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ARCHIVES DIVISION
SECRETARY OF STATE
February 12, 1998 by

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Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies are true, full and correct copies of the PERMANENT Rules adopted on February 12, 1998 by

Land Use Board of Appeals (LUBA) Administrative Rule Chapter Number: 661
Bobby Sullinger (Rules Coordinator) (503) 373-1265
306 State Library Bldg.
250 Winter Street NE
Salem, Oregon

LUBA 1-1998

to become effective March 1, 1998. Rulemaking notice was published in the December 1, 1997 Oregon Bulletin.

RULEMAKING ACTION

List each rule number separately, 000-00-0000

AMEND:

661-10-000, 661-10-010, 661-10-015, 661-10-021, 661-10-025, 661-10-026, 661-10-030, 661-10-035,
661-10-038, 661-10-040, 661-10-045, 661-10-050, 661-10-065, 661-10-067, 661-10-070, -661-10-
071, 661-10-073, 661-10-075

Statutory authority: ORS 183.545 and ORS 197.820(4).

Other Authority: None.

Stat. Implemented: ORS 19.230, 197.015, 197.620, 197.805, 197.828, 197.830, 197.835

RULE SUMMARY

- 661-10-000 amends effective dates of rules.
- 661-10-010 amends definition of when decision becomes final; "governing body" and "final decision maker."
- 661-10-015 permits notice of intent to appeal to be filed by registered or certified mail on date of mailing.
- 661-10-021 amends cross-references.
- 661-10-025 clarifies that record includes only record before or incorporated by final decision maker.
- 661-10-026 requires party objecting to record to state compliance with consultation requirement; permits LUBA to deny objections in violation of rule.
- 661-10-030 amends standards for briefs, permits double-sided printing, allows LUBA to reject any nonconforming brief.
- 661-10-035 clarifies respondent's brief need not contain decision.
- 661-10-038 clarifies no fee required for agency brief.
- 661-10-040 amends procedures for oral argument.
- 661-10-045 amends procedures for taking evidence outside the local record.
- 661-10-050 requires intervenor to file motion to intervene within statutory deadline.
- 661-10-065 clarifies procedures and deadlines for filing motions.
- 661-10-067 clarifies procedures for extension of time.
- 661-10-070 clarifies definition of final opinion.
- 661-10-071 clarifies when LUBA may remand a land use decision.
- 661-10-073 clarifies when LUBA may remand a limited land use decision.
- 661-10-075 amends miscellaneous procedures and requirements; requires all briefs and motions filed with LUBA to conform to standards.

Eligina S. Hustayso 2/12/98
Authorized Signer and Date

**LAND USE BOARD OF APPEALS
DIVISION 10
RULES OF PROCEDURE FOR APPEALS**

Introduction

661-010-0000

Scope of Rules and Effective Date: All proceedings commenced by a notice of intent to appeal filed after February 28, 1998, shall be governed by these rules. Any proceedings commenced by a notice of intent to appeal filed on or before February 28, 1998, shall be governed by OAR 661-10-005 through 661-10-075 as effective February 6, 1995.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.805.

Definitions

661-010-0010

In these rules, unless the context or subject matter requires otherwise:

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

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

(3) "Final decision": Unless a local rule or ordinance specifies that the decision becomes final at a later time than defined in this section, a decision becomes final

(a) When it is reduced to writing, bears the necessary signatures of the decision maker(s), and

(b) If written notice of the decision is required by law, when written notice of the decision is mailed to persons entitled to notice.

(4) "Final decision maker" means the governing body, or a person, commission or other entity authorized by the governing body, that makes the final decision.

(5) "Governing body" means a city, county or special district governing body, or a state agency.

(6) "Land use decision" has the meaning given the term in ORS 197.015.

(7) "Lead Petitioner" means the petitioner designated as the contact person for the purpose of receiving documents from the Board and other parties, when two or more petitioners are unrepresented by an attorney. See OAR 661-10-075(7).

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

(9) "Notice" means the notice of intent to appeal and refers to the document that must be filed with the Board in order to begin a review proceeding.

(10) "Party" means the petitioner, the governing body, and any person who intervenes as provided in OAR 661-10-050. "Party" does not include a state agency that files a brief under ORS 197.830(7) or an amicus participating under OAR 661-10-052.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.015(2), (10) and (12); 197.805.

