

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will strike portions of the applicant’s response brief that includes arguments that the challenged decision approving a residential care facility should be reversed because the local government lacks authority to require conditional use approval for a residential care facility, and thus the decision is prohibited as a matter of law. Such arguments constitute a cross-assignment of error, which under LUBA’s rules can be advanced only in a cross-petition for review. LUBA will not overlook violation of its rules based on an argument that federal law requires accommodation for residential care facilities, where such federal law does not apply to LUBA or govern its review. *Bergmann v. City of Brookings*, LUBA No 2020-096 (May 7, 2021).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Petitioners’ brief violated OAR 661-010-0030(2)(b) where the brief used hyphens in order to omit spacebar breaks and join words and characters that otherwise would not be joined, and included a lengthy block quotation that appeared to be inserted as an image instead of text resulting in a lesser word count as measured by the word-processing system used to prepare the brief. The violation was not technical where LUBA had denied petitioners’ prior request to file an overlength brief. Where the word limit was reached somewhere within the third or fourth assignment of error, LUBA did not consider the fourth assignment of error. *Roberts v. City of Cannon Beach*, LUBA No 2020-116 (July 23, 2021).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will not consider a supplemental memorandum that is filed to provide a response to a question posed at oral argument where LUBA did not request or order the parties to submit supplemental briefing, even where the opposing parties have not objected or otherwise responded to the supplemental memorandum. LUBA’s rules do not permit supplemental briefing in the absence of a request from the Board, and LUBA generally does not allow supplemental briefing, especially after oral argument. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** When a party raises an issue for the first time at oral argument LUBA will ignore all statements made at oral argument, by any party, that go beyond the issues framed in the briefs and the evidence cited in the record, and will confine its review to the issues framed in the briefs, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. *See* OAR 661-010-0040(1) and ORS 197.835(2)(a). *Conte v. City of Eugene*, 78 Or LUBA 289 (2018).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** There is no inherent problem with a respondent summarizing overlapping assignments of error and addressing the summary rather than the assignments of error themselves, so long as the summary accurately describes the assignments of error and so long as the respondent’s brief includes adequate responses to the actual assignments of error. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where petitioner and intervenor-petitioner each incorporate by reference the assignments of error in the other petition, and thereby exceed the permissible 14,000-word length of the petition under OAR 661-010-0030(2)(b) (2017), such incorporation does not necessarily cause each petition to violate OAR 661-010-0030(2)(b) (2017). *Columbia Pacific v. City of Portland*, 75 Or LUBA 552 (2017).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** When called upon to determine the applicability or meaning of a statute, LUBA is not limited to the parties’ arguments. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where petitioner does not argue the complexity of an appeal warrants a petition for review with more than 50 pages, and LUBA concludes that petitioner easily could have made the arguments presented in support of petitioner’s three assignments of error in a petition for review that complies with the OAR 661-010-0030(2)(b) 50-page limit, LUBA will deny petitioner’s request to submit a 53-page petition for review. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Including legal arguments in the summary of material facts in a petition for review, and failing to provide record citations in that summary, are violations of LUBA’s rules, but such violations do not warrant striking the summary or other remediable action, absent a showing of prejudice to other parties’ substantial rights. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where the petition for review includes argument in a section of the petition setting out the standard of review, that violation of LUBA’s procedural rules does not warrant striking the argument or other remediable action unless there is prejudice to other parties’ substantial rights. Absent such prejudice, the better practice is to briefly note the alleged violation in the corresponding section of the response brief and clarify any disputed points raised by the violation. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where a jurisdictional statement in the petition for review attempts to incorporate argument on the merits in different section of the petition for review, and in doing so cites the wrong section of the petition for review, LUBA will nevertheless consider the incorporated argument on the merits, where the argument the petitioners intended to incorporate is obvious and no party was misled by petitioners’ error. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where confusing arguments to LUBA are nevertheless discernable with reasonable effort, LUBA states its understanding of the argument and considers the argument on its merits. *Greller v. City of Newberg*, 70 Or LUBA 499 (2014).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** While incorporation of arguments in another brief in a consolidated appeal is a common practice, such incorporation is permissible only if it does not cause the incorporating brief to exceed the 50 page limit in OAR 661-010-0030(2)(b). Even if such an incorporation does not violate OAR 661-010-0030(2)(b), the incorporation does not allow a person who is party in one appeal to file motions in a consolidated appeal to which the person is not a party. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where the county zoning that applied to recently annexed territory inside a city’s urban growth boundary provided that dwellings were allowed only if the property “was designated for residential use by the city,” and the city took the

