

CHAPTER 4: Land Use Appeals

4.1.00 Purpose of Appeals Chapter

This chapter is designed to assist ODOT management, planners and permit specialists to better understand the ties between local land use and development review, the approach road permit process, and the appeal of local land use decisions. This includes steps on how to work with local governments to resolve issues short of an appeal. The chapter also covers how to prepare the record to ensure the agency has a good chance of a successful appeal.

The chapter covers only the land use appeals process and does not discuss appeals under OAR 734, Division 51 State Highway Approach Permit appeals. For questions about appeals of approach permit decisions, contact the Access Management Program Unit Appeals Coordinator. The rules relating to requests for Region Review of approach permitting decisions are in OAR 734-051-0345 and requests for contested case hearings (appeals) in OAR 734-051-0355. Additional information on these review processes are in Chapter 4 of Volume 1 of the Access Management Manual.

4.1.01 Reaching a Successful Decision

The goal of transportation planning, both long-range and short-range, is to ensure the traveling public has a safe and efficient transportation system. To achieve that, growth and development along and adjacent to state highways must be consistent with the planned function, capacity, performance standards and access management standards of those highways. This goal needs to be balanced with local governments' goals as identified in their comprehensive plans, zoning codes and development regulations. There is often a built-in conflict between what the local government or developer wants for its community and what ODOT needs for the state highway system.

Balancing the needs of the state highway system with the local land use regulatory framework calls for working closely with local governments and developers. All parties need to openly discuss their positions, paying particular attention to the distinction between what is required versus what is desired. Often, a middle ground can be reached that satisfies all. From the ODOT perspective, coordination entails educating local planners and developers on the legal and policy framework within which ODOT works. In some areas ODOT has flexibility. It is a delicate matter to look at each case individually and still provide an overall consistent message from one local land use application to another.

In some situations it will not be possible to reach a mutually successful conclusion. For example, the desired comprehensive plan designation is incompatible with the highway designation, or the proposed development will add too much traffic and the developer is unwilling or unable to mitigate the impacts

of the increased traffic. For those instances where a land use appeal must be pursued, this chapter provides the tools to ensure a successful appeal.

4.1.02 ODOT'S Guidelines on Land Use Appeals

As a state agency that is involved in land use actions in carrying out its mission, ODOT has an obligation to appeal local government land use decisions that adversely affect state transportation facilities. Appeals start at the local level and then, if necessary, go to the Land Use Board of Appeals (LUBA). These guidelines are intended to ensure a consistent approach to land use appeals. They set out the major factors used to make the decision to appeal and outline the basic internal coordination process to verify the appropriateness of an appeal.

ODOT's intent is to avoid or minimize appeals of local land use decisions and strive to solve these issues within the local land use process, short of an appeal. The combination of working with all interested parties and the state's ability to appeal when ODOT issues are not adequately considered has kept appeals to a minimum. The authority to appeal has resulted in many productive discussions that have led to agreements and solutions. The judicious use of appeals is a very important tool for ODOT in protecting transportation interests and investments throughout the state.

4.1.03 ODOT Factors for Deciding to Appeal

Before appealing a local land use decision, region planning staff go through a series of questions. These questions relate to previous steps taken to resolve the conflict, whether the local land use decision is inconsistent with or violates existing plans, rules or statutes, and the risk of precedence. Specific questions are as follows:

1. Are the proposed actions of the case inconsistent with the Transportation Planning Rule, adopted state transportation plans or local transportation system plans?
2. Will a ruling in the case provide needed interpretation of ambiguous statute or rule?
3. Has staff worked diligently with property owners, developers and local governments to reach acceptable solutions that minimize the conflicts with state transportation plans and adopted standards?
4. Is there another way to resolve the conflict, such as dispute resolution or technical assistance? Are the applicants willing to delay the land use decision?
5. Is the issue contrary to the responsibilities and authority of ODOT or the OTC? In particular, would the decision result in development that would

negatively affect the safety or operation of the state transportation system?

