Guide

to

Land Use Appeals

1000 Friends of Oregon

June 2018

NOTE: This edition of the Guide to Land Use Appeals was revised in June 2018, and is based upon state law, administrative rules, and the written decisions of LUBA and the courts effective at that time. All are subject to change. Special thanks to Chris Tackett-Nelson and Nick Rischiotto for their volunteer time updating this Guide.

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Introduction

Land use decisions made by local governments in Oregon may be appealed to the state Land Use Board of Appeals (LUBA).[1] LUBA was created solely for the purpose of reviewing these decisions when there are no more opportunities to challenge them at the local level.[2] Rulings by LUBA may be appealed to the Oregon Court of Appeals.[3]

Though its legal rulings are binding, LUBA is not a traditional court. It is composed of three attorneys — known as board members[4] — appointed by the governor and confirmed by the Oregon Senate.[5] Individuals may appear before LUBA on their own behalf without being represented by an attorney.[6] However, corporations, organizations, and individuals who do not wish to represent themselves are required to be represented by attorneys (members of the Oregon State Bar) before LUBA.[7]

LUBA reviews land use decisions for certain specific errors only and is not intended as a substitute forum for good land use planning. You cannot win a land use appeal just because you are unhappy with the decision made by the local government.[8] Because of the broad latitude afforded to local governments under Oregon law, many of their decisions can be challenged successfully only through the political — not the legal — process.

> **NOTE**: The great majority of LUBA appeals involve decisions made by local governments. Therefore, the balance of the text will often refer to local governments as examples. Keep in mind, however, that some special district and state agency decisions can also be appealed to LUBA.

Overview of the LUBA Appeal Process

A LUBA appeal proceeds along a schedule (summarized below) that is designed to resolve land use appeals in roughly four months, barring any objections to the local government's record of the case or other extraordinary extensions of the appeal schedule. This four month period required for a LUBA decision may seem intimidating, but it is actually a much faster means of resolving land use disputes than occurs in California and Washington, where challenges to permit applications often drag on for two to four *years*.

Here is a quick overview of the LUBA process:

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[1] ORS 197.820(1); ORS 197.825(1).

[2] ORS 197.805

[3] ORS 197.850(1) and (3).

[4] Currently LUBA attorneys are known as "Board Members;" in the past they have been known as "Referees." For statutory reference, see ORS 197.810 and OAR 661-010-0010(2).

[5] ORS 197.810(1).

[6] OAR 661-010-0075(6).

[7] OAR 661-010-0075(6). A party can also choose not to appear before LUBA even though they are named on the appeal. Activists will often pool their resources for the appeal fees, collaborate on the written filings, and then have a single spokesperson before LUBA that technically only represents themselves.

[8] See e.g., Reed v. Benton County, 23 Or LUBA 486 (1992).

- A party[9] bringing an appeal is called the "Petitioner" and the local government is the "Respondent." Anyone else who is allowed to participate is called an "Intervenor."
- The Petitioner files with LUBA a Notice of Intent to Appeal (NITA), along with two copies, a filing fee, and a deposit for costs (see section 2, fees), in most cases within 21 days after the land use decision becomes final.[10]
- A "Motion to Intervene" may be filed, within 21 days after the NITA is filed,[11] by any other eligible party who appeared before the local government and wishes to participate.[12]
- The Respondent (city or county) delivers the record of the local proceeding to LUBA and the Petitioner within 21 days after the NITA is filed.[13]
- A party may file "Objections to the Record" within 14 days of the date appearing on the Notice of Record Transmittal sent to the parties by the Board.[14]
- Within 14 days after receiving a record objection, an opposing party may file an answer to the objection.[15]
- The Petitioner submits to LUBA a "Petition for Review" ("petition" or "brief"), along with four copies, within 21 days after LUBA receives the record or amended record[16] or 21 days after any objections to the record have been settled.[17] (An Intervenor on the side of the Petitioner must also submit a brief by this time.[18])
- The Respondent (and any intervenor on the Respondent's side) submits to LUBA its "Response Brief," along with four copies, within 42 days after the record is received[19] or any objections to the record are settled.[20]
- LUBA schedules a date for and hears oral argument.[21]
- LUBA renders a decision within 77 days after receiving[22] or settling the record.[23]

Each step in the appeal process is described in more detail in Part II, including the other entities that must be served with these various documents, in addition to LUBA.. However, you should carefully review Part I, which discusses factors that could greatly influence prospects for a successful appeal, before assuming that a LUBA appeal is justified and worthwhile.

NOTE: State law and state administrative rules mandate the process by which LUBA

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[9] OAR 661-010-0010(11).
[10] ORS 197.830(3), (4), (8), (9); OAR 661-010-0015(1).
[11] ORS 197.830(7)(a), (b); OAR 661-010-0050(2).
[12] OAR 661-010-0050(1).
[13] ORS 197.830(10)(a); OAR 661-010-0025(2)(4).
[14] OAR 661-010-0026(2).
[15] OAR 661-010-0026(4).
[16] ORS 197.830(12), (13); OAR 661-010-0030(1).
[17] OAR 661-010-0030(1).
[18] OAR 661-010-0050(6)
[19] OAR 661-010-0035(1)
[20] OAR 661-010-0026(6).
[21] OAR 661-010-0040(3).
[22] ORS 197.830(14).
[23] OAR 661-010-0026(6).

makes its decisions. Anyone participating in a LUBA appeal should become familiar with the rules governing LUBA decisions (see Oregon Administrative Rules (OAR) Chapter 661, Division 10, available in most public libraries or from LUBA and at the LUBA Homepage: http://luba.state.or.us).

Part One

DECIDING WHETHER TO APPEAL A LOCAL DECISION

I. AM I ELIGIBLE?

Individual Standing

Normally, to qualify to bring an appeal before LUBA (to have "standing"), a Petitioner must: 1) submit a Notice of Intent to Appeal by the deadline for appealing (discussed in Part II), and 2) have "appeared" before the local government.[24]

A person "appears" by testifying orally at a hearing or submitting written testimony to the local decision-making body.[25] It is not sufficient to have only attended a hearing, one must also testify.[26] Sending a letter of testimony to the decision-making body may be sufficient to have "appeared" in writing.[27] The letter must clearly indicate that it concerns the land use decision and it must be mailed during the time period allowed for public comment.[28] You should confirm that the letter was entered into the "record" of the proceedings or specifically request in your letter that it be entered into the record.[29]

Remember that because decisions often pass through a number of stages before different decision-making bodies, you have to be sure that: (1) you actually appeared *orally or in writing* before the *final* local government decision-maker, or (2) your comments from an earlier proceeding were made a part of the *final* proceeding's record.

> **EXAMPLE:** If you testified on a decision before the planning commission but not again before the city council, you will not be able to appeal the city council's decision unless your earlier comments were made a part of the city council's final record of decision. Likewise, if you submitted opposition to a proposed development before an application had actually been filed, you will have to state your opposition again during proceedings on the formal application.

Individuals may appear on behalf of other individuals or artificial entities in local land use proceedings provided they adequately identify the person they are appearing for.[30] If an attorney appears before the local governing body on behalf of an individual or organization, she must indicate whom she is representing for those persons to later have standing on their own before LUBA.[31]

> **NOTE:** In very rare circumstances, a person who did not appear before the governing

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[24] ORS 197.830(2).

[25] See gen., ORS 197.830(2)(b).

[26] See e.g., Cecil v. City of Jacksonville, 19 Or LUBA 446, 448-49 (1990).

[27] Cecil v. City of Jacksonville, 19 Or LUBA at 453; Wolverton v. Crook County, 34 Or LUBA 515, 519 (1998).

[28] Wolverton v. Crook County, 34 Or LUBA at 518-19.

[29] Cf., Cecil v. City of Jacksonville, 19 Or LUBA 446, n.8.

[30] Neighbors for Responsible Growth v. City of Veneta, 50 Or LUBA 745 (2005).

[31] Dowrie v. Benton County, 37 Or LUBA 998 (1999).

body may still have standing to appeal the decision if he or she is adversely affected by it.[32] The appearance requirement will be excused in two instances. First, if the local government makes a land use decision without holding a hearing.[33] Second, if the government's notice fails to describe the matter to be decided in a reasonable way.[34] For example, if the notice did not have given adequate warning that the decision at issue was going to be discussed, and thus concerned parties didn't think they needed to attend. In that case, to have standing to appeal, an opponent need not have appeared, but must be adversely affected by the decision,[35] e.g,. own property likely to be affected.[36]

NOTE: Persons (other than the applicant) may "intervene" in an appeal before LUBA *only* if they appeared before the local government.[37] Being adversely affected may provide standing to bring an appeal but never provides standing to intervene in an existing one. If a local government refuses to allow a person to testify, that person has "appeared" and has standing to intervene, at least for the purpose of challenging the decision to refuse testimony.[38]

Organizational Standing

An organization may have standing to bring a LUBA appeal in its own interest just like any individual.[39] For an organization to have standing:

- its members must have standing in their own right;
- neither the claim asserted nor the relief sought requires the participation of individual members; and
- the interests the organization seeks to protect are germane to the organization's purpose.[40]

An organization must appear at local hearings to have standing to appeal or intervene before LUBA on its own behalf.[41] For an organization to appear, persons testifying on behalf of an organization should clearly indicate to the governing body that they are doing so.[42] Anyone representing an organization should also indicate when she is also testifying on her own behalf.[43]

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[32] ORS 197.830(3), (4).

[33] Flowers v. Klamath County, 98 Or App 384, 389, 780 P.2d 227, rev. den. 308 Or 592 (1989)(decided under former ORS 197.830(3) standard of "aggrieved" rather than "adversely affected").

[34] ORS 197.830(3)

[35] ORS 197.830(3).

[36] See Kamppi v. City of Salem, 21 Or LUBA 498, 501 (1991); Schatz v. City of Jacksonville, 21 Or LUBA 149 (1991); Goddard v. Jackson County, 34 Or LUBA 402, 408-09 (1998).

[37] ORS 197.830(7); OAR 661010050(1).

[38] Sorte v. City of Newport, 25 Or LUBA 828 (1993); McKenzie v. Multnomah County, 26 Or LUBA 619 (1993).

[39] Tuality Lands Coalition v. Washington County, 21 Or LUBA 611, 618 (1991); citing 1000 Friends of Oregon v. Multnomah County, 39 Or App 917, 924, 593 P.2d 1171 (1979).

[40] Tuality Lands Coalition v. Washington County, 21 Or LUBA at 618.

[41] ORS 197.830(2); See e.g., Faye Wright Neighborhood Planning Council v. City of Salem, 3 Or LUBA 17, 18-19 (1981).

[42] See East McAndrews Neighborhood Assoc. v. City of Medford, 19 Or LUBA 390, aff'd 104 Or App 280, 800 P.2d 308 (1990), rev. den. 311 Or 150 (1991); Friends of Douglas County v. Douglas County, 39 Or LUBA 156 (2000).

[43] But see Terra v. City of Newport, 24 Or LUBA 579 (1992) (member of organization with interests identical to organization afforded standing as individual despite not clearly indicating she was testifying on her own behalf, rather than the organization's).

If you state to the local government that you are appearing for yourself *and* on behalf of an organization, *both* you and the organization will have standing in a LUBA appeal.[44] For the same reason, you should sign written testimony twice - once as a representative of the organization and once in your individual capacity.

> **EXAMPLE**: Here is how to sign testimony in both representative and individual capacities:
>
> Respectfully submitted,
>
> (Signature)
>
> D.O. Right
>
> and
>
> Friends of Land Use
>
> By (signature)
>
> D.O. Right, VicePresident

Remember also that if an organization, such as a neighborhood association or a "citizen participation organization," wants to support or oppose a land use decision, it must be very careful to follow its own procedural requirements before it can speak on behalf of its members. Otherwise, any member of the organization can seek to invalidate the organization's actions.

> **EXAMPLE:** A formal vote conducted during a neighborhood meeting and recorded in the minutes may be required before the organization can act in an appeal.[45] The organization's bylaws usually set forth its procedural requirements.

II. How Much Will it Cost?

Filing Fees

The initial cost of an appeal (as of 2018)[46] is $400 for *each* Notice of Intent to Appeal filed with LUBA.[47] This amount includes a $200 filing fee and a $200 deposit for costs.[48] (See Part II (Fees) for details on filing.) If the appeal results in a reversal or remand, the Petitioner should file a cost bill requesting award of the $200 filing fee and return of the $200 deposit for costs, and serve a copy on all parties to the appeal.[49] The cost bill must be filed within 14 days of the date of LUBA's final order in the appeal.[50]

If LUBA upholds the local government's decision or dismisses the appeal, the $200 filing fee is

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[44] See e.g., Dames v. City of Medford, 9 Or LUBA 433, 436-37 (1983).
[45] But See, Clark v. Dagg, 38 Or. App. 71, 82-83, 588 P.2d 1298 (1979).
[46] OAR 660-010-0015(4). See also www.oregon.gov/LUBA/Pages.FAQ.aspx.
[47] OAR 661-010-0015(4).
[48] Id.
[49] OAR 661-010-0075(1)(a).
[50] Id.

forfeited.[51] Additionally, the local government may file a cost bill to cover its expenses in preparing the record.[52] These expenses are paid from the deposit for costs, and cannot exceed the amount of the deposit.[53] Any excess is returned to the Petitioner.[54] A party who intervenes in a case must pay a $100 filing fee[55] and, along with the Respondent, may be assessed the cost of the filing fee awarded to a prevailing Petitioner.[56]

Attorney Fees

If a Petitioner brings an appeal before LUBA without a valid reason for doing so, LUBA may charge him or her with the opposing party's attorney fees.[57] Although such an award has rarely been made, the law does allow LUBA to award reasonable attorney fees if it finds the appeal was brought "without probable cause to believe the position was well-founded in law or on factually supported information."[58]

Attorney fees will *not* be awarded just because a party presented a losing argument.[59] Even poorly founded arguments will not be penalized unless LUBA believes an improper motive was involved.[60] Moreover, attorney fees are recoverable only if the presentation of the non-prevailing party from whom they are sought is devoid of merit in its entirety.[61] LUBA would be most likely to grant attorney fees if an appeal were brought only to harass the other party or to stall progress on a proposal that had been approved.

Attorney fees also may be awarded to the applicant when LUBA grants a ”stay” (discussed in Part II), which prevents a land use decision from going forward during the appeal, if LUBA ultimately affirms the decision, but the amount of fees recoverable is limited.[62] For example, a party who requested a stay of an applicant's building permit will be liable for the applicant's attorney's fees if LUBA ultimately affirms the permit approval.[63]

Other Costs

Petitioners will also incur other costs when appealing a land use decision to LUBA. For example, notice must be served on the entire list of interested persons for the land use decision. This list can be long and a Petitioner can incur significant photocopying and mailing costs serving the notice list. The Petitioner can request the notice list from the government body prior

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[51] OAR 661-010-0075(1)(c); See e.g., Remarkable Properties v. Deschutes County, LUBA No. 99-096 (1999).

[52] OAR 6610100075(1)(b)(B).

[53] OAR 6610100075(1)(b)(C).

[54] OAR 661-010-0075(1)(d).

[55] OAR 661-010-0050(3);OAR 661-010-0050(4)

[56] See e.g., Gray v. Clatsop County, LUBA No. 93-010 (1994); Mazeski v. Wasco County, LUBA No. 93-206 (1994).

[57] ORS 197.830(15)(b).

[58] ORS 197.830(15)(b); OAR 661-010-0075(1)(e).

[59] Fechtig v. City of Albany, 150 Or App 10, 27-28, 946 P2d 280 (1997).

[60] Bradbury v. City of Independence, 23 Or LUBA 670, 671 (1992); See also McKay Creek Valley Assoc. v. Washington County, 20 Or LUBA 494, 497n6 (1990).

[61] Fechtig v. City of Albany, 150 Or App. 10, 946 P.2d 280 (1997).

[62] OAR 661-010-0075(1)(e)(C).

[63] Walton v. Clackamas County, 34 Or LUBA 829 (1998).

to deciding whether to appeal if these costs are a concern.

III. Is My Case Eligible?

Is it a Land Use Decision?

The first question to consider before bringing an appeal before LUBA is whether the decision involved is a "land use decision" or "limited land use decision."[64] These are the only types of decisions LUBA has statutory authority to consider.[65] LUBA has authority to review *permitting type* decisions, such as re-zonings of specific parcels, land divisions, variances, conditional use approvals, and site plan approvals.[66] These are decisions by which the local government applies criteria or standards from the comprehensive plan or land use regulations to a specific development application.[67] LUBA's statutory authority also includes most *legislative* actions, such as adopting generally applicable zoning ordinances and amending comprehensive plans.

An action by a local government that does *not* fit the statutory definition of a land use decision would still be appealable to LUBA if it would "create an actual, qualitatively or quantitatively significant impact on present or future land uses."[68] For example, a routine road improvement could be authorized by a city and not fall under the statutory definition of a "land use decision," even though the authorization will help lead to more development along the road. A party could appeal the authorization to LUBA because it will significantly impact future land uses.

An important exception to LUBA's jurisdiction involves "ministerial decisions."[69] These are decisions that "do not require the interpretation or exercise of policy or legal judgment."[70] An example of a purely ministerial act is when a planning official looks at a zoning map to decide which zone classification applies to a given parcel.[71] Likewise, when a building permit is approved or denied under clear and objective standards,[72] such as upon receipt of septic, electrical, and plumbing documentation, the action is only ministerial. The point is to avoid needless appeals of land use actions that are essentially automatic.

Although an action may seem quite simple, it might not be considered "ministerial."[73] Deciding whether previous or current zoning criteria apply to a given application, for example, is not ministerial.[74] Likewise, whether a proposed use falls within the same class as listed permitted uses[75] (e.g. whether a proposed methadone clinic is a "medical clinic" under the city code[76]) is not

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64 ORS 197.015(10) and (12).
65 ORS 197.825(1).
66 See gen., ORS 197.828; ORS 197.015(12).
67 See gen., ORS 197.825; ORS 197.015(10)(a).
68 Hashem v. City of Portland, 34 Or LUBA 629 (1998).
69 ORS 197.825(3)(a).
70 ORS 197.015(10)(b)(A).
71 Bradbury v. City of Independence, 18 Or LUBA 883 (1989).
72 ORS 197.015(10)(b)(B).
73 Breivogel v. Washington County, 114 Or App 55, 834 P.2d 473 (1992).
74 Tuality Lands Coalition v. Washington County, 22 Or LUBA 319, 327 (1991).
75 Citizens Concerned v. City of Sherwood, 21 Or LUBA 515, 522 (1991).

a ministerial decision, and LUBA will have authority to review it.[77] In some cases, relief from ministerial decisions may be available through circuit court review.

