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# 4. LAND USE APPEALS

## 4.1.00 Purpose of Appeals Chapter

Oregon is unique in the U.S. in allowing state agency appeal of local land use decisions. ODOT's intent is to avoid or minimize appeals of local land use decisions and strive to solve problems within the local land use process without resorting to an appeal. The authority to appeal has resulted in many productive discussions that lead to solutions and agreement. The judicious use of appeals is a very important tool for ODOT in protecting transportation objectives and public investments throughout the state.

As a state agency that is involved in land use actions in carrying out its mission, ODOT may consider appealing a local government land use decision that adversely affects state transportation facilities. Appeals start at the local level and then, if necessary, go to the Land Use Board of Appeals (LUBA). This chapter is intended to model a consistent approach to both avoiding and preparing for land use appeals. It sets out the factors considered to make the decision to appeal and outlines the internal coordination process to verify the appropriateness of an appeal.

This chapter is designed to assist ODOT management, planners and permit specialists to better understand the ties between local land use and development review and when and how ODOT may act to appeal a local land use decision. It includes steps to take when working with local government to resolve issues short of an ODOT appeal, and communication with the Department of Land Conservation and Development (DLCD) when an appeal is anticipated. The chapter also covers preparing an adequate record of ODOT's participation in the local land use process to support a successful appeal.

The chapter covers only the land use appeals process and does not discuss appeals under OAR 734, Division 51 State Highway Approach Permit appeals. For questions about appeals of approach permit decisions, contact the Access Management Program Unit Appeals Coordinator.

Much of the work for a successful appeal has to be completed before the appeal is even contemplated, which is why it is important to establish standing to appeal by appearing before the local government either in person or in writing, establish best practices that include developing and keeping an adequate record[1], support recommendations with reasons backed up by thorough statements of fact, and keeping track of any other ODOT permit issues that relate to the land use decision.

[1] Keep a file of all materials submitted to the local government and any related background materials that may help our DOJ representative work a case if an appeal is initiated.

### 4.1.01 ODOT Factors for Deciding to Appeal

The following questions are intended to provide a framework for deciding when an appeal is appropriate. Because land use proposals and local contexts vary so much, not all of them will apply in every situation and additional questions may arise.

1. Would the decision result in development that would negatively affect safety or operations on the state transportation system?
2. Is the land use application proposing improvements or activities that are inconsistent with the Transportation Planning Rule, adopted state transportation plans or local transportation system plans?
3. Has staff worked diligently with property owners, developers and local government(s) to reach acceptable solutions that minimize any differences with state transportation plans and adopted standards?
4. Is there another way to resolve the conflict, such as dispute resolution or technical assistance? Are the applicants willing to delay the land use decision to work on solutions?
5. Does the problem include a local government decision that should actually be made under the authority of ODOT or the OTC?
6. Would a ruling in the case provide needed interpretation of an ambiguous statute or rule?
7. Could the decision whether or not to appeal create a risk of setting a legal precedent that goes against state interests? For instance, could the question that would be addressed to LUBA result in a decision that would have statewide implications for the transportation system? Could not proceeding with an appeal result in a local decision that sets a bad example for future negotiations?

If needed, DOJ is a good resource for addressing these questions.

### 4.1.02 Appeals Avoidance and Preparation Best Practices

ODOT prepares for an effective appeal by participating in the local land use decision process, using every opportunity to resolve disagreements, engaging the parties and ODOT staff in a timely and constructive manner, and keeping good records. These are the same steps set out in Chapters 3.1 and 3.2 that are used to effectively resolve issues before the local decision is made, minimizing the need for appeals.

**Standing to Appeal**: To bring an appeal to a local government or to LUBA, ODOT must establish “standing” in the local case to qualify to appeal the land use decision. Standing is a legal construct that identifies who has a right to appeal and is an element of all types of legal cases; in land use it is based upon providing input and raising issues in a timely manner in the local review process.