4.1.04 Participating in the Local Land Use Process

Conveying ODOT's position early in the process gives the applicant and interested parties time to work out solutions. As solutions are sought, the ODOT development review planner should also be establishing the framework for a successful appeal. Before an appeal is ever considered, it is the development review specialist who has established the relationships, built the record, established standing to appeal by appearing before the local government either in person or in writing, and basically set the stage for the final outcome of an appeal. Much of the work for a successful appeal is completed before the appeal is even contemplated, which is why it is important to establish a set of best practices, including developing and keeping a record, writing good findings and keeping track of the various other permit issues that may be related to the land use appeal.

There are several important aspects of "keeping on top" of a potential appeal.

- Recognizing when a local land use decision is potentially contrary to ODOT's interests.
- Establishing "standing" in a local land use case in order to preserve the right to appeal.
- Knowing related procedures that could impact the outcome of a land use decision, including approach permitting and other access management issues under Division 51.
- Knowing the hearing date scheduled for the planning commission and/or city council or county commission.
- Compiling accurate data, maps, traffic impact studies, correspondence, findings and other information for the local government record as such data becomes available.
- Knowing the local jurisdiction's procedural requirements for appearing at hearings and getting information into the local government record.
- Contacting the Development Review planner at the Salem office as soon as the need to appeal appears likely, to prepare for a possible request of the OTC for authorization to proceed with the appeal
- Recognizing a "final decision" to know when appeal proceedings must take place to be timely.
- Contacting your attorney general (AG) representative to help determine whether an appeal is appropriate in some cases, and to preserve ODOT's right to appeal by acting in a timely manner.

Once the notice of intent to appeal is filed, the Department of Justice will step in to prepare the legal documents for the appeal, assist in any mediation or negotiation processes, and appear before LUBA or in court. However, it is the responsibility of the development review specialist to prepare the documentation for the appeal.

4.1.05 Strategies: Avoid Appeals and Prepare For Successful Ones

Managing the state's transportation system is becoming more expensive and more difficult to fund with continued growth and development pressures adding to a system that, in many cases, is already beyond capacity. Add to this the recognition that the legal and regulatory arena in which ODOT operates is becoming increasingly complex. This section outlines some of the lessons learned to avoid adversarial actions where possible, and to prepare for and survive legal challenge.

1. **Understand the action.** Recognize that there may be separate issues being considered together, such as a permit application and a zone change application. Be able to separate these distinct concurrent processes. For example, access management negotiations and local land use actions may be taking place at the same time, with the same people. The hearing may only be about the land use actions, not the access management issues. Or a zone change and a site development plan may be reviewed together, with different review criteria for each. It is important to be able to separate the issues in order to know which information is important to which issue. Make sure the information pertinent to the specific action under review is made part of the record.
2. **Know the timelines.** Do not miss filing deadlines.
3. The record.
 - a. **Know the contents of the record.** It is important to be familiar with the entire contents of the local government record, including maps, previous plan amendments, local government decisions, ODOT actions and any other relevant material. Knowledge of the contents of the record is particularly important when the opponent tries to enter information that is new or different from the record. If ODOT is unaware of the contents of the record, the agency may miss the opportunity to respond to, or base an appeal upon evidence that the local government has relied upon that is incorrect, misleading or irrelevant.
 - b. **Build the record.** Do not assume that the local government will build the record in a way that will address ODOT issues. The local government's interest may not necessarily be the same as ODOT's. ODOT staff should go to the city or county to review the record, and

submit additional material as needed with the specific, written request that it be added to the record.