More About LUBA's Jurisdiction . . .
A few other exceptions to LUBA's jurisdiction are provided by statute.[78] For example, when a local government makes decisions about updating its local comprehensive plan, a process known as "periodic review," those decisions are reviewed by the Department of Land Conservation and Development (DLCD) and not LUBA.[79] Other examples are decisions involving the Forest Management Practices Act[80] and the Columbia River Gorge Natural Scenic Area Act.[81] It should be clear from the local proceedings if any of these exceptions are involved.

Additionally, conventional lawsuits may be brought in circuit court to enforce land use orders rendered by LUBA[82] or the provisions of a comprehensive plan or zoning ordinance.[83] LUBA has no authority over these types of enforcement cases, and they are appealed from the circuit courts to the Oregon Court of Appeals.[84] However, LUBA does have authority to review land use decisions to determine whether they comply with an LCDC enforcement order.[85]

Is the Decision Final?
The land use decision to be appealed must be a "final" decision of the local government.[86] Normally, a decision is final when it is written in its final form and signed by the appropriate members of the governing body.[87]

Decisions often pass through several stages before they become final. A development proposal, for instance, might start at the local planning department, be reviewed by a planning commission, and finally progress to city hall for ultimate approval. Decisions are final only when ultimately acted on by the final decision-making body.[88] If the final decision maker sends a proposal back to an earlier stage for further consideration, the action is not a final decision if it will come back to the final decision maker again for final approval.[89]

Occasionally, a local ordinance will provide that a decision becomes final at some point in time

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[76] Hollywood Neighborhood Assoc. v. City of Portland, 22 Or LUBA 789 (1991).
[77] ORS 197.825.
[78] See gen., ORS 197.825; ORS 197.828.
[79] ORS 197.825(2)(c)(A).
[80] ORS 197.825(2)(e).
[81] ORS 197.825(2)(f).
[82] ORS 197.825(3)(b).
[83] ORS 197.825(3)(a).
[84] ORS 197.335(2).
[85] Schatz v. City of Jacksonville, 23 Or LUBA 40, 47, aff'd 113 Or. App. 675, 835 P.2d 923 (1992).
[86] ORS 197.015(10)(a)(A); ORS 197.830(2); OAR 661-01-0015(1).
[87] OAR 661-010-0010(3).
[88] OAR 661-010-0010(3).
[89] Tylka v. Clackamas County, 20 Or LUBA 296 (1990).

after it is in final written form and signed.[90] For example, an ordinance could provide that a decision becomes final after a certain number of days if no one requests a hearing during that time.[91] However, a city charter provision that delays the *effective date* of a decision does not postpone the date on which that decision is considered *final*;[92] which is when it is signed. Likewise, a land use decision may be final for purposes of appeal even if approval is conditioned on the completion of further studies.[93] Local rules can change the time at which decisions are considered "final" if they do not violate statewide procedural requirements.[94]

Tentative decisions and decisions that are only recommendations are not final decisions appealable to LUBA.[95] Decisions in which the local government is only answering inquiries or giving opinions on land use matters (often called "advisory opinions" or "interpretations") normally do not count as final decisions because the local government will not later be bound to follow them.[96] But some rulings *are* issued pursuant to formal proceedings for binding declaratory rulings and might affect future land use decisions.[97] They are therefore final land use decisions, which are appealable to LUBA.[98]

Have All Other Options Been Exhausted?

Opponents of a land use decision must make sure they have used every means available at the local level to change the decision before appealing it to LUBA.[99] This rule is intended to encourage resolution of land use issues at the local level whenever possible.[100] A land use proposal could be appealed to one or more local bodies before the highest responsible authority approves it. Each step in the process might be an opportunity to challenge the proposal. Only when there are no more avenues to challenge a local decision are local remedies considered "exhausted" so that LUBA will accept the appeal.[101] Fear that an appeal on the local level will be futile does not excuse a party's failure to exhaust their local appeals.[102]

> **NOTE**: If you have lost your chance to oppose a decision at the local level because you failed to apply for any available *local* appeal, LUBA will not hear the case.[103] LUBA will enforce the requirement that local

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90 OAR 661-010-0010(3).

91 OAR 661-010-0010(3).

92 Club Wholesale v. City of Salem, 19 Or LUBA 576, 578 (1990); Friends of Clean Living v. Polk County, 36 Or LUBA 544 (1999).

93 Citizens for Responsible Growth v. City of Seaside, 23 Or LUBA 100, 104 (1992) (ODOT traffic study required by conditional use zoning ordinance.).

94 Columbia River Television v. Multnomah County, 299 Or 325, 702 P.2d 1065 (1985).

95 Goose Hollow Foothills League Assoc. v. City of Portland, 21 Or LUBA 358 (1991).

96 See General Growth v. City of Salem, 16 Or LUBA 447 (1988); But see Weeks v. City of Tillamook, 113 Or App 285, 289 (1992).

97 Hollywood Neighborhood Association v. City of Portland, 21 Or LUBA 381, 384 (1991).

98 Id.

99 ORS 197.825(2)(a).

100 See Shaffer v. City of Salem, 29 Or LUBA 479 (1995).

101 Lyke v. Lane County, 70 Or. App. 82, 688 P.2d 411 (1984).

102 Shaffer v. City of Salem, 29 Or LUBA 479 (1995).

103 See e.g., Southeast Neighbors v. City of Eugene, 43 Or LUBA 268, 288-89 (2002).

remedies first be exhausted even if a local planning staff member mistakenly tells you there are no opportunities to do so.[104]

Is the Decision Moot?

Finally, a land use decision cannot be appealed if it has become "moot."[105] An appeal is considered moot if a decision in the appeal would be without practical effect.[106] For example, if a decision was repealed by the local government or cannot go forward for some other reason, LUBA will not rule on it.[107]

IV. What Are My Chances for Success?

If you have standing and a land use case that seems eligible for LUBA review, you can go ahead with an appeal. Your chances of success at LUBA, however, depend on certain limitations and standards LUBA follows in reviewing cases.

Grounds for Reversal or Remand

When deciding a case, LUBA affirms (approves) the local decision, reverses (overturns) it, or remands (sends back) the decision to the local government for further consideration.[108] In some cases, a remand can be as effective as a reversal in defeating a proposal because flaws identified by LUBA can be very hard to remedy by the local government.

To receive a favorable ruling from LUBA, a Petitioner should cite certain grounds for either reversal or remand that fall within LUBA's scope of authority.[109] The grounds for reversal or remand explained below provide the basis for challenging a land use decision before LUBA.

Reversal

LUBA may reverse a decision when the decision of local government exceeds its jurisdiction, is unconstitutional, or violates a provision of applicable law.[110]

A decision that is found to violate a provision of applicable law, must also be "prohibited as a matter of law"[111] to be reversed. This means the decision is illegal and there is *no* way for the local government to cure the illegality by modifying the decision or supporting it with additional information. Notably, it is the decision made that is the operative determination for whether reversal is appropriate, not whether a different application could potentially be approved. In other words, where the applicant has advanced only one rationale for meeting the criteria and that rationale has been found to be prohibited by law, reversal is appropriate even though there

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[104] Kamppi v. City of Salem, 21 Or LUBA 498, 50506 (1991); Lyke v. Lane County, 70 Or App. 82, 688 P.2d 41.

[105] Davis v. City of Bandon, 19 Or LUBA 526, 527 (1990)(and cases cited therein).

[106] Id.

[107] Kuzmanich v. Washington County, 9 Or LUBA 179 (1983)(case is moot where decision challenged is supplanted by controlling legislation); 1000 Friends of Oregon v. DEQ, 7 Or LUBA 84 (1982)(issuance of new permit authorizing structures renders appeal of prior permit for such structures moot).

[108] ORS 197.835(1).

[109] See gen., ORS 197.835(5) – (10); OAR 661-010-0071; OAR 661-010-0073.

[110] OAR 661-010-0071(1)

[111] OAR 661-010-0071(1)(c); OAR 661-010-0073(1)(c); see also ORS 197.835(5),(6),(7); ORS 197.828(2)(b).

might be other options for a new application to be successful.[112]

LUBA may, for example, reverse a decision that violates a local comprehensive plan provision or an applicable land use regulation.[113] (Quite often, however, there is a possibility that a *decision* could be made legal after some modifications by the local government. Thus, it is much more common for LUBA to "remand" (discussed below) a decision than to reverse it.) LUBA may also reverse decisions that violate statewide law,[114] including statutes, land use goals, administrative agency rules,[115] and Oregon's constitution.[116]

LUBA will also reverse a decision in which the local government exceeded its scope of authority (jurisdiction) in making the decision.[117] A local government may exceed its jurisdiction, for example, by passing a regulation affecting land outside its geographic boundaries or imposing restrictions that are the sole responsibility of the state or federal government. Additionally, LUBA will reverse a decision in which the local government acted "outside [its] range of discretion" in denying an application.[118] This would occur if the local government considered factors it was not supposed to take into account when deciding to deny an application.

When a local government creates a new land use regulation or amends an existing one, that decision may be reversed if it is not in compliance with the local comprehensive plan,[119] or if the local plan or the statewide planning goals provide no basis for creating the regulation or amendment in the first place.[120] Amendments to the comprehensive plans themselves must comply with the statewide planning goals[121] and state statutes.[122] State agency and special district land use decisions are also reviewed for goal compliance.[123]

Remand

LUBA will remand a decision that improperly construes applicable law.[124] Many decisions are remanded under this standard. Also, many local decisions are defective in only one or two respects, which are correctable, but comply with the law otherwise.[125] This fact accounts for many remands.

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[112] See 1000 Friends v. Jackson County, __ Or App __ (2018), slip op at

[113] ORS 197.835(5) – (7).

[114] OAR 661-010-0071(1)(c); OAR 661-010-0073(1)(c); see also ORS 197.835(5), (7).

[115] Id.

[116] OAR 661-010-0071(1)(b); OAR 661-010-0073(1)(b); see also ORS 197.835(9)(a)(E); ORS 197.828(2)(c)(B).

[117] OAR 661-010-0071(1)(a); OAR 661-010-0073(1)(a); see also ORS 197.835(9)(a)(A); ORS 197.828(2)(c)(A).

[118] ORS 197.835(10)(a)(A).

[119] ORS 197.835(7)(a).

[120] ORS 197.835(7)(b).

[121] ORS 197.835(6).

[122] See Alliance for Responsible Land Use in Deschutes County v. Deschutes County, 115 Or App 621, 839 P2d 746 (1992).

[123]ORS 197.835(9)(b).

[124] OAR 661-0100-071(2)(d); OAR 661-010-0073(2)(d); see also ORS 197.835(9)(a)(D).

[125] See e.g., Alliance for Responsible Land Use Planning v. Deschutes County, 23 Or LUBA 476, aff'd 115 Or App 621, 839 P.2d 746 (1992).

LUBA will remand a decision that is not "supported by substantial evidence in the whole record."[126] This means that LUBA will send a decision back to the local government if (1) there was virtually no evidence to support the decision, or (2) the supporting evidence was so undermined by other evidence that it was unreasonable for the local government to decide as it did.[127]

> **NOTE:** Land use decisions often involve valid evidence both for and against a given proposal. It is up to the local government, and not LUBA, to decide which evidence deserves more weight in these cases.[128] Likewise, evidence may be subject to more than one legitimate interpretation, in which case a reasonable interpretation by the local government controls.[129]

The local government is required to adopt written "findings" that explain the criteria which apply to its decision and say how those criteria have been satisfied.[130] *This is a very important requirement that local governments often fail to meet*. LUBA will remand when the local government's findings are inadequate to allow LUBA to review the decision.[131]

LUBA will also remand a decision if the local government fails to follow proper procedures to such an extent that the failure "prejudiced the substantial rights of the Petitioner."[132] Land use participants commonly feel they have been treated unfairly, but LUBA remands very few decisions for that reason. Only when the local government made serious procedural errors is a remand likely.[133] Procedural problems, which can range from minor flaws in the notice procedure to a hostile planning staff or decision maker, but which have no provable effect on the outcome of the case, do not provide a basis for remand.[134]

> **NOTE:** In practice, a significant number of LUBA decisions are remands, rather than reversals, which are comparatively rare. If remanded, a case will return to the local government for further consideration, and the applicant seeking a permit (or the governing body proposing an ordinance or plan amendment) does not have to begin the approval process from scratch. It is up to the local government to decide whether new

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126 OAR 661-010-071(2)(b); OAR 661-010-073(2)(b). See also ORS 197.835(9)(a)(C); ORS 197.828(2)(a).

127 See e.g., Younger v. City of Portland, 305 Or 346, 752 P.2d 262 (1988); Dodd v. Hood River County, 317 Or 172, 855 P.2d 608 (1993).

128 Stefan v. Yamhill County, 18 Or LUBA 820,838 (1990); See Boumon v. Jackson County, 23 Or LUBA 628, 641 (1992); Harwood .v Lane County, 23 Or LUBA 191 (1992).

129 Dority v. Clackamas County, 23 Or LUBA 384, 388, aff'd 115 Or. App. 449, 838 P.2d 1103 (1992), rev. den. 315 Or 311 (1993); McInnis v. City of Portland, 25 Or LUBA 376 (1993).

130 See, e.g., ORS 215.416(9); ORS 227.173(2)(land use permit); Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 1923, 569 P.2d 1063 (1977)(quasi-judicial plan amendment); Von Lubken v. Hood River County, 22 Or LUBA 307, 313 (1991)(for legislative plan amendment, explanation may be made in either the findings or the record); Latta v. City of Joseph, 36 Or LUBA 708 (1999) (where the staff report identifies an approval criterion and the final decision fails to demonstrate compliance with the criterion or take the position that the criterion does not apply, the decision will be remanded).

131 OAR 661-010-0071(2)(a); OAR 661-01-0073(2)(a).

132 OAR 661-010-0071(2)(c); OAR 661-010-0073(2)(c); see also ORS 197.835(9)(a)(B); ORS 197.828(2)(d).

133 See gen., ORS 197.835(9)(a)(B).

134 West Amazon Basin Landowners Association, Inc. v. Lane County, 24 Or LUBA 508, 512 (1993) (notice of hearing made available nine days rather than ten prior to hearing did not prejudice substantial rights of the parties); See also Mazeski v. Wasco County, 26 Or LUBA 226 (1993).

individuals or organizations or only the parties to the LUBA appeal can participate at this stage of the decision-making process. Based on its reconsideration, the local government may then approve or deny the application or ordinance. (If disagreement still exists, this decision of the local government on remand can be appealed to LUBA by parties with standing.)

In short, some (but by no means all) cases heard by LUBA do *not* result in a final resolution in four months. Be prepared for a longer haul (e.g., two years or more) if there is ongoing disagreement between the parties involved.

Deference to Local Decisions

LUBA's authority in reviewing decisions applying *local* law is limited, and this will affect your prospects for success. If the local rule or ordinance is subject to more than one valid interpretation, LUBA cannot reject a decision just because its interpretation of the local comprehensive plan or land use regulation might be different from the local government's.[135] The following rules govern LUBA's authority in these cases:

- if a local government's interpretation of its comprehensive plan or land use regulation is consistent with the express language, purpose, or underlying policy of the plan or regulation as a whole, LUBA must uphold the interpretation;
- if a local interpretation of a local provision or regulation clearly goes against the actual language, purpose, or policy, LUBA need not uphold the interpretation; and
- if the local provision being interpreted implements a state statute, administrative rule or statewide planning goal, LUBA can reverse an interpretation that is contrary to the statewide requirement. [136]

Raise It or Waive It

The subjects you may address at LUBA depend on what subjects were addressed during local proceedings. State law dictates that when the local government has made a "quasi-judicial" land use decision (e.g., a permit approval), *a party can only appeal issues to LUBA that were raised during the local government hearings*.[137] For example, if testimony during a permit hearing talked about nothing but the *traffic impact* of a proposed development, a party probably won't be able to raise the issue of *height restrictions* in an appeal to LUBA.

This requirement to "raise it or waive it" is designed to make sure parties give the local government an opportunity to respond to issues before LUBA reviews them.[138] An issue must have been raised by *any* party (you do not have to be the person who raised it)[139] before the local government in order to challenge the local government on that issue before LUBA.[140]

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[135] DLCD v. Crook County, 25 Or LUBA 625, 633 (1993).

[136] ORS 197.829.

[137] ORS 197.763(1); ORS 197.835(3).

[138] See Boldt v. Clackamas County, 21 Or LUBA 40, 46 (1991) ("Petitioners may not fail to raise issues locally and then surprise the local government by raising those issues for the first time at LUBA."); Larson v. Multnomah County, 25 Or LUBA 18, 2122 (1993)(takings claim waived if not raised below, because denial of application is reasonably foreseeable).

[139] ORS 197.835(3).

[140] Spiering v. Yamhill County, 25 Or LUBA 695 (1993).

Additionally, the requirement to "raise it or waive it" refers to the requirement that *issues,* rather than *arguments*, must have been raised during the local government proceedings if they are to be reviewed by LUBA.[141] There is no statutory requirement that particular arguments be raised in local proceedings in order to address those arguments on appeal.[142] Thus, the statutory restrictions to raising "issues" on appeal before LUBA do not apply to new "arguments" regarding issues that were raised at the local level.[143]

> **NOTE:** The requirement to "raise it or waive it" does not apply to "legislative" land use decisions.[144] In a legislative decision, the local government adopts or amends provisions to its comprehensive plan or zoning ordinance that are generally applicable to everyone. It is not just deciding an individual permit or addressing an individual property.

In quasi-judicial cases (i.e., "permitting type," see Glossary), issues brought before LUBA don't have to be *identical* to those raised at the local level,[145] but close enough so that the local government could have addressed them during the hearing. If the local government's written decision interprets a local ordinance differently than the Petitioner could have reasonably anticipated during the local hearing, however, the Petitioner may raise that interpretation as an issue before LUBA even if it was not raised locally.[146] Also, LUBA's review is not limited to only issues raised by the Petitioner, it can also review issues raised by "any participant" including the applicant, so it may be worth reviewing other testimony to determine if issues you did not raise were raised by other parties.[147]

Because parties appealing quasi-judicial decisions to LUBA are limited to issues raised locally, the local government is required to give complete notice of the issues to be discussed at the local hearing so parties may come prepared to raise them.[148] Thus (in quasi-judicial local hearings), if the local government fails to send notice to interested persons, fails to explain the proposal and list all the criteria applicable to it, or fails to make the necessary information available to parties before the hearing, parties may raise new issues before LUBA.[149] If the local government does not follow those requirements, or if the final decision turns out to be significantly different from what was proposed in the notice,[150] parties may raise new issues before LUBA.[151]

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141 ORS 197.763(1).