ODOT has standing to appeal a land use decision if it "appeared before the local government, special district or state agency orally or in writing"[2] . Standing to appeal may be achieved either through speaking at the first or a continued public hearing, or by submitting written testimony within locally prescribed time limits, as included in the initial notice of a pending decision. Written testimony must be submitted to the local government during the course of the proceedings before the record is closed. It is a good safeguard to include a request in any written submittals that the submitted document be added to the decision record. The record is typically closed at the end of a hearing and before the hearings body deliberates on its decision, but a hearings body may agree to keep the record open or re-open it at the request of one or more parties. If the record is still open after a public hearing, ODOT may submit additional information that addresses questions arising in the hearing unless the hearings body has limited what new information will be accepted, for example limiting it to information addressing or rebutting issues raised in the initial hearing.

**Local Decision Time Limits:** State law sets timeframes for local decision making included the timing of notices, review and response periods, appeal periods, and the "120-day rule" that applies to most land use decisions outside of plan amendments and zoning and code amendments. Notices provide the dates for the deadlines for any next steps such as the deadline for comments and a hearing date. To see the whole time line for a particular type of land use decision, consult the local code.

**Exhaustion of Administrative Remedies:** LUBA and other state courts will not hear land use decisions before the local "administrative remedies" have been "exhausted." Before an appeal can be filed with LUBA, the petitioner must "exhaust all administrative remedies". This means that ODOT has followed all local government administrative requirements and has appealed the decision to the highest decision-maker at the local level. It is important to know the local government's decision-making structure and follow it to the letter.

### Building ODOT's Case Through the Decision Record:

Keeping good records and making sure those records (e.g., maps, letters, correspondence, comments, traffic impact studies) get into the formal local government record should start at the very beginning of ODOT's review process so that if and when an appeal does arise, ODOT is prepared.

The "record" is the formal file of the jurisdiction exercising its decision making authority. ODOT submits comments and recommendations in writing into the local record and those materials should provide adequate information, such as traffic studies, graphics, crash data, meeting notes from discussions with the local government and/or applicant, sometimes state rule or policy excerpts, etc., to demonstrate the basis for the recommendations, The local record should include, at a minimum, all of the information that was submitted and relied upon

[2] ORS 197.830(2)

to make the decision, documentation of all public notice(s) of the subject decision process, testimony at hearings in the form of meeting minutes, (recordings, and sometimes transcriptions if part of a LUBA record) and written findings and decision details, documented and signed where required by state or local law.

When the local decision is appealed to LUBA pursuant to OAR 197-835(2) (a)-(b), this local record is the written information upon which the LUBA decision will be based. Development review staff can check the local file to be sure that it includes the correct and complete information that was submitted by ODOT. By definition, the LUBA record includes:

> *"All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker"*[3]

Use the Development Review System data base to save all electronic documentation and emails related to the local land use case file, particularly letters and exhibits submitted to the local government to be added to the record. Use the DRS email function to the extent practicable to record correspondence with the other parties to the decision and maintain any other email correspondence in accessible files. (Access to DRS is set up by the Region DRS Administrator.)

When a decision record is packaged for LUBA there are a couple of additional steps to remember. When the LUBA record is submitted there is an opportunity for review by parties to be sure that the record document is a correct representation of what local decision makers saw when they made their decision(s). At this stage it is important to review the record and be sure ODOT's materials are included and complete. Any over-sized materials submitted to the record may not be copied into the case file even though they are part of the record. The local government should make sure those exhibits are carried into oral arguments at LUBA; in some cases, ODOT staff or DOJ may want to carry copies of oversize exhibits into the hearing themselves to be sure the board sees everything.

### 4.1.03 Internal ODOT Coordination Process

1. Participate in the local land use action to identify ODOT's interests and concerns and establish standing in the case to protect the right to appeal.
2. Advise Planning Managers of any issues indicating an appeal may be necessary and work with multi-disciplinary teams to find solutions where possible.
3. When the Region determines that an appeal is likely to be necessary, prepare a brief analysis of the case that includes a description of the development

[3] OAR 661-010-0025(1)(d)

proposal, anticipated effects on state facilities, how the agency has coordinated with the local government to solve problems, and any other reasons to consider whether to proceed to an appeal.

