

# ROUGH NOTES: EFFECTIVE LAND USE TESTIMONY

June 19, 2013

## II. EFFECTIVE LAND USE TESTIMONY

Overall written testimony is more effective than oral testimony. Both is the best approach.

**A. What Is Testimony That Will Not Be Considered?** Most critically, your written or oral testimony that does not address the issues and standards and/or criteria for approval will not be considered by the local hearing officers, planning commission, or decision makers.

This is huge. Except for venting or for political purposes, it is usually not helpful to provide your own logical arguments for why the land use application should not be approved outside the legislative standards and criteria, even if you know the decision makers agree with you.

### **B. Findings Are The Key**

When you file a local or LUBA appeal, you are challenging the *legal sufficiency of the local government's decision* based on the evidence that was before the local government. Therefore, your concerns are never about your neighbor, the applicant. Your concerns are with a government decision. **It should never be personal.**

### **1. LAND USE DECISIONS: WHAT ARE FINDINGS?**

Land Use Committee, Hugo Neighborhood Association & Historical Society. December 20, 2003. *Know the Rules of Your Land Use Sandbox*. Brochure 1 in Findings Series. Hugo, Oregon

**One of the most basic needs** for the local planning commissioner, local government decision maker, planner, developer, land owner, environmentalist, and/or the average neighbor is to **understand the land use rules**. One of the most important rules a local government must follow is

that it is required to include “findings” in a decision to approve or deny an application.

**Findings are written statements of fact, conclusions, and determinations based upon the evidence at hand, presented relative to the standards and criteria for such review and adopted by the local government’s decision maker(s) in support of a land use decision.**

**Findings Must:** (Overhead)

1. Identify of the relevant approval standards (i.e., standards and criteria).
2. Identify of the facts which were believed and relied upon by the decision maker(s).
3. Explain how those facts lead to the conclusion that the standards are, or are not, satisfied.
4. Respond to specific issues relevant to compliance with applicable approval standards and criteria that were raised by citizens in the proceedings.
5. State that the approval standards are met or that compliance is feasible and impose conditions that will ensure compliance.

**Findings** *As required by ORS 215.416(8), written statements of fact, conclusions, and determinations based upon the evidence at hand, presented relative to the criteria and standards for such review and accepted by the review or hearing body in support of a final action.*

**Critical To Get Your Testimony Into The Record** It's critical to get your testimony into the record. And, it is especially important of getting testimony into the record *in writing*. As a practical matter, it's simply too difficult to retrieve and rely on oral testimony. It is the local government's *responsibility* to identify the **local applicable standards and criteria**. However, the local government often does not identify all relevant provisions of the local development code, or zoning ordinance or the comprehensive plan, much less relevant administrative rules or

statutes. A person must identify and address other criteria that he or she thinks are applicable, and in fact must do so or risk waiving the right to raise those issues later.

## **2. STANDARDS AND CRITERIA**

Land Use Committee, Hugo Neighborhood Association & Historical Society. December 20, 2003. *Critical Rules to Understand Are the Standards and Criteria*. Brochure 2 in Findings Series. Hugo, Oregon

### **Standards & Criteria: Findings Must Identify of the relevant approval standards (i.e., standards and criteria).**

In land use proceedings the local government's responsibility is to inform the public of the standards and criteria which it will use to make a decision. If the government does not, it commits procedural errors that may substantially prejudice a party's rights.

**Law & LUBA Opinions** The law requires the local government to list the substantive criteria from the ordinances and comprehensive plan in notices that apply to land use applications. LUBA has ruled many times that the government's obligation is to ensure that compliance with all applicable approval criteria is determined at a stage that provides opportunity for notice and hearing.

Local government notices sometimes omit important criteria governing land use decisions. Be aware that additional code sections, plan provisions, or state statutes or rules applicable to the decision may have been overlooked.

Applicable state or local criteria govern whether an application may be approved (or denied), and, therefore, they must be a central focus of the participant's testimony. For this reason, failure to list the applicable criteria may allow new issues to be raised in an appeal to LUBA - even if they were not raised during the local proceedings. If the notice is not specific enough when it lists what criteria apply (e.g., it indicates the entire zoning ordinance as the applicable law), a party will be able to raise new issues for the first time at LUBA.

**More Information** The notice provisions of ORS 197.763(3)(b) require only a listing of *local* provisions. That statute does not require that the notice include statutory or administrative rule provisions that may apply to the application. Therefore, a local government's failure to list such provisions does not relieve a party of the obligation to raise issues related to such provisions at the local level in order to raise them on appeal. *Van Dyke v. Yamhill County*, 35 Or LUBA 676, 684 (1999).

One has to be a bit careful. A person cannot raise a new issue at LUBA if the issue "could have been raised" before the local government. ORS 197.835(4)(a). LUBA has held that a party couldn't raise a new issue when she failed to factually challenge an issue and did in fact know of the existence of the provision relating to the issue. *Van Dyke v. Yamhill County*, 35 Or LUBA 676, 687 (1999). LUBA looks at *evidence in the record* to see if the party could or did have actual knowledge.