142 DLCD v. Tillamook County, 34 Or LUBA 586, 591-92, aff'd 157 Or. App. 11, 967 P.2d 898 (1998).

143 Id.

144 DLCD v. Columbia County, 24 Or LUBA 32, 36, aff'd 117 Or. App. 207, 843 P.2d 996 (1992).

145 Boldt v. Clackamas County, 21 Or LUBA 40, aff'd 107 Or. App. 619, 813 P.2d 1078 (1991).

146 Washington County Farm Bureau v. Washington County, 21 Or LUBA 51, 57 (1991).

147 Central Klamath CAT v. Klamath County, 40 Or LUBA 111, 123 (2001).

148 See ORS 197.763(3); DLCD v. Columbia County, 24 Or LUBA 32, aff'd 117 Or. App. 207, 843 P.2d 996 (1992).

149 ORS 197.830(5)(a); ORS 197.835(4)(a).

150 ORS 197.830(5) and ORS 197.835(4)(b) permit new issues to be raised if "the local government made a decisions which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

151 See also Wuester v. Clackamas County, 25 Or LUBA 425, 429 (1993) (local government's failure to list all applicable criteria allows parties to raise any new issues before LUBA).

Part Two

THE APPEAL PROCESS

You must strictly follow LUBA rules and state law to have a successful appeal at LUBA. This section summarizes some of LUBA's rules. Be sure to check the current rules at http://www.oregon.gov/LUBA/Pages/Rules.aspx to verify that nothing has changed. Follow all the rules applicable to your particular appeal. While some mistakes are correctable (e.g. failing to notify someone on the notice list who is not a party to the case and does not wish to intervene) others are not (e.g. failing to file with LUBA on time) and will result in dismissal of your case.

TIP: You can call LUBA during normal business hours and talk with a LUBA staff person or paralegal during normal business hours. They cannot give you legal advice but they might be able to answer some technical questions about filing fees, mailing, copies etc. Please be courteous and respectful to the LUBA staff.

I. Notice of Intent to Appeal

Deadlines

Once the requirements listed in Part I are satisfied, an appeal is commenced by submitting to LUBA a "Notice of Intent to Appeal" (NITA).[152] *A "Notice of Intent to Appeal" is commonly known as a "NITA" but may also be referred to as a "NOITA" or a "NOIA".* (A sample NITA is provided in Appendix A.)

The NITA, along with a filing fee and deposit, must be received at, or mailed to, LUBA's Salem office within 21 days after the decision appealed becomes "final."[153] The date of filing a NITA is the date the NITA is received by LUBA, or the date the NITA is mailed, provided it is mailed by registered or certified mail and the party filing the NITA has proof from the post office of the mailing date.[154] If you rely on the date of mailing as the date of filing, acceptable proof from the post office consists of a receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number.[155]

Normally, a decision becomes "final" when it has been written in its final form and signed by the members of the governing body rendering the decision.[156] Thus, if a decision is signed on June 1, June 2 is counted as the first day and June 22 is counted as the 21st day after the decision became final. However, a local rule or ordinance may specify that a decision becomes final on a date later than when it is signed.[157] *As discussed above, if the NITA is not received at, or mailed to,*

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[152] ORS 197.830(1).

[153] OAR 661-010-0015(1); Pilling v. Crook County, 23 Or LUBA 51 (1992) (fees and deposit received by the 21st day, but NITA filed after untimely filing).

[154] OAR 661-010-0015(1)(b).

[155] Id.

[156] OAR 661-010-0010(3). Final legislative type decisions are often described as "entered" or "adopted" by the local government; quasi-judicial decisions are often described as "transmitted" once they become final.

[157] Id.

LUBA's office by 5:00 p.m. on the 21st day, the case will automatically be thrown out and the opportunity to appeal will be lost.[158]

> **NOTE:** The rules about when a decision becomes final and when the NITA is due are applied differently in different situations. The rule stated above is a general guideline. How it applies in a given case may vary. For example, when a local government adopts a new comprehensive plan provision or land use regulation (or amends an existing one), the 21-day deadline to file your NITA starts counting when notice of the decision is mailed to the various people entitled to receive them.[159] If the 21st day falls on a weekend or holiday, the NITA must be filed by the end of the next business day.[160] If you are not sure when you must file your NITA, it is best to file it early.

> **NOTE:** Occasionally, a separate local rule or ordinance may provide that the land use decision to be appealed does not become "final" until some later date after the decision has been written and signed.[161] For instance, a local ordinance may provide that a decision becomes final if no one requests a hearing on it within a certain number of days. In such cases, the 21-day time limit does not begin running until the later date.[162]

Because local governments do not always hold public hearings for land use decisions, concerned persons might not learn of the decision until well after it became final. In such cases, persons adversely affected (discussed in Part I, Section I) by the decision have 21 days from the time they knew or should have known of the decision to file a NITA.[163]

The same rule applies when the local government was supposed to provide notice of the hearing and failed to do so, or notice was provided, but it did not adequately describe the matter that was going to be considered.[164] In these situations, interested persons might not have thought of attending, so they are also given 21 days until after they learn of the decision to file a NITA.[165]

> **NOTE:** It is important to follow up on any information you receive about the land use decision as soon as you learn it. If activity on the property, conversations with others, news reports, etc. give you reason to think a decision has taken place, contact the local planning office immediately and confirm. LUBA might conclude you had enough reason to know a land use decision took place and count the 21-day time limit from that time.

Two copies of the NITA must be filed along with the original.[166] Filing may be by first class

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158 Oak Lodge Water District v. Clackamas County, 18 Or LUBA 643 (1990) (NITA mailed prior to, but received after, the 21 day deadline is not timely filed); See also J.C. Reeves Corporation v. Washington County, 32 Or LUBA 263 (1996), aff'd without opinion 147 Or. App. 241, 932 P.2d 1217 (1997).

159 ORS 197.8307(a); OAR 661-10-015(1); Sparrows v. Clackamas County, 24 Or LUBA 318, 324-25 (1992).

160 OAR 661-010-0075(8).

161 OAR 661-010-0010(3).

162 OAR 661-010-0010(3).

163 ORS 197.830(3)(b); Clearwaters v. Josephine County, 50 Or LUBA 300 (2005); Rogers v. City of Eagle Point, 42 Or LUBA 607 (2002).

164 ORS 197.830(3), (6)(b).

165 ORS 197.830(4).

166 OAR 661-010-0015(1)(a).

mail, by hand, or by messenger, but not by fax.[167] If you file by mail, the NITA must be mailed by certified or registered mail before the expiration of the 21-day time limit.[168] Call LUBA on or before the 20th day to confirm that the notice has been filed.

> **NOTE:** An attorney must sign a NITA filed on behalf of an organization, corporation or individual other than the Petitioner.[169]

> **NOTE:** If there are related land use decisions to be appealed (such as a comprehensive plan amendment and a corresponding zone change), both decisions can usually be addressed in a single NITA, but will require an additional filing fee and deposit for costs on each decision being appealed.[170] Generally, as long as the related decisions are contained in a single written order (such as an ordinance), they may be combined in a single NITA.[171] Separate NITAs are required for separate land use decisions contained in separate written orders.[172]

Contents of the Notice of Intent to Appeal

Each NITA must contain[173]:

- a caption identifying the person(s) filing the NITA, identified as "Petitioner(s)"[174] (if there is more than one petitioner, one must be identified as the "Lead Petitioner,"[175] who may receive subsequent documents, such as the Respondent's Brief, on behalf of the other Petitioners);
- a caption identifying the governing body, identified as "Respondent";[176]
- the heading "Notice of Intent to Appeal" below the caption;[177]
- the title of the decision being appealed as it appears on the final decision issued by the local government, special district, or state agency;[178]
- the date the decision became final;[179] and
- a concise description of the decision being appealed.[180]

The NITA must also include the name(s), address(s), and phone number(s) of:[181]

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[167] OAR 661-010-0015(2); See also, OAR 661-010-0075(2).

[168] OAR 661-010-0015(1)(b).

[169] OAR 661-010-0015(3)(h); 661-010-0075(6); Gray v. Clatsop County, 21 Or LUBA 600 (1991); Homebuilders Association v. City of Portland, 37 Or LUBA 991 (1999).

[170] See e.g., McKenzie v. Multnomah County, 30 Or LUBA 459, 460 (1996).

[171] See e.g., Reusser v. Washington County, 24 Or LUBA 652, n.2 (1993) ; But see, Woodward v. City of Cottage Grove, 56 Or LUBA 206 (2008).

[172] Osbourne v. Lane County, 4 Or LUBA 368, 370 (1981); Seneca Sawmill Company v. Lane County, 6 Or LUBA 454, 454-55 (1983).

[173] OAR 661-010-0015(3).

[174] OAR 661-010-0015(3)(a).

[175] OAR 660-010-0010(8); OAR 661-010-0015(3)(f)(A).

[176] OAR 661-010-0015(3)(a).

[177] OAR 661-010-0015(3)(b).

[178] OAR 661-010-0015(3)(c).

[179] OAR 661-010-0015(3)(d).

[180] OAR 661-010-0015(3)(e).

[181] OAR 661-010-0015(3)(f).

- the Petitioner(s) (unless an attorney represents them, in which case you give the attorney's name, etc.),
- the governing body and the governing body's legal counsel,
- the applicant for the decision being appealed (if there is an applicant or the applicant is not the Petitioner) or the applicant's attorney, and
- any person who received written notice of the decision as indicated in the governing body's records. (The telephone numbers of these persons are not required.)

The NITA must also include a statement advising the applicant and those who received notice of the decision that they must file a "Motion to Intervene" (explained below) if they wish to participate in the appeal.[182] It also needs to have a statement that the Petitioner served copies of the NITA to all persons listed above at the time the notice was filed with LUBA (See Certificates of Filing and Service).[183] The NITA must also contain the signature of each Petitioner or the attorney representing the Petitioner on the last page.[184]

(A sample NITA is included in the Appendix)

Fees

A filing fee of $200 plus a $200 deposit to cover the costs of preparing the record must accompany the NITA.[185] (These are the costs as of 2018 and may be subject to later changes). Parties who win their appeal can have these amounts refunded.[186] The deposit and filing fee may be paid by a single $400 check, money order, or State of Oregon purchase order made payable to the Land Use Board of Appeals.[187]

LUBA will not accept a NITA for filing until it receives the required filing fee and deposit.[188] A filing fee and deposit are required for each separate NITA being filed.[189]

Service: NITA and Other Documents

In addition to filing a Notice of Intent to Appeal (plus one copy) with LUBA, exact copies of the notice must be mailed or hand delivered to the local governing body, the governing body's legal counsel, the applicant (or the applicant's attorney), all persons identified in the NITA, and any other person to whom written notice of the *final* decision was mailed.[190] You are not required to send NITA copies to everyone who received notice of the local public *hearings*, only those who

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[182] OAR 661-010-0015(3)(g).
[183] OAR 661-010-0015(3)(i).
[184] OAR 660-010-0015(3)(h).
[185] ORS 193.830(9); OAR 661-010-0015(4).
[186] OAR 661-010-0075(1)(b)(A) (filing fee); Tice v. Josephine County, 21 Or LUBA 596 (1991).
[187] OAR 661-010-0015(4).
[188] OAR 661-010-0015(1).
[189] OAR 661-010-0015(1)(c).
[190] ORS 197.830(9); OAR 661-010-0015(2) and (3)(f)(C) and (D).

received written notice of the *final decision*.[191]

> **NOTE:** The records of the decision (kept on file at the local planning department) will list everyone who received written notice of the final decision and who is therefore entitled to receive a copy of the NITA.[192] The planning director or a clerk may be able to provide the names by phone, mail, email, or fax. You may also inspect the records personally at the planning office.

While LUBA requires the NITA to be *received* at, or *mailed* by registered or certified mail to, its office within 21 days after the decision became final, it is sufficient if copies of the NITA are *mailed* to those entitled to receive them on the day the original notice is filed with LUBA.[193] Copies of the notice may be sent by first class mail[194] and should be sent by certified mail, return receipt requested to prove the notice was served.[195] Copies of the notice may also be hand delivered,[196] in which case the person receiving it should sign a receipt indicating the delivery date.

> **NOTE:** Filing any document (other than the NITA) with LUBA may be accomplished by personal delivery or by first class mail on the date the document is due.[197] The NITA must be received, or mailed by registered or certified mail, by the due date.[198] Any document may be served on other parties by mailing a copy of the document on the same date the original is filed with LUBA.[199] Failure to serve notice to the required parties by the due date can result in dismissal of the appeal if that party establishes substantial prejudice from the delay in service.[200]

Certificates of Service and Filing

All documents filed with LUBA, including the NITA, must be accompanied by a "Certificate of Service" which includes a statement that the Petitioner served a "true copy" (exact copy) of the document on each person entitled to receive one.[201]

Likewise, copies of all documents filed with LUBA (including the NITA) sent to other participants must contain a "Certificate of Filing" indicating the date on which the original document was filed with LUBA.[202]

(Sample Certificates of Service and Filing provided by LUBA are included in Appendix B.)

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[191] Heritage Enterprises v. City of Corvallis, 12 Or LUBA 402, aff'd 71 Or App 581, 693 P.2d 651 (1984); aff'd 300 Or 168, 708 P.2d 601 (1985).

[192] See gen., OAR 661-010-0015(3)(f)(D).

[193] OAR 661-010-0015(1)(b), (2); OAR 661-010-0075(2)(b)(A) and (B); Davenport v. City of Tigard, 23 Or LUBA 679 (1992); Petersen v. Columbia County, 39 Or LUBA 799 (2001).

[194] OAR 661-010-0015(2).

[195] See OAR 661-010-0015(1)(b).

[196] OAR 661-010-0015(2); OAR 661-010-0075(2)(b)(B).

[197] OAR 661-010-0075(2)(a).

[198] OAR 661-010-0015(1)(b).

[199] OAR 661-010-0075(2)(b)(A) and (B).

[200] Winner v. Multnomah County, 30 Or LUBA 420 (1996).

[201] OAR 661-010-0015(3)(i); OAR 661-010-0075(2)(b)(D).

[202] OAR 661-010-0075(2)(b)(A), (C).

II. Motions to Intervene

As stated in the section on Standing, any person who appeared before the local government while the land use proposal in question was being considered may be entitled to participate in the appeal.[203] Anyone wishing to participate, including the original applicant, must file a "motion to intervene," plus two additional copies,[204] with LUBA within 21 days after the Notice of Intent to Appeal is filed.[205] A filing fee of $100 must also be included.[206] (An example of a Motion to Intervene is provided in Appendix C.)

> **NOTE:** LUBA appeals typically involve challenges to development applications, which were approved by the local government and appealed by opponents. But if the applicant's request was *denied* by the local government, the applicant also has the right to appeal. In that event, a person who wishes to participate in seeing the local decision upheld must file a motion to intervene on the side of the *Respondent* (the local government) within 21 days after the NITA is filed.[207]

The motion to intervene must state whether the party is intervening on the side of the Petitioner or the Respondent, and it must indicate why the person filing the motion is eligible to participate in the appeal.[208] (Parties may submit a sworn affidavit or simply refer in their motions to pages of the record which show their participation in the local hearing.) True copies of the motion to intervene, along with Certificates of Filing, must be delivered to the Petitioner, the local government's attorney, and any other parties to the appeal.[209]

A party who files a motion to intervene becomes an "intervenor,"[210] who is entitled to receive copies of any document filed with LUBA by any participant during the appeal.[211] (LUBA may later deny intervenor status to that party.[212])

> **NOTE:** Persons who received written notice of the final decision (and were thus entitled to receive copies of the NITA) will not be entitled to receive future documents relating to the appeal unless they also become intervenors.

> **NOTE:** If you intervene on the side of the Petitioner and the Petitioner is later disqualified, you will also be eliminated as a party.[213] Thus, anyone wishing to challenge a local government decision should file a Notice of Intent to Appeal rather

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[203] ORS 197.830(2); OAR 661-010-0050(1).
[204] OAR 661-010-0075(3).
[205] ORS 197.830(7); OAR 661-010-0050(2).
[206] OAR 661-010-0050(3).
[207] OAR 661-010-0050(3).
[208] OAR 661-010-0050(2).
[209] OAR 661-010-0050(3).
[210] Ramsey v. City of Portland, 22 Or LUBA 295, 303 (1991).
[211] OAR 661-010-0075(2)(b)(A).
[212] OAR 661-010-0050(1).
[213] See e.g., Gross v. Washington County, 17 Or LUBA 640, 646 (1989).

than intervene on the side of another petitioner.[214]

III. The Record

What Information Will LUBA Consider?

Appeals before LUBA are based solely on information gathered during the local proceedings that led to the land use decision.[215] With few exceptions, no new information about the land use decision can be brought up for the first time before LUBA.[216] Furthermore, the record includes only information gathered by the *final* decision-making body.[217] Information gathered during an earlier proceeding will be part of the record only if the final decision-maker adopts that information in its record.[218]

> NOTE: This also means that it is important to raise all of your issues with the final decision-making body, even if your arguments have been rejected by the lower level decision-makers. This ensures that your issues are preserved for review at LUBA.

When analyzing a local land use decision, LUBA will look at information gathered in local proceedings to determine if the decision-making body properly applied an applicable land use statute. In some cases, these statutes might be unclear or ambiguous. A party may therefore include in the record any legislative history that clarifies the legislative intent of an applicable statute.[219] If, for example, an applicable statute refers to the "preservation of land for wildlife," and it is unclear from the text what the legislature meant by "wildlife," a party may introduce legislative history that determines or clarifies what the legislators meant when they included this word in the statute. However, LUBA may conclude that an applicable statute is clear and unambiguous, in which case it does not have to give weight to this legislative history.[220] Furthermore, LUBA is not obligated to conduct independent research of legislative history,[221] and therefore parties wishing to challenge a land use decision based on alleged misinterpretation of legislative intent should include in the record any applicable legislative history.

It is very important that all parties review the record carefully as soon as it is received. You should make sure the record contains all the information which supports your case that was presented at the local proceeding -- even if it was presented by someone else or as part of a staff report. The record will have to contain all the facts needed to support your arguments; you

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214 See National Advertising Co. v. City of Portland, 20 Or LUBA 79 (1990).

215 ORS 197.835(3); See also, OAR 660-010-0025(1).

216 See e.g., Von Lubken v. Hood River County, 19 Or LUBA 548 (1990) (where identity or authenticity of excluded document is not disputed, document may be admitted as part of LUBA's record for limited purpose of review for error in excluding the document from the local government's record); Friends of Clean Living v. Polk County, 36 Or LUBA 544 (1999) (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).

217 OAR 661-010-0025(1).

218 OAR 661-010-0025(1)(b).

219 State v. Gaines, 346 Or 160 (2009).

220 Id.

221 Id.

cannot introduce new facts at LUBA (see Legal Research). And, in most cases, the record must include evidence showing the issues being appealed were raised at least once before the local government (see Part I).

