

OREGON LAND USE BOARD OF APPEALS

<http://www.oregon.gov/LUBA/pages/faq.aspx>

June 12, 2013

FREQUENTLY ASKED QUESTIONS (FAQs)

PREFACE

This is an introduction to LUBA and how it handles land use appeals. It answers the questions most often asked by persons who wish to represent themselves in appeals. This is not a procedure manual, nor is it a legal document.

The laws governing LUBA are in Oregon Revised Statutes (ORS) Chapter 197 and in procedural rules adopted by LUBA. Read the statutes and rules before becoming involved in an appeal. The statutes are available online and at most public libraries.

Question 1: What is LUBA and what does it do?

Answer: The Land Use Board of Appeals (LUBA) was established by the Oregon Legislature in 1979. LUBA hears and rules on appeals of land use decisions made by local governments and special districts. LUBA is the only forum that can hear appeals of local land use decisions. The circuit courts no longer can hear such appeals. LUBA consists of three Board members who are appointed by the Governor. They are attorneys who are experts in land use planning law.

Question 2: Is LUBA part of the LCDC?

Answer: No. Although LUBA had ties to the Land Conservation and Development Commission (LCDC) before 1983, it is now an independent agency. LCDC occasionally is a party to LUBA appeals, asserting its views, along with the other parties in the case, on the interpretation of the statewide planning goals, administrative rules and statutes.

Question 3: Must every party in a LUBA appeal have an attorney?

Answer: No. An individual person may represent himself or herself in a LUBA appeal, but may not represent others unless that individual is an attorney admitted to practice in the State of Oregon. A group, organization or corporation *must* be represented by an attorney who is admitted to practice in the State of Oregon.

An attorney can be helpful in LUBA appeals because the issues are often complex. The Oregon State Bar operates a lawyer referral service at 1-800-452-8260 ext. 408. The service will give you the name of one attorney with a special interest in land use law and will guarantee an initial office consultation at not more than \$35.

Question 4: Is mediation available?

Answer: Yes. Pursuant to ORS 197.860, all parties to a LUBA appeal may at any time stipulate that the appeal proceeding be stayed to allow the parties to enter into mediation. Mediation can often be an efficient and cost effective means of resolving the conflicts giving rise to an appeal. It can also be used in advance of an appeal or even at the local government level. Information on independent mediation and assistance in assessing its feasibility and in initiating it can be obtained from the Oregon Consensus Program at Portland State University at 503-725-9070. This program receives some funding from the Department of Land Conservation and Development to provide this service.

Question 5: What kinds of decisions can be appealed to LUBA?

Answer: LUBA can review only final "land use decisions" and "limited land use decisions."

There are two tests for determining whether a decision is a "land use decision." One is based on a state statute. The other test is based on appellate court rulings, and is called the "significant impact" test.

The statutory test (ORS 197.015(10)) defines 'land use decision' as a final decision by a local government or special district that concerns the adoption, amendment or application of the statewide planning goals, a comprehensive plan provision, or a land use regulation (*e.g.*, zoning or subdivision ordinance).

Examples of land use decisions in this group are:

- comprehensive plan change
- zone change
- conditional use permit
- variance
- rural land division

A final decision of a state agency is also a "land use decision" if the state agency is required to apply the statewide planning goals.

The other test for a "land use decision" comes from appellate court rulings. Under this test, a decision is a "land use decision" if it will have a significant impact on present or future land uses in the area.

For example, construction of a major street through a quiet residential area was held to be a 'land use decision' in the Oregon Supreme Court case of *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982); *see also Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985). You can find these cases in a public library or a law library.

The term "limited land use decision" is defined in ORS 197.015(12). Limited land use decisions include certain listed types of decisions concerning sites within urban growth boundaries. Examples of limited land use decisions include:

- urban partition
- urban subdivision
- urban site review decision
- urban design review decision

The tests for determining what is a land use decision or limited land use decision are not always easy to apply. A petitioner in a LUBA appeal must explain why the appealed decision is a land use decision. If the explanation is not stated in the petition for review (see question 13) the appeal may be dismissed.

Note that both a land use decision and a limited land use decision must be "final" before either can be appealed to LUBA. Generally, a decision is considered final when it is reduced to writing. Local government regulations may also require the signatures of certain decision makers or officials to be placed on the document. You should check the local regulations to determine when a local decision becomes final.

If local ordinances or regulations provide for an appeal from one decision maker (*e.g.*, planning commission, hearings officer) to a higher body within the same unit of government (*e.g.*, city council, county board of commissioners), that appeal *must* be completed before LUBA is asked to review the decision. State law requires completion of all available local appeals before a Notice of Intent to Appeal is filed at LUBA.

Question 6: Who are the parties in a LUBA appeal?

