LUBA Practice Tips

RELU ANNUAL MEETING 2005

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I. LUBA Basics

LUBA's review statutes are located between ORS 197.805-850. LUBA's administrative rules are at OAR 661-010-000 et seq. LUBA has a website (http://luba.state.or.us/) that contains all the current cases and publishable orders that are available for review. LUBA head notes are also a useful search tool and those are located in a searchable format on LUBA's website as well.

LUBA has exclusive jurisdiction over final land use and limited land use decisions. ORS 197.825. A person with standing must appeal a final land use or limited land use decision to LUBA within 21 days of the date the decision is final. ORS 197.830(9). A decision is final when the local government code says it is or, if the local code is silent or ambiguous, as LUBA's rules specify. LUBA's rules specify that: a "final decision" has the following elements: "A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance. OAR 661-010-0010(4).

One of the most significant traps in LUBA practice is timely filing the Notice of Intent to Appeal. Subject to limited exceptions explained below, one must file a Notice

[1] The assistance of attorney Al Johnson is gratefully acknowledged.

of Intent to appeal within 21 days of the date the local decision is final. ORS 197.830(9). The court of appeals has held that a multi day gap between the time of local notice of the final decision and the date the decision is final does not toll the running of the 21 day LUBA appeal period. *Van Halewyn v. City of Hillsboro*, 152 Or App 11 (1998). An untimely LUBA appeal will be dismissed because LUBA and derivatively the court of appeals are deprived of jurisdiction after the expiration of 21 days from the date a local decision is final. *Wicks-Snodgrass v. City of Reedsport*, 148 Or.App. 217, 939 P.2d 625, *rev. den.* 326 Or. 59, 944 P.2d 949 (1997).

When a decision is "final" versus when a local appeal must be exhausted has been the subject of much gnashing of practitioner teeth. A careful practitioner who does not know if they are dealing with a final decision appealable to LUBA or a decision where a local appeal must be first exhausted for the decision to be a "final" is well advised to double file – file a local appeal and a LUBA appeal. In *Warf v. Coos County*, 42 Or LUBA 84, (2002), LUBA warned:

> "The variety of notice and other local procedural errors that are possible in rendering land use decisions, along with the often complicated interrelationship between ORS 197.830(3), (4) and (9) and the statutory exhaustion requirement of ORS 197.825(2), invite confusion about whether a right of local appeal exists to challenge a local government decision or whether the only right of appeal to challenge that decision lies at LUBA. Overlapping and duplicative local land use procedural provisions, which in some cases are inconsistent with statutory requirements, often add to the possible confusion. This potential for confusion makes caution consistently appropriate. When confronting uncertainty among relevant statutes and local procedural provisions, if there is any doubt about the proper venue for appeal and the deadline for such an appeal, the filing of timely precautionary appeals with all possible review bodies is the only safe course of action."

This is only the tip of the LUBA practice iceberg. However, reviewing the statutes and rules and staying reasonably current on the cases should help practitioners stay as the iceberg rather than becoming the Titanic.

II. Appealing to LUBA -- Notice Issues

It is important to stay current on the rules regarding when the 21 day LUBA appeal period referenced above runs. There are seemingly endless fact situations that can create as many difficult analytical issues for a LUBA practitioner. There are limited exceptions to the 21 day LUBA appeal deadline. These exceptions are in ORS 197.830(3), (4) and (5). ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416(11) or 227.175 (1) or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision [to LUBA] under this section:
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> > "(a) Within 21 days of actual notice where notice is required; or
> >
> > "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

ORS 197.830(4) provides:

> "If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175(10):
>
> > "(a) A person who was not provided mailed notice of the decision as required under ORS 215.416(11)(c) or 227.175(10)(c) may appeal the decision to [LUBA] under this section within 21 days of receiving actual notice of the decision.
> >
> > "(b) A person who is not entitled to notice under ORS 215.416(11)(c) or 227.175(10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to [LUBA] under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416(11)(a) or 227.175(10)(a).

> "(c) A person who receives mailed notice of a decision made without a hearing under ORS 215.416(11) or 227.175(10) may appeal the decision to [LUBA] under this section within 21 days of receiving actual notice of the nature of the decision, if the mailed notice of the decision did not reasonably describe the nature of the decision."

ORS 197.830(5) provides:

> "If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision [to LUBA] under this section:
>
> "a. Within 21 days of actual notice where notice is required; or
>
> "b. Within 21 days of the date a person knew or should have known of the decision where no notice is required."

