

Corrected Copy

CERTIFICATE AND ORDER FOR FILING PERMANENT ADMINISTRATIVE RULES WITH THE SECRETARY OF STATE

I HEREBY CERTIFY that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on January 17, 1992 (Date)

by the Land Use Board of Appeals (Department) _____ (Division) _____

to become effective upon filing (Date)

The within matter having come before the Land Use Board of Appeals (Department) _____ (Division) _____ after

all procedures having been in the required form and conducted in accordance with applicable statutes and rules and being fully advised in the premises:

Notice of Intended Action published in Secretary of State's Bulletin: NO YES Date Published: January 1992

NOW THEREFORE, IT IS HEREBY ORDERED THAT the following action be taken: (List Rule Number(s) or Rule Title(s) on Appropriate Lines Below)

Adopted: 661-10-020, 661-10-073 (New Total Rules)

Amended: 661-10-000, 005, 010, 015, 025, 030, 050, 055, 068, 075 (Existing Rules)

Repealed: _____ (Total Rules Only)

as Administrative Rules of the Land Use Board of Appeals (Department) _____ (Division) _____

DATED this 17th day of January, 19 92

By: [Signature] (Authorized Signer)

Title: Chief Referee

Statutory Authority: ORS 197.820(4) or _____

Chapter(s) 817 _____; Oregon Laws 19 91 or _____

House Bill(s) _____, 19 _____ Legislature; or Senate Bill(s) _____, 19 _____ Legislature

Subject Matter: These new and amended rules implement 1991 legislation concerning limited land use decisions and withdrawal of local government or state agency decisions for reconsideration.

For Further Information Contact: Jan Zwemke (Rule Coordinator) Phone: 373-1265

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RECEIVED JAN 21 10 14 AM '92

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PHIL KEISLING SECRETARY OF STATE

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1 PROPOSED AMENDMENTS
2 TO LUBA RULES TO
3 REFLECT 1991 LEGISLATION

JAN 21 10 11 AM '92

PHIL KEELING

4 [INDICATES BRACKETED LANGUAGE IN CURRENT RULES TO BE
5 RETAINED]

6 ~~{Indicates existing rule language to be deleted}~~

7 Indicates new language

8 -----
9 DIVISION 10

10 RULES OF PROCEDURE FOR APPEALS
11
12
13

14 Introduction

15 661-10-000 Scope of Rules and Effective Date: All
16 proceedings commenced by a Notice of Intent to Appeal filed
17 after ~~{December 31, 1987,}~~ September 29, 1991 shall be
18 governed by these rules. Any proceedings commenced by a Notice
19 of Intent to Appeal filed on or before ~~{December 31, 1987,}~~
20 September 29, 1991 shall be governed by OAR 661-10-005
21 through 661-10-075 as adopted ~~{October 3, 1983.}~~ December 31,
22 1987.

23
24 Purpose

25 661-10-005 These rules are intended to promote the
26 speediest practicable review of land use decisions and limited
27 land use decisions, in accordance with ORS 197.805-197.855,
28 while affording all interested persons reasonable notice and
29 opportunity to intervene, reasonable time to prepare and submit
30 their cases, and a full and fair hearing. The rules shall be

1 interpreted to carry out these objectives and to promote
2 justice. Technical violations not affecting the substantial
3 rights of parties shall not interfere with the review of a land
4 use decision or limited land use decision. Failure to
5 comply with the time limit for filing a Notice of Intent to
6 Appeal under OAR 661-10-015(1) or a Petition for Review under
7 OAR 661-10-030(1) is not a technical violation.

8

9 **Definitions**

10 **661-10-010** In these rules, unless the context or subject
11 matter requires otherwise:

12 (1) "Applicant" means the person who requested that the
13 governing body take an action which resulted in a land use
14 decision or limited land use decision.

15 (2) "Board" means the Land Use Board of Appeals or any
16 member thereof.

17 (3) "Final decision": A decision becomes final when it is
18 reduced to writing and bears the necessary signatures of the
19 decisionmaker(s), unless a local rule or ordinance specifies
20 that the decision becomes final at a later time, in which case
21 the decision is considered final as provided in the local rule
22 or ordinance.

23 (4) "Governing body" means a city, county or special
24 district governing body or a state agency or a person,
25 commission or other entity authorized by the governing body to
26 make a final decision.

1 (5) "Land use decision" has the meaning given the term in
2 ORS 197.015.

3 (6) "Limited land use decision" has the meaning
4 given the term in ORS 197.015.

5 ~~+(6)+~~ (7) "Notice" means the Notice of Intent to Appeal
6 and refers to the document which must be filed with the Board in
7 order to begin a review proceeding.

8 ~~+(7)+~~ (8) "Party" means the petitioner, the governing
9 body, and any person who intervenes as provided in OAR 661-10-
10 050. "Party" does not include a state agency that files a brief
11 under ORS 197.830(6).

12 ~~+(8)+~~ (9) "Transmit" means to send with the United States
13 Postal Service by first class mail or to deliver in person.

14
15 **Notice of Intent to Appeal**

16 **661-10-015** (1) Filing of Notice: The Notice, together
17 with the filing fee and deposit for costs required by subsection
18 (4) of this rule, shall be filed with the Board as provided in
19 OAR 661-10-075(2)(a) on or before the 21st day after the date
20 the decision sought to be reviewed becomes final or within the
21 time provided by ORS 197.830(3) and (4). A Notice of
22 Intent to Appeal plan and land use regulation amendments
23 processed pursuant to ORS 197.610 to 197.625 shall be filed with
24 the Board on or before the 21st day after the date the decision
25 sought to be reviewed is mailed to parties entitled to notice
26 under ORS 197.615. A Notice filed thereafter shall not be

1 deemed timely filed, and the appeal shall be dismissed. A
2 notice unaccompanied by payment of the required fee and deposit
3 shall not be accepted for filing.

4 (2) Service of Notice: The Notice shall be served on the
5 governing body, the governing body's legal counsel, and all
6 persons identified in the Notice as required by subsection
7 (3)(f) of this rule on or before the date the Notice of Intent
8 to Appeal is required to be filed.