The governing body is required to send the original or a certified copy of the record (except for large maps and other items that are difficult to duplicate[222]) to LUBA within 21 days after the governing body was served its copy of the Notice of Intent to Appeal.[223] The governing body must also send a copy of the record to the Petitioner.[224] Intervenors and other interested parties may obtain copies of the record as long as the local government is reimbursed for duplication costs.[225]

> **NOTE:** If you are entitled to a copy of the record and do not receive it within 21 days after sending the NITA to the governing body, call the governing body's legal counsel and find out the reasons for the delay. If the record is not on the way, call LUBA and ask for a conference call so that you, LUBA, and the governing body can resolve the problem.

Contents of the Record

When you receive a copy of the record, review it immediately for accuracy and completeness. . The record sent by the local government to LUBA might be inaccurate or incomplete, or include materials that were never placed before the governing body. A common scenario is when a planning staff member reports the results of a study to the decision-making body, thus causing the *results*, but not the entire *study*, to become part of the record. Neither side can bring up other information from the study to help its case unless that information was also submitted during the local proceedings.[226]

The record required to be provided to LUBA is very broad, including all spoken and written information actually offered before, and not specifically rejected by, the decision-making body during its hearing process.[227] The record must at least include:

- the final decision itself, including the findings and conclusions of the decision-making body,
- all written exhibits, maps, documents, transcripts, and other written material submitted to the decision-making body,
- minutes of the proceedings summarizing oral testimony to the decision-making body and the decision-making body's responses, or verbatim transcriptions, if any were

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[222] OAR 661-010-0025(2). However, maps and documents must be individually identified in the record's table of contents if they are part of the record. OAR 661-10-0025(4)(a)(B); see Eckis v. Linn County, 20 Or LUBA 589 (1991) (large bulky documents, such as maps, may be listed in the contents of the record and withheld until oral argument).

[223] ORS 197.830(10); OAR 661-010-0025(2).

[224] OAR 661-010-0025(3).

[225] Id.

[226] Eckis .v Linn County, 20 Or LUBA 589 (1991); See McKay Creek Valley Association v. Washington County, 19 Or LUBA 500 (1990); Hoffman v. City of Lake Oswego, 19 Or LUBA 607 (1990); Homebuilders Association v. Metro, 41 Or LUBA 616 (2002).

[227] OAR 661-010-0025(1); Silani v. Klamath County, 22 Or LUBA 823 (1991); Wilson Park Neighborhood Assoc. v. City of Portland, 23 Or LUBA 688 (1992).

prepared, of some or all of the oral testimony and responses,

- notices of proposed action, public hearing, and adoption of final decision, published, printed, posted, or mailed during the course of the land use hearing.[228]

The following points are useful when verifying the contents of the record:

- Check whether the record includes all information accepted by the decision-making body, whether it was actually reviewed by them or not.[229]
- Normally, all information from a series of meetings before a single decision-making body is part of the record of the decision issued by that body.[230] However, when a proposal passes through several hearings before different levels of decision-making bodies, the record before LUBA will include only information from the lower level proceedings if that information was reintroduced before the final decision maker and not rejected.[231] A local ordinance might require that the record from a lower level proceeding automatically be placed before the final decision maker.[232]
- The decision-making body must be clear that it is rejecting evidence, or LUBA will consider it part of the record.[233] But if the decision maker receives information, considers it, and then expressly rejects it, that information usually does not become part of the record, even if the decision maker retains it throughout the proceeding.[234] Further, written submissions to the decision maker after the final due date are usually rejected from the record.[235]
- Local rules might require certain information (such as planning commission documents) to be submitted every time a certain type of land use proceeding is conducted. Even if staff members neglected to actually place such information before the decision maker in your case, it will be included in the record before LUBA.[236]
- The local comprehensive plan and any ordinances applicable to the land use decision may always be referred to as if they were part of the record.[237] LUBA may consider criteria contained in these documents even if they are not cited by the parties or included in the record.[238] LUBA is also free to consider official agency publications

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[228] OAR 661-010-0025(1).

[229] Hummel v. City of Brookings, 15 Or LUBA 634 (1987).

[230] Davis v. City of Bandon, 19 Or LUBA 493 (1990) (successive investigation, reporting, and adoption meetings for a moratorium are part of the final of decision adopting a moratorium); McKay Creek Valley Assoc. v. Washington County, 19 Or LUBA 500 (1990) (citizen involvement phase of proceedings leading to adoption of challenged ordinances part of final decision record).

[231] Leonard v. Union County, 23 Or LUBA 664, 667 (1992); Hubenthal v. City of Woodburn, 38 Or LUBA 916 (2000).

[232] Union Gospel Ministries v. City of Portland, 21 Or LUBA 557, 559, 560 (1991); League of Women Voters v. Coos County, 13 Or LUBA 311, 312, aff'd 76 Or. App. 705, 712 P.2d 111 (1985), rev. den. 301 Or 76 (1986).

[233] Central Klamath County CAT v. Klamath County, 41 Or LUBA 579 (2002).

[234] Id. at 580.

[235] Kane v. City of Beaverton, 49 Or LUBA 712 (2005).

[236] Union Gospel Ministries v. City of Portland, 21 Or LUBA 557, 559, 560 (1991); Hubenthal v. City of Woodburn, 38 Or LUBA 916 (2000).

[237] Sunburst II Homeowners Assoc. v. City of West Linn, 18 Or LUBA 695, 698, aff'd 101 Or. App. 458, 790 P.2d 1213, rev. den. 310 Or 243 (1990).

[238] Hoffman v. City of Lake Oswego, 19 Or LUBA 607, 611 (1990) (official notice of transportation planning study incorporated by reference into comprehensive plan); Sunburst II Homeowners Assoc. v. City of West Linn, 18 Or

and the history behind any general state laws which might apply to your case.[239] However, LUBA is not free to consider pertinent history, which led to a *local* law, unless that history is included in the record.[240] Because LUBA has no obligation to consider the legislative history that leads to an applicable law or ordinance,[241] a petitioning party should seek to have such relevant information included in the record.

More About the Record . . .

Because LUBA's concern is with what information was actually before the decision-making body, and not what should have been before it, the following points are also important:

- Occasionally, the decision-making body will receive new information after it has completed its hearings but before it has issued a final decision.[242] Unless the decision maker specifically rejects that information, it will usually be included as part of the record, even though the governing body had announced that it would not accept additional evidence after the close of hearings.[243] Minutes of deliberations by the decision-making body during public hearings, but after parties are no longer allowed to submit evidence or arguments, are also part of the record.[244] However, "resolutions" subsequently adopted by the governing body to clarify its actions during the proceedings are not part of the record.[245]
- A land use decision may have been appealed to LUBA before and "remanded" (sent back) to the local decision maker for additional proceedings. The record for a subsequent appeal to LUBA includes the record from the original proceedings as well as from the proceedings on remand unless a new application was filed in place of the old one.[246]
- Inaccurate information placed before the decision maker will be included to provide a "complete" record for LUBA to review.[247] (Inaccuracies may be able to be addressed during an "evidentiary hearing" discussed below.[248])
- A party cannot have information removed from the record just because she never

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LUBA 695, 698, aff'd 101 Or. App. 458, 790 P.2d 1213, rev. den. 310 Or 243 (1990); Downtown Community Assoc. v. City of Portland, 31 Or LUBA 574 (1996); Jackman v. City of Tillamook, 27 Or LUBA 704 (1994).

[239] Foland v. Jackson County, 18 Or LUBA 731, 738, aff'd 101 Or. App. 632, 792 P.2d 1228 (1990), aff'd 311 Or. 167, 807 P.2d 801 (1991); Adkins v. Heceta Head Water Dist., 23 Or LUBA 207, 211 (1992).

[240] 19th Street Project v. City of The Dalles, 20 Or LUBA 440, 447, 448 (1991); Adkins v. Heceta Head Water Dist., 23 Or LUBA 207, 211 (1992).

[241] State v. Gaines, 346 Or. 160 (2009).

[242] See e.g., Von Lubken v. Hood River County, 19 Or LUBA 548, 552 (1990) (minutes of deliberations after hearing closed are part of the record).

[243] Schatz v. City of Jacksonville, 22 Or LUBA 799 (1990); But see Kane v. City of Beaverton, 49 Or LUBA 712 (2005).

[244] Von Lubken v. Hood River County, 19 Or LUBA 548, 552 (1990).

[245] Perkins v. City of Rajneeshpuram, 10 Or LUBA 426, aff'd 68 Or. App. 726, 686 P.2d 369 (1984), aff'd 300 Or. 1, 706 P.2d 949 (1985).

[246] Rutigliano v. Jackson County, 47 Or LUBA 628, (2004); Fisher v. City of Gresham, 10 Or LUBA 409, aff'd 69 Or. App. 411, 685 P.2d 486 (1984).

[247] Gray v. Clatsop County, 21 Or LUBA 574, 578 (1991).

[248] OAR 661-010-0045(1).

knew it was put in the record during the local proceedings.[249]

- If, during a hearing, you informally requested a staff member to include documents in the record and they are accidentally left out, LUBA will not include them in the record.[250]
- Written submissions must be to the members of the body rendering the decision or their designated custodian of records (as designated in the governing body's charter). Do not, for example, submit written testimony to a member of the planning staff when the hearings are being held before the city council unless that planning staff person is the designated custodian of the records. Your testimony will not be counted as placed before the city council.[251] When submitting testimony to a planning staff person you should ask for written confirmation that it will be placed in the record.
- Letters, documentation, and the like submitted before an actual application was filed are not part of the record of the subsequent hearing unless they were reintroduced at that hearing.[252]

Objections to the Record

If you discover errors or omissions in the record, **you must first contact the local government's attorney and attempt to resolve any differences.**[253] If you are unsuccessful, you must file an "Objection to the Record" within 14 days of the date appearing on the notice of record transmittal.[254] (A sample Objection to the Record is provided in Appendix D.) It is sufficient if the objection is sent by first class mail by the 14th day.[255] Retain a postmarked receipt from the post office to show that the objection was mailed on time.

> **NOTE:** Unless the local government actually corrects the error or omission in the record (and doesn't just agree to) within the 14-day period, file an objection with LUBA.[256]

The objection must state exactly how the record is inaccurate.[257] For example, the record does not include all materials included as part of the record during the proceedings before the final decision maker, the record contains material not included as part of the record during the proceedings before the final decision maker, the minutes or transcripts of meetings or hearings are incomplete or do not accurately reflect the proceedings.[258] It is important to be specific. The objection should state, for example, how your arguments will be incomplete without information that should be in the record, or why LUBA won't be able to reach the correct decision unless certain inaccuracies in the minutes or transcripts are corrected.[259]

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[249] Chauncey v. Multnomah County, 23 Or LUBA 685, 686-67 (1992).
[250] Eckis v. Linn County, 18 Or LUBA 889, 890 (1989).
[251] Blatt v. City of Portland, 20 Or LUBA 572 (1991).
[252] Forest Highlands Neighborhood Assoc. v. City of Lake Oswego, 23 Or LUBA 723 (1992).
[253] OAR 661-010-0026(1).
[254] OAR 661-010-0026(2).
[255] OAR 661-010-0026(2); OAR 661-010-0075(2)(a)(B).
[256] OAR 661-010-0026(2).
[257] OAR 661-010-0026(2).
[258] Id.
[259] See e.g., Schmaltz v. City of Hood River, 21 Or LUBA 563, 566 (1991).

> **NOTE:** If a party demonstrates that alleged defects in the minutes are material, LUBA will require the local government to submit more complete or amended transcripts of audiotape recordings.[260] Parties are also routinely allowed to submit partial transcripts of official tapes from the local proceedings.[261] Transcripts are *prepared at the parties' own expense* and are included with their briefs.[262]

Remember that the objection requires a certificate of service indicating that a true copy of the objection was served on all parties and each copy sent to the parties requires a certificate of filing.[263]

IV. The Petition for Review

The Petition for Review is the heart of an appeal. It presents the legal arguments as to why the local decision should be overturned.[264] These arguments must be as thorough and convincing as possible. Refer to the section on legal research for help when preparing your legal arguments. A Sample Petition for Review can be found in Appendix F.

The Petition for Review must be filed with LUBA within 21 days after LUBA receives the complete record.[265] *At the same time, copies of the Petition must be served on the local government and any parties who have filed a motion to intervene.*[266] ***If you file or serve the Petition even one day late, your case will be dismissed and your fee will be forfeited.***[267]

> **NOTE:** The 21-day time limit for filing the Petition for Review begins to run *even if LUBA receives the record and you do not*.[268] If you do not receive the record, file an objection with LUBA. Only an objection to the record or a motion for an evidentiary hearing stops the 21-day clock for filing the Petition for Review.[269]

> **NOTE:** Remember that if there are objections to the record, the time limits for future documents (the Petition for Review, Respondent's Brief, etc) are measured from the date the record objection is *settled*, not when the record was first *received*.[270]

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[260] OAR 661-010-0026(3).

[261] Hammack and Associates v. Washington County, 16 Or LUBA 75, n.2, aff'd 89 Or App 40, 747 P.2d 373 (1987).

[262] Id.; OAR 661-010-0025(3).

[263] OAR 661-010-0075(2)(b)(A).

[264] OAR 661-010-0030(4)(b).

[265] OAR 661-010-0030(1).

[266] OAR 661-010-0030(1).

[267] OAR 661-010-0030(1).

[268] OAR 661-010-0025(5); OAR 661-010-0030(1).

[269] OAR 661-010-0026(6); OAR 661-010-0045(9).

[270] OAR 661-010-0026(6).

Format of the Petition for Review

The Petition for Review must:

- Contain a table of contents at the beginning;
- Be no more than 50 pages, excluding appendices, except with permission from LUBA;
- Contain a blue cover page with the caption of the proceeding and the names, addresses, and phone numbers of all parties. If an attorney(s) represents a party, only list the attorney(s). A plain sheet of the same blue paper is used as the back cover. These blue pages must be of heavier quality than typing paper (at least 65 pound weight);
- Be typewritten, with lines double-spaced except for the footnotes. The font size should be at least 12 point for text and 10 point for footnotes. The printed area should not exceed 6 ¼ inches by 9 ½ inches (inside margins of 1 ¼ inch, outside margins 1 inch, and top and bottom margins of ¾ inch), exclusive of page numbers;
- Be on unglazed white paper (8 1/2 x 11 inches), with surface suitable for both pen and pencil notations (not onionskin). Text should be printed on one side. Double-sided printing is permitted if the paper is sufficiently opaque to prevent material from showing through and the pages are bound along the left-hand margin so that the pages lie flat when open;
- On the last page should be the name of the author of the Petition for Review, the author's signature, and the name of the law firm(s), if any, representing the Petitioner;
- If a single Petition is submitted by multiple unrepresented parties (petitioners or petitioner-intervenors) each must sign.[271]

> **NOTE:** The LUBA Rules of Procedure require the original Petition for Review to be submitted to LUBA with *four copies*.[272] In addition, one copy of the Petition must be served on the attorney for the governing body and on each party.[273] Also, each copy, like the original, must have the cover page on 65pound weight blue paper and have a plain sheet of the same blue paper as a back cover.[274] If the Board determines that the Petition fails to conform to the formatting rules, it will notify the author and allow three days to resubmit a corrected petition.[275]

Contents of the Petition for Review

The Petition for Review must contain the following seven components:

1. Basis for Standing

A statement describing the Petitioner's basis for standing to appeal the local decision.[276] *Review the requirements for standing explained in Part I, Section I*. If you participated in the land use decision before the local government, either in writing or orally, standing can usually be explained in one or two sentences.

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[271] OAR 661-010-0030(2)(i).
[272] OAR 661-010-0030(1).
[273] Id.
[274] OAR 661-010-0030(2)(c).
[275] OAR 661-010-0030(3).
[276] OAR 661-010-0030(4)(a).

NOTE: On rare occasions, a party will challenge the Petitioner's standing by alleging that the facts in his statement are not true. LUBA may hold an "evidentiary hearing" (see Section X) to decide the issue.[277] This is one occasion when new facts (facts not preserved in the record of the local proceeding) can be presented to LUBA.[278] If your statement of standing is challenged, you will need to gather witnesses or other proof to support your claim.

2. Statement of the Case

The next section of the Petition, the "Statement of the Case," includes several subsections:

- The "*Nature of the Land Use Decision and the Relief Sought"* by the Petitioners;
- A succinct and clear "*Summary of the Arguments"* contained in your Petition; and
- A complete and concise "*Summary of the Facts."*[279]

Under "Nature of the Land Use Decision and Relief Sought,"[280] identify the land use decision you are challenging by its title and number, and explain what that land use decision would do. Then ask LUBA to "reverse" (overturn) or "remand" (send back to the local government) the decision.

Under "Summary of Arguments,"[281] summarize each "assignment of error" (discussed below) set out in your Petition for Review. This section should be fairly short, not a complete restatement of the arguments in the assignments of error. A good rule of thumb is to write only one summary paragraph per assignment of error.

Next, under "Summary of the Facts," list the relevant facts of the proceeding *with citations to the pages in the local government record where those facts are found*.[282] Be sure to summarize only the *facts, and not opinions or arguments*.

NOTE: It is appropriate to emphasize the facts that are helpful to your side, but the fact summary must give a complete picture of the local proceeding.

3. LUBA's Jurisdiction

State why the decision being appealed is a land use decision or a limited land use decision (see Part I, Section III).[283] Also, state why LUBA has jurisdiction to hear the appeal.[284]

4. Assignments of Error and Arguments

The "assignments of error" section specifically identifies each violation of the law that you are alleging. There should be a separate assignment of error for each violation alleged.[285] Each assignment of error should state why LUBA should reverse or remand the local decision. Each assignment of error begins with a succinct one or two sentence statement of how and why the

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[277] OAR 661-010-0045(4).
[278] OAR 661-010-0045(1).
[279] OAR 661-010-0030(4)(b).
[280] OAR 661-010-0030(4)(b)(A).
[281] OAR 661-010-0030(4)(b)(B).
[282] OAR 661-010-0030(4)(b)(C).
[283] OAR 661-010-0030(4)(c); See also ORS 197.825(1); ORS 197.015(10), (12).
[284] Id.
[285] OAR 661-010-0030(4)(d).

local decision is unlawful. Each assignment of error is followed by an "argument." The argument explains in detail how the decision violates the legal requirement identified in the assignment of error. *The argument is the legal analysis; it is the heart of the petition.*

In preparing your arguments, it is helpful to outline your thoughts for each assignment of error in the following order:

- What does the law require?
- What are the facts? (Remember, only facts in the record may be relied upon.)
- What did the decision-making body conclude from the facts? Do the facts support the conclusions reached? Are there sufficient facts in the record for the decision-making body to reach the conclusions it did?
- How are those conclusions inconsistent with the law?

It is important that each assignment of error be addressed separately so as to provide clarity to LUBA. Arguments should be clear and concise so that LUBA can properly address the issues being raised. The section on legal research discusses in detail how to develop arguments and present them in the most convincing manner possible.

5. Conclusion

At the end of the argument prepare a one paragraph conclusion summarizing the case and sign your name below the last paragraph.