- c. **Make sure the TIS is in the record when one is prepared.** Ask the consultant to provide two copies, one for the office and one for the decision record.
 - d. **Be familiar with the *entire* record.** In some instances, there may be several phases to a project, including a series of applications and possible LUBA or other legal decisions. It is sometimes important to ask that records and documentation from earlier phases are included in the current decision record. These earlier phases may contain records and information that will provide important background, or conditions of earlier approvals critical to the present issue.
4. **Local Approval Criteria.** When challenging a land use or other development proposal, written or oral responses must state how the proposal fails to meet the local approval criteria. ODOT must specifically identify the provisions it believes that the proposal does not satisfy, explain how the Department reached that conclusion, and submit any additional technical data and analysis needed to support its position.
 5. **Develop a narrative or outline of ODOT's interests.** Take the time to establish, in clear language, ODOT's interests in the matter. Do not assume that the hearings officer, judge, opposing parties or anyone else involved in the case understands ODOT's position. For example, if there are an ongoing approach permit issue and a local land use issue, describe each, clarify which issue is before the decision body, describe the data or information pertinent to the hearing and, most important, describe the results that ODOT wants and why. Describe the state's interests in mobility, safety or whatever the issue may be. Do not describe the detail without explaining where the detail fits into the overall picture.
 6. **Use good visual aids.** Make sure to have good visual aids as appropriate, including accurate maps, as part of the record and for presentations to the hearings body. If you produce a large format visual aid, for example a large map, be sure it can be folded into a file folder or take a legible, smaller format copy for the record. Note that appeals to LUBA require that the entire record be reproduced. Items that cannot be reproduced on a copy machine are just cited to in the record, and so may not be available to the LUBA referees for use in their deliberations.
 7. **Cite Section 0060 of the TPR** whenever a land use change significantly affects the state highway. Include discussion of how the significant effect was determined.
 8. **Become familiar with the local jurisdiction's procedural codes and ordinances.** There may be procedural or substantive requirements in the code, in addition to the decision criteria specific to the case at hand, that could be the leverage needed to get to a decision consistent with ODOT

policy and could also be the basis for a successful appeal. Know the levels of review available locally so you know when administrative remedies have been exhausted, and when the local government has arrived at a **final** decision.

The Oregon Administrative Rule on when a decision becomes final was amended in 2001 to reflect the role of local rules or ordinances. The rule now states: "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." A decision cannot be appealed to LUBA until the highest applicable reviewing authority of the local government has issued a final decision.

9. **Coordinate internally throughout the process.** Develop a method or process for internal ODOT coordination. For example, if ROW is also involved in an aspect of the process, make sure that there is some form of frequent communication so that you know when and if another ODOT section is taking action that could impact the outcome of the appeal.
10. **Develop tools to protect ODOT's interests during phased development.** If development will occur over several phases, negotiate clear conditions of approval and/or written agreements with the local government to ensure that certain conditions of approval will be satisfied or applicable public improvements constructed before permits for subsequent phases can be issued.
11. **Balance ODOT and developer expectations.** Look at the big picture. For example, is there a Division 51 interchange area management plan under way that needs to be complete before the permit is granted? Is there a way in which the developer can proceed prior to ODOT's completion of the management plan? ODOT needs to be flexible and be able to rely on the OHP and HDM while working with developers in interchange management areas where plans are not yet in place.
12. **Document, document, document.** Keep notes of conversations, meetings, decisions and phone calls. Document dates and times, what is said and by whom. Of particular value are documentation of discussions regarding any disagreement or negotiated agreement, and offers from all parties of actions they are willing to take to remediate problems.
13. **Continue to try to resolve the issue with the applicant.** Learn, understand and use all available means for alternative dispute resolution. Remember that resolving a dispute short of appeal and judicial resolution does not mean "giving in" on important issues. ODOT may have some room to maneuver or the developer may agree to modify the site plan or land use.

14. **Learn how to use citations.** It is important to correctly cite various statutes, rules, codes and other documentation. For example:
- Transportation Planning Rule (TPR) section regarding proposals that will “significantly effect” the state facility: cite OAR 660-012-0060;
 - Access management rule: OAR 734-051-section (subsection); or
 - Zoning codes: City of ____, Land Development Ordinance, (year) (chapter) (section) (subsection).
15. **Knowledge is power.** Become familiar with and know the facts and history of the action. Sometimes a case can turn on what one might perceive to be a tiny technical detail. Being familiar with the case and the record will allow representatives of the agency to know when the opposing party’s argument is specious, or just incorrect. If you know the details of the case, you will be able to keep the record straight with more confidence and credibility.
16. **Use peer review early and often** to ensure the broadest possible understanding of ODOT’s issues and the best quality testimony.