position in its brief that the property was not designated for residential use, LUBA will assume that the city is correct where (1) petitioners do not argue in their petition for review that property was designated for residential use and (2) petitioners fail to respond to the city's argument in its brief. *Knaupp v. City of Forest Grove*, 67 Or LUBA 398 (2013).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA only has authority to affirm, remand or reverse land use decisions and does not have authority to grant injunctive or mandatory relief. LUBA will deny assignments of error where LUBA lacks authority to grant the relief that is requested under those assignments of error. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where an intervenor moves to intervene only on the side of respondent, but later submits a response brief supporting the position of the respondent on some assignments of error and supporting the position of petitioner on other assignments of error, LUBA will strike the portion of intervenor's response brief that supports petitioner's assignments of error on its own motion. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where an intervenor-respondent attempts to defend a local government's decision by arguing that the local government correctly decided the matter but should have done so based on a different interpretation of its zoning ordinance that the local government specifically rejected, and intervenor-respondent does not file a cross-petition for review or include a cross assignment of error in its response brief, LUBA will not consider the interpretive question. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA's rules requires that argument in support of or in opposition to an assignment of error be set forth in the body of the brief, and do not provide for attachment of additional argument in an appendix to a brief, in part to preserve the 50-page brief limit. However, where the brief is 38 pages long and the attached argument is 10 pages, and there is no contention that considering 48 pages of argument in a brief that is otherwise consistent with LUBA's rules prejudices any party's substantial rights, LUBA will not strike the attachment. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** When appending portions of regulations or standards to a brief, it is common practice and helpful to LUBA for parties to highlight or underline or otherwise draw attention to pertinent sections, and doing so does not prejudice other parties' substantial rights. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will consider arguments in a brief filed by an amicus whose participation at LUBA has been denied, where the respondent's brief incorporates the arguments in the amicus brief and the respondent's brief with the incorporated material does not exceed the 50-page limit or otherwise violate any other rule limitation. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will not assume that petitioners meant to rely on an intergovernmental agreement provision that can be read to bar requiring annexation agreements for certain types of development, where petitioners do not cite the

intergovernmental agreement provision, there are significant questions regarding whether it would preclude the challenged condition requiring an annexation agreement and petitioners do not address those questions. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Petitioners’ arguments on the merits of an appeal that are included in their notice of intent to appeal are presented prematurely. Petitioners’ arguments on the merits of an appeal are properly presented in their petition for review, after petitioners’ record objections are resolved and after LUBA settles the record. *Robson v. City of La Grande*, 53 Or LUBA 604 (2006).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** If the argument included in support of an assignment of error clearly alleges that findings are not supported by substantial evidence, the fact that an assignment of error that challenges the adequacy of the city’s findings does not expressly include a substantial evidence challenge does not preclude LUBA review of the substantial evidence arguments that follow that assignment of error. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** While LUBA’s practice is to allow replies to responses to a motion to dismiss if limited to new issues raised in the response, LUBA will deny a request to file a reply where the response is exclusively concerned with a jurisdictional issue that LUBA declines to resolve. *Kamp v. Washington County*, 51 Or LUBA 670 (2006).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Allowing intervenors-petitioner to belatedly sign the signature page of a timely filed petition for review is not tantamount to allowing a late petition for review. Intervenors’ failure to sign or join the petition for review prior to its filing is at most a technical violation that does not affect our review, absent prejudice to another party’s substantial rights. *Kane v. City of Beaverton*, 49 Or LUBA (512).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will strike allegations in a brief accusing opposing party of intentional misrepresentation where there appears to be a factual basis for the opposing party’s statement. *Patterson v. City of Independence*, 48 Or LUBA 155 (2004).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** It is consistent with LUBA’s rules to advance in a response brief what corresponds to a cross-assignment of error under Oregon Rules of Appellate Procedure 5.57(2), *i.e.*, an argument that, if the relief sought by the petitioner is granted, LUBA should also reverse or remand a related intermediate ruling of the decision maker. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Parties may facilitate LUBA’s legal research by providing copies of cases, briefs that were filed in other appeals, or other research materials in their briefs. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will not attempt to resolve a largely hypothetical dispute between a petitioner and a county over the degree of incidental social activity that might be permissible at an existing airport in conjunction with any particular activity that the

county must allow under ORS 836.616(2). *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** A motion requesting permission to exceed the 50-page limit on briefs imposed by OAR 661-010-0030(2)(b) will be denied where the motion is filed three days before the brief is due and does not state how many additional pages are requested or indicate whether other parties oppose the motion. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 561 (2001).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where a transcript that is attached to a brief in accordance with OAR 661-010-0030(5) shows that a letter signed by petitioners was read to the local decision maker during the proceedings below and that the local decision maker stated that the letter would be made part of the record, the transcript is sufficient to show that petitioners made a written appearance in accordance with ORS 197.830(2) and have standing at LUBA to appeal the local government's decision. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where a brief includes as an appendix two letters that post-date the challenged decision and are not included in the record, LUBA will grant a motion to strike the letters but will not strike the brief in its entirety. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA may allow a party to submit a memorandum of additional citations of relevant authority with brief summaries. However, the memorandum will not be considered if it contains additional arguments, replies to issues raised in the response brief, or does not allow other parties adequate time to address the additional citations. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** That a brief includes allegations of fact not supported by substantial evidence is not grounds for striking those allegations from the brief. LUBA will, however, disregard allegations of fact that are not supported by the record. *Spiro v. Yamhill County*, 38 Or LUBA 133 (2000).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will not review eight audiotapes in the record, where the party relying on testimony in the tapes provides LUBA no assistance in locating the testimony and does not attach partial transcripts of the testimony to its brief. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** The failure to serve all persons required to be named in the notice of intent to appeal as required by OAR 661-010-0015 is a technical violation of LUBA's rules, when intervenor's only alleged prejudice is that the violation prohibits other parties from contributing resources to support his position. A person need not have intervenor status to contribute to the preparation of a brief, financially or otherwise. *Multi/Tech Engineering v. Josephine County*, 36 Or LUBA 774 (1999).

