitioners'
21 new evidence as it was clearly entitled to do under
the Board's rules. If petitioners were surprised it
was because they did not read those rules." Response
to Objection to Record 2.

22 The petitioners' record objection and the responses to
23 petitioners' record objection raise two questions with regard
24 to the county's action on February 21, 1989. First, is the
25 disputed evidence the board of commissioners accepted on that
26 date properly considered part of the record in this appeal

1 proceeding? Second, if the evidence is properly considered to
2 be part of the record, did the county err by accepting and by
3 considering the disputed evidence?¹

4 As we have repeatedly stated, the record in a local
5 government proceeding includes all evidence actually placed
6 before the decision maker. Hemstreet v. City of Seaside, ___
7 Or LUBA (LUBA Nos. 87-094/87-096, Order on Record Objections
8 and Motion to Bifurcate, January 14, 1988); Lamb v. Lane
9 County, 14 Or LUBA 506 (1985); Panner v. Deschutes County, 14
10 Or LUBA 512 (1985). For purposes of identifying the contents
11 of the record required under OAR 661-10-025, it does not matter
12 whether the decision maker erred in accepting and considering
13 evidence. If the evidence was actually accepted and considered
14 in making the challenged decision, as was the disputed evidence
15 in this proceeding, it is properly included as part of the
16 record.

17 Petitioners' reliance on State of Oregon Mental Health
18 Division v. Lake County, supra, is misplaced. In that case,
19 the county closed the record and orally reached a decision to
20 deny a request for a conditional use permit for a group home.
21 Following this action, and before adopting its written
22 decision, "[t]he Board of Commissioners proceeded to discuss
23 alternative sites for group homes in the county and legal
24 issues affecting selection and approval of such sites." State
25 of Oregon Mental Health Division v. Lake County, supra, slip op
26 at 4. However, we determined in that case that although

1 subsequent discussion of the general subject of group homes and
2 other possible sites for group homes might be relevant to the
3 decision previously reached orally and yet to be reflected in a
4 written decision, we did not view "[the] additional discussion
5 as part of the Board of Commissioners' proceedings on the
6 conditional use permit." Id.

7 In this case, to the contrary, the disputed evidence was
8 submitted as part of the hearing and deliberations that led to
9 the decision challenged in this proceeding. Accordingly, the
10 disputed evidence is properly included in the record.

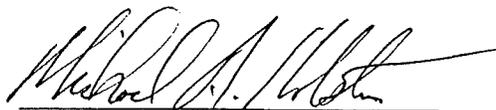
11 We do not determine whether the county's acceptance and
12 consideration of the disputed evidence was inconsistent with
13 its decision on January 16, 1989 to limit additional evidence,
14 or its notice preceding the February 21, 1989 meeting, quoted
15 supra. We also do not decide whether Section 3.49 of the board
16 of commissioners' procedural rules, quoted supra, is limited to
17 "argumentative" rebuttal as petitioners suggest or whether it
18 encompasses "evidentiary" rebuttal as respondents contend.²

19 If petitioners wish to contend that the county committed
20 procedural error by accepting and considering the disputed
21 evidence, they may assign that county action as error in the
22 petition for review. Regardless of the correctness of the
23 county's decision concerning the disputed evidence, the
24 evidence is properly included in the record.

25 The county shall have seven days from the date of this
26 order to submit as a supplemental record the seven page letter

1 discussed supra. The record shall be considered settled the
2 date the letter is received by the Board. OAR 661-10-026(5).

3 Dated this 12th day of June, 1989.

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7 Michael A. Holstun
8 Chief Referee
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FOOTNOTES

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The board of commissioners accepted the disputed evidence
and considered the evidence in reaching its decision.
Record 28.

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We also note that although petitioners argue the disputed
evidence goes beyond mere rebuttal, they do not identify the
evidence they believe goes beyond rebuttal.

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