4.1.06 Land Use Appeals Process

For purposes of this chapter, land use appeals generally occur when a local government makes a final decision that is contrary to ODOT’s interests after the department has made an effort to negotiate a better solution. Review the decision against the following questions or benchmarks:

- Is it inconsistent with the Transportation Planning Rule, adopted state transportation plans or local transportation system plans?
- Is it contrary to the responsibilities and authority of ODOT or the Oregon Transportation Commission?
- Would it result in development that would negatively affect the safety or operation of the state transportation system?

There are always at least three parties involved in a land use appeal beyond the local appeal process: the petitioner, the respondent and the Land Use Board of Appeals. The petitioner is the complaining party who files the action with LUBA. The respondent is the party being sued, who responds to the complaint. ODOT is generally the petitioner in land use appeals, appealing an action of a local government.

The above summary only pertains to land use appeals to LUBA. ODOT can be involved in legal action outside of LUBA and those actions are handled differently. Examples of other legal actions would be approach road applications

and the Division 51 appeals process or property management cases and Right of Way.

4.1.07 Outline of LUBA Appeals Process

LUBA hears and rules on appeals of land use decisions made by local governments and special districts. LUBA is the first forum that can hear appeals of local land use decisions. Subsequent appeals would go to the Oregon Court of Appeals and the Oregon Supreme Court, if that latter body chooses to hear the case. Good basic information on the LUBA appeals process and frequently asked questions (FAQs) is available online. For a summary of applicable case law, see Appendix 9.

1. An appeal of a land use decision to LUBA requires authorization by the OTC. After discussion with the Region, the TDD Manager advises the Director of the intention to appeal and asks that the question be added to the next regular OTC agenda. If the deadline to file falls before the OTC meeting, the filing of a Notice of Intent to Appeal is done with the Director's tentative approval. When the commission considers the question they may affirm the decision to file or have the LUBA filing withdrawn.
2. A LUBA appeal is initiated by filing a timely Notice of Intent to Appeal at the LUBA offices in Salem.
 - The notice must be received at LUBA, within 21 days after the challenged local land use decision becomes final.
 - The date of filing of the notice is either when it is received in the LUBA office, or the date it is mailed either registered or certified mail, which must be documented with the Post Office date- stamped receipt for the mailing.
 - The notice is submitted with a specified filing fee, part of which is a deposit for appeal process costs. The deposit for costs typically goes to the prevailing party once the LUBA decision is issued.
 - The notice of intent must be copied to the local government and to all parties to the local decision, using the list of participants in the local decision which is maintained by the local agency.
3. If the decision appealed is for physical development of a project, a Motion for Stay of the land use decision must also be filed to stop development while the appeal is pending.
4. To become a party to a case after it is started, within 21 days after the Notice of Intent to Appeal, an entity that meets the requirements for legal standing in the case may file a Motion to Intervene, specifying whether the intervention is on the side of the Petitioner or Respondent.
5. The local government, special district or state agency whose decision has been appealed (Respondent) must submit a formal Record of Decision to

LUBA within 21 days after the notice of intent to appeal is served on the local government, special district or state agency. The Respondent also supplies a copy of the record to the Petitioner.

6. The Petition for Review must be filed by the appealing party (Petitioner) within 21 days after the date the record is received by LUBA. The Petition for Review:
 - Identifies the basis for the Petitioner's standing, e.g. participation in the local decision process with written or oral testimony.
 - Relies on the existing record to support its claims;
 - Identifies the basis for the appeal including decision criteria and why the record does not meet the burden of proof to demonstrate compliance with the criteria;
 - Demonstrates that the decision at hand is a land use decision or limited land use decision to establish LUBA's jurisdiction over the matter; and
 - Raises all matters of law that can be considered in the LUBA review. If an issue is not raised, it will not be available as a basis for a decision.
7. The Respondent must file Respondent's Briefs responding to the Petitioner's claims within 42 days after LUBA receives the record.
8. Oral Arguments are scheduled once the respondent's briefs are received. Only the petitioner, respondent and any interveners, or their legal counsel, may testify.
9. LUBA must issue a Final Opinion and Order within 77 days after the record is transmitted to it.
10. Other procedures may prolong the decision process, including various motions, an opportunity for mediation, and negotiated delays for other reasons. See the LUBA information site link, above.