6. Attachments

You are required to attach a copy of the local government's decision that you are challenging, including all findings adopted in support of the decision and any comprehensive plan provision or ordinance cited in your petition.[286]

> **NOTE:** The authors asked LUBA the most common mistakes made by petitioners. The Board Chair stated that not attaching the decision was a common mistake and materially affected the Board's ability to review petitions and reach proper conclusions. It is extremely important that you attach a copy of the decision.

7. Certificate of Filing and Service

Finally, at the back of the Petition for Review, just inside the back cover page, attach a "Certificate of Filing and Service." (Sample Certificates of Service and Filing are provided in Appendix B.)

Filing the Petition for Review

Make four copies of the entire Petition for LUBA, one copy for each party, a couple for you, and mail them first-class.[287] Be sure that the postmark indicates that the petitions were mailed no more than 21 days after LUBA received the record.

> **NOTE:** If you discover after the Petition is filed that it did not significantly comply

[286] OAR 661-010-0030(4)(e) and (f).

[287] OAR 661-010-0030(1).

with LUBA's rules, you may request permission from LUBA to amend the petition.[288] *However, permission to amend the Petition is within LUBA's discretion.*[289] It might or might not be approved. If a serious problem is spotted after filing, a motion to amend should be made as soon as possible.

V. Respondent's Brief

The Respondent's Brief must be filed with LUBA within 42 days after LUBA receives the record[290] or 42 days after any objections to the record are settled.[291] Copies of the brief must be served on all other parties and intervenors within the same time limit.[292]

The Respondent's Brief takes the same form and meets the same requirements as a Petition for Review, except the Respondent's Brief has red front and back covers.[293] If there is more than one Respondent, the cover of the brief must indicate which Respondent is filing that particular brief.[294]

The Respondent's Brief replies to the legal arguments in the Petition for Review. First, it either accepts the Petitioner's statement of the case (see Contents of the Petition for Review) or challenges it as inaccurate or incomplete.[295] The Respondent's statement of the case may, for example, highlight different facts in the record. Or it may provide additional detail or context to the Petitioner's description of the land use decision.

Second, the Respondent's statement of the case accepts or rejects the Petitioner's standing (see "Standing") and LUBA's jurisdiction (see "Requirements Prior to a LUBA Appeal") and sets out its summary of the arguments.

If you are the Petitioner (or intervening on the side of the Petitioner), you must scrutinize the Respondent's Brief carefully to prepare for oral argument or to prepare a reply brief prior to oral argument. Check any information cited to in the record to confirm that it is accurate.

> **NOTE:** Like the Petitioner, the Respondent may rely only on facts in the record.[296] If the Respondent states facts outside the record, file a motion to strike (discussed below).

Confirm that the cited cases contain the legal propositions the Respondent claims they do. Can the cases be distinguished from your case because they involve different fact patterns? Have any of the cases been overturned or limited since they were written? Finally, consider carefully if there are any logical gaps between the conclusions reached by the local government and the facts

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[288] OAR 661-010-0030(6).
[289] OAR 661-010-0030(3), (6).
[290] OAR 661-010-0035(1).
[291] OAR 661-010-0026(6).
[292] OAR 661-010-0035(1).
[293] OAR 661-010-0035(2); OAR **661-010-0035(3)(a).**
[294] OAR 661-010-0035(2).
[295] OAR 661-010-0035(3)(a).
[296] See gen., OAR 661-010-0035(3)(a).

and law cited to support those conclusions.

> **NOTE:** Refer again to the section on legal research to help you challenge the Respondent's arguments. You must be ready to respond to those arguments by the time of oral argument. Focus on your opponent's best arguments and your weakest arguments first when preparing for oral argument. LUBA is likely to ask you questions about these issues and ask the other party about issues that weaken their case.

VI. Intervenor's Brief

If intervening as a Petitioner, the Brief must be written in the same format and filed within the same time limit as for Petition for Review.[297] Likewise, an Intervenor's Brief on the side of the Respondent must comply with the requirements and time limits of the Respondent's Brief.[298]

VII. The Reply Brief

On rare occasions, a petitioner will need to file a Reply Brief after receiving the Respondent's Brief and before oral argument. *A Reply Brief is allowed only to respond to new issues raised by the respondent and is limited to five pages unless permission is granted for a longer brief.*[299] It cannot be filed simply to reiterate or embellish arguments already contained in the Petition for Review, [300] or to raise assignments of error for the first time.[301] The Reply Brief has a grey cover.[302]

You must obtain permission from LUBA before filing a Reply Brief.[303] A "Motion for Permission to File a Reply Brief" (discussed below) must be filed with LUBA along with four copies of the proposed Reply Brief.[304] Copies must also be served on all parties.[305] You must explain in the motion why a reply is necessary; namely, what new issues have been raised and how they will affect the outcome of the case.[306] For example, if the Respondent's Brief asserts that the petitioner failed to exhaust all local administrative remedies, and neither party (in a previous motion) had addressed this, the Petitioner may be allowed to address the matter in a Reply Brief. *A Reply Brief will not be permitted after oral argument*.[307]

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297 OAR 660-010-0050(6)(a).
298 OAR 661-010-0050(6)(b).
299 OAR 661-010-0039.
300 Bohnenkamp v. Clackamas County, 56 Or LUBA 17 (2008); Wissusik v. Yamhill County, 20 Or LUBA 246 (1990).
301 Porter v. Marion County, 56 Or LUBA 635 (2008).
302 OAR 661-010-0039.
303 Id.
304 Id.
305 OAR 661-010-0075(2)(b)(A)
306 Kellogg Lake Friends v. Clackamas County, 17 Or LUBA 277, 279-80 (1988), aff'd 96 Or. App. 536, 773 P.2d 23, *rev. den*. 308 Or. 197 (1989) (LUBA requires that petitioners demonstrate a need for reply brief).
307 East McAndrews Neighborhood Assoc. v. City of Medford, 19 Or LUBA 604, aff'd 104 Or. App. 280, 800 P.2d

NOTE: The chance of having the motion approved may be enhanced if you offer to file it quickly (for example, within 7 days). A Reply Brief may not exceed five pages, exclusive of appendices, unless the Board gives permission for a longer Reply Brief.[308] A request for an overlength reply brief should be made, if applicable, when the "Motion for Permission to File a Reply Brief" is made.

NOTE: Remember to send copies of each motion to all parties and attach a certificate of service (see Certificates of Service and Filing).[309]

VIII. Oral Argument

Only parties who submitted briefs are given the opportunity to present their cases orally before LUBA.[310] Generally, oral argument is held in the hearing room at LUBA's Salem office at a date and time set by LUBA (usually two or three weeks after the Respondent's Brief is due).[311] If you live a great distance from Salem (e.g., Pendleton, Klamath Falls, or Ontario), LUBA may arrange for oral argument by conference call.[312] Ask LUBA's paralegals about this possibility.

You may waive your right to oral argument,[313] but 1000 Friends strongly discourages this. Oral argument serves two important functions. First, it allows the Petitioner to respond to arguments raised in the Respondent's Brief.[314] Second, it provides LUBA with an opportunity to ask questions of both sides.[315] Both parties may stipulate to waive oral argument,[316] but you should object if your opponent suggests this.

Remember that unlike local land use hearings, you are appearing before LUBA to argue the *law that applies to the facts of your case, not the facts themselves.* The facts of the case were established at the local proceeding. You will bring them up to give background, to emphasize important aspects of your case, and to distinguish the facts in your case from those in the cases raised by your opponent. (See the chapter on legal research.) But you cannot dispute the accuracy of any facts except in the rare case of a "special evidentiary hearing" (discussed below).

The best way to prepare for oral argument is to study your brief and your opponent's. You must also know the contents of relevant parts of the record as thoroughly as possible.

Unless LUBA says otherwise, each side is allowed up to 30 minutes for argument.[317] The

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308 (1990), rev. den. 311 Or 150, 806 P.2d 128 (1991).
308 Id.
309 OAR 661-010-0075(2)(b)(A), (C).
310 OAR 661-010-0040(1).
311 OAR 661-010-0040(3); http://www.oregon.gov/LUBA/Pages/FAQ.aspx.
312 OAR 661-010-0040(6).
313 OAR 661-010-0040(2).
314 See gen., http://www.oregon.gov/LUBA/Pages/FAQ.aspx.
315 Id.
316 OAR 661-010-0040(2).
317 OAR 661-010-0040(3)(a),(b).

Petitioner will speak first.[318] (If there is more than one Petitioner, the time will be split among all of the Petitioners for oral argument. The same is true with Respondents.)[319] Outline your most important points for emphasis. Remember that LUBA has read your Petition, so it is not necessary to repeat all of its contents. The Petitioner may also reserve some of their 30 minutes for rebuttal after the Respondents present their side. It is common for Petitioners to reserve 10 minutes for rebuttal.[320] If you wish to do this tell LUBA how much time you wish to reserve at the beginning of your argument.

In general, at oral argument you should:

- Briefly highlight what the case is about (or point to any *important* aspects of the case your opponent is ignoring);
- Present your most persuasive arguments; and
- Respond to your opponent's arguments.

For the Petitioner, the third point can be the most critical since this may be the only opportunity to respond to the arguments raised in the opponent's brief.[321]

Expect LUBA to ask questions. The questions are intended to improve LUBA's understanding of the case and are not intended to intimidate or harass. *Be aware that LUBA's questions LUBA might consume a large portion of your argument time.* Begin with your strongest arguments, including responding as necessary to the arguments your opponents raised in their brief, to be sure they are heard before your time is up. Then, if you finish early, you may want to repeat your strongest points as a conclusion, but don't talk simply to fill the time. If you feel your points have been made and you have rebutted the Respondents arguments, tell LUBA you have completed your argument and ask them if they have any further questions.

Also, do not read from a prepared text when presenting your oral argument. Speak calmly but with conviction. (It's natural to be nervous.) Always remain polite. Address the LUBA board members as Mr./Ms.___. LUBA places a placard with the board members name on it in front of each board member. Address your opponent as "Respondent," "Petitioner," or Mr./Mrs./Miss/Ms. ____. Above all, try not to worry. LUBA is not there to embarrass you.

IX. Final Opinion and Order

Usually about two weeks after all sides have submitted their briefs and argued their cases, LUBA will issue its decision (called "Final Opinion and Order"). LUBA will mail a copy to each party. LUBA is required to issue a final opinion and order 77 days after it receives the record.[322] LUBA commonly asks the parties at oral argument if it is OK to extend the final order deadline, usually

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[318] OAR 661-010-0040(3)(a).
[319] Id.
[320] See gen., OAR 661-010-0040(3)(a).
[321] OAR 661-010-0040(3).
[322] ORS 197.830(14).

by a week. Parties customarily agree to allow LUBA the extra time to complete the case.

X. Miscellaneous Provisions

Motions

A "motion" is a written request for an "order" (resolution of an issue) from LUBA. Typical motions include:

- **Motion to Dismiss:** This is a request to throw out the appeal, usually on the ground that the Petitioner does not have standing or LUBA lacks jurisdiction to hear the case (see Part I, Section I).
- **Motion to Strike:** This is a request to remove a portion of a brief, usually on the ground that the portion relies on evidence not in the record.
- **Motion to Intervene** (see Section II).[323]
- **Motion to File a Reply Brief** (see Section VII).[324]
- **Motion for Evidentiary Hearing** (discussed below).[325]

A sample Motion to Intervene is provided in Appendix C. Motions must be filed with LUBA and served on all parties, and proof of service (see Certificates of Filing and Service) must be filed with LUBA.[326] Where the motion challenges a party's failure to satisfy any statutory requirements or LUBA's rules (for example, the requirement in Oregon Administrative Rule 660-10-030(1) to file the Petition for Review within 21 days after the record is complete), then the motion must be filed *within 10 days* of when the party filing the motion learns of the violation.[327]

The motion should be on white, unglazed paper, with the case caption set out at the top of the first page. Motions should be accompanied by a short memorandum stating the reasons, and citing the case law and/or statutes, why the motion should be granted (see Arguments and Legal Research). The other side may file an opposing memorandum within 14 days.[328] Ultimately, LUBA will issue an "order" resolving the motion one way or the other.[329]

> **NOTE:** If a motion is filed against you, you have 14 days to respond.[330] While parties are not required to respond to motions, 1000 Friends strongly recommends that you do so.

Extensions of Time for Filing Documents

A party may, by filing a motion with LUBA, request a motion to extend the time limit for filing

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[323] OAR 661-010-0050(2).
[324] OAR 661-010-0039.
[325] OAR 661-010-0045.
[326] OAR 661-010-0065(1).
[327] OAR 661-010-0065(2).
[328] Id.
[329] See e.g., Citizens for Florence v. City of Florence, 33 OR LUBA 255, 258-260 (1998).
[330] OAR 661-010-0065(2).

documents *other than the Notice of Intent to Appeal and the Petition for Review.*[331] The motion must state reasons for granting the extension and must be filed with LUBA before the date the document would have been due.[332]

On rare occasions, it may be possible to obtain an extension of time for filing the Petition for Review.[333] The motion requesting the extension must be accompanied by a written "stipulation" (agreement) signed by each party to the appeal.[334] Such stipulations are rarely obtained.

Special Evidentiary Hearings

In very special circumstances, LUBA will hold special evidentiary hearings to resolve *factual* disputes, such as whether particular evidence was actually placed before the decision maker in the local government proceeding.[335] Special evidentiary hearings are also used when a party's standing has been challenged on factual grounds or issues concerning the constitutionality of the decision are raised.[336] Filing a motion for an evidentiary hearing suspends all other time limits in the appeal.[337]

> **NOTE:** Most attacks on "standing" do not challenge the facts; rather, they claim that the facts, *even if true*, do not give the Petitioner standing. Such challenges *are not grounds* for an evidentiary hearing. Hearings are appropriate only when the truth of the facts is at issue. If this occurs, we recommend you call an attorney or 1000 Friends for advice.

LUBA also holds special evidentiary hearings when it appears that such a hearing is necessary to reveal procedural irregularities not shown in the record and which, if proven, would warrant reversal or remand of the decision.[338] "Procedural irregularities" usually refer to evidence of (1) illegal *ex parte* contacts (private communications) between a party and the decision maker at the local level (presumably influencing the decision maker and preventing a fair hearing); and (2) conflicts of interest or bias by a local decision maker.[339]

It is extremely rare that a challenge will succeed based on claims of ex parte contacts, bias, or conflict of interest. If you intend to challenge a decision on such grounds, you should consult a lawyer or 1000 Friends.

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[331] OAR 661-010-0067(1)-(3).
[332] OAR 661-010-0067(4).
[333] OAR 661-010-0067(2).
[334] Id.
[335] OAR 661-010-0045(1); Dickas v. City of Beaverton, 17 Or LUBA 1076 (1989).
[336] Id.; Johnson v. Jefferson County, 56 Or LUBA 72 (2008); See also, Berg v. Linn County, 21 Or LUBA 622 (1991) (Under OAR 661-10-045(1), allegations of unconstitutionality only provide grounds for an evidentiary hearing if the facts presented are not in the local record).
[337] OAR 661-010-0045(9).
[338] OAR 661-010-0045(1); see e.g., Halvorson Mason Corp. v. City of Depoe Bay, 39 Or LUBA 702 (2001). (LUBA will accept evidence not included in the record where that evidence is necessary to support a claim of bias in a "clear and unmistakable manner" so as to warrant reversal or remand of the local government's decision pursuant to ORS 197.835(9)(a)(B)).
[339] Id.; Space Age Fuels Inc. v. City of Sherwood, 40 Or LUBA 577 (2001).

Stays

In some instances, a successful applicant may begin development pursuant to the local land use decision that you are appealing to LUBA. Under these circumstances, LUBA has the authority to "stay" the activity (stop the activity until the resolution of the appeal) if the Petitioner demonstrates:

> (1) A colorable claim of error in the land use decision under review; and
> (2) That the Petitioner would suffer irreparable injury if the stay is not granted.[340]

To establish a "colorable claim of error," the Petitioner must allege error which, if sustained, would be sufficient to reverse or remand the local land use decision.[341] For example, the Petitioner might honestly assert that the local government's decision is based on inadequate findings. Since the decision would be remanded if the assertion were true (and as long as the claim is not devoid of legal merit[342]) the Petitioner has established a "colorable claim of error."

To establish "irreparable injury" the Petitioner must meet the following requirements:

- the injury must be adequately specified;
- the injury cannot be adequately compensated for by the payment of money;
- the injury must be substantial and unreasonable;
- the conduct sought to be barred must be probable; and,
- the resulting injury must be probable.[343]

For example, if an applicant has obtained a conditional use permit to conduct forestry practices in an exclusive farm use zone, the harvesting may constitute an irreparable injury by disrupting wildlife habitat or the natural drainage of an intermittent stream. These losses are not like lost business profits, for example, which can be replaced with a payment of money (irreparable injury requirement No. 2). The other requirements for irreparable injury also appear to be met, so a stay would be appropriate in this situation.

> **NOTE:** Attach affidavits, preferably from experts, specifically describing the adverse affect of the activities at issue. Your motion arguments must be precise and specific. Your injuries must be definitely stated.[344] Do not allege likely or speculative injuries.

A "stay" will *not* be granted simply to ease fears or apprehensions.[345]

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[340] ORS 197.845(1).
[341] Dames v. City of Medford, 9 Or LUBA 433, 438 (1983), aff'd 69 Or. App. 675, 687 P.2d 1111 (1984).
[342] Save Amazon Coalition v. City of Eugene, 29 Or LUBA 565 (1995); Thurston Hills Neighborhood Assoc. v. City of Springfield, 19 Or LUBA 591 (1990).
[343] City of Oregon City v. Clackamas County, 17 Or LUBA 1032 (1988).
[344] OAR 661-010-0068(1)(c).
[345] McGreer v. Rajneeshpuram, 7 Or LUBA 406 (1983).

NOTE: If LUBA grants the "stay" and the decision being appealed is a quasi-judicial one, you will be required to post a $5,000 "undertaking" or surety bond.[346] The undertaking is in addition to the LUBA appeal filing fee and deposit.[347] If you lose on appeal, LUBA must award to your opponent reasonable attorney's fees and actual damages resulting from the stay.[348] This amount cannot exceed the undertaking.[349]

A motion for a stay requires statements of jurisdiction and standing, as required in a Petition for Review.[350]

[346] ORS 197.845(2); OAR 661-010-0068(4).
[347] ORS 197.845(2).
[348] ORS 197.845(3).
[349] Id.
[350] OAR 661-010-0068(1).

Part Three

HOW TO DO LEGAL RESEARCH

I. Introduction—The Role of Legal Research

Legal research for a successful LUBA appeal is different from and more extensive than the research required for local land use proceedings. To a greater extent than in local proceedings, the courts and the law stated in past LUBA decisions play a vital role in a LUBA appeal. Also, as part of its job reviewing local land use decisions, LUBA may focus on whether all of the necessary procedures were followed by the local government (procedural issues) in addition to whether the local government understood and applied the law correctly (substantive issues).