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

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where a brief includes allegations of fact that are not supported by evidence in the record, LUBA will disregard the allegations, but the lack of evidentiary support is not a basis for granting a motion to strike the allegations. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where an allegedly new argument presented by petitioner at oral argument simply reflects a difference in the parties' understanding of the arguments that are contained in the petition for review, LUBA will consider the argument if it is not fundamentally different from the arguments presented in the petition for review. *Nike, Inc. v. City of Beaverton*, 35 Or LUBA 57 (1998).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Assignments of error in petitions for review filed with LUBA must identify which portions of the challenged land use decision are challenged and why. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** It is the parties' responsibility to identify the evidence in the record that supports their positions. Where parties cite large documents in their entirety, and do not identify where in these documents relevant material is located, LUBA will not search through the documents looking for supporting evidence. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** Where a decision is challenged on evidentiary grounds, LUBA relies on the parties to provide it with record citations to the supporting or countervailing evidence on which their argument depends. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** It is the practice at LUBA for a party that wishes LUBA to consider a document not in the local record, for one of the purposes listed in ORS 197.830(13)(b) or OAR 661-10-045(1), to attach that document to its brief and explain in its brief why LUBA should consider the document. If another party does not object to LUBA considering the document, the document becomes part of LUBA's record and is considered for the requested purpose. If an objection is made, the party offering the document may file a motion for evidentiary hearing under OAR 661-10-045. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will not grant motions to strike portions of a brief, based on allegations that the disputed portions are inaccurate or without factual support. Rather LUBA will simply disregard inaccurate or unsupported assertions. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** A petitioner fails to adequately allege error with regard to a particular code section, where that code section is not identified in petitioner’s assignment of error and a different code section is cited in the argument supporting the assignment of error. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will deny a motion to strike portions of a brief that are alleged to be inaccurate or unsupported by the record. Rather, LUBA will simply disregard inaccurate or unsupported statements. *A Storage Place v. City of Tualatin*, 25 Or LUBA 202 (1993).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** In reviewing an evidentiary challenge, LUBA relies on the parties to identify the evidence in the record that supports their positions. *Todd v. Columbia County*, 24 Or LUBA 289 (1992).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will not consider letters from intervenors-petitioner that “support” the petitioners’ petition for review, but do not comply with the requirements of LUBA’s rules for an intervenor-petitioner’s brief. *Gray v. Clatsop County*, 21 Or LUBA 600 (1991).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** A letter stating an intervenor-petitioner “adopts” another party’s petition for review as its own brief can satisfy the requirements of OAR 661-10-050(3)(a) for filing an intervenor-petitioner’s brief, if (1) the “adopted” petition for review is properly filed, and (2) the intervenor-petitioner’s letter is timely filed and served on the other parties. *Gray v. Clatsop County*, 21 Or LUBA 600 (1991).

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

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will not consider a supplemental brief filed after oral argument and 18 days before the final opinion is due, where the supplemental brief was not requested by LUBA and consideration of the arguments presented in the supplemental brief would delay issuance of LUBA’s final opinion. *Cecil v. City of Jacksonville*, 19 Or LUBA 621 (1990).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA considers the words spoken at the local government hearings to be part of the record, and will permit parties to attach excerpts from transcripts of such hearings to their briefs, notwithstanding that neither tapes nor transcripts of the local government hearings were submitted to LUBA as part of the record. Other parties may contest the accuracy of such transcript excerpts in their opening brief or in a reply brief. *Columbia Steel Castings v. City of Portland*, 19 Or LUBA 338 (1990).

**27.5.1 LUBA Procedures/Rules – Briefs – Generally.** LUBA will accept a cross petition for review filed after the deadline established under OAR 661-10-075(3) where the cross petitioner (1) was entitled to but did not receive written notice of the challenged decision, (2) received actual notice of the challenged decision eight days after the petition for review was filed and moved to

intervene on the side of respondent five days later, and (3) filed a timely response brief with the cross petition for review included. *Smith v. Clackamas County*, 19 Or LUBA 497 (1990).