4. The region staff contacts the Department of Justice as soon as possible. No appeal is filed unless DOJ concurs there is a legal basis for the action. The case file shall include a copy of the notice of land use action with the envelope attached to monument the postmark date which is the basis for the 21-day filing period. DOJ has the responsibility to file a notice of intent to appeal" for ODOT. The LUBA version of the notice is a boilerplate document that can usually be prepared quickly.
5. Develop a staff report in coordination with DOJ that includes a process timeline that considers the steps to get OTC approval if the commission meets during the appeal process or the timing for gaining OTC review after the appeals period according to the procedures described in ORS 184.633 (5) and (6)[4].
6. Initiate contact with the Department of Land Conservation and Development Regional Representative or Salem transportation section to coordinate as needed when an appeal appears necessary and when the decision to appeal has been made.
7. ODOT can appeal to LUBA either as a proponent of a local land use action (usually in conjunction with project development) or as a reviewer of a local action (development review function). The Region Manager, in consultation with the Transportation Development Division Manager, and considering the staff analysis and DOJ advice, submits a recommendation to appeal to the Director.
8. The Region Planning Manager will also review the case with the Planning Business Line Team as an informational item and seek their advice on land use policy implications. PBLT review is not a prerequisite to filing an appeal and may occur after the appeal is filed. The goal of the PBLT review is to achieve long-term consistency across the state.
9. Where there is disagreement between the Region Manager and TDD Division Administrator on whether to appeal, the differing perspectives should be documented and presented to the director.
10. The Director must approve the filling of the appeal and get formal approval to proceed from the OTC following the procedures specified in ORS 184.633 (5) and (6).
11. If an appeal is to be filed and consequently a review is scheduled for the OTC, the Region notifies the local government and applicant of their opportunity to address the Commission regarding the appeal.

[4] http://www.leg.state.or.us/ors/184.html

### 4.1.04 Consultation with OTC

1. The Director's authorities and the process of engaging OTC in the decision to appeal are set out in ORS 184.633 (5) and (6). A "Notice of Intent to Appeal" does not have to be approved by the OTC before it is filed. The OTC can confirm the Director's decision to file the notice of intent after the notice has been filed with LUBA. However, the OTC members will be informed about any appeal before the notice is filed. See Item 10 below.
2. Discuss the proposed land use action and these impacts with the Region Manager, TDD Division Administrator or designee and the assigned DOJ attorney before the final land use hearing.
3. Call the Director's office to schedule a briefing with the Director for one or two days after the local decision is to be announced. It is recommended that this be done through TDD and in any case the TDD Division Administrator needs to be included in the briefing. The Director's calendar is tightly scheduled – expect more than a week before you get a meeting time.
4. If you set up the briefing and the local government does not approve the land use action, or adopts acceptable conditions of approval, the meeting with the Director can be cancelled and no one will mind. Waiting to schedule the briefing until the local decision is made, or until the written decision is in hand will make it very difficult to find sufficient time and the support necessary to accomplish the other steps.
5. Work with the Development Review staff person at TDD as needed to prepare the memorandum from the Director authorizing DOJ to file the notice of intent to appeal. The Region office will send an electronic version of the memo to the TDD Division Administrator and the Director's office. Do this as early as possible to allow time for follow-up.
6. In the scheduled meeting with the Director, expect to describe and discuss the following:
   - Illustrations and description of the development proposal;
   - The unacceptable safety, operational or other impacts on state facilities;
   - Steps that have been taken to remediate the situation;
   - What was done to try and settle the issue outside of the local appeals and/or LUBA process;
   - If there is any room to negotiate after the notice of intent is filed; and
   - Any anticipated political ramifications such as a party calling state representatives or members of congress to assist, etc..
7. The Region provides individual briefings to OTC members before the Director authorizes the "Notice of Intent to Appeal". This will have to be accomplished in a non-quorum manner (no more than two OTC members per briefing) and

can be done by phone or video conference. This could easily require more than a week to accomplish. Sending briefing information electronically to each commissioner prior to the briefing will expedite the process.