Answer: The parties in a LUBA appeal are the "Petitioner," the "Respondent" and persons who "intervene" on the side of either.

The Petitioner is the person, organization or corporation dissatisfied with the land use decision or limited land use decision made by the local government or special district. The Petitioner is the party appealing the decision to LUBA.

The Respondent is the unit of government that made the decision appealed to LUBA. The Respondent is automatically a party to the LUBA appeal.

If you want to become a party in a case after it is started at LUBA, you must file a Motion to Intervene. There is a \$100.00 filing fee to intervene. The motion must be filed within 21 days after the Petitioner files the Notice of Intent to Appeal. A sample Motion to Intervene is appended to LUBA's rules. The motion must indicate whether you (or your organization) want to intervene on the side of Petitioner or Respondent. If you intervene on the side of Petitioner, you will be referred to as Intervenor-Petitioner. If you intervene on the side of Respondent, you will be referred to as Intervenor-Respondent.

If you want to intervene in a LUBA appeal, the Motion to Intervene must show that you meet the test for "standing" to intervene set forth in ORS 197.830(7). You must show that either (1) you are the applicant who initiated the action before the local government or special district; or (2) you "appeared," orally or in writing, before the local government or special district.

Question 7: How is an appeal started in LUBA?

Answer: An appeal is started when a Petitioner files a "Notice of Intent to Appeal" a land use decision or a limited land use decision. You can find an example of a Notice of Intent to Appeal appended to LUBA's rules as Exhibit 1 (Rule Exhibits).

The Notice of Intent to Appeal *and* the required fees (see next question) must be filed at LUBA within 21 days after the land use decision becomes final as described by OAR 661-010-0010(3). *If the deadline is missed, LUBA will dismiss the appeal.* Under LUBA's rules (OAR 661-010-0015(1)(b)), the date of filing a Notice of Intent to Appeal is either the date the Notice is actually received by LUBA or the date the Notice is mailed, provided it is mailed by registered or certified mail and the party filing the Notice obtains a receipt stamped by the U.S. Postal Service showing the date mailed and the certified or registered number.

ORS 197.830(3), (4) and (8) contain provisions that affect the deadline for filing a Notice of Intent to Appeal in certain circumstances where decisions are made without required hearings, required notices of hearings are not provided or do not reasonably describe the final action taken, or required notice of the final decision is not provided to the person filing the Notice of Intent to Appeal. Interpretation and application of these provisions is very complex. If you find yourself in the position of having to rely on one of these provisions in filing a Notice of Intent to Appeal, you would be well advised to consult an attorney who is familiar with Oregon land use law.

Question 8: What are the fees for a LUBA appeal?

Answer: The Petitioner must pay **\$400.00** (check or money order) when the Notice of Intent to Appeal is filed at LUBA. This includes a \$200.00 filing fee and a \$200.00 deposit, called "the deposit for costs."

If the appeal is decided in the *Respondent's* favor, the deposit is used to reimburse the Respondent for costs it incurred in preparing the record for the appeal. The reimbursable costs are listed in LUBA's rules (see also Question 15).

If the *Petitioner* wins the appeal, the deposit for costs is returned to the Petitioner by LUBA. LUBA can also require the Respondent and Intervenor(s)-Respondent to reimburse the Petitioner for the \$200 filing fee.

Question 9: What other expenses are there in a LUBA appeal?

Answer: The major expense is for attorney fees. If you do not hire an attorney, there will still be expenses for typing and copying briefs and correspondence, postage, and travel to Salem for oral argument.

If you lose your appeal at LUBA, you could be required to pay the winning party's attorney fees. Under ORS 197.830(14)(b), LUBA is required to order the losing party in a LUBA appeal to pay the prevailing party's attorney fees and costs **if the losing party's claims were not 'well founded in law or on factually supported information.'** See *Fechtig v. City of Albany*, 150 Or App 10 (1997).

LUBA has required unrepresented parties who presented meritless claims to pay the attorney fees of the prevailing party. If you are unsure about the legal sufficiency of your arguments you would be well advised to consult with an attorney who is familiar with Oregon land use law.

Question 10: How long does an appeal take?

Answer: It varies from case to case. The general rule is that a final decision should be issued by LUBA within 77 days after the Respondent sends the record of its decision to LUBA for review. ORS 197.830(13). That deadline is extended when record objections or motions to take evidence not in the record are filed. It may also be extended for other motions or for cases involving particularly complex issues. You can learn the due date for a given LUBA decision by calling LUBA at (503) 373-1265. The average appeal, from start to finish, takes about four to eight months.

Question 11: Does an appeal automatically stop a development that has been approved by a local government or special district?