Notice of Intent to Appeal

661-010-0015

(l) Filing of Notice:

(a) The Notice, together with two copies and the filing fee and deposit for costs required by section (4) of this rule, shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3) through (5). A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.

(b) The date of filing a notice of intent to appeal is the date the Notice is received by the Board, or the date the Notice is mailed, provided it is mailed by registered or certified mail and the party filing the Notice has proof from the post office of such mailing date. If the date of mailing is relied upon as the date of filing, acceptable proof from the post office shall consist of a receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number. A Notice unaccompanied by payment of the fee and deposit required by section (4) of this rule shall not be accepted for filing.

(c) If the Board determines that a Notice identifies more than one final decision as the subject of appeal, the Board shall notify the petitioner. The Board shall dismiss the Notice if the petitioner fails to submit within the date specified by the Board either a written election to appeal only one decision, or a separate Notice and separate filing fee and deposit, as required by section (4) of this rule, for each additional decision.

(2) Service of Notice: The Notice shall be served on the governing body, the governing body's legal counsel, and all persons identified in the Notice as required by subsection (3)(f) of this rule on or before the date the notice of intent to appeal is required to be filed. Service of the Notice as required by this section may be in person or by first class mail. The date of serving such notice shall be the date of mailing.

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

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

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

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

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

(e) A concise description of the decision to be reviewed, or a copy of either the notice of decision or the decision to be reviewed;

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

(A) The Petitioner. If the petitioner is not represented by an attorney, the petitioner's name, address and telephone number shall be included. If an attorney represents the petitioner, the attorney's name, address and telephone number shall be substituted for that of the petitioner. If two or more petitioners are unrepresented by an attorney, one petitioner shall be designated as the lead petitioner. See OAR 661-10-075(7);

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

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

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

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

(h) On the last page, a signature by each petitioner, or the attorney representing that petitioner, on whose behalf the Notice is filed.

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

(4) Filing Fee and Deposit for Costs: The Notice shall be accompanied by a filing fee of \$175 and a deposit for costs in the amount of \$150 payable to the Land Use Board of Appeals. One check, State of Oregon purchase order or money order for \$325 may be submitted. Cash shall not be accepted.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.620; 197.830(1) and (8).

Withdrawal of Decision for Reconsideration

661-010-0021

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

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

(3) A decision on reconsideration under section (1) of this rule shall be filed with the Board within 7 days after the local government or state agency issues the decision on reconsideration and copies of the decision on reconsideration shall be served on all parties. The first page of the decision on reconsideration, or an accompanying transmittal letter, shall indicate the title and case number of the pending appeal before the Board.

(4) Petitioner(s) may seek review of the decision on reconsideration as provided in section 5 of this rule. Any other person may file a notice of intent to appeal the decision on reconsideration as provided in OAR 661-10-015. If such an appeal is filed, and a petitioner files an amended notice of intent to appeal or refiles the original notice of intent to appeal as provided in section (5) of this rule, any party may move to consolidate the appeals challenging the decision on reconsideration as provided in OAR 661-10-055.

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

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

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

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

(b) Refiling of the original notice of intent to appeal or filing of an amended notice of intent to appeal is accomplished by delivery of the Notice to the Board, or receipt of the Notice by the Board, on or before the due date.

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

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

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

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

(d) No additional filing fee or deposit for costs shall be required to refile the original notice of intent to appeal or file an amended notice of intent to appeal under subsection (5)(a) of this rule.

(e) If no amended notice of intent to appeal is filed or no original notice of intent to appeal is refiled, as provided in subsection (5)(a) and (b) of this rule, the appeal will be dismissed.

(6) The local government or state agency shall, within 21 days after service of the amended notice of intent to appeal or refiled original notice of intent to appeal under subsection (5)(a) of this rule, transmit to the Board the original or a certified copy of the record of the proceeding under review in accordance with OAR 661-10-025. The record submitted by the local government or state agency in an appeal of a decision on reconsideration shall include the record of the original decision and the decision on reconsideration.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.830(12)(b).

Record

661-010-0025

(1) Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

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

(b) 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.

(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. A verbatim transcript of audiotape or videotape recordings shall not be required, but if a transcript has been prepared by the governing body, it shall be included. If a verbatim transcript is included in the record, the tape recordings from which that transcript was prepared need not be included in the record, unless the accuracy of the transcript is challenged.