4.1.08 ODOT's Role in Land Use Appeals

As stated earlier, ODOT generally participates in a land use appeal as the petitioner. ODOT may also participate in a LUBA appeal as an intervenor (intervene in the case as a party), with permission of LUBA. There are a number of procedural rules to follow should ODOT wish to intervene in a case and ODOT staff is advised to consult the Department of Justice immediately should an appeal be filed with LUBA in which ODOT has an interest in participating.

4.1.09 Standing to Appeal

To bring an appeal to LUBA, ODOT must establish "standing" to appeal the local decision. ODOT has standing to appeal a local land use decision if it "appeared

before the local government, special district or state agency orally or in writing” (ORS 197.830(2)). Standing to appeal may be achieved either through oral testimony (speaking at the hearing – it is not enough to merely show up) or in written form, through a memorandum, letter, petition or other document. The written document must be submitted to the local government during the course of the proceedings before the record is closed. The record is typically closed during the hearing before the hearings body deliberates on its decision.

4.1.10 Exhaustion of Administrative Remedies

Before an appeal can be filed with LUBA, the petitioner must “exhaust all administrative remedies”. This means that ODOT has followed all local government administrative requirements and has appealed the decision to the highest decision-maker at the local level. It is important to know the local government’s decision-making structure and follow it to the letter.

4.1.11 The Record – What is the record, and why is it important?

The “record” is the formal file of the jurisdiction exercising its decision making authority. It should include, at a minimum, all of the information that was submitted and relied upon to make the decision, documentation of all public notice(s) of the subject decision process, and written findings and decision details, documented and signed where required by state or local law. When the local decision is appealed to LUBA pursuant to OAR 197-835(2) (a)-(b), this local record is the written information upon which the LUBA decision will be based. The development review planner should review the record while it is still open for submittals and be sure that it includes the correct and complete information from ODOT’s perspective. By definition, the record includes:

“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.” (OAR 661-010-0025(1)(d))

Keeping good records and making sure those records (e.g., maps, letters, correspondence, comments, traffic impact studies) get into the formal local government record should start at the very beginning of ODOT’s review process. The following section provides some best practices to use to obtain, retain and transmit appropriate information to the local government so that if an appeal does arise, ODOT is prepared.

4.1.12 Building a Good Record

There are two aspects to the recordkeeping that ODOT needs to do in responding to local land use decisions. One is supporting the decision(s) ODOT makes regarding its decision to get involved, its position on the case, and any

decision to appeal. The other is making sure that the local government gets sufficient evidence in its record to clearly support ODOT's position and help local decision makers arrive at an informed and favorable decision.

All correspondence, maps, traffic impact studies, meeting notes and records of conversations are part of ODOT's decision-making history. As such, this information should be kept in some logical order so that it can later be made part of the formal local government record.

An example of an easy logical system is typical of local government practice. Local planning files are often maintained in reverse chronological order, reading from the present to the past. This is relatively easy using either a notebook or a file folder with a two-hole brad spindle. Just file from the back forward so that the latest items are the easiest to locate, and the relationship between items can be understood based upon what information was available at the time an action occurred and the item was filed.

Information submitted to the local government to include in their record should be organized like a planning report with a summary or cover memo on top, detailed narrative if the issues are complex, and technical materials, maps, charts, etc. attached below. A stand alone report such as a TIS would typically be submitted as a separate exhibit.

- **Letters and documents for the record.** ODOT staff submittals may take the form of letters, memoranda, and/or staff reports, and will include recommendations and findings. Be sure to include a request that the written information be made part of the local record. This written documentation must be submitted prior to the close of the record. The submittals need to reference how the materials relate to the logical approval criteria for the local land use application at hand. Written testimony can be received at more than one point in the process, but it is important to meet deadlines and provide information at the point in time it will be most useful:
 - The notice of a pending land use decision will include a deadline by which information must be submitted for it to be considered in conjunction with the development of the staff report (or ministerial decision). This is the best time to submit information so the staff planner will be able to consider ODOT issues from the beginning of the review process, and will be able to ask questions of ODOT staff before presenting the application to the planning commission or other reviewer.
 - If there is a public hearing, written and oral testimony are both accepted while the hearing is open.