There is a three year statute of ultimate repose in ORS 197.830(6) the supplies a limitation on the above exceptions to the 21 day appeal period. ORS 197.830(6) provides:

> "(a) Except as provided in paragraph (b) of this subsection, the appeal periods described in subsections (3), (4) and (5) of this section shall not exceed three years after the date of the decision.
>
> "(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.763 or 197.195 is required but has not been provided the provisions of paragraph (a) of this subsection do not apply."

Regarding whether ORS 197.830(3) or (4) applies, LUBA has held that: "* * * the choice between ORS 197.830(3) and (4) is governed [not by the procedure the local government should have followed but] by the procedure the local government actually followed. *Warf v. Coos County*, 42 Or LUBA 84, 100-101 (2002).

ORS 197.830(3)(a) is the source of numerous LUBA opinions and a variety of interpretations concerning its meaning. ORS 197.830(3)(a) can be a trap for the LUBA practitioner. LUBA has held differing views over the years about the meaning of "actual notice" as used in ORS 197.830(3)(a). The term "actual notice" is an "inexact term."[2] As a consequence, it has only the meaning that the legislature intended it to have and includes no implicit delegation of authority to LUBA to expand, contract, or otherwise complete the legislative process. It is also ambiguous term, as LUBA's diverse interpretations attest. Under *PGE v. Bureau of Labor and Industries*, 317 Or 607 (1993) the LUBA ascertains the intent of the legislature by examining first the text and context of statutes in light of applicable rules of statutory construction, second legislative history, and third, general maxims of statutory construction.

In *Willhoft v. Gold Beach*, 38 Or LUBA 375, 391 (2000), LUBA concluded, in dictum, that receipt of information other than a copy of the decision or written notice of the decision may constitute "actual notice" under ORS 197.830(3)(a) if it suffices to inform the petitioner of both the existence and substance of the decision. However, in *Frymark v. Tillamook County*, 45 Or LUBA 687, 695-698 (2003), LUBA concluded that its dictum in *Willhoft* was incorrect. Instead, LUBA said, ORS 197.830(3)(a) draws "a bright line" under which: "* * * the 21-day deadline specified in ORS 197.830(3)(a) does not begin to run until the local government provides that person (1) the legally required written notice of that decision or (2) a copy of the decision itself." 45 Or LUBA 697.

[2] "An inexact term gives the agency interpretive but not legislative responsibility. With respect to an inexact term, the role of the court is to determine whether the agency 'erroneously interpreted a provision of law,' ORS 183.482(8)(a), and the ultimate interpretive responsibility lies with the court in its role as the arbiter of questions of law." *England v. Thunderbird*, 315 Or. 633, 638, 848 P.2d 100 (1993).

Frymark is based mainly on the administrative benefit to LUBA of a "bright line" in determining its jurisdiction. 45 Or LUBA 496. LUBA said:

> "Although our cases applying ORS 197.830(3) have not been entirely uniform, we have consistently attempted to draw a clear distinction between the 'actual notice' standard in ORS 197.830(3)(a) and the 'knew or should have known' standard in ORS 197.830(3)(b). *Frymark*, 45 Or LUBA 696.

LUBA bases its ruling in *Frymark* in part also upon a desire to avoid "overlap" between ORS 197.830(a) and (b). Given these bases for *Frymark,* its holding is worth paying attention to as further refinement may be on the horizon. Principles arguing against the *Frymark* ruling include that the legislature chose language that is administratively inconvenient rather than a bright line. The language of ORS 197.830(3)(a) is no more explicit in requiring that actual notice be limited to "written notice of the decision that is legally required" than it is in envisioning other kinds of notice. Another principle that argues against the *Frymark* holding is that there is no rule against overlap where it is not complete. The term "actual notice" can mean the same thing as "knew" when the term "knew" is coupled with "or should have known." The common phrase avoids awkward phrasing by using parallel verbs. ORS 197.830(a) tolls an appeal only if the higher standard is met. Section (b) tolls an appeal if either the higher standard or the lower standard is met.

It can be said that the text, context, and legislative history are consistent with the idea that "actual notice" as used in ORS 197.830(3)(a) has commonly understood and inherently circumstantial meanings reflected for years in the legislative history in this statute and elsewhere. *Frymark* recognizes there is a commonsense meaning for "actual notice."