9 (3) Contents of Notice: The Notice shall be substantially
10 in the form set forth in Exhibit 1 and shall contain:

11 (a) A caption which sets forth the name(s) of the
12 person(s) filing the Notice, identifying the person(s) as
13 petitioner(s), and the name of the governing body, identifying
14 the governing body as respondent;

15 (b) Below the caption the heading "Notice of Intent to
16 Appeal";

17 (c) The full title of the decision to be reviewed as it
18 appears on the final decision;

19 (d) The date the decision to be reviewed became final;

20 (e) A concise description of the decision to be reviewed;

21 (f) The name, address and telephone number of each of the
22 following:

23 (A) The Petitioner. If the petitioner is not represented
24 by an attorney, the petitioner's name, address and telephone
25 number shall be included. If an attorney represents the
26 petitioner, the attorney's name, address and telephone number

1 shall be substituted for that of the petitioner. If two or more
2 petitioners are unrepresented by an attorney, one petitioner
3 shall be designated as the lead petitioner. See
4 OAR 661-10-075(6);

5 (B) The governing body and the governing body's legal
6 counsel;

7 (C) The applicant, if any (and if other than the
8 petitioner). If an applicant was represented by an attorney
9 before the governing body, the applicant's address and telephone
10 number may be omitted and the name, address and telephone number
11 of the applicant's attorney shall be included;

12 (D) Any other person to whom written notice of the land
13 use decision or limited land use decision was mailed as
14 shown on the governing body's records. The telephone number may
15 be omitted for any such person.

16 (g) A statement advising all persons, other than the
17 governing body, that in order to participate in the review
18 proceeding a person must file a motion to intervene pursuant to
19 OAR 661-10-050.

20 (h) Proof of service upon all persons required to be named
21 in the Notice. See Exhibit 1.

22 (4) Filing Fee and Deposit for Costs: The Notice shall be
23 accompanied by a filing fee of \$50 and a deposit for costs in
24 the amount of \$150 payable to the Land Use Board of Appeals.
25 One check, State of Oregon purchase order or money order for
26 \$200 may be submitted. Cash shall not be accepted.

1 Withdrawal of Decision for Reconsideration

2 661-10-020 (1) If a local government or state
3 agency, pursuant to ORS 197.830(12)(b), withdraws a
4 decision for the purposes of reconsideration, it shall
5 file a notice of withdrawal with the Board on or before
6 the date the record is due. A decision on
7 reconsideration shall be filed with the Board within 90
8 days after the filing of the notice of withdrawal or
9 within such other time as the Board may allow.

10 (2) The filing of a notice of withdrawal under
11 subsection (1) of this rule shall suspend proceedings on
12 the appeal until a decision on reconsideration is filed
13 with the Board, or the time designated therefor expires,
14 unless otherwise ordered by the Board. If no decision
15 on reconsideration is filed within the time designated
16 therefor, the Board shall issue an order restarting the
17 appeal.

18 (3) A decision on reconsideration under section (1)
19 of this rule shall be filed with the Board within 7 days
20 after the local government or state agency issues the
21 decision on reconsideration and copies of the decision
22 on reconsideration shall be served on all parties.

23 (4) Petitioner(s) may seek review of the decision
24 on reconsideration as provided in section 5 of this
25 rule. Any other person may file a notice of intent to
26 appeal the decision on reconsideration as provided in

1 OAR 661-10-015. If such an appeal is filed, and a
2 petitioner files an amended notice of intent to appeal
3 or refiles the original notice of intent to appeal as
4 provided in section (5) of this rule, any party may move
5 to consolidate the appeals challenging the decision on
6 reconsideration as provided in OAR 661-10-055.

7 (5) After the filing of a decision on
8 reconsideration:

9 (a) If the petitioner wishes review by the Board of
10 the decision on reconsideration:

11 (A) Except as provided in paragraph (B) of this
12 subsection, the petitioner shall file an amended notice
13 of intent to appeal within 21 days after the decision on
14 reconsideration is received by the Board.

15 (B) In the event the local government or state
16 agency affirms its decision or modifies its decision
17 with only minor revisions, the petitioner may refile the
18 original notice of intent to appeal, with the date of
19 the decision on reconsideration indicated thereon,
20 within 21 days after the decision on reconsideration is
21 received by the Board.

22 (b) An amended notice of intent to appeal or a
23 refiled notice of intent to appeal under paragraphs (A)
24 and (B) of section 5(a) of this rule shall conform with
25 the requirements of OAR 661-10-015(3) and shall be
26 served on the following:

1 (A) All parties to the appeal suspended pursuant to
2 section 2 of this rule;

3 (B) The applicant, if any (and if other than the
4 petitioner). If an applicant was represented by an
5 attorney before the governing body, the applicant's
6 address and telephone number may be omitted and the
7 name, address and telephone number of the applicant's
8 attorney shall be included;

9 (C) Any other person to whom written notice of the
10 original or reconsidered land use decision or limited
11 land use decision was mailed as shown on the governing
12 body's records. The telephone number may be omitted for
13 any such person;

14 (c) No additional filing fee or deposit for costs
15 shall be required to refile the original notice of
16 intent to appeal or file an amended notice of intent to
17 appeal under section (5)(a) of this rule.

18 (d) If no amended notice of intent to appeal is
19 filed or no original notice of intent to appeal is
20 refiled, as provided in section (5)(a) of this rule, the
21 appeal will be dismissed.

22 (6) The local government or state agency shall,
23 within 21 days after service of the amended notice of
24 intent to appeal or refiled original notice of intent to
25 appeal under section (5)(a) of this rule, transmit to
26 the Board the original or a certified copy of the record

1 of the proceeding under review in accordance with OAR
2 661-10-025. The record submitted by the local
3 government or state agency in an appeal of a decision on
4 reconsideration shall include the record of the original
5 decision and the decision on reconsideration.

6 **Record**

7 **661-10-025** (1) Contents of Record: Unless the Board
8 otherwise orders, or the parties otherwise agree in writing, the
9 record shall include at least the following:

10 (a) The final decision including any findings of fact and
11 conclusions of law;

12 (b) All written testimony and all exhibits, maps,
13 documents or other written materials included as part of the
14 record during the course of the governing body's proceeding.

15 (c) Minutes of the meetings conducted by the governing
16 body as required by law. A verbatim transcript of audiotape
17 recordings shall not be required, but if a transcript has been
18 prepared, it shall be included.

19 (2) Transmittal of Record: The governing body shall,
20 within 21 days after service of the Notice on the governing
21 body, transmit to the Board the original or a certified copy of
22 the record of the proceeding under review. The governing body
23 may, however, retain any large maps or documents which are
24 difficult to duplicate, until the date of oral argument.

