

VI. STRATEGY CONSIDERATIONS FOR TESTIMONY ALTERNATIVES

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)). An issue which may be the basis for an appeal to the Oregon Land Use Board of Appeals (LUBA) must be raised no later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Keeping in mind the differences, the range of opportunities to submit relevant written testimony is broad and does not have to be limited to testimony at public land use hearings. This section of the “*For The Record, or Not?*” paper addresses some of the pros and cons of a range of different alternatives for submitting relevant written testimony “For The Record”.

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Strategy considerations for submitting different testimony alternatives may cover some, or all of the following factors:

1. Clarity of the Law, Regulations, And/or Local Ordinances.
2. Clarity of Court Rulings.
3. Planning Office Supports Citizen Involvement.
4. Hearing Body Supports Citizen Involvement.
5. Level of Neighbors' Involvement and Networking
6. Fund Raising.
7. Citizen Apathy.
8. Dollar Costs of Land Use Proceedings Process.
9. Time and Labor Needs of Land Use Proceedings Process.
10. Stress.
11. Burn out - the Overburdened Citizen.
12. Support from Others (e.g., DLCDC, OCIAC, LCDC, Elected Officials, Local Planning Commission, Local CIC, Resource Agencies, Citizen Groups, Etc.).
13. Reasonable Assurance That Submitted Testimony Will be "For the Record".

A. Alternative A. Testimony Submitted Prior to Public Hearing

There are several alternatives for neighbors to become involved in submitting relevant written testimony for the record prior to a public hearing. These alternatives have value in helping neighbors requesting assistance and the potential for neighbors networking, and when there is time for organizing approaches that might be applicable for future testimony. However, Josephine County does not have procedures for accepting relevant written testimony for the record during the time period prior to a public hearing (see Section II.B.; Section V.A.). These pre-hearing submission alternatives 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.

Parties can never be sure testimony submitted prior to the first public hearing will be part of the record when the local government has no adopted procedures for submitting documents prior to public land use hearings for permit applications. Even so, LUBA rulings have been favorable to a testifier when there are no local procedures, and the neighbors have made the following attempts to get their testimony into the record.

1. The neighbor (party) hand-delivered the relevant written testimony to the Planning Director and/or designated planner in advance of a public hearing and secured a receipt for the delivered testimony.
2. The written testimony included a request that it be made part of the record.
- 3.a) The Planning Director verbally accepted the written testimony as part of the record, did not respond, or rejected the material.

- 3.b) An alternative to 3.a) is to submit a written receipt form for the Planning Director to sign that the testimony is: part of the record, or to be held and placed before the hearing body for acceptance or rejection, or is rejected as being part of the record.
4. The party verbally requested at the first public hearing that the previously submitted written testimony be made part of the record and the local government did not rule on the request.
5. The party verbally requested at the first public hearing for an explanation of the procedures for accepting testimony prior to the hearing, during the hearing, and after the hearing.

This five-step citizen involvement process has value in a later content of the record conflict between the local government and a petitioner to LUBA when the local government has no procedures and has not ruled on the request to have testimony included into the record. It is anticipated that this scenario would be favorably received by LUBA in a ruling that a reasonable person would assume that in those circumstances written testimony is part of the record of the land use proceedings. Additional positive efforts by citizens to clarify the procedures for accepting evidence into the record are citizen requests before the BCC at its weekly business sessions for clarification of the procedures, including requests to the Josephine County Citizen Involvement Committee (CIC) to research and make recommendations to the BCC on establishing procedures for submitting written testimony into the record. OAR 661-010-0025.

1. Alternative A1. Land Use Assessments

Pros. This alternative is a result of events alerting the Hugo Land Use Committee (HLUC) that a land use application is probable in the near future, and it may have 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 serious commitment by neighbors.

The process to develop an assessment and deliver it to the Planning Office is a huge opportunity for neighbors to network concerning their having a say in the quality of life in their neighborhood. After the assessment is in the planning file, regardless whether it is part of the record, and it might be discovered by other citizens. This development and discovery process can lead to neighbors networking and becoming involved in time to make a difference.

An equal opportunity is to have the written testimony in the files be discovered by the applicant with the potential for a voluntary design change in the proposal which mitigates adverse impacts and, even though the changed proposal might continued to be resisted by some, the new proposal is a benefit to the neighborhood. In the same vein it might alert the Planning Office to issues not yet researched. During this pre-formative stage the probability for acceptance and/or change is the highest as the applicant and the Planning Office have not completed the pre-application review with the expended energy, time, and money during the normal compromises of trying to make the application complete enough for a permit or land use request. They have not already

invested a large amount of time and money in the “right” proposal which is in compliance with the applicable standards and criteria. The proposal and viewpoints are only beginning to form.