"[I]f a petitioner 'knew' of the decision, i.e. had subjective knowledge of the

> decision, then that also may constitute 'actual notice' of the decision* * * has some commonsense justification * * *" 45 Or LUBA 696.

This common-sense meaning for "actual notice" is reflected in the legislative history. Robert Liberty, then-director of 1000 Friends, before the House E & E Committee, advised "We do not have any objection to some of the amendments * * * establishing a 21 day period in which to bring appeals after constructive or actual notice of a land use decision occurs (*e.g.* a neighbor observes construction commencing."[3] *See also* ORS 30.275(6), defining "actual notice" of a claim to mean "actual knowledge" of key facts necessary to inform the potential defendant that someone intends to file a claim and of the time, place and circumstances giving rise to the claim. The test of "actual notice" is not whether a particular document has been received but whether "the communication is such that a reasonable person would conclude that a certain person intends to assert a claim against the public body." *Flug v. University Of Oregon,* 335 Or. 540 (2003).

In the example cited by Mr. Liberty, a neighbor who sees a home under construction has actual notice that land use decisions necessary to authorize the activity have probably been issued.

However, for now, the *Frymark* decision controls to require that in the context of land use decision and limited land use decision "actual notice" means the local government must provide the required notice of the decision or a copy of the decision to the appellant for the 21 day appeal period to begin to run.

II. <u>What You Can Argue at LUBA --Raise it or Waive it based on State Statutes:</u>

Once the practitioner successful appeals to LUBA, the question is what may be

[3] May 1, 1989 letter from Robert Liberty to House E & Energy Comm., Ex. B, May 24 HE & E hrg. on HB 2288.

argued? Here too there are nuances worth careful attention and study.

ORS 197.763 "governs the conduct of quasi-judicial land use hearings * * *". ORS 197.763(2)(a) contains notice requirements for property within a certain geographic area of the proposal between 100 and 500 feet depending on certain factors. ORS 197.763(3)(c) requires the notice list the "applicable criteria from the ordinance and the plan" and that the notice thus provided include a statement that issues must be raised before the expiration of the "close of the record" "at or following the final evidentiary hearing." Similarly, ORS 197.195(3)(c) (regarding limited land use decisions) requires the "applicable criteria" be listed in the notice provided to persons "within 100 feet of the entire contiguous site for which the application is made" and a statement that issues must be raised "in writing prior to the expiration of the comment period."

ORS 197.835(4) provides, in part: "A petitioner may raise new issues to [LUBA] if: "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government."

The purpose of the ORS 197.763(1) "raise it or waive it" requirement is to prevent unfair surprise. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129, 137 (2001). Under these raise it or waive it rules, the general idea is that in order to raise an issue before LUBA, a party must have raised the issue at the local level with sufficient specificity to afford the parties and decision maker an opportunity to respond. ORS

197.763(1); *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375, 386-87 (2004).

The raise it or waive it provisions of ORS 197.763(1) apply only where the local government provides a hearing at which issues may be raised. Thus where local government does not provide a hearing where petitioners could raise issues, petitioners may raise issues at LUBA in the first instance. *Dead Indian Memorial v. Jackson County*, 43 Or LUBA 511 (2002).

Similarly, LUBA has reinforced that the predicate to application of the "raise it or waive it" rule in ORS 197.835(3) is a local proceeding pursuant to ORS 197.195 or 197.763. LUBA has pointed out that a proceeding to vacate county roads under ORS 368.346 is not such a proceeding. *Mekkers v. Yamhill County*, 39 Or LUBA 367 (2001).

In *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999), LUBA determined that a general listing of the "Comprehensive Plan goals, policies and land use map" in the notice of hearing without listing the specific applicable plan provisions, is inadequate under ORS 197.763(3)(b). Therefore, LUBA explained that raise it or waive it would not apply in such a circumstance. On the other hand, in *Burke v. Crook County*, ___ Or LUBA ___ (LUBA No. 2004-081, October 6, 2004), LUBA determined that where a mandatory approval criterion is *not* listed in the notice, but *is cross-referenced* in a listed code provision, issues related to that unlisted provision could have been raised and, where not raised, are waived.

