

V. TESTIMONY ALTERNATIVES

The range of opportunities to submit relevant written testimony is broad and not limited to testimony presented at public land use hearings. There are many reasons for submitting written testimony, however, the main reason is that relevant written testimony be placed before the final decision maker during the course of the land use proceedings.

Alternative A	Testimony Submitted Prior to Public Hearing
	1. Land Use Assessments
	2. Pre-application Review Period
	3. After Land Use Application and Prior to Notice of Public Hearing
	4. After Notice of Public Hearing and Prior to Public Hearing
Alternative B	Testimony Submitted at Public Hearings
	1. Before Rural Planning Commission
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Alternative C	Testimony Submitted at Continued Public Hearing(s)
Alternative D	Testimony Submitted During Periods When the Record Is Open after Public Hearing(s)
Alternative E	Testimony Submitted During Public Comment for a Written, Signed, and Final Decision by the Final Decision Maker for Purposes of Appeal

A. Alternative A. Testimony Submitted Prior to Public Hearing

Josephine County does not have RLDC procedures for accepting relevant written testimony for the record during the time period prior to notice of a public hearing (see Section II.B), and it has minimal procedures for the time period from the date of notice to the time of the public hearing.

The Planning Director has “For The Record” responsibilities for site reviews, administrative reviews, and public hearings: conducting the correspondence for the hearing body and maintaining the record for the course of the proceedings. The hearing body is normally the RPC or the BCC. The Planning Director’s judgmental responsibilities to determine “For The Record” procedures for the “course of the land use proceedings” are substantial to absolute as there are no identified county procedures, except some procedures for the quasi-judicial process, public notice, and public hearings. Even for these three areas there are many situations not covered in the procedures, and the hearing bodies’ deferral to the Planning Director’s opinion is near absolute. LUBA’s court made law definition of the “course of the proceeding” (OAR 661-010-0025) is from the time of a land use application until after the local decision is reduced to a written, signed and final decision for the purposes of a LUBA appeal. In contrast the local code is almost 100 percent focused on the requirements of ORS 197.763 (i.e., conduct of local land use hearings), and is generally silent on the other time periods during the course of the proceedings, especially the time period prior to a public hearing, which written testimony can be placed before the hearing body and/or final decision maker.

Nevertheless, there are several alternatives for neighbors to become involved in submitting relevant written testimony for the record prior to a public hearing. When there is time, these alternatives are effective for helping neighbors requesting assistance and for organizing approaches that might be applicable for future testimony. They are not safe in the assumption that relevant written testimony will be part of the record even if physically given to a planner at the planning office with oral assurances from the planner that the submitted testimony will be part of the record of the proceedings.

1. Alternative A1. Land Use Assessments
2. Alternative A2. Pre-Application Review Period
3. Alternative A3. After Land Use Permit Application and Prior to Notice of Public Hearing
4. Alternative A4. After Notice of Public Hearing and Prior to Public Hearing

1. Alternative A1. Land Use Assessments

Josephine County does not have RLDC procedures for accepting relevant written testimony for the record during the time period prior to a pre-application review request by an applicant, and few procedures applicable to the time period prior to a public hearing.

Although still a rare event, the HLUC has developed a program for developing land use assessments when there is a relevant resource issue and there is time for neighbors to organize. On occasions, land use assessments will be developed after neighbors discovery some Pre-activity on the Ground like DEQ test holes from a public road, an on-going Pre-application Review Request, or an advance Oregon Department of Land Conservation and Development (DLCD) "Notice of Proposed Amendment" (ORS 197.610), and there is a request for assistance from neighbors to the HLUC. These events alert the HLUC that a land use application could be imminent, or in the near future, but there may be time to develop an assessment. Land use assessments will be considered, on a case-by-case basis, depending if there is active interest and concern, and a serious commitment by neighbors.

A land use assessment is a description of existing conditions, including standards and criteria, potentially applicable to such an application. It can include probable standards for adequate findings, and the long-range standards and criteria for carrying capacity issues: 1. ground water, 2. rural character, 3. transportation, 4. air pollution, 5. wildfire, and 6. affordability. It also can include the issue of compliance determinations for conditions of approval made at a stage that provides opportunity for public review and comment. A land use assessment is considered an ongoing process. As new information becomes available, the assessment will be considered, and updating could occur. A land use assessment is developed for the land use applicant and surrounding neighbors. It is a neighborhood alert that the HLUC considers the potential action as serious and worthy of its attention.