8. For a LUBA appeal, the Notice of Intent to Appeal must be filed by DOJ within 21 days of the final local decision.
9. When all of these steps are taken together, this is a quick turnaround time for what can be a challenging process and there is little margin for error on the timing. The local government or applicant may file a notice to dismiss and demonstrate that the appeal period expired before the notice of intent was filed.
10. Develop the report to the OTC as soon as possible. Be aware of Commission Services' submission deadlines for agenda items. Provide an ODOT-generated location map with the report. For a variety of reasons, the local government's public notice map may be inadequate.
11. The Region will mail a copy of the report to OTC and to the local government and applicant as soon as it is completed. The law requires that the applicant and local government be afforded an opportunity to address the OTC before the commission deliberates on the authorization to proceed with the appeal.

### 4.1.05 After the Decision has been Made to Appeal

#### Local Appeals

There are several levels of land use decision processes and one or more opportunities for local appeal of a decision. The local development code or general code will set out the procedures and timelines that apply. A simple way to find the local ordinances for most local governments is to reference the Oregon Blue Book which includes links to city and county web pages: http://bluebook.state.or.us/default.htm.

Administrative (or ministerial) decisions are made by local planning or other administrative staff based on objective standards, and can be appealed. The hearings body may be the appointed planning commission, a hearings officer and/or the city council or county commission (or county court in some Eastern Oregon counties).

Planning commissions may hear appeals of administrative decisions, make some types of administrative decisions, make quasi-judicial[5] decisions and typically also hold hearings and make recommendations regarding legislative land use actions such as plan and code amendments.

[5] Decisions related to a particular land area that require discretion or judgment on subjective standards in addition to any related objective standards

A hearings officer works for a local jurisdiction to hear and decide appeals of staff and planning commission decisions. In some communities, a hearings officers' decision is the final decision of the jurisdiction without any referral to the elected body (city council or county commission/court).

City councils and county commissions have final local land use decision authority unless they have delegated that role to a hearings officer or other hearings body.

The local development code or other code will set out the local appeals process. There may be a form to submit or appeal may be by letter. The basic standard for an appeal is to describe the reasons for the appeal and relate them to applicable sections of the local code that are the basis for the appeal. Relate the reasons for the appeal to one or more of:

- The facts in the record and how they support ODOT's point of view or contradict the decision findings;
- ODOT's materials submitted to the record that support a different outcome;
- Other parties' submittals to the record and testimony in hearings; and
- Whether the findings and conditions in the staff report and/or final decision are consistent with local criteria and the facts of the case.

A typical appeals process starts by meeting the deadline for providing notice of intent to appeal that includes all the locally required documentation. The local government will provide notice of the subsequent hearing to the petitioner and to other interested parties as defined in the local code.

Also in the code may be specifications on whether or not the subject appeal process will allow introduction of new information or be limited to information already in the record. If new information is not allowed, arguments in the appeal must be based on the materials already in the record, identifying points in the decision findings that are not supported by the facts in the record.

New issues that can be raised will usually relate to either incomplete or contradictory information in the record, or the failure to address criteria that the petitioner believes should have been applied in the decision. In the latter case, it is important to explain why the neglected criteria apply.

Hearings are held in public meetings and other parties than the petitioner and applicant are allowed to testify. Hearings bodies have some discretion about what new information they will consider in making their decision. The record may be left open for new information in response to issues raised in a hearing, with a specific deadline for submittal of those materials. Hearings and/or deliberations may be continued to the next regular meeting of the body or to a different "date certain" meaning the hearings body will set the date at the time they decide to continue the proceedings.

There is often more than one local appeal process that must be worked through in a set order. The last appeals process decision (or any decision that is not

appealed) is the final local decision. The final decision of a city or county can be appealed to the Land Use Board of Appeals. The LUBA Process is described in some detail in section 4.1.06, below. A LUBA decision can be appealed to the Oregon Court of Appeals.

Only issues raised in the local appeal can be raised in a LUBA appeal unless the LUBA appeal is based on an alleged procedural error.

### LUBA and Beyond

An appeal of a final local land use decision is made to LUBA. The Land Use Board of Appeals (LUBA) was created by legislation in 1979 (ORS Chapter 197-805 through 860[6]) and has exclusive jurisdiction to review all governmental land use decisions, whether legislative, quasi-judicial or ministerial.