Legal research tells you what the law requires in your case and how that law has been applied in similar situations in the past. It also helps you understand the issues that matter most to LUBA and how to present those issues in a thorough and convincing manner.

A LUBA appeal does *not* decide what the facts are in your case; the facts of the case were established in the local proceedings. Rather, LUBA decides if the law, when applied to the facts of your case, upholds the local decision. As explained in this chapter, participants attempt to persuade LUBA to decide in their favor by making legal "arguments" and supporting those arguments with legal "authorities." Facts are used in legal arguments only to explain the situation or context of the case and to compare or contrast the case with prior cases dealing with the same or similar issues.

> **NOTE**: Remember that only the facts that are contained in the record of the local proceeding may be used to support your legal arguments before LUBA. Except for the rare case of an evidentiary hearing (*see* Chapter II, Sec. X), LUBA does not settle disagreements about the facts of the case (*e.g.*, whether a given parcel is 49 acres or 51 acres, or whether the applicant submitted documentation before or after a certain date).

A legal *argument* is a statement or explanation why, under the facts of your case, the law requires an outcome in your favor. An argument may take anywhere from a few paragraphs to many pages to explain fully. Legal *authorities* include "codified law" (the local ordinances and statewide statutes and rules that govern Oregon's land use system) and "case law" (the written opinions of LUBA and the appellate courts interpreting the codified law in individual cases).

II. Steps to Researching an Issue

Determine Which Law(s) Apply

Getting Started

The first step in arguing to challenge or uphold a land use decision is to ascertain which law or laws govern the decision. Often, the easiest place to start is with the decision itself or the staff reports or findings prepared for the decision. These documents often list some or all of the

applicable criteria (*e.g.*, a comprehensive plan or zoning ordinance provision) and explain how they were applied to the case. Additional documents describing the applicable law may be available through the planning office or in the record of the local proceeding.

> **NOTE**: As explained below, in Section IV, the governing law for different types of decisions comes from different sources. For example, a building permit application will normally be governed by a local ordinance. On the other hand, a decision approving or denying a farm dwelling will be governed, at least in part, directly by ORS Chapter 215 and OAR Chapter 660, Div. 33. Moreover, a zone change will be governed by the local comprehensive plan, and an amendment to a local comprehensive plan will be governed by the Statewide Planning Goals and statutes.

> **NOTE**: There is no single best way to research a given issue. Unfortunately, trial and error will usually be part of your method. It is important not to become discouraged; with a little practice, research quickly becomes easier.

An alternative approach is to study the various land use laws generally and then narrow your focus to the specific state and local provisions governing your issue. The advantage of this "top-down" approach is a better-rounded understanding of the land use program, which may be very useful when building your arguments. The disadvantage is potential confusion faced by beginners and experienced researchers alike, resulting from Oregon's broad and comprehensive land use laws.

An excellent place to start with this approach is the Oregon State Bar Continuing Legal Education Handbook on Land Use, in addition to the handbooks on Oregon land use law published by the Oregon Law Institute. The "Headnotes" on LUBA's homepage, covered in Section V, below, are also an excellent place to start.[351] These resources are available through the sponsoring organizations or in some law libraries. They provide thorough introductions to many specific areas of land use law.

Being Thorough

Once you have identified the main body of law controlling the decision, confirm that the local government has not overlooked any of the other laws discussed in Section IV of this chapter that may apply in your particular case. Review carefully all cross-references to other sections of the same law or other laws. For example, a typical cross-reference in an applicable zoning code might read: "Except as provided in § 21(a) [. . .]" You must then look up § 21(a), where you might discover that other provisions control because, for example, a planned unit development rather than a conventional subdivision is proposed.

You should also review the table of contents of the ordinance or statute to ascertain if other provisions might apply. *Be sure to check any section that seems like it could apply to your case.*

[351] Headnotes are brief synopses of the law. LUBA produces its own headnotes for each case it decides as a legal research aid and provides them on its webpage categorized in a Table of Contents style presentation.

Also be sure to check interpretive guides (especially the "Definitions" section of an ordinance or statute), which may help you determine if a law applies to your case.

In some cases an applicable law might be unclear and it becomes necessary to consider the legislative history to discern the law's intent. If a local decision-maker interprets a law to mean something other than its intended meaning, a Petitioner can challenge this interpretation by looking at the legislative history of the law. Be sure to first look at any interpretive guides included in the ordinance or statute that may clarify ambiguous language. *If the legislative history reveals that the local decision-maker misinterpreted a law's intended meaning, then the relevant history should be included in the record if possible, and be addressed in the Petition for Review.*

Statewide statutes and administrative rules may directly govern some or all of your case or apply in conjunction with local laws. You must identify the general type of decision involved (*e.g.*, a conditional use permit for a golf course in an EFU zone), and check Oregon Revised Statutes (ORS) Chapters 197, 215, and 227 and Oregon Administrative Rules (OAR) Chapters 660 and 661 for laws applying to your case. The applicable ORS (under "State Statutes") and OAR (under "Administrative Rules") chapters can be found on DLCD's website.

Be aware that provisions of different laws might conflict with each other. For example, a development allowed by a local ordinance might be prohibited by the local comprehensive plan. In such cases (known as "Baker conflicts"), the comprehensive plan, and not the ordinance implementing that plan, controls.[352] Likewise, in all but the most extraordinary circumstances, a city or county cannot amend its comprehensive plan based on the authority of a zoning ordinance; rather, the plan amendment will be governed by the statewide planning goals or statutes. Case law will further help you decide how to resolve conflicts between applicable laws.

> **NOTE**: Remember that language in a comprehensive plan might appear to require something when it really describes only what the city or county hopes will happen. Such "aspirational" language (*e.g.*, "conflict between agricultural and non-agricultural uses should be avoided . . .") probably won't be binding on the local government in a given case since it is too vague.

Determine How the Law Applies to Your Case

Closely related to determining what law applies to your case is determining *how* that law applies. This determination is made through research of cases decided by LUBA and the appellate courts on the same or related issues. How to find cases relevant to your issue is detailed in Section IV, below.

Remember that your task is to explain why the law requires, or at least strongly favors, an outcome in your favor. Hopefully, you will find a case dealing with the same legal issue (*i.e.*, application of the same statutes, rules, or ordinances) and similar facts where LUBA or the

[352] Baker v. City of Milwaukie, 271 Or 500, 533 P.2d 772 (1975); Fasano v. Washington County Commission, 264 Or 574, 507 P.2d 23 (1973).

appellate courts decided the issue in your favor. Then you simply have to state: (1) the issue presented in your case; (2) how that issue was decided in the earlier case; (3) how the facts from the cases are similar; and (4) the conclusion that LUBA should reach as a result. Further discussion of an effective legal argument is provided in Section III, under the "Formulating Arguments" subheading.

More often, however, you will find cases that deal with issues only analogous to the ones in your case or deal with your issues under different factual situations. Your argument will then have to describe how the law applies in closely related situations and why it should apply favorably in your case. For example, if several cases uphold the denial of a certain type of permit, then you need to explain why the permit in your case is comparable, and therefore should also be denied (or why it is different, and therefore should be approved).

Think carefully about the facts involved in the cases and how they relate to your case. You might be able to argue that the facts of your case justify a different outcome. Remember to focus only on *relevant* facts. If the local government relied on engineering studies to justify approval of a development proposal, then neighbors' testimony against increased property taxes are probably *not* relevant to support an argument in favor of a denial. Rather, you must focus on the adequacy of the studies, whether they were misinterpreted, or some other aspect of the decision-maker's reliance on the studies that undermines the approval.

You should strive to build your case based upon the application of facts to the law, using the decisions in previous LUBA cases to bolster your argument. At times, there simply might not be any cases dealing with the issue presented by your case. You should then explain why, in addition to the law being on your side, it would be good public policy to decide in your favor. An outcome in your favor might, for instance, send a signal to local governments that they must consider potential water shortages more carefully when they plan rural subdivisions. Or an outcome in your favor might represent a victory for greater public involvement. It is important to be creative while bearing in mind the objectives of Oregon's land use program when making policy arguments.

III. Developing Arguments

Organizing Assignments of Error

Arguments in appeals to LUBA are organized according to "assignments of error." As explained in Part II, Section IV of this Guide, an assignment of error states how the decision-maker made an unlawful decision, by describing the decision and referring to the legal arguments governing the decision. Review the assignments of error in the Sample Petition for Review in Appendix F and consider the first example, which begins by noting the county's legal obligations under OAR 660-004-0020(2)(a) to provide justification for exceptions to statewide planning policies. The first assignment of error states that "the County's market analysis fails to provide reasons that justify why state policy embodied in Goal 3 should not apply to the subject property." An assignment of error begins with statements like this because it addresses the legal requirements (justification of exceptions to state policy), which LUBA has authority to review under ORS

197.835.

The example continues: "OAR 660-004-0022(2) provides at the outset that the reasons necessary to justify an exception for rural residential development must not be based on "market demand for housing, assumed continuation of past urban and rural population distributions, or housing types and cost characteristics." This statement further incorporates applicable legal criteria while identifying the decision and the criteria's applicability to the decision.

Refer to Part I of this Guide for a summary of LUBA's authority in reviewing land use decisions. Refer to Appendix F for additional examples of assignments of error presented in a Petition for Review.

> **NOTE**: Remember that since LUBA has authority to reverse or remand a decision when the local government "[i]mproperly construed the applicable law,"[353] parties may also raise violations of any applicable local or statewide law in their assignments of error, and not just the ones listed in ORS 197.835. Every decision will therefore have its own set of relevant legal criteria for which LUBA may take action.

To formulate assignments of error, first dissect the land use decision into its components. A decision might, for example, include a comprehensive plan amendment, a zone change, and a development permit. Separate assignments of error should address each component of the decision.

Next, organize the applicable legal criteria and state how it was or was not applied to each component of the decision. Using the example from the preceding paragraph, lack of "substantial evidence in the record as a whole" and inadequate findings supporting the comprehensive plan amendment should probably be listed together in an assignment of error, but inadequate findings in support of the plan amendment and inadequate evidence supporting the development permit application should be addressed in separate assignments of error (because the comprehensive plan amendment and the development permit application are separate components of the decision). Observe in the Sample Petition for Review how a series of arguments is broken down into separate assignments of error. Each assignment of error is further broken down into sub-arguments (*i.e.*, "subassignments of error") that address each specific requirement that the County is alleged to have failed to have addressed.

Formulating Arguments

Points raised in each assignment of error are then discussed in detail in the arguments presented under the assignment. If the same arguments and discussion apply to several assignments of error, present a single argument beneath the related assignments, which are simply listed one after the other before the combined argument.[354] For example, a local government decision might have three components (*e.g.*, a conditional use permit, a zone amendment, and a variance), each of which is unsupported by substantial evidence in the record as a whole. In that

[353] ORS 197.835(9)(a)(D).
[354] OAR 661-010-0030(4)(d).

hypothetical scenario, each of the three components of the decision would first be listed individually, one after the other, and then challenged collectively in one combined argument on the basis that the local government lacked the evidence required to support each part of its decision.

It is often best to present your argument (discussion) under each assignment according to the following formula: (1) what was required, (2) what was decided, and (3) why the decision did or did not satisfy what was required. The elements of your argument don't necessarily have to be presented in this order, but doing so helps make your argument concise, easier for LUBA to follow and, thus, more likely to succeed. The following is a shorthand example of an argument based on the authority of the local comprehensive plan:

> The city erred in granting a permit for the hazardous waste incinerator in the R-2 Residential zone, because Policy 6-A of the Comprehensive Plan states: "No use which threatens public health or safety shall be authorized in any residential zone." There is no dispute that hazardous waste incinerators are authorized in the R-2 zone by the zoning ordinance. However, land use regulations are subordinate to the comprehensive plan; therefore, to the extent that the land use regulations authorize more intensive uses than are permitted in the plan, they are invalid. Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975).

A similar formula for presenting legal arguments in a clear and concise manner is to use the "IRAC" methodology. IRAC stands for Issue, Rule, Analysis, and Conclusion. First, begin by stating the *issue* or legal question at hand, making sure to address exactly what the question of law is before including any application of rules or legal analysis. Second, introduce the *rule(s)* that applies to the issue stated. Rather than stating all the applicable laws verbatim, you should summarize them and condense them into a clear rule. Third, make a legal *analysis* of how the rule applies or does not apply to the specific set of facts in your case. Finally, make a *conclusion* that directly answers your stated issue, while making sure not to introduce any new facts or analysis.

The number of arguments that may be possible in a given case depends on how many separate issues were decided by the local government and the different legal criteria which were applied and might have been violated. To help yourself come up with arguments, consider any place where there are logical gaps between the information cited and the conclusions reached by the decision maker. Remember that if vital information is missing, that omission itself or other flaws, which are implicated by the omission, might form the basis of an argument.

You will also need to consider the arguments which are or will be offered by your opponent. There is no more effective way to strengthen your arguments than by playing "devil's advocate" with yourself or with someone reviewing your brief. Try as hard as you can to argue your opponent's side, and then fill in any holes in your argument revealed in the process. Try to anticipate challenges to your argument and address them ahead of time.

Finally, there is no formula for what constitutes the most persuasive style of argument. Above all, try to proof read your brief from the standpoint of the person reading it. Remember that

LUBA sees a very large number of briefs each year, so "brief" as briefly as possible (under OAR 661-010-0030(2)(b) and as noted above in Part II, Section IV, briefs must not exceed 50-pages, but shorter briefs are preferred where practical).

> **NOTE**: Copies of briefs submitted in prior LUBA cases can be obtained through LUBA's office. These briefs might give you a head start on your legal research and help you formulate your arguments, in addition to helping you assess your own writing style.

IV. Sources of Legal Authority

There are several sources of codified law and case law that may be needed in your legal research. These sources may be accessed through a law library, your local courthouse, or one of the law school libraries (*see* Part III, Section V, below). Local planning departments, general libraries, or legal aid offices might also be able to provide you with access to legal reference material.

Laws governing land use are written in and available from the following sources:

Codified Laws

- Local zoning ordinances, subdivision controls, and other local land use regulations

  Local land use regulations are contained in city or county ordinances (often called codes, zoning ordinances, etc.). These regulations provide the most specific legal requirements, including restrictions and approval criteria, applicable to a given type of land use decision. They are often published in loose-leaf binders since they are frequently revised.

- Comprehensive plans

  Oregon's cities and counties are required to adopt comprehensive land use plans. Generally, these plans are implemented through local land use regulations, described above, which control each land use decision. But sometimes the local comprehensive plan itself will contain requirements directly applicable to a decision. Also, if the regulation that is supposed to implement a plan provision is inconsistent with that provision, the plan provision controls over the inconsistent regulation (*see* "Baker conflicts," discussed above in Part III, Section II, under the "Being Thorough" subheading).

  Comprehensive plans also contain supporting information, such as inventories and statistical data, which can be directly incorporated into legal arguments supporting or opposing a local government's decision.

- Statewide Planning Goals

  Oregon's Statewide Planning Goals (the Goals) are adopted and periodically revised by

the Land Conservation and Development Commission (LCDC). There are currently nineteen goals. These goals can be found on the Department of Land Conservation and Development (DLCD) website at: https://www.oregon.gov/LCD/Pages/goals.aspx. You may also obtain a paper copy of the goals directly from the DLCD, or you may make copies from libraries of the local planning department.

The goals themselves sometimes apply directly to land use decisions. For example, state law provides that the goals generally apply to local comprehensive plan amendments. The goals also apply if a decision was made pursuant to a plan or ordinance amendment and that amendment has not been "acknowledged" (*i.e.*, approved by the DLCD as being in compliance with the Statewide Planning Goals). The goals might also apply because the local plan or ordinance incorporates a goal in its decision criteria (in other words, because the local plan or ordinance says a goal applies). The goals apply in other circumstances as well.

- Oregon Revised Statutes

  Chapters 197, 215, and 227 of the Oregon Revised Statutes (ORS) encompass most of the state laws on land use. Local plans, regulations, and procedures must comply with the requirements in these statewide laws. The state laws also set forth specific requirements that apply directly to many land use decisions.

  The statewide land use statutes could be revised at least once every two years during general and special legislative sessions. The Oregon Revised Statutes are available in law libraries and many general libraries. Copies of important ORS chapters on land use can be found on the LUBA website at: http://www.oregon.gov/LUBA/Pages/Rules.aspx.

- Oregon Administrative Rules

  Chapters 660 and 661 of the Oregon Administrative Rules (OARs) contain the administrative rules of the DLCD.

  Whereas the ORS set out the law, the OARs contain the rules and regulations that implement, interpret, or prescribe the law or policy. LCDC disseminates specific rules to implement the general laws contained in the ORS and the Statewide Planning Goals. These rules often simply restate the law contained in the statutes and goals. But they also usually provide additional and more detailed legal requirements. The requirements in LCDC's administrative rules may either apply to local regulations or directly to land use decisions. The OARs applying to land use appeals can also be found on the LUBA website at: http://www.oregon.gov/LUBA/Pages/Rules.aspx.

- Constitutions

  The Oregon Constitution and the Constitution of the United States of America govern all actions of government. The constitutional principles of fairness and "due process" in particular are applicable to all land use decisions, but it is very unusual to have a local

decision overturned because it is unconstitutional. The constitutional prohibition against the taking of private property for public purposes without just compensation (takings) may also be, but very rarely is, implicated.

Case Law

Land use decisions are also governed by case law contained in the written opinions of LUBA, the Oregon Court of Appeals, and the Oregon Supreme Court. These opinions interpret the codified law by deciding exactly what the law requires when applied to specific controversies. In some instances, case law establishes new rules not otherwise contained in any statutes or regulations.

Like any appellate tribunal, LUBA attempts to decide each case consistently with its past decisions. For this reason, prior LUBA decisions set the precedent for how future LUBA cases should be decided, and thus past LUBA decisions are "authorities" that can be used to support arguments in a new case before LUBA. In other words, LUBA should decide an issue the same way it has in previous cases unless the factual situation in the current case differs significantly from past one or the statutes or rules have been changed.

> **NOTE**: Your research of prior LUBA and court opinions should focus on (1) the law that was applied in the case and whether that law has been repealed or amended, (2) the circumstances of the case which lead LUBA to decide the way it did, and (3) how the legal and factual circumstances of your case compare to those of the prior cases.

Case law from the Oregon Court of Appeals or the Oregon Supreme Court is "binding authority" on LUBA. In other words, LUBA must adhere to the decisions of these courts when deciding cases. Also an appellate court decision can "overrule" a rule established by older LUBA decisions by resolving an issue differently than the older LUBA decisions have. Likewise, Court of Appeals decisions may be overruled by subsequent decisions of the Oregon Supreme Court, the highest court in the state.