(d) Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed during the course of the land use proceeding, including affidavits of publication, posting or mailing. Such notices shall include any notices concerning amendments to acknowledged comprehensive plans or land use regulation given pursuant to ORS 197.610(1) or 197.615(1) and (2).

(2) Transmittal of Record: The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board the original or a certified copy of the record of the proceeding under review. The governing body may, however, retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument. Transmittal of the record is accomplished by delivery of the record to the Board, or by receipt of the record by the Board, on or before the due date.

(3) Service of Record: Contemporaneously with transmittal, the governing body shall serve a copy of the record, exclusive of large maps, tapes, and difficult-to-duplicate documents and items, on the petitioner or the lead petitioner, if one is designated. The governing body shall also serve a copy of the record on any other party, including intervenors-petitioner, requesting a copy provided such other party reimburses the governing body for the reasonable expense incurred in copying the record. The governing body shall also serve a copy of any tape included in the record, or any tape from which a transcript included in the record was prepared, on any party requesting such a copy, provided such party reimburses the governing body for the reasonable expense incurred in copying the tape.

(4) Specifications of Record:

(a) The record, including any supplements or amendments, shall:

(A) Be filed in a suitable folder; the cover shall bear the title of the case as it appears in the Notice or in the Board's order consolidating multiple appeals, and the Board's numerical designation for the case, and shall indicate the numerical designation given the land use decision or limited land use decision by the governing body; if the record consists of multiple volumes, the cover shall indicate the page numbers contained in each volume;

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

(C) Be securely fastened on the left side;

(D) Have pages numbered consecutively, with the page number at the bottom outside corner of each page;

(E) Be arranged in inverse chronological order, with the most recent item first. Upon motion of the governing body, the Board may allow the record to be organized differently.

(b) Where the record includes the record of a prior appeal to this Board, the table of contents shall specify the LUBA number of the prior appeal, and indicate that the record of the prior appeal is incorporated into the record of the current appeal.

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

(5) If no record objection is filed and the governing body transmits an amendment to the record, the date the amendment is received by the Board shall be considered the date the record is received for the purpose of computing time limits as required by these rules.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.830(9)(a) and (13); 197.835.

Objections to the Record

661-010-0026

(1) Before filing an objection to the record, a party shall attempt to resolve the matter with the governing body's legal counsel. The objecting party shall include a statement of compliance with this section at the same time the objection is filed. The Board may deny any objection to the record that does not comply with this rule.

(2) An objection to the record or an objection to an amendment or supplement to the record shall be filed with the Board within 14 days of the date appearing on the notice of record transmittal sent to the parties by the Board. A party may file a precautionary record objection while continuing to resolve objections with the governing body's legal counsel. Objections may be made on the following grounds:

(a) The record does not include all materials included as part of the record during the proceedings before the final decision maker. The omitted item(s) shall be specified, as well as the basis for the claim that the item(s) are part of the record.

(b) The record contains material not included as part of the record during the proceedings before the final decision maker. The item(s) not included as part of the record during the proceedings before the final decision maker shall be specified, as well as the bases for the claim that the item(s) are not part of the record.

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

(d) The record does not conform to the requirements of OAR 661-10-025(4).

(3) An objection on grounds that the minutes or transcripts are incomplete or inaccurate shall demonstrate with particularity how the minutes or transcripts are defective and shall explain with particularity why the defect is material. Upon such demonstration regarding contested minutes, the Board shall require the governing body to produce a transcript of the relevant portion of the proceeding, if an audiotape recording or other type of recording is available. Upon such demonstration regarding contested transcripts, the Board shall require the governing body to produce a more complete or amended transcript.

(4) A party may, within 14 days from the date of service of a record objection, file a response.

(5) The Board may, at its discretion, conduct a telephone conference with the parties to consider any objections to the record. A party desiring a telephone conference on an objection to the record shall include a request for a telephone conference in its objection to the record or response.

(6) If an objection to the record is filed, the time limits for all further procedures under these rules shall be suspended. When the objection is resolved, the Board shall issue an order declaring the record settled and setting forth the schedule for subsequent events. Unless otherwise provided by the Board, the date of the Board's order shall be deemed the date of receipt of the record for purposes of computing subsequent time limits.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.830(9)(a) and (13); 197.835.