25 (3) Service of Record: Contemporaneously with
26 transmittal, the governing body shall serve a copy of the

1 record, exclusive of large maps and other documents which are
2 difficult to duplicate, on the petitioner or the lead
3 petitioner, if one is designated. The governing body shall also
4 serve a copy of the record on any other party requesting a copy
5 provided such other party reimburses the governing body for the
6 reasonable expense incurred in copying the record.

7 (4) Specifications of Record:

8 (a) The record shall:

9 (A) Be filed in a suitable folder; the cover shall bear
10 the title of the case as it appears in the Notice, and the
11 Board's numerical designation for the case, and shall indicate
12 the numerical designation given the land use decision or
13 limited land use decision by the governing body;

14 (B) Begin with a table of contents, listing each item
15 contained therein, and the page of the record where the item
16 begins (see Exhibit 2), and listing each large map or document
17 retained by the governing body under subsection (2) of this
18 rule;

19 (C) Be securely fastened;

20 (D) Have pages numbered consecutively, with the page
21 number at the bottom right-hand corner of each page;

22 (E) Be arranged in inverse chronological order, with the
23 most recent item on top.

24 (b) A record which does not conform to the preceding
25 requirements shall not be accepted by the Board.

26

1 **Objections to the Record**

2 **661-10-026** (1) Before filing an objection to the
3 record, a party shall attempt to resolve the matter with the
4 governing body's legal counsel. If the governing body amends
5 the record in response to an objection, the date the amendment
6 is received by the Board shall be considered the date the record
7 is received for the purpose of computing time limits as required
8 by these rules.

9 (2) An objection to the record shall be filed with the
10 Board within 10 days following service of the record on the
11 person filing the objection. Objections may be made on the
12 following grounds:

13 (a) The record does not include all materials included as
14 part of the record during the proceedings before the governing
15 body. The omitted item(s) shall be specified, as well as the
16 basis for the claim that the item(s) are part of the record.

17 (b) The record contains material not included as part of
18 the record during the proceedings before the governing body.
19 The item(s) not included as part of the record during the
20 proceedings before the governing body shall be specified, as
21 well as the bases for the claim that the item(s) are not part of
22 the record.

23 (c) The minutes or transcripts of meetings or hearings are
24 incomplete or do not accurately reflect the proceedings.

25 (3) An objection on grounds that the minutes or
26 transcripts are incomplete or inaccurate shall demonstrate with

1 particularity how the minutes or transcripts are defective and
2 shall explain with particularity why the defect is material.
3 Upon such demonstration, the Board shall require the governing
4 body to produce additional evidence to prove the accuracy of the
5 contested minutes or transcripts. If the evidence regarding
6 contested minutes is in an audiotape recording, a transcript of
7 the relevant portion shall be submitted.

8 (4) The Board may conduct a telephone conference with the
9 parties to consider any objections to the record.

10 (5) If an objection to the record is filed, the time
11 limits for all further procedures under these rules shall be
12 suspended. When the objection is resolved, the Board shall
13 issue a letter or order declaring the record settled and setting
14 forth the schedule for subsequent events. Unless otherwise
15 provided by the Board, the date of the Board's letter or order
16 shall be deemed the date of receipt of the record for purposes
17 of computing subsequent time limits.

18 **Petition for Review**

19 **661-10-030** (1) Filing and Service of Petition: The
20 petition for review shall be filed with the Board within 21 days
21 after the date the record is received by the Board. See
22 OAR 661-10-025(2) and 661-10-026(1) and (5). The petition shall
23 also be served on the governing body and any party who has filed
24 a motion to intervene. Failure to file a petition for review
25 within the time required by this section, and any extensions of
26 that time under OAR 661-10-045(7) or OAR 661-10-067(2), shall

1 result in dismissal of the appeal and forfeiture of the filing
2 fee and deposit for costs to the governing body. See
3 OAR 661-10-075(1)(c).

4 (2) Specifications of Petition: The petition for review
5 shall:

6 (a) Begin with a table of contents;

7 (b) Not exceed 50 pages, exclusive of appendices, unless
8 permission for a longer petition is given by the Board. If a
9 Petition for Review exceeding the 50 page limit is filed without
10 permission, the Board shall notify the author, and a revised
11 brief satisfying the 50 page limit shall be filed within three
12 (3) days of notification by the Board.

13 (c) Have a blue cover page, stating the full title of the
14 proceeding, and the names, addresses and telephone numbers of
15 all parties unrepresented by attorney. If a party is
16 represented by an attorney, the name, address and telephone
17 number of the attorney shall be substituted for the party. If
18 there is more than one petitioner, the cover page shall specify
19 which petitioner(s) are filing the petition. An intervenor
20 shall be designated as either petitioner or respondent in
21 accordance with OAR 661-10-050;

22 (d) Be typewritten, in pica type, and double spaced;

23 (e) Be signed on the last page by the author.

24 (3) Contents of Petition: The petition for review shall:

25 (a) State the facts that establish petitioner's standing;

26 (b) Present a clear and concise statement of the case, in

1 the following order, with separate section headings:

2 (A) The nature of the land use decision or limited land
3 use decision and the relief sought by petitioner;

4 (B) A summary of the arguments appearing under the
5 assignments of error in the body of the petition;

6 (C) A summary of the material facts. The summary shall be
7 in narrative form with citations to the pages of the record
8 where the facts alleged can be found.

9 (c) State why the challenged decision is a land use
10 decision or a limited land use decision subject to the
11 Board's jurisdiction;

12 (d) Set forth each assignment of error under a separate
13 heading. Where several assignments of error present essentially
14 the same legal questions, the argument in support of those
15 assignments of error shall be combined;

16 (e) Contain a copy of the challenged ~~{land use}~~ decision,
17 including any adopted findings of fact and conclusions of law;

18 (f) Contain a copy of any comprehensive plan provision,
19 ordinance or other provision of local law cited in the petition,
20 unless the provision is quoted verbatim in the petition.

21 (4) Amended Petition: A petition for review which fails
22 to comply with subsections (2) or (3) of this section may, with
23 permission of the Board, be amended. The Board shall determine
24 whether to allow an amended petition for review to be filed in
25 accordance with OAR 661-10-005.