Answer: No. In order to stop development while a LUBA appeal is pending, the Petitioner must file a Motion for Stay of the land use decision or limited land use decision. State law (ORS 197.845) and LUBA's rules (OAR 661-010-0068) govern whether a stay can be issued in a particular case. LUBA's rules allow parties who oppose the Motion for Stay to submit a response before a ruling is made.

If LUBA grants a stay of a decision approving a specific development, state law requires the Petitioner to post a \$5,000 bond. ORS 197.845(2). If LUBA eventually upholds the land use decision, the bond is used to reimburse the developer for attorney fees and "actual damages resulting from the stay."

Question 12: How is a LUBA appeal different from the hearings by the local government?

Answer: LUBA is like an appellate court. It is not a political body. This means that LUBA's procedures are more formal and its role is more technical than the role of local government decision makers. When you file a LUBA appeal, you are challenging the *legal sufficiency of the*

local government's decision based on the evidence that was before the local government. A LUBA appeal is not an opportunity to present new evidence.

Some important points to remember about LUBA's procedures are:

In order to take part in a LUBA appeal, a person must be either a Petitioner or a Respondent (or an Intervenor on the side of Petitioner or Respondent). There is no informal participation by interested citizens or groups. However, in some circumstances, LUBA may allow the filing of an amicus brief. OAR 661-010-0052.

1. No party may speak privately or informally with a LUBA Board Member about an appeal. If a party sends correspondence to LUBA, a copy must also be sent at the same time to all other parties or their attorneys.
2. LUBA appeals follow steps outlined in LUBA's Rules of Procedure (OAR Chapter 661, Division 10). Failure to meet a deadline can result in dismissal of an appeal.
3. As a general rule, LUBA holds only one hearing in each appeal. The hearing is for legal argument based on the briefs filed by the parties, *not* for the presentation of evidence by witnesses. (See Question 13, step 5). This is a major difference from most local hearings.

Additionally, the legislature has limited LUBA's role in two important ways:

1. The general rule is that LUBA *cannot* consider evidence that was not considered by the local decision makers. Keep this in mind when you present a case to LUBA. The only evidence that LUBA can consider is *the evidence already in the record of the decision*. The exceptions to this rule are listed in ORS 197.835(2)(b) and OAR 661-010-0045(1).
2. LUBA cannot overturn a decision merely because the LUBA Board Members disagree with the decision or think it is unwise. The legislature has listed the types of reasons for overturning an appealed decision in ORS 197.835 (land use decision) and ORS 197.828 (limited land use decision).

Keep these reasons in mind when presenting arguments to LUBA. The reasons include:

1. The local officials failed to follow the correct procedures in making the decision, *and* the procedural error deprived the Petitioner of a substantial right.
2. The local officials failed to follow the correct procedures in making the decision, *and* the procedural error deprived the Petitioner of a substantial right. [NOTE: Petitioners' "substantial rights" are the rights to a reasonable opportunity to prepare and submit their cases and a full and fair hearing, *not* the right to a particular outcome.]
3. The decision violates a constitutional guarantee, a state law (*e.g.*, statute, statewide planning goal) or a local law (*e.g.*, comprehensive plan policy, zoning ordinance).

4. The land use decision is not supported by "substantial evidence in the whole record;" or If the decision is a limited land use decision, it is not supported by "substantial evidence in the record." ORS 197.828(2)

[NOTE: By law, local decision makers can choose which evidence they wish to believe, so long as the evidence they rely on is "substantial evidence." Substantial evidence is evidence that a reasonable person could rely on to support a conclusion.]

Question 13: What happens after the Notice of Intent to Appeal is filed at LUBA?

Answer: A sequence of steps is followed. There are deadlines for each step. These are outlined below.

Step 1. Filing the Record (OAR 661-010-0025). Within 21 days after the Notice of Intent to Appeal is filed at LUBA, the Respondent (the unit of government that made the land use decision or limited land use decision) must file a copy of the record of the decision with LUBA. The record consists of the materials submitted to, and not rejected by, the decision makers in the course of the local proceedings.

The Respondent must provide a copy of the record to the Petitioner. The Respondent is required to provide a copy of the record to an Intervenor only if the Intervenor requests a copy and reimburses the Respondent for reasonable copying costs.

Step 2. Objections to Record (OAR 661-010-0026). Within 14 days after the record is filed, any party may object to the contents of the record. An objection may assert that the record:

1. is incomplete, *i.e.*, does not include all the materials that were actually submitted to, and not rejected by, the local decision makers; or
2. contains material that was not actually placed before the decision makers.

LUBA's rules govern the procedure for objections to the record. If an objection to the record is filed, the appeal is suspended until the objection is settled by the parties or by an order of LUBA. An objection to the record should be filed only if it is necessary to the merits of your appeal. It may be wasteful to object to a technical error or minor omission from the record if the error or omission is not relevant to your claims or will not help you prevail in the appeal.