Petition for Review

661-010-0030

(1) **Filing and Service of Petition:** The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. See OAR 661-10-025(2) and 661-10-026(6). The petition shall also be served on the governing body and any party who has filed a motion to intervene. Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-10-045(9) or OAR 661-10-067(2), shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body. See OAR 661-10-075(1)(c).

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

(a) Begin with a table of contents;

(b) Not exceed 50 pages, exclusive of appendices, unless permission for a longer petition is given by the Board;

(c) Have blue front and back covers of at least 65-pound weight paper. The front cover page shall state the full title of the proceeding, and the names, addresses and telephone numbers of all parties unrepresented by an attorney. If a party is represented by an attorney, the name, address and telephone number of the attorney shall be substituted for the party. If there is more than one petitioner, the cover page shall specify which petitioner(s) are filing the petition. An intervenor shall be designated as either petitioner or respondent in accordance with OAR 661-10-050;

(d) Be typewritten in pica type not exceeding 10 characters per inch, or word-processed in proportionately spaced type no smaller than 12-pt Courier for text and 10-pt Courier for footnotes;

(e) Be double spaced, except that quotations and footnotes may be single-spaced with double space above and below each paragraph of quotation;

(f) Have text printed on only one side of the page; however, text may be printed on both sides of the page if the paper is sufficiently opaque to prevent material on one side from showing through, and the petition is bound along the left-hand margin so that the pages lie flat when open;

(g) Be printed on 8 1/2 by 11 inch paper, with numbers for each line of text;

(h) Have inside margins of 1 1/4 inches, outside margins of 1 inch, top and bottom margins of 3/4 inch; and

(i) Be signed on the last page by the author.

(3) If the Board determines that the petition for review fails to conform with the requirements of section (2) of this rule, it shall notify the author, and a brief conforming with the requirements of section (2) shall be filed within three (3) days of notification by the Board. The Board may refuse to consider a brief that does not substantially conform to the requirements of this rule.

(4) **Contents of Petition:** The petition for review shall:

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

(b) Present a clear and concise statement of the case, in the following order, with separate section headings:

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

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

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

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

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

(e) Contain a copy of the challenged decision, including any adopted findings of fact and conclusions of law;

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

(5) The petition for review may include appendices containing verbatim transcripts of relevant portions of tapes that are part of the record.

(6) Amended Petition: A petition for review which fails to comply with section (4) of this rule may, with permission of the Board, be amended. The Board shall determine whether to allow an amended petition for review to be filed in accordance with OAR 661-10-005.

(7) Cross Petition: Any respondent or intervenor-respondent who desires to file a petition for review may do so by filing a cross petition for review. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.830(10), (11) and (12)(a).

Respondent's Brief

661-010-0035

(1) Filing and Service of Brief: Unless otherwise provided by the Board, respondent's brief together with four copies shall be filed within 42 days after the date the record is received or settled by the Board. See OAR 661-10-025(2) and 661-10-026(6). A copy of the respondent's brief shall be served on the petitioner or the lead petitioner, if one is designated, and all intervenors.

(2) Specifications of Brief: Respondent's brief shall conform to the specifications of the petition for review at OAR 661-10-030(2), except that the brief shall have red front and back covers. If there is more than one respondent, the front cover page shall specify which respondent is filing the brief. Respondent's brief shall be subject to OAR 661-10-030(3).

(3) Contents of Brief:

(a) The respondent's brief shall follow the form prescribed for the petition for review, but need not contain the final decision. The respondent shall specifically accept the petitioner's statement of the case or shall cite any alleged omissions or inaccuracies therein, and may state additional relevant facts or other matters. The statement shall be in narrative form with citations to the pages of the record where the facts alleged can be found.

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

(4) The respondent's brief may include appendices containing verbatim transcripts of tapes that are part of the record.

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

Stat. Auth.: ORS 183.545 & 197.820(4)
Implements: ORS 197.830(12)(a).

State Agency Briefs

661-010-0038

A state agency that wishes to file a brief under ORS 197.830(7) shall file the brief together with four copies within the time required for respondent's brief. No fee is required. A state agency brief shall have yellow front and back covers.

Stat. Auth.: ORS 183.545 & 197.820(4)
Implements: ORS 197.830(7).