26

1 **Respondent's Brief**

2 **661-10-035** (1) Filing and Service of Brief: Unless
3 otherwise provided by the Board, respondent's brief shall be
4 filed within 42 days after the date the record is received by
5 the Board. See OAR 661-10-025(2) and 661-10-026(1) and (5). A
6 copy of the respondent's brief shall be served on the petitioner
7 or lead petitioner and all intervenors.

8 (2) Specifications of Brief: Respondent's brief shall
9 conform to the specifications of the petition for review, except
10 that the brief shall have a red cover. If there is more than
11 one respondent, the cover page shall specify which respondent is
12 filing the brief.

13 (3) Contents of Brief:

14 (a) The respondent's brief shall follow the form
15 prescribed for the petition for review. The respondent shall
16 specifically accept the petitioner's statement of the case or
17 shall cite any alleged omissions or inaccuracies therein, and
18 may state additional relevant facts or other matters. The
19 statement shall be in narrative form with citations to the pages
20 of the record where support for the facts alleged can be found.

21 (b) Respondent shall accept or challenge petitioner's
22 statement of the Board's jurisdiction and petitioner's statement
23 of standing. The basis for any challenge shall be stated. If
24 respondent contends that the facts alleged by petitioner in
25 support of standing are not true, respondent shall specify which
26 allegations are contested.

1 (4) Amended Brief: The Board may allow the filing of an
2 amended brief in accordance with OAR 661-10-005.

3
4 **State Agency Briefs**

5 **661-10-038** A state agency that wishes to file a brief
6 under ORS 197.830(6) shall file the brief within the time
7 required for respondent's brief. A state agency brief shall
8 have a yellow cover.

9
10 **Reply Brief**

11 **661-10-039** A reply brief may not be filed unless
12 permission is first obtained from the Board. A reply brief
13 shall be confined solely to new matters raised in the
14 respondent's brief. A reply brief shall have a gray cover.

15
16 **Oral Argument**

17 **661-10-040** (1) Only parties who have submitted briefs
18 shall be allowed to present oral argument to the Board.

19 (2) If a party waives the right to present oral argument,
20 the Board shall consider the case based on that party's brief
21 and the briefs and oral arguments presented by other parties.
22 The parties may, with consent of the Board, stipulate to submit
23 a case to the Board on briefs without oral argument.

24 (3) The Board shall inform the parties of the time and
25 place of oral argument. Unless the Board otherwise orders,
26 petitioner(s) shall be allowed 30 minutes for oral argument,

1 which may be divided between the initial presentation and
2 rebuttal. Multiple petitioners shall share the thirty minutes
3 for argument. The respondent(s) shall be allowed 30 minutes to
4 respond. The Board shall tape record all arguments, but any
5 party may also arrange at its own expense to record the argument
6 in some other manner.

7 (4) A state agency which has filed a brief pursuant to
8 ORS 197.830(6) may move to argue orally before the Board. The
9 motion shall be filed with the brief.

10

11 **Evidentiary Hearings**

12 **661-10-045** (1) Grounds for Hearing: The Board may,
13 upon written motion, conduct an evidentiary hearing in the case
14 of disputed allegations in the parties' briefs concerning
15 unconstitutionality of the decision, standing, ex parte contacts
16 or other procedural irregularities not shown in the record and
17 which, if proved, would warrant reversal or remand of the
18 decision. An evidentiary hearing may also be held upon motion
19 or at the direction of the Board to consider disputes regarding
20 the content of the record or requests for stays, attorney fees
21 and actual damages under ORS 197.845.

22 (2) Motions for Hearings: A motion for an evidentiary
23 hearing shall contain a statement explaining with particularity
24 what facts the moving party will present at the hearing and how
25 those facts will affect the outcome of the review proceeding.
26 Whenever possible such facts shall be presented by affidavit

1 with the motion.

2 (3) Conduct of Hearing:

3 (a) Insofar as the Board finds it practical, the hearing
4 shall be conducted in the following order:

5 (A) The moving party shall present its evidence including
6 that of any witnesses;

7 (B) The other party(ies) shall have the opportunity to
8 present evidence disputing that of the moving party;

9 (C) The moving party shall present rebuttal evidence;

10 (b) Any witness is subject to cross examination by
11 opposing parties.

12 (c) Any member of the Board may question any witness;

13 (d) The burden of presenting evidence in support of a fact
14 or proposition rests on the proponent of the fact or
15 proposition;

16 (e) The Board may continue a hearing, and may set time
17 limits for any hearing.;

18 (f) Exhibits shall be marked to identify the party
19 offering the exhibits. The exhibits shall be preserved by the
20 Board as part of the record.

21 (4) Evidentiary Rules:

22 (a) Evidence of a type commonly relied upon by reasonably
23 prudent persons in conduct of their serious affairs shall be
24 admissible.

25 (b) Irrelevant, immaterial or unduly repetitious evidence
26 shall be excluded.

1 (c) All evidence not objected to, shall be received by the
2 Board, subject to the Board's power to exclude irrelevant,
3 immaterial or unduly repetitious matter.

4 (d) Evidence objected to may be received by the Board.
5 Rulings on the admissibility of such evidence, if not made at
6 the hearing, shall be made at or before the time a final order
7 is issued.

8 (e) Any time ten days or more before a hearing, any party
9 may serve on every other party an affidavit, certificate or
10 other document the party proposes to introduce in evidence.
11 Unless cross-examination of the affiant, certificate preparer or
12 other document preparer or custodian is requested within five
13 days prior to hearing, the affidavit or certificate may be
14 offered subject to the same standards and received with the same
15 effect as oral testimony. If cross-examination is requested,
16 and the requestor is informed within five days prior to the
17 hearing that the requested witness will not appear for cross-
18 examination, the affidavit, certificate or other document may be
19 received in evidence if the Board determines that the party
20 requesting cross-examination would not be unduly prejudiced or
21 injured by lack of cross-examination.

22 (5) Prehearing Conference: The Board, on its own motion
23 or at the request of any party, may call a prehearing conference
24 to consider:

25 (a) Simplification of the issues;

26 (b) The possibility of obtaining admissions of fact and

1 documents which will avoid unnecessary proof;

2 (c) Limitation of the number of witnesses;

3 (d) The form and substance of any prehearing order;

4 (e) Such other matters as may aid in the disposition of
5 the appeal.