### **Raise It Or Waive It/For The Record Or Not**

These two requirements are critical. If the issue is not raised locally it does not exist upon appeal to the local decision makers. If the issue is not in the local record it does not exist and can not be inserted into the record at an appeal to LUBA.

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### Miscellaneous

Sometime during workshop the local sponsoring individual needs to share the local applicable standards and criteria.

### **Josephine County Rural Land Development Code**

**CRITERION (CRITERIA) OF APPROVAL** A subjective rule for permit approval that requires the decision-maker to exercise discretion or interpretation, or to exercise legal judgment, in determining compliance.

**STANDARD OF APPROVAL** An objective standard for permit approval that requires the decision-maker to verify the existence or non-existence of certain facts or circumstances by observation or measurement.

### 3. FACTS

Land Use Committee, Hugo Neighborhood Association & Historical Society. December 20, 2003. *Identify of the Facts Which Were Believed and Relied upon by the Decision Maker(s)*. Brochure 3 in Findings Series. Hugo, Oregon

#### **Findings Must: Identify of the facts which were believed and relied upon by the decision maker(s).**

**Substantial Evidence** LUBA will remand a decision that is not “supported by substantial evidence in the whole record.” 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.

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. Likewise, evidence may be subject to more than one legitimate interpretation, in which case a reasonable interpretation by the local government controls.

**More Information** The local government has freedom to base its decision on one side’s reliable evidence, even if that evidence has been controverted (i.e., to raise arguments against; voice opposition to) by the other side. But it cannot rely on unsupported assertions to justify a decision. If conflicting evidence directly and credibly undermines evidence relied upon to support a decision, the final decision should explain why the evidence is still adequate to support the decision.

#### **Raise It Or Waive It/For The Record Or Not**

It is very frustrating when you know the other side’s evidence is inaccurate or misleading, but you don’t have the resources to engage in a “battle of the experts.” Even if you did have the resources, there is no guarantee you will win the battle. Evidence in support of a proposal may be challenged by a much greater amount of evidence in opposition, and still the local

government can often base its decision on supporting evidence without being overturned.

#### **4. STANDARDS ARE, OR ARE NOT, SATISFIED**

Land Use Committee, Hugo Neighborhood Association & Historical Society. December 20, 2003. *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.* Brochure 4 in Findings Series. Hugo, Oregon

**Findings Must: Explain how those facts lead to the conclusion that the standards are, or are not, satisfied.**

**LUBA Opinions** 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. To receive a favorable ruling from LUBA, a petitioner should cite certain grounds for either reversal or remand that fall with LUBA’s scope of authority.

##### Reversal:

- Governing body *exceeded its jurisdiction*;
- Decision is *unconstitutional*; or
- Decision violates a provision of applicable law and is *prohibited as a matter of law*.

##### Remand:

- The *findings are insufficient*;
- The decision is *not supported by substantial evidence* in the whole record;
- Decision errors that *prejudice the substantial rights* of the petitioners; or
- Decision *improperly construes the applicable law*.

Reversals are rare. However, a significant number of LUBA decisions are remands.

**More Information** Arguing The Merits. This usually boils down to arguing the merits of the land use request.

- # Inadequate Findings
- # Lack of Substantial Evidence
- # Misconstrued Applicable Law
- # Prohibited as a Matter of Law

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. This is a very important requirement which local governments often fail to meet.

We have found the best way to understand the law is to read it again and again, and **especially review the court’s interpretations** (LUBA - Web Page: <http://luba.state.or.us/>, Court of Appeals, & Oregon Supreme Court).



## **5. MUST ADDRESS RELEVANT ISSUES RAISED BY PUBLIC**

Land Use Committee, Hugo Neighborhood Association & Historical Society. December 20, 2003. *Where There Is Focused Testimony Raising Legitimate Concerns about Compliance with a Relevant Approval Criterion, the Local Government's Findings must Address Such Concerns*. Brochure 5 in Findings Series. Hugo, Oregon

**Findings Must: Respond to specific issues relevant to compliance with applicable approval standards and criteria that were raised by citizens in the proceedings.**

**LUBA Opinions** LUBA has held on many occasions that when the public raises legitimate issues in a quasi-judicial land use proceeding concerning a relevant approval criterion, a local government's findings must address such issues. If it does not LUBA may remand back to the local government.

**Fails to Address Legitimate Issues Concerning a Concerning a Comprehensive Plan Amendment and a Zone Change Raised in a Quasi-judicial Land Use Proceeding Concerning Relevant Approval Criteria**

**2004 Local Testimony** If a local government's decision will be remanded in an appeal to LUBA is it lacks findings sufficient to support the decision, is not supported by substantial evidence in the whole record, and fails to address legitimate issues concerning a concerning a comprehensive plan amendment and a zone change raised in a quasi-judicial land use proceeding concerning relevant approval criteria. ORS 197.835; OAR 661-010-0071.

