

**Additional Comments to 2013 Proposed Amendments
to OAR chapter 661, division 010**

The Board received comments with respect to proposed amendments to OAR 661-010-0025(2)(b), OAR 661-010-0030(2)(d), OAR 661-010-0030(4)(d), and OAR 661-010-0067. In response to comments, the Board has modified some of the proposed amendments, and added two new minor amendments, to OAR 661-010-0025(1)(b) (Content of the Record), and OAR 661-010-0075(4) (Copying Fees), discussed below.

1. New Amendment: OAR 661-010-0025(1)(b). One commentator requested that the rule be amended to clarify and codify case law that visual materials presented to the final decision maker during the proceedings below, such as Power Point Slides, are included in the record. *See Downtown Canby v. City of Canby*, __ Or LUBA __ (LUBA No. 2012-097, Order, March 5, 2013). To the extent the rule is ambiguous on this point, the ambiguity is in the catch-all phrase “other *written* materials.” Therefore, the rule is amended to delete “written,” making the phrase broad enough to include any materials, written or not.

2. OAR 661-010-0025(2)(b).

The original draft stated a preference that electronic records be searchable, but did not require it. One commentator suggested, and the Board agrees, that where a local government transmits the record in electronic form as proposed under amended OAR 661-010-0025(2)(b), that at least for larger records in excess of 100 pages the electronic record must be “searchable.”

Also, the original proposed amendment to OAR 661-010-0025(2)(b) provided that “A local government may not recover copying costs under OAR 661-010-0075(1)(b)(B) for electronic copies of the record transmitted to the Board.” This language was proposed for consistency with OAR 661-010-0025(3)(b), adopted in 2010, which provides that a local government may, by prior agreement of the parties, serve an electronic rather than paper copy of the record on the parties. If so, OAR 661-010-0025(3)(b) provides for no cost recovery for that electronic copy. However, the costs for compiling an electronic record, particularly staff time, are probably not much less than the cost for compiling a paper record. Therefore, the Board chose to delete the proposed language in OAR 661-010-0025(2)(b) limited cost recover for transmittal of electronic copies to the Board and, for consistency, to delete the 2010 language in OAR 661-010-0025(3)(b) prohibiting cost recovery for service of electronic copies.

3. Petition for Review

A. Proposed OAR 661-010-0030(2)(d) requires 14 point font for both text and footnotes, instead of 12 and 10 point font, respectively. The main purpose is to make briefs more readable for all parties. The amended rule retains the current 50 page limitation. The net effect is that 50 page briefs under the amended rule will necessarily include fewer words than 50 page briefs

under the current rule, perhaps 15 to 20 percent fewer words. This amendment One commentator suggested that to avoid reducing the number of words allowed in the brief the 50 page limit should be replaced by a 14,000 word limit, similar to ORAP 5.05(2)(b), applicable to opening briefs before the Oregon Supreme Court.

According to the Board's experiments, 14,000 words at 12 point font is roughly equivalent to 50 pages, so the current rules allow parties a maximum of around 14,000 words (absent permission to exceed the 50 page limit under OAR 661-010-0030(2)(b)). Replacing the 50 page limit with a 14,000 word limit would therefore preserve the maximum verbiage allowed under the current rule. However, for three reasons, the Board elects to retain the 50 page limit, notwithstanding the effective reduction in the maximum number of words allowed. First, most briefs filed under the current rule do not exceed 40 pages, so the larger font size combined with the 50 page limit will not affect the word count in the majority of appeals. Second, where a larger brief would suffer a reduced word count under the proposed rule, one desirable consequence may be more concise and focused briefs. Third, where additional briefing is warranted in more complex appeals, parties still have the option of requesting permission to file a brief that exceeds 50 pages. While the number of parties requesting extra-length briefs may increase under the proposed rule, that is a relatively minor inconvenience for the Board and parties.

B. Proposed OAR 661-010-0030(4)(d) requires each assignment of error to demonstrate that the issue raised was preserved during the proceedings below, but only "if preservation is required." A commentator suggested amendments that put the initial burden on the petitioner to explain why, if the issue was not preserved below, preservation is not required. The new language states: **Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required.** The Board agrees with the suggestion, and has modified proposed OAR 661-010-0030(4)(d) accordingly.

4. Extensions of Time

Proposed OAR 661-010-0067(3) and (4) provide that a written motion to extend time limits (except the deadlines for the notice of intent to appeal, the petition for review and record objections) may be extended upon written **or oral** consent of all parties. One commentator expressed concern that this amendment would create accusations of impropriety or fraud, and suggested an alternative amendment that would allow oral consent to extend deadlines only during an appearance of all parties before the Board, essentially during oral argument.

The proposed amendment codifies the Board's current practice, which is to grant written motions to extend certain non-critical deadlines (to file the record, to file the response brief etc.) based upon the movant's written representation that all parties have consented to the extension. In the current Board's memory, under that practice no issue has ever arisen regarding accusations of fraud or impropriety. Because such oral consents are allowed only with respect to non-critical

deadlines, the consequences of a misrepresentation, if any occurred, would likely be insignificant. Further, if a misrepresentation or misunderstanding occurred, and a party had not in fact consented to the extended deadline, the party could inform the Board, which could restore the original deadline, if that is consistent with OAR 661-010-0005, or the Board could choose to grant the extension over the objection of the party, which is currently permitted under OAR 661-010-0067(3).

5. Copying Costs for Scanned Documents

OAR 661-010-0075(4)(a) currently provides that LUBA shall charge 25 cents per page for making copies of public documents in LUBA's records. Some parties ask for public documents to be scanned rather than copied, but the rule does not explicitly authorize LUBA to recover cost for scanned copies. Scanning costs LUBA approximately the same amount of money and staff time as making paper copies. The amendment authorizes LUBA to recover 25 cents per page for scanned copies.