A local government's failure to list applicable criteria in a pre-hearing notice in violation of ORS 197.763(3)(a) allows petitioner to raise issues at LUBA relating to the

omitted criteria even though those issues were not raised before the local government. However, the local government's failure to list applicable criteria does not, in itself, provide a basis for reversal or remand. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000). Yet, it is important to note here that a local failure to make the *staff report available* within the time periods required by ORS 197.763 *does provide a basis for remand* notwithstanding that the local government does not assert in the LUBA appeal the raise it or waive doctrine it as a bar to what the petitioner may raise. *Hammons. v. City of Happy Valley*, 49 Or LUBA ___ (LUBA No. 2004-117 March 10, 2005).

The raise it or waive it bar seems to be a fairly low one. Thus, LUBA has held where a city determines that revisions to easements within a previously approved subdivision require a replat, an applicant's verbal testimony and a letter noting that the applicants will comply with the city's determination but consider a replat unnecessary, are sufficient to preserve the issue for appeal to LUBA, notwithstanding that the applicants did not expressly submit the disputed replat application under protest. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

One of the most important if not perplexing cases on raise it or waive it is *Lowrey v. City of Keizer*, 48 Or LUBA 568 (2005). This case demonstrates that LUBA is willing to resolve its questions about notice or the issues raised in favor of the LUBA petitioner.

In *Lowrey*, the only issue the petitioners clearly raised before the city was the city's authority to approve a master plan covering an entire city comprehensive plan sub area, even regarding property in that sub area that the applicant did not own. LUBA held

in its final opinion in the case that the city's code provided the express authority and the requirement for an applicant to submit a master plan covering the entire sub area.

However, for the first time, at the LUBA oral argument, the petitioners claimed the city provided too much detail in the master plan for property the applicant did not own and made an oblique reference to a plan provision that had not been in issue below. After oral argument, LUBA sent the parties a letter asking for further briefing on whether a footnote in the petition for review had in fact raised the new issue and then asked the parties to assume the issue was raised in the footnote and to answer certain questions about the meaning of the obliquely referenced plan provision.

In LUBA's final opinion, it explained that the issue about too much master plan detail implicated the obliquely noted plan provision (that required master plans for the subarea to show "appropriate detail based on ownership.")

LUBA went on to explain that where, as in *Lowrey*, the LUBA petitioner does not raise an issue about a standard and where "the city did not address whether the language at issue is an approval criterion, because petitioner did not raise the issue" LUBA will "exercise [its] discretion to make that determination in the first instance" about whether the unraised and unnoticed standard is an approval criterion that should have been listed in the local government's ORS 197.763 notice. *Lowrey v. Keizer, supra*. In *Lowrey*, LUBA held the unraised and unnoticed city plan provision was an approval criterion because: "the city could deny or require modification of a [master plan] application that did not master plan the area in 'appropriate detail based on ownership'"

In *Lowrey*, the city argued a code provision specified the detail for master plans, this code provision was listed in the pre-hearing notice and, was, therefore apprise

petitioners of the issue they sought to raise for the first time at LUBA about the obliquely raised plan provision. They city argued that as such, petitioners never made an argument that the application did not comply with that code provision, and therefore cannot now complain about the "merits of the master plan itself" with reference to the plan provision or any other provision.

LUBA held: “The city seems to miss the point. Petitioners are not arguing that the master plan does not comply with the approval criteria already listed in [city code]. Although petitioners mix their argument up with the [issue about city authority to approve a master plan for property the applicant does not own], we read their argument to be that the notice of hearing did not include the [plan language about ‘appropriate detail based on ownership plan provision]’, upon which the development of unowned property issue [the master plan detail issue] is based. Accordingly, under ORS 197.835(4)(a), they are allowed to raise the issue for the first time here.” *Lowrey, supra,* 48 Or LUBA at 583. From there, LUBA explained: “petitioners did not have an opportunity to raise the * * * issue. Consequently, the city did not have an opportunity to adopt an express interpretation of the [plan] language [obliquely footnoted in petitioners’ brief] and consider whether that language (1) merely directs an applicant to include unowned property in the master plan for the limited purposes of developing a "cohesive interconnected system of planned facilities" and "general design guidelines [for] the Master Plan area," (2) requires that the applicant include unowned property and propose a development Master Plan as though the applicant owned the unowned property, or (3) include unowned property and treat that unowned property in some other manner. It is

therefore necessary to remand the challenged decision to allow the city, in the first instance, to provide an interpretation of the[plan] language." *Id*. at 586.