The strategy is that the committed neighbor(s) becomes the liaison between the Josephine County Planning Office and the HLUC. The objective of the neighbor(s) is to develop a relationship with staff at the planning office concerning the applicable file(s). After the land use assessment is developed the neighbor would request that this testimony become a component of the official pre-application review file for purposes of eventually becoming part of the record of the potential proceedings. The idea is that where Josephine County has no adopted procedures for submitting documents prior to public land use hearings for potential permit applications that the following actions can occur: (1) a neighbor (party) delivers the assessment to the Planning Director in advance of a public hearing, (2) the assessment includes a request that it be made part of the record, (3) the Planning Director verbally accepts the assessment as part of the record, does not respond, or rejects the assessment, and (4) the party verbally requests at the public hearing that the assessment be made part of the record. With this four-step citizen involvement process it is assumed that the neighbor's actions might be sufficient to place the document before the decision maker. It is assumed that a reasonable person (normal citizen not familiar with planning rules) would assume the submitted written testimony is part of the record of the land use proceedings.

The HLUC has developed two land use assessments and is considering others. They all deal with resource issues. It has also developed an inventory of historically important orchards in the Hugo region.

1. Completed March 6, 2006 *Lynch Ranch Land Use Assessment* (farmland)
2. Completed June 2006 Ockenden Woodlot Land Use Assessment (farmland and forestland)
3. Dickerson's Corner Land Use Assessment (farmland) - Being considered.
4. June 7, 2003 (Updated January 9, 2005) Brochure on *Hugo's Famous Orchards*

a) Lynch Ranch Land Use Assessment

On June 23, 2005 the Josephine County Planning Office received a request for a pre-application review (Article 21 of the *Josephine County Rural Land Development Code*) from Mr. Cliff Woodruff. The request, involving 127.27 acres, was for an assessment of the potential for a comprehensive plan map amendment and zone change of 114.75 acres from Exclusive Farm to Rural Residential. Approval of this land use request would amend the Josephine County Comprehensive Plan from Agricultural to Rural Residential and change the Zone Map designation from Exclusive Farm to Rural Residential. Most of this property, identified in the pre-application review, is known locally as the Lynch Ranch (approximately 120-acres). The pre-application review request stated: "*An application would be prepared based on the Non-Resource Criteria of the Josephine County Comprehensive Plan.*"

A neighbor submitted the Lynch Ranch Land Use Assessment to the Planning Office March 6, 2006. She was informed by the Planning Director that the assessment would be part of the record.

b) Ockenden Woodlot Land Use Assessment

The HLUC became aware that this land use project was becoming active through the Josephine County's April 4, 2006 ORS 197.610 "DLCD Notice of Proposed Amendment." Approval of this land use request would amend the Josephine County Comprehensive Plan (JCCP) text to add Tallowbox soil to the Josephine County Soils Inventory and amend the JCCP Map and Zoning Map from Forest & Agriculture (Woodlot Resource & Farm Resource) to Residential (Rural Residential 5 acres) for 157.93 acres located on Hugo Road in Grants Pass, Oregon.

The local process was originally started with a land use application in 1992. Various filings and opinions have included, but are not limited to numerous public hearings before the Rural Planning Commission (RPC) and the Board of County Commissioners (BCC), a LUBA remand, district court opinion, consent decree, and an Oregon Appeals Court opinion. A complete history of the Ockenden property from 1973 through 2003 was prepared by the Josephine County Planning Office.

A land use assessment was completed by the HLUC June 2006 but not submitted to the Planning Office by neighbors. On November 21, 2006 there was another Oregon DLCD "Notice of Proposed Amendment". On November 17, 2006 a Notice of Public Hearing was distributed scheduling a December 18, 2006 public hearing before the RPC. A member of the HLUC, hand-delivered the HLUC's written testimony to the RPC c/o the Planning Office on November 28, 2006. He was informed by the receiving planner that the submitted testimony would be part of the record (Appendix F).

c) Dickerson's Corner

During the fall-winter of 2002 neighbors reported DEQ test holes in Dickerson's field to the HLUC, and requested assistance to find out what was going on. Investigation revealed that on November 26, 2002 the Josephine County Planning Office had received a pre-application review for a comprehensive plan and zone change for Dickerson's Corner (41.5 acres) from "*Exclusive Farm*" to "*Rural Residential - 5 Acres*". The request was based upon the concept that the land was irrevocably committed to non-resource.

Neighbors organized, held meetings, wrote letters, and developed four brochures, the last one on January 1, 2003 entitled, "*Attempt To Re-zone Dickerson's Corner From Exclusive Farm To Rural Residential*". The pre-application review request has not yet developed into a land use application and the HLUC has not yet developed a land use assessment.

d) Other Farm And Forest Land Materials

The HLUC has a list of farmlands in the Hugo region (i.e., January 9, 2005 brochure on *Hugo's Famous Orchards*). It will consider these farmlands for the development of land use assessments and/or written testimony submitted prior to a public hearing.

e) Written Testimony

The normal strategy of the HLUC is to make every effort to get written assessments submitted as early as possible, if not into the record, into the files. The principal value is helping neighbors requesting assistance and for organizing approaches that might be applicable for future testimony.