> **NOTE**: Make sure you do not cite to case law that has been overruled by a higher authority. Do do not base your argument on a LUBA decision that is no longer valid.

> **NOTE**: The Oregon Supreme Court can be overruled only by itself or the United States Supreme Court. LUBA and the Court of Appeals may also, on rare occasions, overrule principles they established in their own earlier decisions. However, decisions of the Oregon Supreme Court, the Court of Appeals, and LUBA could be rendered moot if the Oregon State Legislature later passes new statutes dealing directly with issues decided in cases.

V. Locating and Citing the Law

Codified laws and court cases are referred to by uniform citation formats to make legal research

easier. Statutes, administrative rules, and cases are referenced in their proper citation forms in footnotes throughout this Guide. As you will see during your legal research, every time you state what the law is (*i.e.*, what a statute, regulation, or case decision provides), you must cite the authority (the law or case) that contains that legal rule.

Codified Law

Citations to codified law consist of abbreviated references to the set of laws from which the particular law is drawn and a specific section or paragraph reference. An example is "ORS 197.763(2)(a)(A)," which refers to paragraph A of subsection (2)(a) of section 197.763 (the statewide law governing the conduct of local quasi-judicial land use hearing notice requirements and procedures) of Chapter 197 of the Oregon Revised Statutes. Thus, an example of a proposition in a legal argument using this statutory citation may appear as follows:

> Property owners within 100 feet of the proposed development were to have received notice of the hearing. ORS 197.763(2)(a)(A).

LCDC's administrative rules follow a simple citation formula. For example, section 45 of Oregon Administrative Rules Chapter 660, Division 12 (Transportation Planning) is cited as: OAR 660-012-0045.

Citations to local ordinance or regulations often refer to their common names—often abbreviated—rather than their exact technical citations. For example, a citation to section 501.01 of the Yamhill County Zoning Ordinance can be cited as YCZO § 501.01. ("YCZO" is commonly understood to refer to "Yamhill County Zoning Ordinance.") The "§" symbol, "section, or "sec." may be used to identify the section number.

> **NOTE**: An Oregon statute recently passed by the legislature but not yet published in an updated volume of the Oregon Revised Statutes is cited by its "session law" citation. A session law citation might read as follows: "1993 Or Laws Ch. 792, §2(1)(b)." The Sessions Laws are published in two or three volumes following the close of every legislative session and are cited for several months until a new version of the Oregon Revised Statutes is published. They can be found in law libraries and occasionally in general libraries.

Case Law

Case decisions are published in a "reporter" (bound volumes and paperback updates) available in law libraries. Each case has its own citation, which tells you the volume and page number where the case if found.

An example of a LUBA case citation is:

> Von Lubken v. Hood River County, 24 Or LUBA 271 (1992).

"Von Lubken v. Hood River County" (underlined or italicized) is the name of the case, signifying "[the name (or last name if an individual) of the Petitioner or lead Petitioner] versus [the name of the Respondent or lead Respondent]." Following the case name is a comma, and then the location of the written opinion, indicating the following:

"24"	"Or LUBA"	"271"	"(1992)"
Volume	Reporter	first page where case is found	year of opinion

Thus, to find this Von Lubken case, you would look in volume 24 of the LUBA reports ("Or LUBA") at page 271.

Citations to decisions of the Court of Appeals or Supreme Court follow the same format. An example is:

1000 Friends of Oregon v. Jackson County, 79 Or App 93, 718 P.2d 753 (1986).

This case is found in volume 79 of the Oregon Appellate Court Reporter ("Or App"), beginning on page 93. The second citation is to a "parallel" reporting of the case in the Pacific Reporter Second.

> **NOTE**: The Pacific Reporter, published by the West Publishing Company, contains appellate court (Court of Appeals and Supreme Court) decisions from many states. A regional reporter such as the Pacific Reporter enables attorneys from other states, who might not have a set of official Oregon reports, to look up an Oregon case.
>
> The Pacific Reporter is also published much more quickly than the official reporter. Thus, *formal citations to Oregon Court of Appeals or Supreme Court cases should always contain a parallel citation to the Pacific Reporter*. The bound volumes of the Oregon case reporters provide the Pacific Reporter cite at the beginning of each case, and vice versa.

An example of an Oregon Supreme Court citation is:

Anderson v. Peden, 284 Or 313, 587 P.2d 59 (1978).

The official Oregon Supreme Court Reporter (a set of volumes separate from the Court of Appeals reporter) is abbreviated "Or," but the parallel citation is to the same regional reporter ("P.2d") that contains opinions from the Oregon Court of Appeals.

A citation in a brief or in a legal opinion appears as a stand-alone sentence in the text of the brief, following the sentence that states the legal proposition.[355] Just as with a codified law citation, a citation to case law in a brief is given just after a legal proposition, such as in the following example:

[355] Please notice that because this Guide is not a legal brief, legal authorities here have instead been cited in footnotes; nevertheless, you will use stand-alone citation sentences in your brief.

Conversion of rural resource land to one-acre residential use requires compliance with Goal 14. DLCD v. Klamath County, 16 Or LUBA 23 (1987).

A Note on Late-Breaking Case Law

Court opinions written since publication of the latest bound volumes of the Oregon Appellate Court Reporters are compiled in "Advance Sheets," which are temporary paperback supplements to the reporter and written in the same format. The Advance Sheets provide the correct citation to the case as it will appear in the next bound volume.

LUBA opinions written since the last LUBA reporter was published are issued as "Slip Opinions," which are compiled in loose-leaf notebooks or folders and are usually available with the bound volumes in a law library. *It is very important to check late-breaking cases in the Advance Sheets or Slip Opinions to make sure any authorities cited in your brief have not been overruled.*

A table entitled "Appellate Court Decisions on LUBA Cases," printed at the beginning of each LUBA reporter, indicates which of the recent LUBA cases have been appealed to the appellate courts and whether the LUBA holding was upheld or overturned. Check the tables contained in the next couple of volumes after a decision was published to see whether the decision was ever appealed. If you discover that one of your authorities has been overruled, you might have to adjust your argument to reflect the change in the law. More on this point is discussed below.

Additional Notes on Case Citations

"Subsequent History" of a Case

Often you will read citations that indicate the journey a case made through the court system—its so-called "subsequent history." An example is:

> City of Pendleton v. Kerns, 56 Or App 818, 643 P.2d 658, aff'd, 294 Or 126, 653 P.2d 992 (1982).

This citation shows that the case was first appealed to the Court of Appeals ("Or App"), and then to the Supreme Court ("Or"), where the Court of Appeal's ruling was affirmed ("aff'd").

Similarly, an example of a LUBA case that was appealed to the Court of Appeals and then to the Supreme Court is:

> Citizens for Responsible Growth v. City of Seaside, 23 Or LUBA 100, rev'd and remanded, 116 Or App 275, 840 P.2d 1370 (1992), rev den, 315 Or 643, 849 P.2d 524 (1993).

This citation tells you that LUBA's decision was reversed and remanded (overturned and sent back to the local government) by the Court of Appeals, and the Supreme Court denied a petition to review ("rev den") the Court of Appeals decision to reverse and remand LUBA's decision. Note that since LUBA's and the Court of Appeals' decisions were in the same year, the date only needs to be written after the Court of Appeals cite; a different date must be indicated for the Supreme Court's decision since it was not in the same year as the earlier decisions.

Two especially important actions by a reviewing court are signified in citations by reversed ("rev'd") and modified. As described in "A Note on Late-Breaking Case Law" above, if a holding has been reversed or modified on appeal, the holding of the original opinion is no longer legal authority, at least as applied to the facts of that case.

"Pinpoint" and Explanatory Citations

Sometimes a citation refers to the exact page within an opinion where a rule is stated for the convenience of the reader (sometimes known as "pinpoint citation" or a "pin cite"). For example, a writer referring to a specific legal proposition stated on page 316 of the Anderson case cited above would cite the case in its normal format but add an additional page number reference (316) as follows:

> Anderson v. Peden, 284 Or 313, 316, 487 P.2d 59 (1978).

Note that the exact page number of the proposition is cited for the official reporter, but not for the regional reporter.

You can also expect to encounter various explanatory introductions to citations (a.k.a. "signals") during your research, including: see, e.g. (which essentially means "for an example of the legal proposition I'm describing, see the following case . . ."), accord (acc'd) (which means "the following case involved a similar situation or came to a similar legal conclusion . . ."), and compare (cf) (which means "the following case involved a different situation or came to a different conclusion").

Cross References

Finally, Latin reference indicators used frequently in legal writing (including in this Guide) include "infra" (meaning "cited or discussed below (later) in this text") and "supra" (meaning "discussed above (earlier) in this text"). For example, a brief might read:

> "As noted, some cases have used a different legal standard. See Anderson, supra, 284 Or App at 319."

You will note that some writers simply type "id." rather than re-typing an entire citation when they are repeating a citation made just a few sentences earlier. The better alternative is to give a "short form" citation like the Anderson citation at the end of the previous paragraph. Similarly, to direct the reader's attention to a different page of the same case, some writers cite as follows:

"See id. at 321."

Reference Tools to Help You Locate Cases

As you read opinions by LUBA and the courts, you will see citations to other cases, which you should also read. These cases will lead you to still other cases and authorities, and so on. The following tools (some more readily available than others) will make it easier to sort out the cases or find additional cases dealing with a particular issue.

Headnotes

Headnotes for LUBA cases are available on the LUBA website at:

http://www.oregon.gov/LUBA/Pages/Headnote-Index.aspx

Headnotes provide a quick reference to the holdings of LUBA cases. Each holding is organized by topic and each topic is assigned a number (*e.g.*, 36.2; Nonconforming Uses—Definition). Once you find the topic you are searching for, you can browse the LUBA headnotes for holdings related to your case. While headnotes provide a convenient reference, they should not be the full extent of legal research as they are not considered part of the LUBA's opinions and cannot be cited as legal authority. Once you have found headnotes that relate to your argument, you should read the case carefully to see if its holding can be applied to your case.

In addition to the headnotes available on the LUBA website, the LUBA Reporter has a section at the beginning of each volume that provides the headnotes pertaining to the cases of that volume. Find the number of the topic you are researching in the "Headnote Index" and turn to the "Headnote Digest" section in the reporter, and locate any headnotes under that number. Each headnote cites the case in that volume that discusses the topic. Turn back to the Index of Opinions (or Index of Orders) to find the page number for the case.

Unfortunately, headnotes are not available for the Slip Opinions published prior to new volumes of LUBA opinions. You must skim the Slip Opinions themselves to find the most recent discussions of your issues.

Where to Find Legal Resources

The LUBA website (http://www.oregon.gov/LUBA/Pages/index.aspx) posts the Oregon Administrative Rules and the Oregon Revised Statutes that pertain to land use appeals (available through the "Rules & Statutes" link). Additionally, the website posts the headnotes of cases that have come before LUBA (available through the "Headnotes" link). However, these headnotes should serve merely as a guide to help you find cases related to your argument. LUBA cases can be found in the Oregon LUBA Reports, available through a legal search engine such as Westlaw and LexisNexis or in printed volumes. If you do not have access to an online legal search engine, it might be best to find case law in a law library. There are several public law libraries and law school libraries accessible throughout the State of Oregon. They are listed at http://www.oregoncountylawlibraries.org.

APPENDIX A

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JANE SMITH,	)	
	)	
Petitioner,	)	
	)	LUBA No. _____
vs.	)	
	)	
WILLAMETTE COUNTY,	)	
	)	
Respondent.	)	

NOTICE OF INTENT TO APPEAL

I.

Notice is hereby given that petitioner intends to appeal that land use decision or limited land use decision of respondent entitled [INDICATE TITLE OF LAND USE DECISION OR LIMITED LAND USE DECISION], which became final on [INDICATE DATE] and which involves [SET FORTH A BRIEF STATEMENT OF THE NATURE OF THE DECISION].

II.

Petitioner, Jane Smith, is represented by: [INDICATE NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY OR PETITIONER(S) IF UNREPRESENTED BY AN ATTORNEY].

Respondent, Willamette County, has as its mailing address and telephone number: [INDICATE MAILING ADDRESS AND TELEPHONE NUMBER] and has, as its legal counsel: [INDICATE NAME, ADDRESS AND TELEPHONE NUMBER].

III.

Applicant, John Developer, was represented in the proceeding below by: [INDICATE NAME, ADDRESS AND TELEPHONE NUMBER OF ATTORNEY].

IV.

Other persons mailed written notice of the land use decision or limited land use decision

by Willamette County, as indicated by its records in this matter, include: [INDICATE NAMES, ADDRESSES AND TELEPHONE NUMBERS OF ALL PERSONS WHOM THE GOVERNING BODY'S RECORDS INDICATE WERE MAILED WRITTEN NOTICE OF THE LAND USE DECISION OR LIMITED LAND USE DECISION. THE TELEPHONE NUMBERS OF SUCH PERSONS MAY BE OMITTED].

NOTICE:

Anyone designated in paragraph III of this Notice who desires to participate as a party in this case before the Land Use Board of Appeals must file with the Board a Motion to Intervene in this proceeding as required by OAR 661-010-0050.

Dated this _____ day of _____, _____
Day Month Year

_____
Petitioner (each petitioner must sign)

or

_____
Attorney for Petitioner(s)

(Editor's Note: Be sure and include Certificates of Filing and Service along with your NITA -- see Appendix B.)

CERTIFICATE OF SERVICE

I hereby certify that on [INDICATE DATE], I served a true and correct copy of this **Notice of Intent to Appeal** on all persons listed in paragraphs II and III of this Notice pursuant to OAR 661-10-015(2) by (a) first class mail or (b) personal delivery. [INDICATE WHICH]

Dated this _____ day of _____, _____
Day Month Year

_____
Petitioner (each petitioner must sign)

or

_____
Attorney for Petitioner(s)

APPENDIX B

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on (Month Day, Year), I filed the original of this **Petition for Review**, together with four (4) copies with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283, by first class mail.

I also certify that on (Month Day, Year), I served a true and correct copy of this Petition for Review, by first class mail, on the persons listed below.

John Q. Attorney
Willamette County Courthouse, Room 100
123 Valley Street
Urbania, Oregon 97123
Willamette County Counsel

Jane C. Lawyer
Jacoby & Smith
National Bank Office Tower, Ste. 1200
500 S.W. Ninth Avenue
Portland, Oregon 97223
Counsel for Intervenors

DATED: (Month Day, Year)

Oliver Wendell Holmes

APPENDIX C

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JANE SMITH,	)	
	)	
Petitioner,	)	
	)	LUBA No. _____
vs.	)	
	)	
WILLAMETTE COUNTY,	)	
	)	
Respondent.	)	

MOTION TO INTERVENE

I.

John Davis moves to intervene on the side of (a) Petitioner or (b) Respondent [INDICATE WHICH] in the above-captioned appeal. Mr. Davis's (or his attorney's) address and phone number are as follows: [INDICATE ADDRESS AND PHONE NUMBER].

II.

The facts establishing movant's right to intervene are as follows: [SET FORTH STATEMENT OF FACTS].

III. [OPTIONAL]

In support of this motion, John Davis relies on the attached affidavit, Memorandum of Law or both.

Dated this _____ day of _____, _____
Day Month Year

_____
Petitioner (each petitioner must sign)

or

_____
Attorney for Petitioner(s)

[Editor's Note: Add Certificates of Filing and Service -- see Appendix B.]

CERTIFICATE OF FILING

[For Document Other Than
Notice of Intent to Appeal]

I hereby certify that on [INDICATE DATE], I filed the original of this [IDENTIFY DOCUMENT], together with [INDICATE NUMBER OF COPIES] copies, with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283, by (a) first class mail or (b) personal delivery [INDICATE WHICH]

I also certify that on [INDICATE DATE], I served a true and correct copy of this [IDENTIFY DOCUMENT] by (a) first class mail or (b) personal delivery [INDICATE WHICH] on the following persons: [LIST NAME AND ADDRESS OF EACH PARTY OR THE PARTY'S ATTORNEY].

Dated: _____

_____
Signature

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JANE SMITH,	)	
	)	
Petitioner,	)	
	)	LUBA No. _____
vs.	)	
	)	
WILLAMETTE COUNTY,	)	
	)	
Respondent.	)	

OBJECTION TO THE RECORD

I.

Pursuant to OAR 661-010-0026(2), the petitioner objects to the record filed in the above-captioned appeal as follows:

A. The record does not include all the materials on which the respondent based the decision appealed in this matter. Specifically, the record does not include: [SET FORTH OMITTED ITEM(S)] that was (or were) submitted to and accepted by the respondent for inclusion in the record in the proceedings leading to the challenged decision.

B. The record contains material that was not included as part of the record during the proceedings before the governing body. Specifically, the following document(s) was (or were) not submitted to or accepted by the respondent in the proceedings leading to the challenged decision: [SPECIFY DOCUMENTS]

II.

Pursuant to OAR 661-010-0026(1), counsel for the petitioner attempted to resolve the matter with counsel for the respondent.

_____ _____
Date Jane Smith, Petitioner
or

_____
Tom Dum, Attorney for Petitioner

[Editor's Note: Add Certificates of Filing and Service -- See appendix B.]

APPENDIX E

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JANE SMITH,	)	
	)	
Petitioner,	)	
	)	LUBA No. _____
vs.	)	
	)	
WILLAMETTE COUNTY,	)	
	)	
Respondent.	)	

_____

COST BILL

_____

Pursuant to OAR 661-010-0075(1), the petitioners in the above captioned case respectfully request the reimbursement of the filing fee ($50) and the deposit for costs ($150). Checks should be made payable to Jane Smith.

Respectfully submitted this _____ day of _____, 200__

_____
Keith A. Bartholomew, OSB 87377
300 Willamette Building
534 SW Third Avenue
Portland, Oregon 97204
503/497-1000
Of attorneys for the petitioners

[Editor's Note: Add Certificates of Filing and Service -- See appendix B.]

APPENDIX F – Sample Petition for Review

BEFORE THE LAND USE BOARD OF APPEALS

FOR THE STATE OF OREGON

JANE SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	**LUBA No. _____**
	)	
YAMHILL COUNTY,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
JOHN DAVIS,	)	
	)	
Intervener-Respondent.	)	
	)	

PETITION FOR REVIEW

Jane Smith,
1234 SE Easy St.
Portland, OR 97214
Phone: (503) 555-1234

Petitioner

John Q. Attorney, OSB #_____
Assist. Yamhill County Counsel
Courthouse
321 N.E. Yamhill St.
McMinnville, OR 97128
Phone: (503) 555-5678

Attorney for Respondent

Jane Q. Lawyer, OSB #_____
Attorney at Law
1234 S.W. Baker Rd.
Sherwood, OR 97140
Phone: (503) 555-9876

Attorney for Intervener–Respondent

APPENDIX F – Sample Petition for Review

TABLE OF CONTENTS

(Omitted)

I. STANDING OF PETITIONER

ORS 197.830(2) contains two requirements for a petitioner to have standing to appeal a land use decision. The petitioner must have:
(a) Filed a notice of intent to appeal as provided in subsection (1) of [ORS 197.830]; and (b) Appeared before the local government [. . .] orally or in writing. Petitioner, Jane Smith, has met both aspects of the standing test established by ORS 197.830(2). A notice of intent to appeal, as provided in ORS 197.830(1), was filed on June 3, 2004. In addition, petitioner appeared before the Yamhill County Board of Commissioners on March 18, 2004. Rec. 24.