It is difficult to distill a raise it or waive it principle for LUBA practice. When faced with a raise it or waive it issue, a practitioner is well advised to review the statutes and cases and argue from the ones that seem most helpful to your position. However, it seems relatively clear that a respondent/intervenor respondent may have a tougher time than you might think in making raise it or waive it stick.

III. What You Can Argue At LUBA Based on LUBA's Rules

OAR 661-010-0040(1) is one of LUBA's rules. It precludes LUBA's consideration of issues raised for the first time at oral argument. LUBA has stated that the purpose for OAR 661-010-0040(1) prevents LUBA from deciding cases based on issues that the parties did not have an adequate opportunity to respond to. *Lowrey v. City of Keizer,* 48 Or LUBA 568 (2005)*; see also Ward v. City of Lake Oswego,* 21 Or LUBA 470, 482 (1991) (consideration of issue raised for first time at oral argument would violate purpose of LUBA's rules to provide reasonable time to prepare and submit case and provide full and fair hearing under OAR 661-010-0005). In *Lowrey*, LUBA determined that while a "close question" an obscure reference in a footnote in a petition for review raised an issue. However, LUBA also stated that even if the issue wasn't raised in the obscure footnote, that post oral argument briefing requested by LUBA gave: "the parties an opportunity to brief the issue, and the purpose of the rule has been satisfied in this case."

IV. Changing a Decision While that Same Decision is Pending at LUBA

In LUBA practice, sometimes local government discovers it has an indefensible or otherwise defective decision that it wants to fix. The question is how does a local government go about fixing such a decision?

Because LUBA has exclusive jurisdiction over decisions appealed to it ORS 197.825, local options are limited once a LUBA appeal is filed. Simply adopting a new decision, however, not is an option – at least under the cases so far with the granddaddy being *Standard Insurance v. Washington County*, 17 Or LUBA 647, *rev'd on other grounds*, 97 Or App 687 (1989) (*Standard Insurance*). In *Standard Insurance*, Washington County made a decision in the same case as a case pending under LUBA's authority..

LUBA held that none of the ORS 197.825(1) exceptions authorized the county to "review, reconsider or modify" a land use decision the review of which was pending before LUBA. *Id.* at 657-58. Accordingly, LUBA reversed Washington County's decision in *Standard Insurance* on the basis that the county had no authority to make it because LUBA had exclusive jurisdiction over the decision. The only lawful way to change a decision that is within the authority of LUBA is to either seek a withdrawal under ORS 197.830(13(b) or obtain approval for voluntary remand.[4] In *Standard Insurance*, LUBA held:

> "We find there is a clear pattern to these statutory provisions for appellate review. Where jurisdiction is conferred upon an appellate review body, once appeal/judicial review is perfected, the lower decision making body loses its jurisdiction over the challenged decision unless the statute specifically provides otherwise. In this case, the statutes do not authorize the county to take further action on its decision while that decision is being reviewed by LUBA or by the Court of Appeals**.** Therefore, the

[4] The source of authority for allowing voluntary remand is LUBA's authority to decide cases consistent with sound principles of judicial review. ORS 197.805.

> county was without jurisdiction to adopt the challenged decision**.** This requires us to reverse the county's decision."

The Board's decision in *Standard Insurance v. Washington County, supra* (hereinafter *Standard Insurance*), regarding LUBA's exclusive jurisdiction remains good law and LUBA has cited the case on numerous occasions. *See, e.g., DLCD v. Klamath County*, 24 Or LUBA 643, 645 (2003); *Church v. Grant County*, 37 Or LUBA 646, 651 n 4 (2000); *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 n 11 (1994); *Blatt v. City of Portland*, 21 Or LUBA 510, 513 n 4 (1991), *aff'd*, 109 Or App 259, *rev den*, 314 Or 727 (1992); *Century 21 Properties Inc. v. City of Tigard*, 17 Or LUBA 1298, 1301-02 (1989), *rev'd on other grounds*, 99 Or App 435 (1989).

LUBA has recently reaffirmed its commitment to the *Standard Insurance* principle in *Rose v. City of Corvallis*, 49 Or LUBA ___ (LUBA No. 2004-022, (April 15, 2005)) stating:

> "[O]ur conclusion in that case was based on a thorough analysis of the applicable statutes and case law. No changes in the statutory or judicial landscape over the intervening years brought to our attention calls our holding in *Standard IV* into question. We affirm its general holding that, absent statutory authority to the contrary, where jurisdiction over an appeal of a land use decision lies with an appellate court, the local government loses jurisdiction to modify that land use decision."