6 (6) Proposed Prehearing Order: The Board, with or without
7 a prehearing conference, may require that the parties prepare
8 and sign a proposed prehearing order to be filed with the Board
9 on or before a date specified by the Board. The order shall
10 contain:

11 (a) A statement of contentions of law of each party;

12 (b) A concise statement of all contentions of fact to be
13 proved by each party;

14 (c) A statement of all agreed facts;

15 (d) A list of witnesses and a summary of their testimony;

16 (e) A list of exhibits and a statement of the contents of
17 each;

18 (f) Such other matters as the Board may require in order
19 to expedite the hearing and appeal.

20 (7) Effect on Time limits: The filing of a motion for
21 evidentiary hearing shall suspend the time limits for all other
22 events in the review proceeding, including the issuance of the
23 Board's final order. If the Board grants an evidentiary
24 hearing, the time limits for other events shall remain suspended
25 until the close of the hearing. Unless the parties agree
26 otherwise, the Board shall schedule any evidentiary hearing not

1 less than ten days after the order granting the motion for
2 evidentiary hearing is issued. If the Board denies a motion for
3 an evidentiary hearing, the time for all other events will begin
4 to run on the date the Board issues its order denying the
5 motion, or on such other date as is specified in that order.

6 (8) Depositions: On petition of any party, the Board may
7 order testimony of any witness to be taken by deposition in the
8 same manner prescribed by law for depositions in civil actions
9 (ORCP 38-40). Depositions may also be taken by the use of audio
10 or audio visual recordings. The petition for depositions shall
11 set forth:

12 (a) The name and address of the witness whose testimony is
13 desired;

14 (b) A showing of relevance and materiality of the
15 testimony;

16 (c) A request for an order that the testimony of the
17 witness be taken.

18 (9) Subpenas: If the Board orders an evidentiary hearing,
19 the Board shall issue subpenas to any party to the appeal upon
20 request and upon a showing that the witness or the documents to
21 be subpoenaed will provide relevant evidence. Subpenas may also
22 be issued under the signature of the attorney of record of a
23 party. Witnesses appearing pursuant to subpoena, other than
24 parties or employes of the Board, shall be tendered fees and
25 mileage as prescribed by law for witnesses in civil actions.
26 The party requesting the subpoena shall be responsible for

1 service of the subpoena and tendering the witness and mileage
2 fees to the witness.

3

4 **Intervention**

5 **661-10-050** (1) Standing to Intervene: The applicant and
6 any person who appeared before the local government, special
7 district or state agency may intervene in a review proceeding
8 before the Board. Status as an intervenor is recognized when a
9 motion to intervene is filed, but the Board may deny that status
10 at any time prior to issuance of its final order.

11 (2) Motion to Intervene: In the interests of promoting
12 timely resolution of appeals, a motion to intervene shall be
13 filed as soon as is practicable after the Notice of Intent to
14 Appeal is filed pursuant to OAR 661-10-015, or the amended
15 Notice of Intent to Appeal is filed or original Notice
16 of Intent to Appeal is refiled pursuant to 661-10-020.

17 The motion to intervene (see Exhibit 3) shall:

18 (a) State whether the party is intervening on the side of
19 the petitioner or the respondent;

20 (b) State the facts which show the party is entitled to
21 intervene, supporting the statement with affidavits, citations
22 to the record or other proof;

23 (c) Be served upon the Board and all parties.

24 (3) Intervenor's Brief:

25 (a) If intervention is sought as a petitioner, the brief
26 shall be filed within the time limit for filing the petition for

1 review, and shall satisfy the requirements for a petition for
2 review in OAR 661-10-030.

3 (b) If intervention is sought as a respondent, the brief
4 shall be filed within the time for filing a respondent's brief
5 and shall satisfy the requirements for a respondent's brief in
6 OAR 661-10-035.

7

8 **Amicus Participation**

9 **661-10-052** (1) A person or organization may appear as
10 amicus only by permission of the Board on written motion. The
11 motion shall set forth the interest of the movant and state
12 reasons why a review of relevant issues would be significantly
13 aided by participation of the amicus. A copy of the motion
14 shall be served on all parties to the proceeding.

15 (2) Appearance as amicus shall be by brief only, unless
16 the Board specifically authorizes or requests oral argument. An
17 amicus brief shall be subject to the same rules as those
18 governing briefs of parties to the appeal, and shall be filed
19 within the time required for filing respondent's brief. No
20 filing fee is required. An amicus brief shall have a green
21 cover.

22

23 **Consolidation**

24 **661-10-055** The Board, at the request of any party or on
25 its own motion, may consolidate two or more proceedings,
26 provided the proceedings seek review of the same or closely

1 related land use decision(s) or limited land use
2 decision(s).

3

4 **Motions**

5 **661-10-065** (1) When Motion is Appropriate: Unless
6 these rules or applicable statutes provide another form of
7 application, a request for an order or relief shall be made by
8 filing a motion in writing for such order or relief. A motion
9 shall show proof of service on all parties.

10 (2) Time of Filing: A party seeking to challenge the
11 failure of an opposing party to comply with any of the
12 requirements of statutes or Board rules shall make the challenge
13 by motion filed with the Board and served on the adverse party
14 within 10 days after the moving party obtains knowledge of such
15 alleged failure. The opposing party may, within 10 days from
16 the receipt of a motion, file an answer.

17 (3) How Submitted: Parties shall submit all motions
18 without oral argument unless otherwise directed by the Board.

19

20 **Extensions of Time**

21 **661-10-067** (1) In no event shall the time limit for the
22 filing of the Notice of Intent to Appeal be extended.

23 (2) In no event shall the time limit for the filing of
24 the petition for review be extended without the written consent
25 of all parties.

26 (3) All other time limits may be extended upon written

1 consent of all parties, the Board's motion or motion of a party.

2 (4) A motion for extension of time shall state the reasons
3 for granting the extension and must be filed with the Board
4 within the time required for performance of the act for which an
5 extension of time is requested.

6 (5) Any agreement by the parties for an extension of time
7 shall automatically extend the time for issuance of the Board's
8 final order by an amount of time equal to the extension agreed
9 to by the parties.

10 (6) In the event the Board extends the deadline for
11 issuance of its final order without consent of the parties, it
12 shall enter the findings required by ORS 197.840.