II. STATEMENT OF THE CASE

(A) Nature of the Land Use Decision and Relief Sought

Petitioner challenges Yamhill County's adoption of Ordinance No. 737, "In the Matter of Approving a Zone Change from Agriculture/Forestry Large Holding to Agriculture/Forestry Small, a Zone Change from EF-20 Exclusive Farm Use to AF-10 Agriculture Forestry Small Holding and Taking an Exception to Goal 3 for a 38.71 Acre Parcel Located on the north side of Chehalem Drive, Yamhill County, Tax Lots Nos. 3301-100, -101 and -102, applicants Matthew and Renee Powell, Docket PAZ-02-03, and Declaring an Emergency", by which Yamhill County adopted a Comprehensive Plan map amendment, a Comprehensive Plan text amendment, a zone change, and an exception to Statewide Planning Goal 3, which became final on May 13, 2004. This action by the county amended the county's comprehensive plan to redesignate land from Agriculture Forestry Large Holding to Agriculture Forestry Small Holding, changed the zoning designation from EF-20 Exclusive Farm Use to AF-10 Agriculture Forestry Small Holding, and

approved an exception to Goal 3. Rec. 1.

Petitioner requests that the Land Use Board of Appeals (LUBA) reverse or remand the county's decision approving the request for a Comprehensive Plan map amendment, zone change, and exception.

(B) Summary of Arguments

ASSIGNMENT OF ERROR: Reasons exception

1. The County's Market Analysis Fails to Provide Reasons that Justify Why State Policy Embodied in Goal 3 Should Not Apply to the Subject Property.

2. The County's Alternative Sites Analysis Fails to Provide Reasons that Justify Why State Policy Embodied in Goal 3 Should Not Apply to the Subject Property.

3. The County's Findings that the Subject Property is Not Well Suited as Resource Land Fails to Provide Reasons that Justify Why State Policy Embodied in Goal 3 Should Not Apply.

4. The County Cannot Grant an Exception to Goal 3 for a Proposed Use which is Already Permitted under the Goal.

(C) Summary of Material Facts

Intervenor-Respondent John Davis submitted applications for a Comprehensive Plan map amendment, a Zone Change and exception to Statewide Planning Goal 3 (agricultural lands). The applicant proposed to amend the Yamhill County Comprehensive Plan Map designation on three tax lots totaling 38.71 acres from Agriculture/Forestry Large Holding to Agriculture/Forestry Small Holding and amend the Zoning Map designation on the 38.71 acres from EF-20 Exclusive Farm Use to AF-10 Agriculture Forestry Small Holding. The subject property is comprised of three tax lots: Tax Lot 100 is 21.27 acres, Tax Lot 101 is 16.86 acres and Tax Lot 102 is 0.58 acres. Rec. 2.

Tax Lot 100 contains one existing residence. It is owned and occupied by John Doe.

APPENDIX F – Sample Petition for Review

The applicant, John Davis, is the prospective purchaser of the western portion of Tax lot 100, in the event that their application is upheld. Tax Lot 101 is owned by the Chehalem Park and Recreation District, a political subdivision of the state. The small Tax Lot 102, which is surrounded by Tax Lot 101, contains one existing residential structure, is owned by the Chehalem Park and Recreation District, and Mary Jones, the latter owning a life estate in the lot. Rec. 229-230.

Taken as a whole, the property slopes down to the south and is predominantly forested on the steeper slopes of the northeast. The applicant indicates that the flatter pastureland of Tax Lot 101 has been grazed, but the steeper original pasture/orchard area located on Tax Lot 100 has not been farmed at least since the 1970s or otherwise for many years. Rec. 2.

According to the soils maps and text of the Soil Survey and Table 2 in the application, the subject property is predominantly High Value Farmland, pursuant to the definition of the High Value Farmland contained in ORS 215.710, with 60.9% of the soils being listed as high value and 39.1% not listed. Rec. 232.

Tax Lot 100 has 20.27 of its 21.27 acres on farm tax deferral. Tax lot 101 has 16.45 of its 16.86 acres on farm tax deferral. Rec. 3.

The subject property is located about one mile north of the City of Newberg. Rec. 228. The area in which the subject property lies includes variously zoned properties, including AF-10, EF-20, EF-80, and EF-40. Rec. 326. The immediate neighboring properties to the east, south, and west are zoned AF-10, and are predominantly used for rural residential hobby farms. Rec. 228. The properties to the north are zoned EF-20, and are used for commercial tree farms, small and large natural woodlots, rural residential small scale hobby farms, and small pasture areas.

* * *

III. LUBA'S JURISDICTION

LUBA's jurisdiction is governed by ORS 197.825(1), which provides that "[LUBA] shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government[.]" The county is a "local government" as defined in ORS 197.015(13). Therefore, if the county's decision was a "land use decision," LUBA has jurisdiction over this appeal.

ORS 197.015(10) defines "land use decision" to mean "a final decision or determination made by a local government [. . .] that concerns the [. . .] application of (i) the goals[.]" Because the county's decision specifically applies the Goal 2 exception process and considers aspects of Goal 3, this is a land use decision and LUBA has jurisdiction over it.

* * *

IV. ASSIGNMENTS OF ERROR: REASONS EXCEPTION

OAR 660-004-0020(2)(a) states that the county must provide "'[r]easons [that] justify why the state policy embodied in the applicable goals should not apply.' The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations, including the amount of land for the use being planned and why the use requires a location on resource land[.]"

1. The County's Market Analysis Fails to Provide Reasons that Justify Why State Policy Embodied in Goal 3 Should Not Apply to the Subject Property.

OAR 660-004-0022(2) provides at the outset that the reasons necessary to justify an exception for rural residential development must not be based on "market demand for housing, assumed continuation of past urban and rural population distributions, or housing types and cost characteristics." The second sentence of that section further requires that a county must

demonstrate why, based on the economic analysis in the comprehensive plan, "there are reasons for the type and density of housing planned that require [a] particular location on resource lands." *Id.* Nevertheless, OAR 660-004-0022(2) provides an exception for justifications based on market demand for housing, whereby a county "identifies existing or planned rural industrial, commercial, or other economic activity in the area that generates a market demand for rural housing." *DLCD v. Umatilla County*, 39 Or LUBA 715, 729 (2001).

The first sentence of OAR 660-004-0022(2) prohibits a reasons exception for rural residential development based on market demand for housing, assumed continuation of past urban and rural population distributions, and on housing types and cost characteristics. The second sentence of that section describes what a reasons exception for rural residential housing must contain: findings based on the economic analysis in the comprehensive plan demonstrating reasons why the type and density of housing planned require this particular location on resource lands. The third sentence provides an exception to the prohibition, in the first sentence, on justifications based on market demand for housing, where the county identifies existing or planned rural industrial, commercial, or other economic activity in the area that generates a market demand for rural housing. *DLCD v. Umatilla County*, 39 Or LUBA 715, 729 (2001).

The county's findings state that:

> Regarding OAR 660-004-0022(2), the applicants have submitted significant and substantial documentation and information regarding the growth in Yamhill County . . . [.]
>
> The Economic Development section of the County's Comprehensive Plan addresses this fact and states that the attraction of new industries in recent years has helped the local economy significantly, and the County's Overall Economic Development Plan has served as a 'guide to the fulfillment of the county's economic development goals and policies.' [. . .][T]he County's own Exception Land analysis [. . .] demonstrates the impact of this economic growth on rural residential lands by finding in 1996 that at least 78.5% of all rural residential properties were then currently developed. Within the Newberg area, the percentage of developed rural residential properties in 1996 actually increased to

> at least 84%. This increased market demand in the Newberg area is supported by and results from the continued commercial and industrial development within the Newberg urban growth boundary and city limits, as well as from the continued demand for all residential land, including rural residential properties, given Newberg's close proximity to the Portland Metro Area. Rec. 10.

The county continues by stating in its findings that "[a]nother indicator of rural economic development is the increase traffic counts on rural County roads." *Id*. The county found that it "should provide sufficient rural residential lands in appropriate ways and locations under the law for as diverse an income level of its citizens as possible, so that such lands are not only available to the wealthy, or to those citizens who either owned the property for a significant period or inherited it." *Id*. The county concludes its analysis by stating that:

> [B]ased on the evidence in the record, the application complies with the requirements of OAR 660-004-0022(2) because the applicants have demonstrated that the subject property is not resource land; that even though the County has not established a specific percentage threshold for developed land, the existing County AF-10 zoned land within the Study Area has been developed to at least 89.1%; and that there is a need for more AF-10 zoned land within the Study Area to satisfy the market demand for housing and park land generated by existing and planned rural and urban industrial, commercial, and other economic activity in the area. *Id.*

The county's findings under OAR 660-004-0022(2) fail to satisfy the requirements of the second sentence of OAR 660-004-0022(2), stated above, which states that findings must be "based on the economic analysis in the [comprehensive] plan[.]" The county's findings fail to adequately address why the type and density of housing planned (one additional 10-acre parcel on the subject property available for rural residential development) require this particular location on resource land.

The county's findings also fail to satisfy the requirements of the third sentence of OAR 660-004-0022(2), which "provides an exception to the prohibition, in the first sentence, on justifications based on market demand for housing, where the county identifies existing or

planned rural industrial, commercial, or other economic activity in the area that generates a market demand for rural housing." *DLCD v. Umatilla County*, 39 Or LUBA 715, 729 (2001). The county fails to provide any data or other empirical analysis for why the proposed type and density of this action, a 10-acre rural residential parcel, is needed to satisfy the alleged housing demands generated by its generalized statements concerning increased economic activity in the area. The county fails to explain how any of these economic activities generate a market demand for rural residential housing.

The county fails to identify any specific growth of "existing or planned rural industrial, commercial, or other economic activity in the area that generates a market demand for rural housing." *Id.* Instead, the county makes generalized statements about population growth and higher traffic counts. Indeed, the county stated in its findings that the reason for granting an exception to Goal 3 for this particular parcel is that "even though other exception lands are available in other areas of the County, those exception lands are located in areas that would require a significant investment in time and money for the applicants to transport themselves to their established community and their son to the Newberg school system[.]" Rec. 6. While the applicants' desires are understandable, they are not appropriate to grant a reasons exception to Goal 3.

No reason is presented by the county to compel the "amount of land for the use being planned" at the subject property's particular location, much less on resource land. OAR 660-004-0020(2)(a). The county fails to provide this or any other empirical data to substantiate its speculation regarding a market need for the subject property. The county does indicate that this particular sized lot is being asked for because it is a size and in an area that is affordable to the applicants. The county fails to show any evidence for why the applicants cannot find adequate housing elsewhere in the area. Such cost considerations for a specific applicant are simply not

relevant to the analysis needed in this case.

The county also fails to address the rest of the requirements in OAR 660-004-0020(2)(a). The county fails to "set forth the facts and assumptions used as the basis for determining" why a 10-acre rural residential parcel is necessary to satisfy the alleged housing demands generated by increased economic activity in the area. The county provides no data or other factual basis showing the alleged increased housing needs of people in the area, and whether or not these needs are currently being met. Indeed, it is clear from the county's findings that there is no increased demand generated by increased economic activity in the area, but rather a demand by a specific family for an affordable 10-acre rural parcel, that lacks a current house, because they would like to build a new house. This is not an appropriate justification for a reasons exception to Goal 3. If such a justification were found appropriate, there would be no end to the exceptions allowed, and Goal 3 would soon be rendered meaningless.

With respect to OAR 660-004-0020(2)(a), the county also fails to "set forth the facts and assumptions used as the basis for determining" why the use, housing for the applicants, requires a location on resource land, rather than on non-resource land. There is no examination of the current housing market within the Newberg Urban Growth Boundary (UGB), whether there is a housing shortage within Newberg, or outside its UGB. There is no explanation why this resource land in particular is needed to satisfy this alleged need. The county fails to address any of these issues in its findings.

2. The County's Alternative Sites Analysis Fails to Provide Reasons that Justify Why State Policy Embodied in Goal 3 Should Not Apply to the Subject Property.

The county's alternative sites analysis, which is required by ORS 197.732(2)(c)(B), Goal 2, Part II(c)(2), and OAR 660-004-0020(2)(b), fails to demonstrate that "areas that do not require a new exception cannot reasonably accommodate the use." OAR 660-004-0020(2)(b)(B).

The county states in its findings that:

> [T]he applicant has appropriately indicated on a map of the county exception lands in the Newberg Dundee areas, and otherwise described, the location of possible alternative areas considered for the proposed use, which alternative sites are predominantly AF-10 exception lands and adjacent UGB and resource lands which do not require a new exception. The Board also accepts the applicants' Study Area, and finds that the area for which the exception is taken has been adequately identified. Rec. 13.

The county continues by noting that:

> One of the questions listed in OAR 660-004-0020(2)(b)(B) is whether the proposed use could reasonably be accommodated in other areas that do not require an exception. Economic factors can be considered along with other relevant factors. One of the items to be considered is whether a dwelling location could be established on property within the Urban Growth Boundary, on committed resource land or on nonresource property. The applicants submitted general information [. . .] stating that rural residential lands within the UGB were eliminated due to lack of availability and that such lands are significantly less affordable. Rec. 13.

The staff report reviewing the application in this case found that:

> [I]t appears that much of the reason for choosing this parcel is that it will simply be less expensive to develop. While the costs of other lots may be considered, it is not a determinative factor that can be used to eliminate other rural residential lots from consideration. Because of this, the applicant has not adequately explained why there is a need for additional AF-10 zoned property. In addition the applicant has not addressed why undeveloped lots surrounding Newberg would not be able to accommodate the proposed use. Rec. 217.

Indeed, the applicants state in their application that:

> Assuming the necessary partition approval is obtained from the County, the subject property can be purchased and developed more easily and less expensively by the applicants than other nonresource lands that are more expensive to purchase at the outset because of the nonresource location, developed status and existing improvements, if nonresource land were even available, which the above findings state they are not. Rec. 217.

As stated in the county planning bureau's staff report for this application, which recommended denial, "[f]rom this statement, it appears that much of the reason for choosing this parcel is that it will simply be less expensive to develop." Rec. 217. The staff report found, and petitioner concurs, that although the costs of other lots may be considered, it is not a determinative factor that can be used to eliminate other rural residential lots from consideration. Rec. 217.

The rationale the county states for the proposed use, a 10-acre rural residential parcel, is that this is needed for the applicants due to their particular circumstances. But the county fails to explain why these other sites are inadequate to provide that same use, or even why a 10-acre parcel is specifically needed to satisfy the applicants' needs. The county's findings include Table 5, which clearly documents that there are 64 available AF-10 lots within the area examined by the applicants. Rec. 7.

[Editor's Note: Assignments of Error 3 and 4 have been omitted.]

V. CONCLUSION

For all of the above reasons, the county's decision in this matter should be reversed or remanded.

Respectfully submitted this 8th day of July, 2004.

_____
Jane Smith
Petitioner

[Editor's Note: Be sure to attach a copy of the local government's decision as well as the "Certificate of Filing and Service" (see Part II, Sec. III).]

Assignment of error: A specification of alleged errors made by the local decision maker that the petitioner relies on to seek reversal or remand before LUBA. *See Part II, Sec. IV; Part III Sec. III*.

Colorable claim of error: A claim of error that appears to be true, valid, or right. *See Part II, Sec. X.*

Declaratory ruling: A legally binding judgment of the duties, rights obligations and status of the parties. *See Part I, Sec. III.*

Fact pattern: A set or series of facts that lead to a legal conclusion.

Evidentiary hearing: A hearing where evidence as opposed to a hearing where only legal argument is presented. *See Part II, Sec. X.*

Ex parte contacts: Private contact between a party and a decision maker (may be illegal if contact results in undue influence or prevention of fair hearing). *See Part II, Sec, X.*

Injunction (a.k.a. stay): An equitable remedy wherein a party is required to refrain from doing certain acts. If a local land use decision is found to cause an **irreparable injury**, LUBA may grant an injunction that halts development while the appeal is being settled. *(see Part II, Sec, X)*

Intervenor: One who voluntarily enters a LUBA appeal, either on behalf of the Petitioner or Respondent, due to a personal stake in the outcome. *See Introduction, Part II, Sec. II.*

Irreparable injury: An injury that cannot be adequately measured or compensated for with money. If irreparable injury can be shown, an injunction or stay may be granted. *See Part II, Sec. X.*

Ministerial decision: Decisions that do not require the interpretation or exercise of policy or legal judgment. *See Part I, Sec. III.*

Moot (or Mootness) : An issue or controversy that has no practical significance (*i.e.*, an issue or controversy that is not within LUBA's scope of review, or one that LUBA has no power to resolve). *See Part II, Sec. III.*

Periodic review: A process by which a local government makes decisions about updating its local comprehensive plan. *See Part II, Sec. IV*.

Petitioner: The party that seeks to challenge a local land use decision before LUBA. *See Introduction.*

Procedural issues: A procedural issue involves whether or not a required procedure is followed. Procedural issues (such as whether a local decision maker provided adequate opportunity for

public comment) are distinct from **substantive issues** (such as whether a local decision maker property applied the law). *See Part III, Sec. I.*

Quasi-judicial decision: An adjudicative decision made by an executive or administrative official. Local land use decisions, such as permitting type, are considered quasi-judicial as they can be carried out by an administrative body. *See Part I, Sec. IV*.

Raise it or waive it: The requirement that issues challenged before LUBA must have been raised at the local level. *See Part I, Sec. IV*.

Remand: To send a case or claim back to the local decision-maker for clarification or modification based on LUBA's holding. *See Part I, Sec. IV*.

Respondent: The party against whom the appeal is taken. In LUBA appeals, the respondent is generally the local government body whose decision is being appealed. *See Introduction.*

Reversal: The overturning of a local land use decision. *See Part I, Sec. IV*.

Standing: The ability of a party to demonstrate to a court sufficient connection to an issue or decision in order to warrant the party's participation in that case. To have standing before LUBA, petitioners must: (1) submit a Notice of Intent to Appeal by the deadline for appealing, and (2) have "appeared" before the local government. *See Part I, Sec. I*.

Stay: *See* **injunction**.)

Substantive issues: A substantive issue involves the proper application of established law. Substantive issues (such as whether a local decision maker property applied the law) are distinct from **procedural issues** (such as whether a local decision maker provided adequate opportunity for public comment). *See Part III, Sec. I.*