

Understanding Land Use Decision Best Practices: Preparing your City for Possible Appeal

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Presentation Overview

- Background on LUBA and Appeals
- Before the Appeal
 - Grounds for Appeal
 - Common Mistakes
 - Best Practices
- During the Appeal
 - What to Expect
- After the Appeal
 - Next Steps

Background on LUBA and Appeals

Land Use Board of Appeals (LUBA)

- Established in 1979
- Hears appeals of local land use decisions (both legislative and quasi-judicial)
- Panel of three attorney board members appointed by the Governor and confirmed by the Senate
- Subject matter expertise in land use issues
- Keeps these cases out of circuit court
- Further appeal to Court of Appeals

Before the Appeal – Grounds for Appeal

Grounds for Appeal

- Failure to follow correct procedures
 - Only if the error prejudiced a substantial right
 - Contrast with harmless error
- Unlawful decision
 - Violates constitution, state law, or local law
 - Includes misconstruing the law
- Decision not supported by “substantial evidence in the whole record”
 - Evidence that a reasonable person could rely on to support a conclusion
 - Not a re-weighing of evidence

Before the Appeal – Common Mistakes

Overview of Common Mistakes

- Bias, ex parte contacts, and conflicts of interest
- Failure to provide notice and an opportunity to be heard
- Decision not based on criteria
- Inadequate findings
- Issues with evidence
- Conditions of approval and exactions
- Clear and objective code requirements

Before the Appeal – Common Mistakes

Bias

- The standard is whether the decision-maker prejudged the application and did not reach a decision based on the evidence in the record and the applicable criteria
- If biased, you must recuse yourself
- Consider *perception* of bias and either address it or recuse yourself out of an abundance of caution
- Only applies to quasi-judicial decisions

Ex parte contacts

- Communication or information received outside of the record on a matter that is pending before the city
- A decision is not invalid if the decision-maker receiving the contact discloses the **substance** of the communication on the record and allows an opportunity for parties to respond
- Exceptions: Communications with staff; communications before application submitted or after final decision
- Only applies to quasi-judicial decisions

Conflicts of interest

- Ethics law issue, but can overlap with bias and can create personal liability

Before the Appeal – Common Mistakes

Failure to provide notice and an opportunity to be heard

- These are types of procedural errors that prejudice a substantial right
- “Substantial rights” are someone’s rights to a reasonable opportunity to prepare and submit their case and to a full and fair hearing
- Contrast with harmless error
- Procedural rules can be complex, but this simple guiding principle is often all you need

Before the Appeal – Common Mistakes

Decision not based on criteria

- Approval or denial must be based on applicable standards and criteria adopted by ordinance
- Limit all decision-maker discussion to criteria and evidence as much as possible

Before the Appeal – Common Mistakes

Inadequate findings

- A quasi-judicial decision must be accompanied by a statement explaining the relevant criteria, facts relied upon, and justification for the decision based on the criteria
- Less stringent standard for legislative decisions, but the record must still be sufficient to establish the above
- Findings should address all relevant issues in contention
- Set out each criterion, with analysis and conclusion beneath each one
- Avoid incorporating by reference if possible, or at least be very clear and specific when incorporating
- Will often need to have staff prepare final findings for adoption at a subsequent meeting after the record has been closed

Before the Appeal – Common Mistakes

Issues with evidence

- Decision must be based on substantial evidence in the record
- Evidence that a reasonable person could rely on to support a conclusion
- Decision-maker weighs the evidence, but must resolve conflicts in the evidence and explain why

Before the Appeal – Common Mistakes

Conditions of approval and exactions

- Conditions cannot substitute for demonstrating compliance with applicable criteria
- Conditions cannot defer a discretionary decision to a later ministerial (administrative) process
- Exactions must have a nexus and be roughly proportional to the impacts of the development

Before the Appeal – Common Mistakes

Clear and objective code requirements

- All “standards, conditions and procedures regulating the development of housing” must be clear and objective
- If they aren’t clear and objective, they cannot be applied
- An alternative, discretionary path can be provided as long as a clear and objective path is available

Before the Appeal – Best Practices

Other Best Practices

- A local appeal is your first indication that the case may be appealed to LUBA
 - Use local appeals to fix earlier procedural errors
 - Use local appeals to identify the issues in contention and ensure adequate findings responding to all issues raised
- If there is a question of interpretation of the local code, in the decision, clearly articulate a plausible interpretation by City Council to receive deference from LUBA
- Keep a complete and organized record

During the Appeal

What to Expect – General Considerations

- Defense by City, intervenor, or both
- Withdrawal for reconsideration
 - Allows the city an opportunity to reconsider its decision
 - Typically, must occur before filing the record
 - Parties may also stipulate to a remand at a later date
- Attorney fees may be awarded to the prevailing party in some circumstances, including:
 - To the prevailing party, if the opposing party presented a frivolous case
 - To the applicant in an affordable housing case, if LUBA reverses a city's denial
 - To the applicant in a housing case and the city, if LUBA affirms a city's approval
 - If LUBA reverses a denial by a city and orders approval in a case where the city acted outside its allowable discretion or acted for the purpose of violating the 120-day rule
- Overall timeline – typically, 4-8 months

During the Appeal

What to Expect – The Process

- Notice of Intent to Appeal (NITA) *(21 days after final decision)*
- Filing the Record *(21 days after NITA)*
- Objections and Settling the Record *(14 days after filing record)*
 - Pauses the clock
- Petition for Review *(21 days after filing/settling record)*
 - Filed by petitioner and intervenor-petitioner, if applicable
- Response brief *(42 days after filing/settling record)*
 - Filed by city and/or intervenor-respondent, if applicable
- Reply brief *(7 days after response brief)*
- Oral Argument *(typically, about 2 weeks after final brief)*
- Decision *(typically, a few weeks after oral argument)*

After the Appeal

Now What?

- LUBA's choices
 - Reverse (overrule)
 - Affirm (uphold)
 - Remand (return to city for further action)
- Procedures on remand
 - Often not specified, so some flexibility
 - Generally, pick up where the city left off
 - Timelines for quasi-judicial decisions (120 days)
- Further appeals

Questions?

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