Step 3. Filing the Petition for Review (OAR 661-010-0030). Unless an objection to the record is filed, the Petitioner must file a "Petition for Review" (Petitioner's brief) within *21 days after LUBA receives the record from the local government*. If a record objection is filed, the Petition for Review must be filed within 21 days after the date the record is settled by LUBA.

The Petition for Review sets forth the reasons why the land use decision or limited land use decision should be reversed or remanded. In preparing the Petition for Review, keep in mind the bases on which LUBA may reverse or remand a decision (see question 12). LUBA's rules

describe the form and content of a Petition for Review. You can get samples of Petitions for Review from previous cases by calling LUBA.

Unless an extension of time to file the Petition for Review is agreed to in writing by all parties, if you don't file a Petition for Review on time, your appeal will be *dismissed*.

A Petition for Review (like all other documents filed in a LUBA appeal, except the Notice of Intent to Appeal) is "filed" when it is either (1) delivered to LUBA, or (2) mailed to LUBA by first class mail with the U.S. Postal Service. OAR 661-010-0075(2)(a). A Petition for Review (like all other documents filed in a LUBA appeal, except the Notice of Intent to Appeal) must be accompanied by proof of service on the other parties. OAR 661-010-0075(2)(b). A sample Certificate of Service is appended to LUBA's rules.

Step 4. Filing the Respondent's Brief (OAR 661-10-035). Respondent must file a response brief answering the arguments made in the Petition for Review within 42 days after LUBA receives the record from the local government whose decision is being appealed (or within 42 days after the record is settled by LUBA, if a record objection is filed). Requirements for the form and content of the Respondent's Brief are outlined in LUBA's rules. You can get samples of Respondent's Briefs from previous cases by calling LUBA.

Step 5. Oral Argument. After receiving the Petition for Review, LUBA will set a date and time for oral argument. The oral argument is usually scheduled to take place about two weeks after the Respondent's Brief is filed.

Oral argument is a hearing usually held at LUBA's office in Salem. Some or all of the parties may arrange with LUBA to participate by telephone. The hearing usually takes about 60 minutes. The order is:

Brief introduction by a LUBA Board Member.

Petitioner has 30 minutes to stress the key points made in the Petition for Review. No new evidence is allowed. Petitioners may save up to 10 minutes of their allotted time to respond to new issues raised in the Respondent's presentation. This is called "rebuttal."

Respondent has 30 minutes to answer Petitioner's arguments. Petitioner may use up to 10 minutes remaining from the original 30 minutes for rebuttal.

LUBA Board Members may ask questions during oral argument to help them understand the case. Spectators may attend. However, only parties who have submitted written briefs may participate in oral argument.

Because of limited space, please notify LUBA no later than 12 days prior to the oral argument if more than 10 people plan to attend, so alternate room arrangements can be made.

Step 6. Issuance of LUBA's Final Opinion and Order. LUBA does not rule on cases at oral argument. Instead, a written decision is usually issued a few weeks afterward. The final opinion and order will address the issues presented in the Petition for Review, setting forth the reasons for LUBA's ruling. The order will end with one of the following actions:

"Affirm" (uphold) the challenged decision;

"Reverse" (overrule) the challenged decision;

"Remand" the challenged decision (return it to the local government or special district for further action);

"Dismiss" the appeal; or

"Transfer" the appeal to the circuit court per ORS 19.230(4). LUBA will only transfer a decision to the circuit court if it determines the decision is neither a land use decision nor a limited land use decision, and thus is not within LUBA's jurisdiction. To obtain transfer of an appeal to the circuit court, a Motion to Transfer must be filed by the requesting party. This procedure is explained in LUBA's rules. OAR 661-010-0075(11).

Question 14: Can a LUBA decision be appealed?

Answer: Yes. Any party can appeal LUBA's decision to the Oregon Court of Appeals. The appeal is governed by state law (ORS 197.850). A petition for judicial review must be filed in the Court of Appeals within 21 days after the date LUBA mailed its final opinion and order.

Question 15: What is a cost bill?

Answer: A "cost bill" asks LUBA to require the losing party to reimburse the winning party for certain costs incurred during the appeal. The reimbursable costs are listed in LUBA's rules. OAR 661-010-0075(1)(b).

The winning party may file a cost bill within 14 days after LUBA's final opinion and order is issued.

The losing side may respond to the cost bill within 10 days after the cost bill is filed at LUBA. Thereafter, LUBA will issue an order awarding or denying the requested costs. However, if LUBA's decision is appealed to the Court of Appeals, LUBA will not act on the cost bill until that appeal is resolved.