Cons. Josephine County does not have RLDC procedures for accepting relevant written testimony for the record during the time period prior to a public hearing (see Section II.B.; Section V.A.).

It is an unusual event for neighbors to become involved in early planning processes that are little understood and not perceived to be an immediate threat. This neighborhood alternative is expensive in time, labor, and money without the assurance that the assessment will become part of the record.

2. Alternative A2. Pre-Application Review Period

The pre-application review period 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 the formal permit or land use request.

Pros. The process to develop testimony and deliver it to the Planning Office is a huge opportunity to connect with neighbors concerning their having a say in the quality of life in their neighborhood. After the testimony is in the planning file, regardless whether it is part of the record, and it might be discovered by the applicant and other citizens. This development and discovery process can lead to neighbors networking and becoming involved in time to make a difference.

Written testimony in the files can also be discovered by the applicant with the potential for of a voluntary design change in the proposal which mitigates adverse impacts and is a benefit to the neighborhood. In the same vein it might alert the Planning Office to issues not well thought out and result in a different staff report more favorable to issues identified by neighbors. During this early formative stage the probability for acceptance and/or change is higher as the applicant and the Planning Office have not completed the pre-application review with the its normal compromises. They have not already invested a large amount of time and money in the “right” proposal which is in compliance with the applicable standards and criteria. The proposal and viewpoints have not completely hardened.

Cons. Josephine County does not have RLDC procedures for accepting relevant written testimony for the record during the time period prior to a public hearing (see Section II.B.; Section V.A.).

There appears to be a double standard here where the applicant, the applicant’s expert witnesses, and agencies can legitimately submit written testimony for the record, but that concerned citizens

do not have this opportunity as an expressed right and opportunity. This neighborhood alternative is expensive in time, labor, and money without the assurance that the written testimony will become part of the record.

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

This time period after the after land use application is complete and prior to notice of public hearing is the same gray area as the proceeding time period of pre-application review. It is a normal time period when the applicant, applicant's expert witnesses, and agencies can submit additional relevant written testimony for the record.

Pros. The process to develop testimony and deliver it to the Planning Office is a huge opportunity to connect with neighbors concerning their having a say in the quality of life in their neighborhood. After the testimony is in the planning file, regardless whether it is part of the record, and it might be discovered by other citizen. This development and discovery process can lead to neighbors networking and becoming involved in time to make a difference.

The probability for voluntary changes and evolving viewpoints during this period is much higher than acceptance of opposition testimony during the later public hearing phase. For example, testimony in the files might be discovered by the applicant with the potential for of a voluntary design change in the proposal which mitigates adverse impacts and is a benefit to the neighborhood. In the same vein it might alert the Planning Office to issues not well thought out and result in a different staff report more favorable to neighbors. However, the probability for change is reduced as the applicant and the Planning Office have already went through pre-application review with the normal compromises. A large amount of time and money has already been invested and the proposal and viewpoints have hardened.

There are LUBA rulings that this time period after the application is complete 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.

Cons. Josephine County does not have RLDC procedures for accepting relevant written testimony for the record during the time period prior to a public hearing (see Section II.B.; Section V.A.).

This neighborhood alternative is expensive in time, labor, and money without the assurance that the assessment will become part of the record.

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

This time period after notice of public hearing and prior to the public hearing is a normal time period when the applicant, the applicant's witnesses, and agencies usually submit additional testimony for the record. There are laws, local rules, and LUBA opinions covering the content requirements of public notice (ORS 197.763(3); RLDC 32.030.A.2.; Section II.A.; Section II.B.7; Section II.C.2.c); IV.B.; and V.A.4.).

Pros. There are LUBA rulings that the time period after notice is given is a legitimate time for public comments becoming part of the record. There is a reasonable expectation that relevant written comments from the public submitted during this time period will be accepted by the hearing body as "For The Record." Even so, LUBA rulings favorable to a testifier when there are no local procedures are enhanced when the record demonstrates attempts by the parties to get their testimony into the record (see Section VI.A.)

Josephine County has some RLDC procedures addressing the notice of a land use hearing (see Section II.B.6.; Section V.A.4.). 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's identified 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 locally when the RLDC quasi-judicial review procedures are examined for mailing notice and response to notice. **All persons commenting or objecting relating to the 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.