13

14 **Stays**

15 **661-10-068** (1) A motion for a stay of a land use
16 decision or limited land use decision shall include:

17 (a) A statement setting forth movant's right to standing
18 to appeal the decision;

19 (b) A statement explaining why the challenged decision is
20 ~~{a land use decision}~~ subject to the Board's jurisdiction;

21 (c) A statement of facts and reasons for issuing a stay,
22 demonstrating a colorable claim of error in the ~~{land use}~~
23 decision and specifying how the movant will suffer irreparable
24 harm if a stay is not granted;

25 (d) A suggested expedited briefing schedule;

26 (e) A copy of the ~~{land use}~~ decision under review and

1 copies of all ordinances, resolutions, plans or other documents
2 necessary to show the standards applicable to the decision under
3 review.

4 (2) A copy of a motion for stay shall be served on the
5 governing body and the applicant for the land use decision or
6 limited land use decision, if any, on the same day the
7 motion is filed with the Board.

8 (3) Unless otherwise ordered by the Board, a response to a
9 motion for a stay of a land use decision or limited land use
10 decision shall be filed within 10 days after the motion is
11 filed and shall set forth all matters in opposition to the
12 motion and any facts showing any adverse effect, including an
13 estimate of any monetary damages that will accrue if a stay is
14 granted.

15 (4) An order granting a stay of a quasi-judicial land use
16 decision or limited land use decision involving a specific
17 development of land shall be conditional upon filing an
18 undertaking in the principal amount of \$5,000. In all other
19 cases an undertaking, if ordered by the Board, shall be in the
20 amount set forth in the order granting the stay. All
21 undertakings shall be substantially in the form as set forth in
22 Exhibit 4, and shall be accompanied by proof that the surety is
23 qualified by law to issue surety insurance as defined in ORS
24 731.186. Any objections to the form of undertaking or the
25 surety shall be filed within 10 days after service of a copy of
26 the undertaking on the objecting party.

1 (5) The Board shall base its decision on the stay,
2 including the right to a stay, amount of undertaking, or
3 conditions of any stay order, upon evidence presented. Evidence
4 may be attached to the motion in the form of affidavits,
5 documents or other materials, or presented at an evidentiary
6 hearing. See OAR 661-10-045.

7

8 **Final Order of Board**

9 **661-10-070** (1) An Order of the Board is final when the
10 cover page of the order containing the caption of the appeal:

11 (a) States "Final Opinion and Order";

12 (b) Indicates whether the decision being reviewed is
13 dismissed, affirmed, reversed or remanded;

14 (c) Contains the date of the final order; and

15 (d) Is time and date stamped by the Board.

16 (2) When an order of the Board becomes final it shall be
17 made available to interested members of the public. The Board
18 may charge a reasonable fee for copies of its final orders or
19 other orders furnished to members of the public.

20 (3) Notwithstanding subsections (1)(a) and (b) of this
21 section, an order granting a motion to dismiss an appeal is a
22 final order.

23

24 **Reversal or Remand of Land Use Decisions**

25 **661-10-071** (1) The Board shall reverse a land use
26 decision when:

- 1 (a) The governing body exceeded its jurisdiction;
- 2 (b) The decision is unconstitutional; or
- 3 (c) The decision violates a provision of applicable law
- 4 and is prohibited as a matter of law.

5 (2) The Board shall remand a land use decision for further
6 proceedings when:

- 7 (a) The findings are insufficient to support the decision,
- 8 except as provided in ORS ~~{197.835(10)(b)}~~ 197.835(9)(b);
- 9 (b) The decision is not supported by substantial evidence
- 10 in the whole record;
- 11 (c) The decision is flawed by procedural errors that
- 12 prejudice the substantial rights of the petitioner(s); or
- 13 (d) The decision improperly construes the applicable law.

14
15 Reversal or Remand of Limited Land Use Decisions

16 661-10-073 (1) The Board shall reverse a limited
17 land use decision when:

- 18 (a) The governing body exceeded its jurisdiction;
- 19 (b) The decision is unconstitutional; or
- 20 (c) The decision violates a provision of applicable
- 21 law and is prohibited as a matter of law.

22 (2) The Board shall remand a limited land use
23 decision for further proceedings when:

- 24 (a) The findings are insufficient to support the
- 25 decision, except as provided in ORS 197.835(9)(b);
- 26 (b) The decision is not supported by substantial

1 evidence in the record. The existence of evidence in
2 the record supporting a different decision shall not be
3 grounds for reversal or remand if there is evidence in
4 the record to support the final decision:

5 (c) The local government committed a procedural
6 error which prejudiced the substantial rights of the
7 petitioner(s); or

8 (d) The decision violates a provision of applicable
9 law but is not prohibited as a matter of law.

10
11 **Miscellaneous Provisions**

12 **661-10-075 (1) Cost Bill and Attorney's Fees**

13 (a) Time for Filing: The prevailing party shall file a
14 cost bill and a petition for attorney's fees within 15 days
15 after the final order is issued. The prevailing party shall
16 serve a copy of the cost bill and petition for attorney's fees
17 on all parties.

18 (b) Recoverable Costs: Costs may be recovered only for
19 the items set forth in this paragraph.

20 (A) If the petitioner is the prevailing party, the
21 petitioner may be awarded the cost of the filing fee.

22 (B) If the governing body is the prevailing party, the
23 governing body may be awarded copying costs for the required
24 number of copies of the record, at \$.10 per page.

25 (C) Costs awarded to the governing body pursuant to this
26 section shall be paid from the deposit required by OAR 661-10-

1 015(4) and shall not exceed the amount of that deposit.

2 (c) Forfeit of Filing Fee and Deposit: If a record has
3 been filed, and a petition for review is not filed within the
4 time required by these rules, the appeal shall be dismissed and
5 the filing fee and deposit required by OAR 661-10-015(4) shall
6 be awarded to the governing body as cost of preparation of the
7 record.

8 (d) Attorney's Fees:

9 (A) Attorney's fees may be awarded by the Board to the
10 prevailing party as specified in ORS [~~197.830(13)(b)~~]
11 197.830(15)(b).

12 (B) Attorney's fees shall be awarded to the applicant,
13 against the governing body, if the Board reverses a land use
14 decision or limited land use decision and orders a local
15 government to approve a development application pursuant to ORS
16 ~~{197.835(9)}~~ 197.835(8).