There are three testimony alternatives besides land use assessments for neighbors to become involved prior to a public hearing. Depending on the timing these other approaches have sometimes been utilized to submit written testimony.

1. Alternative A2. Pre-Application Review Period
2. Alternative A3. After Land Use Permit Application and Prior to Notice of Public Hearing
3. Alternative A4. After Notice of Public Hearing and Prior to Public Hearing

2. Alternative A2. Pre-Application Review Period

Josephine County does not have RLDC procedures for accepting relevant written testimony from the public for the record during the pre-application review period.

The pre-application review request period starts with filing the pre-application review fees and is the normal time period when the applicant submits relevant written testimony for the record as well as the time that written materials are submitted for the record by any the applicant's expert witnesses. It is also the time -period for other noticed agencies to submit comments for the record prior to the land use application being acknowledged as complete and/or filed.

On occasion, the HLUC gets involved with a land use project during pre-application review. For example, because of neighbor involvement the HLUC learned that on November 26, 2002 a pre-application review had been submitted for Dickerson's Corner for a comprehensive plan and zone change (see Section V.A.1.c)). By early 2003 neighbors had organized and were prepared to submit testimony. The pre-application review request has not yet developed into a land use application and the HLUC has not yet developed a land use assessment or submitted written testimony for the record.

3. **Alternative A3. After Land Use Application and Prior to Notice of Public Hearing**

Josephine County does not have RLDC procedures for accepting relevant written testimony for the record during the time period after the land use application is determined to be complete, an application for a land use permit is filed, and prior to the notice of a public hearing.

This time period has the same interpretation issues as the proceeding time period of pre-application review. It is a normal time period when the applicant can submit additional relevant written testimony for the record as well as the time that additional written materials can be submitted for the record by any the applicant's expert witnesses. It is also the time period when the planning department will accept comments from other agencies for the record.

There are LUBA rulings that this time period after the application is complete and filed with the application fees (versus pre-application review fees) is a legitimate time for the submission of relevant written testimony for the record because it is during the course of the proceedings of the final decision maker.

4. **Alternative A4. After Notice of Public Hearing and Prior to Public Hearing**

ORS 197.763(3)(g) and (j) provide:

“(3) **The notice provided by the jurisdiction shall:**” [Emphasis added].

“(g) Include the name of a **local government representative** to contact and the telephone number where additional information may be obtained;” [Emphasis added].

“(j) Include a general explanation of the **requirements for submission of testimony** and the procedure for conduct of hearings.” [Emphasis added].

Josephine County has some RLDC procedures addressing the notice of a land use hearing (see Section II.B.6.; Section IV.B.). The HLUC's view is that when the purpose of public notice and the notice are read together they imply there is a specific opportunity for the public to submit testimony to the hearing body and/or the final decision maker prior to a public hearing for the purpose of the record and that the local government contact is the representation of the local decision maker. There are also several LUBA rulings addressing the notice of a land use hearing inviting written comments. Written comments are “placed before” the final decision maker within the meaning of OAR 661-010-0025(1)(b) where the notice of hearing invites written comments and parties to the case to submit written comments in the manner set forth in the notice (see Section II.C.2.c)). This becomes more obvious when the RLDC quasi-judicial review procedures are examined for mailing notice and response to notice. All persons commenting or objecting relating to a land use application must be submitted in writing within 15 days from the mailing in order to be included in the review, or to establish party status for appeal purposes. RLDC 22.040.B.5.

Josephine County has the following RLDC procedures addressing the notice of a land use hearing.

- . The purpose of public notice is to provide an opportunity for affected or interested persons to participate in Josephine county's *land use review and decision-making process*. Purpose - RLDC 32.010.
- . The name of local government representative to contact and the telephone number where additional information may be obtained is a content requirement of the notice prior to a decision. Content of Notice Prior To Decision - RLDC 32.030.A.2.f.
- . A general explanation of the requirement for submission of testimony and the procedure for the conduct of hearings is a content requirement of the notice prior to a decision. Content of Notice Prior To Decision - RLDC 32.030.A.2.i.
- . The Planning Director is responsible to mail notice of an application to all persons within the notice area as required by RLDC 32. All comments or objections relating to the application shall be submitted in writing within 15 days from the mailing of the notice in order to be included in the review, or to establish party status for appeal purposes. RLDC 22.040.B.5.

