

Comments Against Proposal to Identify Issues in the NITA

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Proposal: Require all petitioners filing a LUBA appeal to identify their issues in the Notice of Intent to Appeal (NITA), which is the initial paperwork filed to initiate a LUBA appeal.

Change from Current Procedure: Currently, identification of issues is done in petitioner's opening brief by listing "assignments of error".

Comments in Support of Proposal:

- A. This would assist local governments to identify and understand the nature of LUBA petitioner's issues earlier than is done now.
- B. This, in turn, would assist cities and counties in deciding whether to take a decision back from LUBA on a voluntary remand.
- C. In some percentage of cases, this may result in cities and counties deciding to take the case back on voluntary remand somewhat sooner than they are able to do now.
- D. This could create a new time and level for the "Raise It Or Waive It" doctrine to be applied.

Comments Against Proposal:

- A. Local governments already have the absolute right to take cases back, until the record is filed, even if the petitioner objects.
- B. Local governments already may ask LUBA for a voluntary remand later in the case. Except in unusual circumstances, LUBA will grant such request will be granted, even if petitioner objects. This proposal is a solution in search of a problem.
- C. Without the proposed new requirement, local governments already have significant information about potential appeal issues, including:
 - Parties are already required to identify all appeal issues before the local government, as the "Raise It Or Waive It" doctrine currently applies to local government hearings.
 - Usually, key issues are identified and addressed by findings set forth in the local government's written decision.
 - In most jurisdictions, there will be city or county staff members who are familiar with the issues that city or county counsel can consult with.
 - At any time after receipt of a notice of intent to appeal, city or county counsel can contact petitioner or petitioner's counsel to discuss the issues and thereby accelerate a decision on possible remand.

For these reasons, there is no current problem and no new requirement is warranted.

- D. The proposal would require formal appeal issue identification before the local government has assembled or submitted the record of the proceedings below. It

- can be difficult to evaluate whether to include certain assignments of error (or how to state them) without having the record available for review.
- E. This could create a new time for the "Raise It Or Waive It" doctrine to be applied and argued. This would complicate deciding appeals and could result in fewer issues being decided on the merits and more issues being decided on technicalities.
- F. This proposal is the opposite of streamlining, as it adds another procedural hurdle. The proposal would be helpful in relatively few cases, whereas the proposal would add a new and burdensome requirement in every appeal. It does not make sense to require every petitioner in every case to accelerate issue identification to the Notice of Intent to Appeal (or NOIA) for whatever limited additional benefit this might occasionally afford local governments.
- G. Assignments of error are now contained in petitioner's opening brief, which is generally filed 21 days after the record is settled. Any acceleration of time from adopting the proposal would be modest.
- H. This proposal would create a difference in practice between appeals to LUBA and appeals of land use cases to the Court of Appeals. Currently, for both types of appeals, assignments of error are first identified in the opening brief. The proposal would create a new trap for the unwary. As a matter of policy, there should be a very good reason before creating a new difference between the two appeal processes, and there is no good reason to do so here.
- I. LUBA handles a number of cases where petitioners represent themselves, without benefit of an attorney. It does not make sense to make the requirements for LUBA appeals more onerous than appeals filed in the Court of Appeals, as parties before LUBA are less versed in appellate procedures than those appearing before the court.
- J. From a land use practitioner's perspective, potential LUBA petitioners often approach attorneys for counsel and advice on whether to file a LUBA appeal only after an unfavorable decision has been handed down. Attorneys in this situation must now take the following steps within 21 (or fewer) days:
- Meet with the client and become acquainted with the case;
 - Review the decision and parts of the record most readily available to determine if there is an issue that merits filing an appeal; and
 - Prepare and file the notice of intent to appeal, including service on all parties to the local proceeding.
- Especially for attorneys who did not participate in the local government proceeding, adding the proposed requirement would make filing notices of intent to appeal much more burdensome.
- K. While this proposal was made on behalf of cities, this proposal would place a new requirement on local governments any time a local government files a LUBA appeal of another jurisdiction's decision.