17 (C) Attorney's fees shall be awarded to the applicant,
18 against the person who requested a stay pursuant to ORS 197.845,
19 if the Board affirms a quasi-judicial land use decision or
20 limited land use decision for which such a stay was granted.
21 The amount of the award shall be limited to reasonable
22 attorney's fees incurred due to the stay request, and together
23 with any actual damages awarded, shall not exceed the amount of
24 the undertaking required under ORS 197.845(2).

25 (e) Objections: Objections to the cost bill and petition
26 for attorney's fees shall be filed with the Board within 10 days

1 after the cost bill or petition is filed.

2 (2) Filing and Service:

3 (a) Filing of Notice of Intent to Appeal: Filing of a
4 Notice of Intent to Appeal with the Board is accomplished by
5 delivery of the Notice to the Board, or receipt of the Notice by
6 the Board, accompanied by payment of the filing fee and deposit
7 required by OAR 661-10-015(4), on or before the date due.

8 (b) Filing of Other Documents: With the exception of the
9 Notice of Intent to Appeal, filing a document with the Board is
10 accomplished by:

11 (A) Delivery to the Board on or before the date due; or

12 (B) Mailing on or before the date due by first class mail
13 with the United States Postal Service.

14 (c) Service:

15 (A) Any document filed with the Board, other than the
16 Record as provided in OAR 661-10-025(3), must also be served on
17 all parties contemporaneously. Service on two or more
18 petitioners unrepresented by an attorney is accomplished by
19 serving the lead petitioner designated under OAR 661-10-
20 015(3)(f)(A).

21 (B) Service may be in person or by first-class mail. Mail
22 service is complete on deposit in the mail.

23 (C) Service copies shall include a certificate showing the
24 date of filing with the Board (see Exhibit 5).

25 (D) Documents filed with the Board shall contain either an
26 acknowledgement of service by the person served or proof of

1 service by a statement certified by the person who made service
2 of the date of personal delivery or deposit in the mail, and the
3 names and addresses of the persons served. (See Exhibit 6).

4 (3) Cross Petition

5 Any respondent who desires to file a petition for review
6 may do so by filing a cross petition for review. The cover page
7 shall identify the petition as a cross petition and the party
8 filing the cross petition. The cross petition shall be filed
9 within the time required for filing the petition for review and
10 must comply in all respects with the requirements of this rule
11 governing the petition for review, except that a Notice of
12 Intent to Appeal need not have been filed by such party.

13 (4) Number of Copies Required:

14 (a) The petition for review and any briefs filed with the
15 Board shall be filed with four copies.

16 (b) Any other document filed with the Board, except
17 documents to be included as part of the record on review, shall
18 be filed with one copy.

19 (5) Conferences: On its own motion or at the request of
20 any party, the Board may conduct one or more conferences.
21 Conferences may be by telephone. The Board shall provide
22 reasonable notice advising all parties of the time, place and
23 purpose of any conference.

24 (6) Appearances Before the Board: An individual
25 petitioner shall either appear on his or her own behalf or be
26 represented by an attorney. A corporation or other organization

1 shall be represented by an attorney. In no event may a party be
2 represented by someone other than an active member of the Oregon
3 State Bar.

4 (7) Computation of Time: Time deadlines in these rules
5 shall be computed by excluding the first day and including the
6 last day. If the last day is Saturday, Sunday or other legal
7 holiday, the act must be performed on the next working day.

8 (8) Address and Hours of the Board: The Board's address
9 is 100 High Street, Suite 220, Salem, Oregon, 97310. The
10 telephone number is 373-1265. The offices of the Board shall be
11 open from 8:00 a.m. to 5:00 p.m. Monday through Friday.

12 (9) Citations to Board Decisions: Citations to Board
13 decisions shall be in the following form:

14 Reported Cases: John Doe v. XYZ County, 5 Or LUBA 654
15 (1981).

16 Unreported Cases: John Doe v. XYZ County, ___ Or LUBA
17 ___ (LUBA No. 80-123, February 15, 1981).

18 (10) Motion to Transfer to Circuit Court:

19 (a) Any party may request, pursuant to ORS 19.230, that an
20 appeal be transferred to the circuit court of the county in
21 which the appealed decision was made, in the event the Board
22 determines the appealed decision is not reviewable as a land use
23 decision or limited land use decision as defined in ORS
24 197.015(10) or (12).

25 (b) A request for a transfer pursuant to ORS 197.230 shall
26 be initiated by filing a motion to transfer to circuit court not

1 later than ten days after the date respondent's brief is due
2 under OAR 661-10-035(1).

3 (c) If the Board determines the appealed decision is not
4 reviewable as a land use decision or limited land use
5 decision as defined in ORS 197.015(10) or (12), and a motion
6 to transfer to circuit court is filed as provided in section
7 (10)(b) of this rule, the Board shall not dismiss the appeal and
8 shall transfer the appeal to the circuit court of the county in
9 which the appealed decision was made.

1 EXHIBIT 1
2 (661-10-015)

3 BEFORE THE LAND USE BOARD OF APPEALS
4 OF THE STATE OF OREGON

5
6 Jane Smith,)
7)
8 Petitioner,)
9)
10 vs.) LUBA No. _____
11)
12 Willamette County,)
13)
14 Respondent.)

15 NOTICE OF INTENT TO APPEAL

16 I.

17 Notice is hereby given that petitioner intends to appeal
18 that land use decision or limited land use decision of
19 respondent entitled [INDICATE TITLE OF LAND USE DECISION OR
20 LIMITED LAND USE DECISION], which became final on [INDICATE
21 DATE] and which involves [SET FORTH A BRIEF STATEMENT OF THE
22 NATURE OF THE DECISION]

23 II.

24 Petitioner, Jane Smith, is represented by: [INDICATE NAME,
25 ADDRESS AND TELEPHONE NUMBER OF ATTORNEY].

26 Respondent, Willamette County, has as its mailing address
27 and telephone number: [INDICATE MAILING ADDRESS AND TELEPHONE
28 NUMBER] and has, as its legal counsel: [INDICATE NAME, ADDRESS
29 AND TELEPHONE NUMBER].

30 III.

31 Applicant, John Developer, was represented in the

1 proceeding below by: [INDICATE NAME, ADDRESS AND TELEPHONE
2 NUMBER OF ATTORNEY].