Prior to LUBA's creation, land use appeals were heard by the Land Conservation and Development Commission (LCDC) and the circuit courts. LUBA was created to simplify the appeal process, speed resolution of land use disputes and provide consistent interpretation of state and local land use laws. The LUBA tribunal is the first of its kind in the United States. The governor appoints the three-member board to serve four-year terms. The appointments are confirmed by the Oregon Senate. The board members must be members of the Oregon State Bar. http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_661/661_010.html

## 4.1.06 Outline of LUBA Appeals Process

LUBA hears and rules on appeals of land use decisions made by local governments and special districts. LUBA is the first state level forum that can hear appeals of final local land use decisions. Subsequent appeals would go to the Oregon Court of Appeals and then the Oregon Supreme Court, if that latter body chooses to hear the case. Good basic information on the LUBA appeals process is available online at: http://www.oregon.gov/LUBA/FAQ.shtml , with additional details on the LUBA Home Page which can be reached from the above site. The steps in an ODOT appeal to LUBA are completed in close coordination with DOJ.

As discussed above, an appeal of a land use decision to LUBA requires authorization by the OTC. After discussion with the Region, the TDD Division Administrator advises the Director of the intention to appeal and asks that the question be added to the next regular OTC agenda. If the deadline to file falls before the OTC meeting, the filing of a Notice of Intent to Appeal is done with the Director's tentative approval. When the commission considers the question they may affirm the decision to file or have the LUBA filing withdrawn.

The following description of the LUBA appeals process is extrapolated from the applicable administrative rules. It is intended to make the material more concise

[6] http://www.leg.state.or.us/ors/197.html

and simplify the language while maintaining consistency with the rules. However, there may be subtle differences that could make a difference in a legal proceeding. The actual rules will always be the best source for digging deeper into their meaning or for quoting from or citing to the rules.

1. A LUBA appeal is initiated by filing a timely Notice of Intent to Appeal at the LUBA offices in Salem.
    - The notice must be received at LUBA, within 21 days after the challenged local land use decision becomes final.
    - The date of filing of the notice is either when it is received in the LUBA office, or the date it is mailed either registered or certified mail, which must be documented with a Post Office date- stamped receipt for the mailing.
    - The notice is submitted with a specified filing fee, part of which is a deposit for appeal process costs. The deposit for costs typically goes to the prevailing party once the LUBA decision is issued.
    - The notice of intent must be copied to the local government and to all parties to the local decision, using the list of participants in the local decision record that is maintained by the local agency.
2. If the decision appealed is for physical development of a project, a Motion for Stay of the land use decision (and site development activities) must also be filed to stop development while the appeal is pending.
3. To become a party to a case after it is started, within 21 days after the Notice of Intent to Appeal, an entity that meets the requirements for legal standing in the case may file a Motion to Intervene, that specifies whether the intervention is on the side of the Petitioner or Respondent.
4. The local government, special district or state agency whose decision has been appealed (Respondent) must submit a formal Record of Decision to LUBA within 21 days after the notice of intent to appeal is served on the local government, special district or state agency. The Respondent also supplies a copy of the record to the Petitioner.
5. The Petition for Review must be filed by the appealing party (Petitioner) within 21 days after the date the record is received by LUBA. The Petition for Review:
    - Identifies the basis for the Petitioner's standing, e.g. participation in the local decision process with written or oral testimony.
    - Relies on the existing record to support its claims;
    - Identifies the basis for the appeal including decision criteria and why the record does not meet the burden of proof to demonstrate compliance with the criteria;

- Demonstrates that the decision at hand is a land use decision or limited land use decision to establish LUBA's jurisdiction over the matter; and
- Raises all matters of law that can be considered in the LUBA review. If an issue is not raised, it will not be available as a basis for a decision.

6. The Respondent must file Respondent's Briefs that addresses the Petitioner's claims within 42 days after LUBA receives the record.
7. Oral Arguments are scheduled once the respondent's briefs are received. Only the petitioner, respondent and any interveners, or their legal counsel, may testify.
8. LUBA must issue a Final Opinion and Order within 77 days after the record was transmitted to the board.
9. Other procedures may prolong the decision process, including various motions, an opportunity for mediation, and negotiated delays for other reasons. See the LUBA information site link, above.