- If any participant in the local hearing requests that the decision record be kept open, a deadline for submitting new information will be set. Do not rely on this process; this should only be used if new issues are raised in the course to the hearing that require additional technical work or other evidence to support ODOT's position.
- An appeal at the local level may or may not be a de novo hearing which would allow the submittal of new information. Often appeals to either a Hearings Officer or the City Council/County Board are hearings on the record, which means that only the record compiled for the earlier decision may be relied upon for the appeal decision. It is important to know whether the local appeal hearing is conducted on the record or de novo ahead of time to anticipate when the opportunity to submit new information will end.
- **Public Hearing Testimony.** ODOT staff may also testify in person at hearings and bring additional written material related to the applicable decision criteria to the hearing and request that it be entered into the record. Public hearing minutes must be made available to the public within time limits set out in the General Code of the governing unit. Request a copy of the minutes for the ODOT record file. Note that the proceedings may also have been recorded and the tapes are available for public review, often before the written minutes have been released.
- **Electronic Record Keeping.** ODOT must keep records of agency correspondence, both internal and external, notices from local jurisdictions, and the local staff reports, findings and decisions. These are a valuable source of information when preparing an appeal. The paper files for local land uses can be organized by either the Region's Planning Unit or by the District Office. Another method ODOT has developed in Region 1 to track local land uses is an electronic Development Review Log. This software has a feature to track the status of all files and keep records of correspondence, comments and meetings. The electronic log also has several features to track land uses by highway and mile point.
- **Keeping a journal.** Keeping a written record of conversations, internal communications and meeting outcomes can be a valuable tool. The written record of conversations does not have to be word for word, but should note important features such as the subject matter, date and persons talked to. Remember to note disagreements, negotiated agreements and any mitigations offered by any part to discussions of the application. Care should always be taken to keep journals professional in nature, so that if the material is submitted as part of the local government record, it will not contain entries embarrassing to the writer or to ODOT.

4.1.13 Important Tips for Building a Record

The following is a list of tips for building a record.

- Establish good record-keeping practices in all cases.
- If the data or information is important to ODOT, get it in the record. If it is not in the record, the local appeals body and LUBA will not use it in its decision-making.
- The local government is the “keeper of the record”. It is up to you to see that the information gets placed into their record.
- As a failsafe request, either orally at a hearing or as part of any written correspondence, that the information be made part of the record. If information is submitted to the planning commission and the decision is then appealed to the city council, make sure that the planning commission record, including your information, is placed before the city council.
- Make sure the TIS and any updates are placed in the record. It is often a good idea to request two copies in order to make sure one is available for the record.

4.1.14 Internal ODOT Coordination Process (PBLT, TDD, OTC)

1. The department must participate in the local land use action to identify ODOT’s interests and concerns and establish standing in the case to protect its right to appeal to LUBA.
2. ODOT staff prepares a brief analysis of the case with reasons to consider whether to proceed to an appeal. The region staff contacts the Department of Justice as soon as possible in cases that might be appealed to LUBA. No appeal is filed unless the Department of Justice concurs there is a legal basis for such action. The case file shall include a copy of the notice of land use action with the envelope attached to monument the postmark date which is the basis for the 21-day filing period.
3. The staff report will include a process timeline that considers the critical steps to get OTC approval if the commission meets during the appeal process or the timing for gaining OTC review after the appeals period according to the procedures described in ORS 184.633(6).
4. The consideration of an appeal of a land use action is coordinated with the Department of Land Conservation and Development in the manner specified in the most recent draft of the intergovernmental agreement between ODOT and DLCD.
5. ODOT can appeal to LUBA either as a proponent of a local land use action (usually in conjunction with project development) or as a reviewer of

- a local action (development review function). The Region Manager, in consultation with the Transportation Development Division Manager, and considering the staff analysis and the Attorney General's advice, makes a recommendation to appeal to the Director.
6. The Region Planning Manager will also review the case with the Planning Business Line Team as an informational item to both inform the members and seek their advice on land use policy implications. PBLT review is not a prerequisite to filing an appeal and may occur after the appeal is filed. The goal of the PBLT review is to achieve long-term consistency across the state.
 7. Where there is disagreement between the Region Manager and TDD Manager on whether to appeal, the differing perspectives should be documented and presented to the director.
 8. The Director must approve the filing of the appeal and get formal approval to proceed from the OTC following the procedures specified in ORS 184.633(6).
 9. If an appeal is to be filed and consequently a review is scheduled for the OTC, the region staff notifies the local government and applicant, if any, of their opportunity to address the Commission regarding the appeal.

