

Appendix V.A.3. LUBA 27.5.1 HEADNOTES
(27.5.1 LUBA Procedures/Rules – Briefs – Generally)
FOR ASSIGNMENT OF ERRORS
June 19, 2013

The parties in a LUBA appeal are the "Petitioner," the "Respondent" (local government decision) and persons who "Intervene" on the side of either. In an appeal the Petitioner will have to submit a "Petition for Review" (petition or brief) to LUBA. This is the equivalent of going to the local district court.

Petition for Review = PFR, Petition, or Brief. OAR 661-010-0030(4) covers the requirements for the contents of a Petition for Review (PFR), Petition, or Brief

OAR 661-010-0030(4)(d) Requirement for Assignment of Errors

OAR 661-010-0030(4)(d) "(4) Contents of Petition: The petition for review shall:"

“(d) **Set forth each assignment of error** under a separate heading. Where several assignments of error present essentially the same legal questions, the argument in support of those assignments of error shall be combined;”

LUBA HEADNOTES 27.5.1 (see Appendix V.A.3. LUBA Headnote Index)

27.5.1 LUBA Procedures/Rules – Briefs – Generally
(<http://www.oregon.gov/LUBA/docs/headnotes/27.5.1.pdf>)

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. 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. 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. 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. 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. 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. 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. 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. 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).