See DLCD v. Klamath County, 26 Or LUBA 589, 590 (1993) (once LUBA issues final opinion and order it lacks authority to reconsider its decision); *ARLU v. Deschutes Cty*., 23 Or LUBA 717 (same); *Sarti v. City of Lake Oswego*, 20 Or LUBA 562 (1991).

Standard Insurance does not prohibit a local government from conducting a separate proceeding, resulting in a separate decision, concerning property. However, it prohibits adopting a decision in the same proceeding.

V. Inconsistent Findings

LUBA has issued another reminder to those of us who draft findings supporting land use decisions of the importance of consistency and clarity. Our clients who are local governments and developers like us best when we hang on to the approvals we achieve. Our clients who are opponents like us best when we are able to identify specific problems in a decision that will result in changes to the decision that they seek. Theoretically at least, neither client set is happy with a remand for simply fixing findings to achieve the same outcome only more definitively or clearly. If you are on the winning side, taking the time you have (understanding in land use cases time is always in short supply) to draft reasonably consistent and understandable findings is important to a successful LUBA appeal and one that is respectful of everyone's time and resources. You will also make LUBA happy which is a good thing.

In *Staus v. City of Corvallis*, 48 Or LUBA 254, 265-66 (2004) LUBA explained:

> "The city's and intervenor's responses in this respect illustrate several of the difficulties posed by incorporation of record documents as findings**,** difficulties more generally discussed under petitioner Rose's first assignment of error. In *Gonzalez*, we explained:
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> > 'Both the appellate courts and this Board have recognized that local government decision makers may rely on findings initially prepared by others. The preferred method of accomplishing this is to physically set out the findings initially prepared by others as an integrated part of the local government's own written decision**.** However, if findings initially prepared by others and set out in a separate document are to be incorporated by reference into a local government's decision**,** it does not seem particularly burdensome to require that the local government clearly indicate in its decision an intent to incorporate all or specified portions of identified document(s) into its findings.
> >
> > 'Nevertheless, this seemingly simple requirement has caused considerable difficulty over the years. In some instances, it is difficult to decide whether particular language indicates an intent to incorporate another document into the findings**,** or is just a reference to that document. In other instances, local government decisions have stated an intent to incorporate entire records, all written and oral testimony, or

> documents of uncertain identity. Finally, in some instances, it is unclear which portions of identified documents a local government wishes to incorporate, because the local government decision includes language qualifying the incorporation.
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> 'After all, the local government decision maker is in a unique position to know what it believes to be the facts and reasons supporting its decision**.** Therefore, we hold that if a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." 24 Or LUBA at 258-59 (citations and footnotes omitted).

"In the present case, the city incorporated by reference hundreds of pages of minutes, written testimony and other documents and adopted them as 'findings.' However, the city identified only a few of those pages in a manner that would allow a reasonable person to locate them with any certainty. For the bulk of the documents incorporated as 'findings,' the city simply identifies them as 'written testimony submitted at the hearings that support approval' of the application. Further, the city qualifies that incorporation in a manner that requires LUBA and the parties to perform the uncertain task of determining which parts of the written testimony supports the approval and are therefore intended to be incorporated. *DLCD v. Douglas County*, 17 Or LUBA at 471 n 6. The city's attempt to incorporate the documents cited by respondents as 'findings' addressing TPR compliance fails. The city did not adequately identify those documents and the city qualified the incorporation in a manner that makes it difficult or impossible to understand the facts the city relied upon and the justification for the decision. The city's approach effectively allows the city to wait until it files the response brief to attempt to identify the findings that demonstrate compliance with applicable approval criteria, from hundreds of pages of testimony in the record.

"Because the city's attempted incorporation of the documents respondents rely upon was ineffective, those documents do not constitute findings supporting the city's decision. Respondents cite us to no other findings demonstrating TPR compliance, and therefore we agree with petitioners that the decision must be remanded to adopt adequate findings addressing the TPR and the issues petitioners raised regarding the TPR. * * *"

See also Larmer Warehouse Co. v. City of Salem, 43 Or LUBA 53, 59 (2002).

These are only a few ideas about successful LUBA practice, but important ones that have cropped up in the past year since the last RELU conference. The best advice one can offer is to review the applicable OARs and ORS provisions relevant to your case and to pursue Westlaw or LUBA's website for new (and old) cases bearing on your issues. Good luck!