3 Other persons mailed written notice of the land use
4 decision or limited land use decision by Willamette County,
5 as indicated by its records in this matter, include: [INDICATE
6 NAMES, ADDRESSES AND TELEPHONE NUMBERS OF ALL PERSONS WHOM THE
7 GOVERNING BODY'S RECORDS INDICATE WERE MAILED WRITTEN NOTICE OF
8 THE LAND USE DECISION OR LIMITED LAND USE DECISION. THE
9 TELEPHONE NUMBERS OF SUCH PERSONS MAY BE OMITTED].

10 NOTICE:

11 Anyone designated in paragraph III of this Notice who
12 desires to participate as a party in this case before the Land
13 Use Board of Appeals must file with the Board a Motion to
14 Intervene in this proceeding as required by OAR 661-10-050.
15

16
17

Petitioner (each petitioner must sign)

18 or

19
20
21

Attorney for Petitioner(s)

22

CERTIFICATE OF SERVICE

23 I hereby certify that on [INDICATE DATE], I served a true
24 and correct copy of this Notice of Intent to Appeal on all
25 persons listed in paragraphs II and III of this Notice pursuant
26 to OAR 661-10-015(2) by (a) first class mail or (b) personal
27 delivery. [INDICATE WHICH]

28
29
30

Dated: _____

1
2
3
4

Signature

EXHIBIT 2
(661-10-025)

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OF RECORD

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2. Record of City Council action on appeal of Fred Meyer/Hyster Co. from Hearings Officer's decision denying Fred Meyer/Hyster proposal	2
3. Record of City Council action on proposed findings to grant appeal of Fred Meyer/Hyster Inc. and approve Fred Meyer/Hyster proposal	3
4. Letter from a City Auditor to Edward J. Sullivan Transmitting a form letter mailed to parties of interest concerning the Fred Meyer/Hyster comprehensive plan map amendment and zone change and transmitting a copy of a notice published in the Oregonian on Sunday, June 7 and Wednesday, June 11, 1986	4
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6. Form letter from City Auditor to interested parties, dated June 6, 1986, transmitting a copy of ordinance No. 158347, and list of persons to whom form letter was mailed	6
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9. Letter from City Auditor to Fred Meyer Real Estate Properties, Ltd., dated June 5, 1986, transmitting a copy of Ordinance No. 158573	15
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1 EXHIBIT 3
2 (OAR 661-10-050)

3 BEFORE THE LAND USE BOARD OF APPEALS
4 OF THE STATE OF OREGON

5
6 Jane Smith,)
7)
8 Petitioner,)
9)
10 vs.) LUBA No. _____
11)
12 Willamette County,)
13)
14 Respondent.)

15 MOTION TO INTERVENE

16 I

17 John Davis moves to intervene on the side of (a) Petitioner
18 or (b) Respondent [INDICATE WHICH] in the above-captioned
19 appeal. Mr. Davis' (or his attorney's) address and phone number
20 are as follows: [INDICATE ADDRESS AND PHONE NUMBER].

21 II

22 The facts establishing movant's right to intervene are as
23 follows: [SET FORTH STATEMENT OF FACTS].

24 III [OPTIONAL]

25 In support of this motion, John Davis relies on the
26 attached affidavit, Memorandum of Law or both.

27
28
29 _____
30 Date

John Davis

31 or

32
33 _____
34 Denise Neil, Attorney for
35 John Davis

36 [Add Certificates of Filing and Service on separate page. See
37 forms in Exhibits 5 and 6.]

1 EXHIBIT 4
2 (661-10-068)

3 BEFORE THE LAND USE BOARD OF APPEALS
4 OF THE STATE OF OREGON

5
6 Jane Smith,)
7)
8 Petitioner,)
9)
10 vs.) LUBA No. _____
11)
12 Willamette County,)
13)
14 Respondent.)

15 UNDERTAKING ON STAY

16 I

17 Whereas, Jane Smith, the petitioner above named, has
18 applied to the Land Use Board of Appeals for an order staying
19 execution of that land use decision or limited land use
20 decision described as [DESCRIBE LAND USE DECISION OR LIMITED
21 LAND USE DECISION]; and

22 II

23 Whereas, the Land Use Board of Appeals entered an order
24 dated [INDICATE DATE] staying said land use decision or
25 limited land use decision pursuant to ORS 197.845, subject
26 to filing an undertaking with the Land Use Board of Appeals in
27 the principal amount of \$_____.

28 III

29 Now, therefore, we [INDICATE PETITIONER'S NAME(S)], the
30 above-named petitioner, as principal, and [INDICATE SURETY
31 NAME], a [INDICATE STATE OF INCORPORATION] corporation qualified

1 by law to issue surety insurance as defined in ORS 731.186, as
2 surety, hereby undertake that petitioner will pay all reasonable
3 attorney's fees and actual damages which may be awarded by the
4 Land Use Board of Appeals in the event the land use decision or
5 limited land use decision above described shall be affirmed,
6 but not to exceed the sum of \$_____.

7 IV

8 The condition of this obligation is that if the land use
9 decision or limited land use decision above described is not
10 affirmed, then this obligation shall be null and void; otherwise
11 it shall remain in full force and effect.

12 Dated this _____ day of _____, 19____.

13
14
15
16
17 _____
18 Principal

19
20
21 By: _____
22 Surety

23
24 [Add Certificates of Filing and Service on separate page. See
25 forms in Exhibits 5 and 6.]

1 EXHIBIT 5
2 (661-10-075)
3

4 CERTIFICATE OF FILING
5 [For Document Other Than
6 Notice of Intent to Appeal]
7

8 I hereby certify that on [INDICATE DATE], I filed the
9 original of this [IDENTIFY DOCUMENT], together with [INDICATE
10 NUMBER OF COPIES] copies, with the Land Use Board of Appeals,
11 Suite 220, 100 High Street SE, Salem, OR, 97310, by (a) first
12 class mail or (b) personal delivery [INDICATE WHICH].
13
14
15
16

17 Dated: _____
18
19
20
21

22 _____
23 Signature

1 EXHIBIT 6
2 (661-10-075)
3

4 CERTIFICATE OF SERVICE
5 [For Document Other Than
6 Notice of Intent to Appeal]
7

8 I hereby certify that on [INDICATE DATE], I served a true
9 and correct copy of this [IDENTIFY DOCUMENT] by (a) first class
10 mail or (b) personal delivery [INDICATE WHICH] on the following
11 persons: [LIST NAME AND ADDRESS OF EACH PARTY OR THE PARTY'S
12 ATTORNEY].
13
14
15
16
17
18
19
20
21
22
23

Dated: _____

Signature