Oral Argument

661-010-0040

(1) Only parties who have submitted briefs shall be allowed to present oral argument to the Board. The Board shall not consider issues raised for the first time at oral argument.

(2) If a party waives the right to present oral argument, the Board shall consider the case based on that party's brief and the briefs and oral arguments presented by other parties. The parties may, with consent of the Board, stipulate to submit a case to the Board on briefs without oral argument. If a party fails to appear at the time set for oral argument, the Board may deem the cause submitted without oral argument as to that party. A party's failure to so appear shall not preclude oral argument by other parties.

(3) The Board shall inform the parties of the time and place of oral argument. A party shall seek the consent of other parties before requesting a change in the scheduled time or date for oral argument. Unless the Board otherwise orders, petitioner(s) shall be allowed 30 minutes for oral argument, which may be divided between the initial presentation and rebuttal. Multiple petitioners shall share the thirty minutes for argument. The respondent(s) shall be allowed 30 minutes to respond. Multiple respondents shall share the 30 minutes. The Board shall tape record all arguments, but any party may also arrange at its own expense to record the argument in some other manner.

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

(5) Demonstrative exhibits presented at oral argument shall be limited to copies of materials already in the record, including reductions or enlargements, or materials created during the party's presentation at oral argument.

(6) The Board may conduct oral argument by telephone conference call.

Stat. Auth.: ORS 183.545 & 197.820(4)
Implements: ORS 197.830(12)(a).

Taking Evidence Not in the Record

661-010-0045

(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, - take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.428 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.

(2) Motions to Take Evidence:

(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party - seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.

(b) A motion to take evidence shall be accompanied by:

(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or

(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.

(c) Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. Depositions under this rule shall be conducted in the same manner prescribed by law for depositions in civil actions (ORCP 38-40).

(d) Subpoenas: the Board shall issue subpoenas to any party upon a showing that the witness or documents to be subpoenaed will provide evidence relevant and material to the grounds for the motion. Subpoenas may also be issued under the signature of the attorney of record of a party. Witnesses appearing pursuant to subpoena, other than parties or employees of the Board, shall be tendered fees and mileage as prescribed by ORS 44.415(2) for witnesses in civil actions. The party requesting the subpoena shall be responsible for service of the subpoena and tendering the witness and mileage fees to the witness.

(3) Any party may file a response within 14 days of the date of service of the motion to take evidence. The response shall specifically state what facts alleged in the motion are contested, with references to where contrary facts are found in the record or in affidavits or documents appended to the response.

(4) If the Board grants the motion to take evidence, the Board shall so notify the parties, and indicate whether it will decide the motion on the submitted materials, whether it will allow depositions or discovery of evidence under section (2), or whether it will schedule an evidentiary hearing on the motion.

(5) Conduct of Hearing:

(a) Where the Board schedules an evidentiary hearing, - the hearing shall be conducted in the following order, insofar as the Board finds it practical:

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

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

(C) The moving party may present surrebuttal evidence;

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

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

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

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

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

(6) Evidentiary Rules:

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

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

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

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

(e) Any time ten days or more before a hearing, any party may serve on every other party an affidavit, certificate or other document the party proposes to introduce in evidence. Unless cross-examination of the affiant, certificate preparer or other document preparer or

custodian is requested within five days prior to hearing, the affidavit or certificate may be offered subject to the same standards and received with the same effect as oral testimony. If cross-examination is requested, and the requestor is informed within five days prior to the hearing that the requested witness will not appear for cross-examination, the affidavit, certificate or other document may be received in evidence if the Board determines that the party requesting cross-examination would not be unduly prejudiced or injured by lack of cross-examination.

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

(a) Simplification of the issues;

(b) The possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;

(c) Limitation of the number of witnesses;

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

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

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

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

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

(c) A statement of all agreed facts;

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

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

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

(9) Effect on Time limits: The filing of a motion to take evidence shall suspend the time limits for all other events in the review proceeding, including the issuance of the Board's final order. If the Board grants the motion, the time limits for other events shall remain suspended until the Board issues its findings. Unless the parties agree otherwise, the Board shall schedule any evidentiary hearing not less than ten days after the order granting the motion - to take evidence is issued. If the Board denies a motion - to take evidence, the time for all other events will begin to run on the date the Board issues its order denying the motion, or on such other date as is specified in that order.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.835(2)(b).