Submitting written testimony can lead to neighbors networking. The parties still have time to make a difference by getting involved, but the opportunity to do advance research and organizing is reduced when compared to an earlier start. The written testimony can also be discovered by the applicant with the potential for a voluntary design change in the proposal which mitigates adverse impacts and is a benefit to the neighborhood. In the same vein it might alert the Planning Office to issues not well thought out and result in a different staff report more favorable to issues identified by neighbors.

Cons. Josephine County has RLDC procedures for accepting testimony after notice and prior to a public hearing (see Section II.B.; Section V.A.), however, in practice, written testimony might not be accepted "For The Record", or if comprehensive written comments are accepted, this alternative can be expensive in time, labor, and money without the assurance that the written testimony will be considered in detail by the hearing body.

The probability for change during this time period is reduced from that of earlier time periods as the applicant and the Planning Office have already went through pre-application review with the normal compromises. A large amount of time and money has already been invested by the applicant and the proposal and viewpoints have hardened.

B. Alternative B. All Public Hearings

Pros. The Planning Staff and the RPC believe there are procedures for accepting relevant written testimony for the record during public hearings. 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 before the hearing body and/or the final decision maker.

There are a couple of alternatives for neighbors to become involved in submitting relevant written testimony for the record at 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 the public hearing(s) in order that members of the hearing bodies have an opportunity to adequately consider issues of concern. This is an excellent opportunity for parties to present written and oral testimony to the hearing body(s) because its members have not formed their opinions. They are at the beginning of their deliberations.

Cons. Many times it is almost impossible for neighbors to develop testimony in time to submit it at a hearing. There is just not enough time between the notice date and the hearing date.

There is still time for neighbors to make a difference by getting involved, but the opportunity to research the issues and organize can only occur with dedicated efforts during a crunch time frame. Many times neighbors fail and their best testimony is in the form of passionate pleas not based on the applicable standards and criteria.

The probability for voluntary change or acceptance of another viewpoint by applicant and the Planning Office is minimal as they have already went through pre-application review with the normal compromises. A large amount of time and money has already been invested and the proposal and viewpoints have hardened. At this point most land use proceedings are usually quasi-judicial, adversarial, and controversial.

The assumption that relevant written testimony will be part of the record if it is physically placed before the hearing body, not the final decision maker, at a public hearing with an oral request that it be part of the record may be in error.

1. Alternative B1. Public Hearing Before Rural Planning Commission

Pros. The purpose of the RPC hearing(s) is to provide for the conduct of an impartial public hearing for applications which involve significant policy issues having county-wide impact, or which call for review and a decision recommendation to the BCC. The RPC acts on behalf of the BCC in hearings in making decisions or making decision recommendations regarding land use applications (Section II.B.3.). The normal strategy of the HLUC is to make every effort to get all testimony, including all the supporting documents (i.e., document dump), submitted for consideration by the RPC during public hearings. This alternative has several advantages. It supports concerned neighbors and develops the arguments before the RPC at the first public hearing. Written and oral testimony presented during the public hearing, if not rejected, becomes part of the record for the hearing body.

Cons. There are disadvantages to a document dump to the RPC. The primary ones are wasted labor, excessive costs, stress, and frustration with the land use planning process. For example, the Planning Director and the RPC's recent direction to the HLUC, although not required by ordinance, is that 10 copies of written testimony must be submitted to the RPC. If not, the HLUC had been instructed that if only one original of the written testimony was submitted it could not be considered by the RPC in detail. The experience of the HLUC in the Ockenden land use proceedings for the December 18, 2006 hearing was that the soil inventory decision recommendation by the RPC did not consider the HLUC's written testimony at all.

In many cases, it was not known whether the RPC had accepted the written material "For The Record". Another disadvantage was the unknown of whether relevant written testimony accepted for the record by the RPC (i.e., a hearing body not the final decision maker) would be part of the record of the final decision maker (BCC).

Too many times to count the result from testimony submitted before the first hearing before the RPC had been that the applicant used all of his "presentation" time before the RPC to rebut the submitted testimony rather than present his own case. The applicant's presentation was usually an hour or more, after which the testifier parties were restricted to five minutes and witnesses were restricted to three minutes.

This process of early testimony and maximum public testimony at the RPC's hearing(s) can be effective, but it can also cause burnout from neighbors in bureaucratic processes that seem without fairness or meaning.