4.1.15 Detailed Steps and Considerations for Filing an Appeal

1. The Director's authorities and the process of engaging OTC in the decision to appeal are set out in ORS 184.633(6). The "Notice of Intent to Appeal" does not have to be approved by the OTC before it is filed. The OTC can confirm the Director's decision to file the notice of intent after the notice has been filed with LUBA. However, the OTC members will be informed about any appeal before the notice is filed. See Item 10 below.
2. Inform and involve the Department of Justice, in time to participate in the final land use hearing at the latest. DOJ will want the details of the case and will want to know what the circumstances are that form the basis for appeal, and will help ODOT in the final local government hearing as needed.
3. DOJ has the responsibility to file the "Notice of Intent to Appeal" for ODOT. This is a boilerplate document that can be prepared very quickly.
4. Understand the work schedule of the DOJ attorney assigned to the case. Currently, there are three attorneys dealing with land use issues for ODOT. All work part time, three days per week.
5. The local land use decision's impacts should be known before the local government has its final land use hearing. Discuss the proposed land use action and these impacts with the Region Manager, TDD Manager or designee, and the DOJ attorney before the final land use hearing.

6. Call the Director's office to schedule a briefing with the Director for one or two days after the local decision is to be announced. It is recommended that this be done through TDD and in any case the TDD Manager needs to be included in the briefing. The Director's calendar is tightly scheduled – expect more than a week before you get a meeting time.
7. If you set up the briefing and the local government does not approve the land use action, or adopts acceptable conditions of approval, the meeting can be cancelled and no one will mind. Waiting to schedule the briefing until the local decision is made, or until the written decision is in hand will make it very difficult to find sufficient time and support necessary to accomplish the other steps.
8. Work with the Development Review staff person at TDD to prepare the memorandum from the Director authorizing DOJ to file the notice of intent to appeal. Either the Region office or the TDD staff person will send an electronic version to the TDD Manager and the Director's office. Do this as early as possible to allow time for follow-up. The DOJ attorney must file the notice of intent for you, but will only do so when they are at work. Remember that they all work part time.
9. In the scheduled meeting with the Director, expect to describe and discuss the following:
 - What the development proposal is;
 - What the unacceptable impacts are;
 - What steps have been taken to remediate the situation;
 - How this matter got to this point;
 - What was done to try and settle the issue outside of the LUBA process;
 - If there is any room to negotiate after the notice of intent is filed; and
 - What the political ramifications are/will be (is the local government calling state representatives or members of congress to assist, etc.).
10. The Region will need to provide individual briefings to OTC members before the Director authorizes the "Notice of Intent to Appeal". This will have to be accomplished in a non-quorum manner (no more than two OTC members per briefing). This could require more than a week to accomplish. Sending briefing information by FAX to each commissioner prior to the briefing will expedite the process.
11. The Notice of Intent to Appeal must be filed within 21 days. If all the worst things happen, the notice of intent may not be filed until the 21st day. This leaves no margin for error. The local government or applicant may file a notice to dismiss and demonstrate that the appeal period expired before the notice of intent was filed.

12. Attend to the report to the OTC as soon as possible. Commission Services has submission deadlines for agenda items, be aware of them. Expect to provide an ODOT-generated location map with the report. For a variety of reasons, the local government's public notice map may be inadequate (poor graphics, area depicted is too small and lacks recognizable geography, etc.).
13. The Region will mail a copy of the report to OTC and to the local government and the applicant as soon as it is completed. The law requires that the applicant and local government be afforded an opportunity to address the OTC before the commission deliberates on the authorization to proceed with the appeal.