Intervention

661-010-0050

(1) Standing to Intervene: The applicant and any person who appeared before the local government, special district or state agency may intervene in a review proceeding before the Board. Status as an intervenor is recognized when a motion to intervene is filed, but the Board may deny that status at any time.

(2) Motion to Intervene: A motion to intervene shall be filed within 21 days of the date the notice of intent to appeal is filed pursuant to OAR 661-10-015, or the amended notice of intent to appeal is filed or original notice of intent to appeal is refiled pursuant to OAR 661-10-021. The motion to intervene (see Exhibit 3) shall:

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

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

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

(3) Intervenor's Brief:

(a) If intervention is sought as a petitioner, the brief shall be filed within the time limit for filing the petition for review, and shall satisfy the requirements for a petition for review in OAR 661-10-030.

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

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.830(2) and (6).

Motions

661-010-0065

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

(2) Time of Filing: A party seeking to challenge the failure of an opposing party to comply with any of the requirements of statutes or Board rules shall make the challenge by motion filed with the Board and served on all parties within 10 days after the moving party obtains knowledge of such alleged failure. However, motions to dismiss for lack of jurisdiction may be filed at any time. - An opposing party may, within 14 days from the date of service of a motion, file a response.

(3) How Submitted: Parties shall submit all motions without oral argument unless otherwise directed by the Board. A party that desires a telephone conference on a motion shall include a request for a telephone conference in its motion or response. The Board may, at its discretion, conduct a telephone conference with the parties to consider any motion.

(4) Effect of Filing Motion: Except as provided in OAR 661-10-026(6) with regard to objections to the record and OAR 661-10-045(9) with regard to motions to take evidence, or as may otherwise be ordered by the Board on its own motion, the filing of a motion shall not suspend the time limits for other events in the review proceeding.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.805.

Extensions of Time

661-010-0067

(1) In no event shall the time limit for the filing of the notice of intent to appeal be extended.

(2) Except as provided in this section, in no event shall the time limit for the filing of the petition for review be extended without the written consent of all parties. The Board may, on a motion of a party or its own motion, extend the deadline for filing the petition for review to allow time to rule on a motion to dismiss.

(3) All other time limits may be extended upon written consent of all parties, the Board's motion or motion of a party.

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

(5) Any agreement by the parties allowing an extension of time shall automatically extend the time for subsequent filings, as well as the issuance of the Board's final order by an amount of time equal to the extension agreed to by the parties.

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

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.830(12)(a).

Final Order of Board

661-010-0070

(1) An Order of the Board is final when the cover page of the order containing the caption of the appeal:

- (a) States "Final Opinion and Order";
- (b) Indicates whether the decision being reviewed is - affirmed, reversed, remanded, or whether the appeal is dismissed;
- (c) Contains the date of the final order; and
- (d) Is time and date stamped by the Board.

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

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.805.

Reversal or Remand of Land Use Decisions

661-010-0071

(1) The Board shall reverse a land use decision when:

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

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

- (a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);
- (b) The decision is not supported by substantial evidence in the whole record;
- (c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or
- (d) The decision improperly construes the applicable law, but is not prohibited as a matter of law.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.835.

Reversal or Remand of Limited Land Use Decisions

661-010-0073

(1) The Board shall reverse a limited land use decision when:

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

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

- (a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);

(b) The decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision;

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

(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 197.828; 197.835.

Miscellaneous Provisions

661-010-0075

(1) Cost Bill and Attorney Fees

(a) Time for Filing: The prevailing party may file a cost bill or a motion for attorney fees, or both, no later than 14 days after the final order is issued. The prevailing party shall serve a copy of any such cost bill or motion for attorney fees on all parties.

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

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

(B) If the governing body is the prevailing party, the governing body may be awarded copying costs for the required number of copies of the record, at 20 cents per page, whether or not the governing body actively participated in the review.

(C) Costs awarded to the governing body pursuant to this section shall be paid from the deposit required by OAR 661-10-015(4) and shall not exceed the amount of that deposit.

(c) Forfeit of Filing Fee and Deposit: If a record has been filed and a petition for review is not filed within the time required by these rules, and the governing body files a cost bill pursuant to this section requesting forfeiture of the filing fee and deposit, the filing fee and deposit required by OAR 661-10-015(4) shall be awarded to the governing body as cost of preparation of the record. See OAR 661-10-030(1).