There is a major disadvantage to a document dump before the RPC listening to a proposal for a comprehensive plan change concerning agricultural or forest lands. The RPC, in this case a hearing body with no responsibility to develop a decision supported by findings, is not required to prepare a detailed response to submitted testimony when it is only making a recommended decision.

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

Pros. An alternative to early comprehensive testimony to the RPC is to practice minimal input to the RPC at its hearings and a "document dump" of testimony into the record at the first evidentiary hearing before the final decision maker (i.e. BCC). Minimal input to the RPC saves labor and dollars, and possible burnout by neighbors. Written testimony to the RPC could be only a few pages, and there would be no fight with the Josephine County Planning Department, or the Chair of the RPC, over the number of copies to submit to the RPC, and whether testimony was part of the record of proceedings to be considered in detail. This process of minimal public testimony to the RPC could also save neighbors from early burnout from sitting through a long RPC meeting without having the opportunity to give testimony as the meeting is continued. For a complex hearing this can also happen at the second RPC hearing. When that happens and the neighbor can be coaxed into attending a third RPC hearing they are usually so frustrated that they are done and do not attend the most important hearing in front of the real decision makers - BCC. As an example, to this point in time three hearings had been held before the RPC on the Ockenden land use application, and another is scheduled for March 5, 2007.

- . December 18, 2006
- . January 22, 2007
- . February 5, 2007
- . March 5, 2007

A document dump before the final decision maker at its first public hearing normally obligates the applicant and/or county to continue the hearing, or to keep the record open, and more importantly to ultimately prepare a detailed response to submitted testimony in its findings.

This approach to submitting relevant written testimony at a public hearing before the final decision maker almost guarantees that it will be "For The Record". If it is rejected by the final decision maker a successful LUBA appeal is near certain.

Cons. Interested members of the community do not have the opportunity to better understand the issues from reading the Planning Office files and/or attendance at RPC hearings, and they will be less effective in their later comments to the BCC.

Members of the BCC may consider document dumps to the BCC without similar information provided to the RPC as unfair and unofficial retaliation can occur sometime later in the subject land use proceeding, or at some future land use proceeding.

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

Pros. Josephine County has RLDC procedures for accepting relevant written testimony for the record at continued public hearings. It is a safe assumption 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. If it is rejected by the final decision maker a successful LUBA appeal is near certain.

Continued public hearings of either the RPC or the BCC are opportunities to further research and refine testimony arguments and/or development new arguments. The pros and cons are the same as for public hearings (Section VI.B.)

Cons. Few. It takes the continued persistence and energy of the parties to participate.

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

Pros. 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 to submit written comments in the manner set forth at the hearing. If it is rejected by the final decision maker a successful LUBA appeal is near certain.

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

Cons. Few. It takes the continued persistence and energy of the parties to participate.

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)). Providing written and/or oral testimony during the public comment period the day a written and final decision (i.e., legislative decisions and quasi-judicial decision and findings) will be signed by the final decision maker for purposes of appeal is marginally utilized by concerned neighbors.

Pros. LUBA has ruled that 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)).

This time period is not an opportunity for a document dump before the final decision maker. Written testimony describing the merits of the issues should have already been submitted at, or prior to, an evidentiary hearing. This is a little used opportunity to raise additional procedural points of order, and perhaps to materially place additional new evidence before the final decision maker if it is not rejected. Even if rejected by the final decision maker, it is an opportunity to “raise it or waive it” for purposes to submitting evidence into the record, especially if the rejected material is erroneously rejected.

A written, signed and final decision starts the clock for a LUBA appeal. Just before the decision is signed during a public hearing in Josephine County the BCC asks the audience at the hearing if they have any comments on the proposed written decision. The HLUC believes that this open public hearing comment time is an opportunity for further public testimony, especially for previously identified and newly identified procedural errors, including air time of a summary of the arguments for public consumption.

A scenario to consider is if the final decision maker accepts and considers material into the record during "the course of proceedings" but after the record is closed. If such an event were to occur an assignment of error could be identified for the local government's action, arguing that neighbors' *Fasano* rights were violated. The remedy would be to remand to offer the neighbors an opportunity to respond to the material.

Cons. Josephine County does not have RLDC procedures for accepting relevant written testimony for the record raised after the close of the evidentiary record. It will probably vigorously defend against addition written testimony as ORS 197.763(1) provides that an issue which may be the basis for an appeal to the Land Use Board of Appeals must be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government, or during an continued hearing or when the record is still open (ORS 197.763(6)(a)).