**2004 Appeal To LUBA** The county's decision lacks findings sufficient to support the decision, is not supported by substantial evidence in the whole record, and fails to address legitimate issues concerning a concerning a comprehensive plan amendment and a zone change raised in a quasi-judicial land use proceeding concerning relevant approval criteria. ORS 197.835; OAR 661-010-0071 (Appendix II.9.3.).

## 6. CONDITIONS OF APPROVAL

Land Use Committee, Hugo Neighborhood Association & Historical Society. December 20, 2003.  
*Documented Compliance Determinations for Conditions of Approval to Meet Criteria That Determinations Are Made at a Stage That Provides Opportunity for Public Review and Comment.* Brochure 6 in Findings Series. Hugo, Oregon

**Findings Must: State that the approval standards are met or that compliance is feasible and impose conditions that will ensure compliance.**

**LUBA Opinions** LUBA opinions on this standard are numerous.

***Myer v. City of Portland, 67 Or App 274, 678 P2d 741, rev den 297 Or 82 (1984)*** In *Meyer* the Court of Appeals explained the significance of the word “feasibility.” By ‘feasibility’ LUBA means more than feasibility from a technical perspective. It means that substantial evidence supports findings that solutions to certain problems posed by the project are possible, likely and reasonably certain to succeed.

In summary, the issue is not with what agency will later oversee compliance, but with the determination of feasibility. For example, a local government may determine and make findings that a community sewer system is feasible - meaning that "substantial evidence supports findings that solutions to certain problems posed by the project are possible, likely and reasonably certain to succeed - but explicitly leave to DEQ the task of actually reviewing and signing off on the system by conditioning the issuance of a building permit on DEQ approval.

- 7. LUBA REMAND** (Appendix V.A.2. Statutes & Rules: LUBA Scope Of Review)  
Land Use Committee, Hugo Neighborhood Association & Historical Society. December 20, 2003. *LUBA Remand*. Brochure 7 in Findings Series, Findings Are Insufficient; Decision Is Not Supported by Substantial Evidence in the Whole Record; Decision Errors That Prejudice the Substantial Rights of the Petitioners; or Decision Improperly Construes the Applicable Law. Hugo, Oregon

**Remand - Misconstrues Applicable Law & Lacks Substantial Evidence**

LUBA will remand a decision that improperly construes applicable law. 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. This fact accounts for many remands.

LUBA will remand a decision that is not “supported by substantial evidence in the whole record.” 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.

**Remand - Insufficient Findings & Prejudiced Substantial Rights** 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. Likewise, evidence may be subject to more than one legitimate interpretation, in which case a reasonable interpretation by the local government controls.

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. This is a very important requirement which local governments often fail to meet. LUBA will remand when there are inadequate findings to allow review of the decision.

**More Information** 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.” Land use participants commonly feel they have been treated unfairly, but LUBA

remands very few decisions under this standard. Only when serious procedural errors were made is a remand likely. 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.

In practice, a significant number of LUBA decisions are remands, rather than reversals, which are comparatively rare

**8. LUBA REVERSAL** (Appendix V.A.2. Statutes & Rules: LUBA Scope Of Review)  
Land Use Committee, Hugo Neighborhood Association & Historical Society. December 20, 2003. *LUBA Reversal*. Brochure 8 in Findings Series, Decision Violates a Provision of Applicable Law and Is Prohibited as a Matter of Law; Governing Body Exceeded its Jurisdiction; or Decision Is Unconstitutional. Hugo, Oregon

**Decision Violates Law & Is Prohibited As A Matter Of Law** LUBA will reverse a decision when the decision of local government violates a provision of applicable law. Additionally, for a decision to be reversed, it must be “prohibited as a matter of law.” 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.

LUBA may, for example, reverse a decision that violates a local comprehensive plan provision or an applicable land use regulation. 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” a decision than to reverse it. LUBA may also reverse decisions that violate statewide law, including statutes, land use goals, administrative agency rules, or Oregon’s constitution.

**Government Exceeded Jurisdiction Or Decision Unconstitutional** LUBA will also reverse a decision in which the local government exceeded its scope of authority (jurisdiction) in making the decision. A local government may exceed its jurisdiction, for example, by passing a regulation affecting land outside its geographic boundaries or impose restrictions which are 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. This would occur if the local government considered factors it was not supposed to take into account when deciding to deny an application.

**Reversal - More Information** When a local government creates a new land use regulation or amends an existing one, that decision may be reversed if it violates a provision of the local comprehensive plan, or if the local plan or the state-wide planning goals provide no basis for creating the regulation or amendment in the first place. Amendments to the comprehensive plans themselves must comply with the state-wide goals and state statutes. State agency and special district land use decisions are also reviewed for goal compliance.

In practice, a significant number of LUBA decisions are remands, rather than reversals, which are comparatively rare.