(d) Return of Deposit: After any award of costs under subsection (b) or (c) of this section is made, any amount of the deposit remaining shall be returned to petitioner.

(e) Attorney Fees:

(A) Attorney fees shall be awarded by the Board to the prevailing party as specified in ORS 197.830(14)(b); a motion for attorney fees shall include a signed and detailed statement of the amount of attorney fees sought.

(B) Attorney fees shall be awarded to the applicant, against the governing body, if the Board reverses a land use decision or limited land use decision and orders a local government to approve a development application pursuant to ORS 197.835(10).

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

(f) Responses and Objections: Any response to a motion for attorney fees, together with any objections to the detailed statement of the amount of attorney fees sought, shall be filed with the Board within 14 days after the date of service of the motion. Objections to the cost bill shall be filed with the Board within 14 days after the date of service of the cost bill.

(g) If a cost bill, a motion for attorney fees, or both are filed, and the Board's decision is appealed to the Court of Appeals, the Board shall act on the cost bill or motion for attorney fees after an appellate judgment is issued and any further Board proceedings necessitated by that judgment are concluded.

(2) Filing and Service:

(a) Except as provided in OAR 661-10-015(1)(b) with regard to the notice of intent to appeal, and as provided in OAR 661-10-021(5)(b) with regard to a refiled original notice of intent to appeal or an amended notice of intent to appeal, filing a document with the Board is accomplished by:

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

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

(b) Service:

(A) Any document filed with the Board, other than the record as provided in OAR 661-10-025(3), or the record after withdrawal for reconsideration as provided in OAR 661-10-021(6), must also be served on all parties contemporaneously. Service on two or more petitioners unrepresented by an attorney is accomplished by serving the lead petitioner designated under OAR 661-10-015(3)(f)(A).

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

(C) Service copies of documents other than the Notice or the record shall include a certificate showing the date of filing with the Board (see Exhibit 5).

(D) Documents filed with the Board shall contain either an acknowledgement of service by the person served or proof of service by a statement certified by the person who made service of the date of personal delivery or deposit in the mail, and the names and addresses of the persons served (see Exhibit 6).

(3) Number of Copies Required: Unless these rules provide otherwise, all documents filed with the Board shall be filed with one copy. No copy of a record transmitted pursuant to OAR 661-10-025(2), or a record after withdrawal for reconsideration transmitted pursuant to OAR 661-10-021(6), is required.

(4) Copying Fee: The following fees shall be charged for certified copies of Board nonexempt public records as defined in ORS 192.410, 192.501, 192.502, and 192.505:

(a) 20 cents per page for copies of any Board transcript or document of public record that is more than fifty pages.

(b) \$10 for a copy of a cassette tape in the record.

(c) \$20 for a copy of a videocassette tape in the record.

(d) The Board shall also charge the actual cost of copying and mailing oversized exhibits, plans or maps.

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

(6) Appearances Before the Board: An individual shall either appear on his or her own behalf or be represented by an attorney. A corporation or other organization shall be represented by an attorney. In no event may a party be represented by someone other than an active member of the Oregon State Bar.

(7) Lead Petitioner: A lead petitioner is responsible for notifying the other petitioners of documents received from the Board and other parties, but each petitioner remains responsible for his or her own representation.

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

(9) Address and Hours of the Board: The Board's address is 306 State Library Building, 250 Winter Street NE Salem, Oregon, 97310. The telephone number is 373-1265. The offices of the Board shall be open from 8:00 a.m. to 12:00 p.m., and 1:00 p.m. to 5:00 p.m. Monday through Friday.

(10) Citations to Board Decisions: Citations to Board decisions shall be in the following form:

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

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

(11) Motion to Transfer to Circuit Court:

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

(b) A request for a transfer pursuant to ORS 19.230 shall be initiated by filing a motion to transfer to circuit court not later than ten days after the date a respondent's brief or motion that challenges the Board's jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than ten days after the date the moving party learns the Board has raised a jurisdictional issue.

(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.

(12) All briefs and motions filed with the Board shall comply with the rules in OAR 661-10-030(2) with respect to type size, spacing, paper size and printing, numbering and margins.

Stat. Auth.: ORS 183.545 & 197.820(4)

Implements: ORS 19.230; 197.830(8), (12)(a) and (14); 197.835(10); 197.845(3).