It is interesting that RLDC 22.040.B.5. has a requirement for persons receiving notice to submit comments or objections in writing within 15 days from the mailing of the notice where the members of the HLUC have never seen this regulation enforced.

The HLUC's view is that when the purpose of public notice, the notice, and the responsibilities of persons to respond to the notice are read together, they imply that the local government representative is the representation of the local decision maker for purposes to placing material before the hearing body because there is a specific opportunity for the public to submit testimony to the hearing body and/or the final decision maker prior to a public hearing for the purpose of providing comments to the record.

B. Alternative B. Testimony Submitted At Public Hearings

Josephine County does not have identified RLDC procedures for accepting relevant written testimony for the record during public hearings. However, there are LUBA rulings that public hearings are a legitimate time for the submission of relevant written testimony for the record because it is during the course of the proceedings of the final decision maker.

There are several alternatives for neighbors to become involved in submitting relevant written testimony for the record prior to a public hearing. The only safe assumption is that relevant written testimony will be part of the record if it is physically placed before the final decision maker at a public hearing with an oral request that it be part of the record, and it is not rejected.

1. Alternative B1. Before Rural Planning Commission
2. Alternative B2. Before the Final Decision Maker

The HLUC's goal is to submit testimony during public hearings in order that members of the hearing bodies have an opportunity to adequately consider their issues (i.e., raise it or waive it).

1. Alternative B1. Public Hearing Before Rural Planning Commission

The normal alternative of the HLUC is to make every effort to get all testimony, including all the supporting documents (document dump), submitted for consideration of the RPC during public hearings. This alternative has several advantages. Submitting testimony to the RPC supports concerned neighbors and develops the arguments.

A secondary alternative used, on a case-by-case basis, by members of the HLUC is to submit testimony covering their issues to the RPC for the record in a minimal way without supporting documents. The purpose is to make an appearance, demonstrate involvement, and connect with neighbors on the issues (see Section VI.). This minimal input RPC strategy of not providing the complete case to the RPC saves time, conserves limited dollars, and helps prevent neighbor burnout (see Section VI).

2. Alternative B2. Public Hearing Before the Final Decision Maker

The "document dump" before the final decision maker (BCC) includes sharing the summary issues with the RPC, but saving most of the testimony and all the supporting primary documents for the hearing before the BCC. It follows the law that, for written testimony to be part of the content of the record, it must be placed before, and not rejected, by the final decision maker during the course of the proceedings before the final decision maker (OAR 661-010-0025).

C. Alternative C. Testimony Submitted At Continued Public Hearing(s)

Josephine County has RLDC procedures for accepting relevant written testimony for the record at continued public hearings. A safe assumption is that relevant written testimony will be part of the record if it is physically placed before the final decision maker at a public hearing with an oral request that it be part of the record, and it is not rejected.

Continued public hearings of either the RPC or the BCC are opportunities to further research and refinement of testimony arguments and/or the development of new arguments.

D. Alternative D. Testimony Submitted Periods During Periods When the Record Is Open after Public Hearing(s)

Josephine County has RLDC procedures for accepting relevant written testimony for the record when the record is left open after public hearings. It is a safe assumption that relevant written

testimony will be part of the record if it is placed before the final decision maker where the hearings procedures invite written comments and parties to the case submit written comments in the manner set forth at the hearing.

Periods for leaving the record open after public hearing(s) are opportunities to further research and refinement of testimony arguments.

E. Alternative E. Testimony Submitted During Public Comment for a Written, Signed, and Final Decision by the Final Decision Maker for Purposes of Appeal

There is a distinction between the content of the record during the course of the proceedings before the final decision maker (OAR 661-010-0025), and when the record is open for public comment (ORS 197.763(1)).

Josephine County does not have RLDC procedures for accepting relevant written testimony for the record raised after the close of the record. However, LUBA has ruled that for purposes of determining the composition of the local record of a decision on a permit application, the local land use proceedings begin when the permit application is submitted. The “course of the proceeding” is from when the land use application is complete until the local decision is reduced to written, signed and final decision for the purposes of a LUBA appeal (see Section II.C.1.a)).

OAR 661-010-0025(1)(b) provides:

“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.”
[Emphasis added].

The final decision maker is the BCC which is composed of three commissioners. The normal procedure is that an oral decision of the BCC is made after the public hearing is closed and deliberations are completed. The BCC then assigns its staff and/or the applicant to develop the decision and findings which are later signed at a future public hearing. This written, signed and final decision starts the clock for a LUBA appeal.

Just before the written decision is signed the BCC asks the audience at the public hearing if they have any comments on the proposed written decision. This open public hearing time is an opportunity for further public comments, especially for alleged procedural errors (see Section VI).