

CERTIFICATE AND ORDER
for
FILING ADMINISTRATIVE RULES WITH THE SECRETARY OF STATE

FILED
APR 29 1980
MICHAEL PAULUS
SECRETARY OF STATE

I HEREBY CERTIFY that the attached copy is a true, full and correct copy of rule(s) adopted by the Land Use Board of Appeals (Agency) on April 29, 1980 (Date) to become effective April 29, 1980 (Date).

The within matter having come before the Land Use Board of Appeals (Agency) 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:

NOW THEREFORE, IT IS HEREBY ORDERED THAT the following rule(s) be adopted: Perm. or Temp.
(List Rule Number(s) or Rule Title on Appropriate Lines Below)

Adopted: (New Rules) Land Use Board of Appeals of the State of Oregon Rules of Procedure

Amended: (Existing Rules) _____

Suspended: (Temporary Only) _____

Repealed: (Existing Rules) _____

Administrative Rules of the Land Use Board of Appeals (Agency)

DATED this 29th day of April, 19 80.

By: Michael D. Reynolds
(Authorized Signer)

Title: Chief Hearings Referee

Statutory Authority: Oregon Laws 1979, ch 772, sec. 2a(4)

Subject Matter: Land Use Board of Appeals of the State of Oregon Rules of Procedure

Statement of Need Attached: Fiscal Impact Attached:

Further Information Contact: Michael D. Reynolds Phone: 3-1265

LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON
RULES OF PROCEDURE

1. Introduction

(A) Scope of Rules and Effective Date

These rules govern procedure for all appeals filed with the Land Use Board of Appeals after April 29, 1980. These rules also govern procedure for all appeals filed with the Board prior to April 29, 1980, provided no party is unduly surprised or its interests adversely affected.

(B) Legal Authority for Rules

Oregon Laws 1979, ch 772, Section 2a(4) provides that the Board shall adopt rules governing the conduct of review proceedings.

(C) Principal Authorities Relied Upon

In adopting these rules, the Board relied upon its temporary Rules of Procedure adopted November 1, 1979, the Rules of Appellate Procedure for the Supreme Court and Court of Appeals of the State of Oregon, March 1, 1979, and the rules governing procedure for review of petitions filed with the Land Conservation and Development Commission, OAR 660-01-010 to 660-01-200.

(D) Fiscal Impact

These rules will have a fiscal impact upon governing bodies in that they will be required to furnish a written record of the land use decision sought to be reviewed. If the governing body is the prevailing party in the appeal, however, there is a provision in the rules which provides, in the discretion of the Board, for reimbursement of all or a portion of these costs.

2. Purpose

The procedures established in these rules are intended to provide for the speediest practicable hearing and decision in the review of land use decisions while affording all interested persons reasonable notice and opportunity to participate, reasonable time to prepare and submit their cases, and a full and fair hearing. The procedures established in these rules seek to accomplish these objectives to the maximum extent consistent with the time limitations placed upon the Board in Oregon Laws 1979, ch 772. These rules shall be interpreted to effectuate these policies and to promote justice. Technical violations of these rules which do not affect substantial rights or interests of parties or of the public shall not interfere with the review of a petition.

3. Definitions

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

(A) "Applicant is the person identified by the governing body as having applied for authorization for a particular land use activity or having requested that the governing body take some action which resulted in a land use decision.

(B) "Board" means the Land Use Board of Appeals.

(C) "Final decision or determination" means a decision or determination which has been reduced to writing and which bears the necessary signatures of the governing body.

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

(E) "Land use decision" means:

(1) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment or application of statewide planning goals, a comprehensive plan provision or zoning, subdivision or other ordinance that implements a comprehensive plan; or

(2) A final decision or determination of a state agency other than the Land Conservation and Development Commission, with respect to which the agency is required to apply the Statewide Planning Goals.

(F) "Notice" means the Notice of Intent to Appeal and refers to that document which must be filed with the Board in order to begin a review proceeding before the Board.

(G) "Party" means the petitioner, the governing body, and any person who files a Statement of Intent to Participate as provided in § 5 of these rules or any other person who intervenes as provided in § 11 of these rules.

(H) "Person" means any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind.

(I) "Service" means delivery, either personally or by mail. The date of service, whether personally or by regular mail, is the date of actual delivery. Time for achieving service will be deemed complied with if actual delivery is attempted at the person's last known address within the time required, or the matter to be delivered is deposited in the mail, bearing first class postage and the

person's last known address, at least three days before the date by which service must be accomplished. The burden of proving proper service, if the issue arises, shall be upon the party making the service.

4. Notice of Intent to Appeal

(A) Contents of Notice

The Notice shall be substantially in the form set forth in Appendix A and shall contain:

- (1) A caption which sets forth the name of the person filing the Notice, identifying that person as a petitioner, and the name of the governing body identifying that governing body as the respondent.
- (2) Below the caption the heading "Notice of Intent to Appeal";
- (3) The full title of the land use decision as it appears on the final decision.
- (4) The date of the land use decision.
- (5) A concise description of the land use decision.
- (6) The name, address and telephone number of each of the following:
 - (a) The petitioner, except that if the petitioner is represented by an attorney, then the petitioner's address and telephone number may be deleted and the name, address and telephone number of the attorney shall be included;
 - (b) The applicant, if any (if other than the petitioner), except that if the applicant was represented by an attorney before the governing body, then the applicant's address and telephone

number may be deleted and the name, address and telephone number of the applicant's attorney of record shall be included;

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

(d) Any other person whom the governing body's records indicate was mailed written notice of the land use decision for which review is sought.

(7) A statement which advises all persons whose name, address and telephone number are required to appear in the notice as provided in § 4(A)(6) to these rules, other than the governing body, that in order to participate in the review proceeding before the Board a Statement of Intent to Participate in such proceedings as required by Section 5 of these rules must be filed with the Board within 15 days of service of the Notice.

(8) Proof of service upon all persons required to be named in the Notice which conforms to Section 3(I) of these rules.

(B) Filing Fee

The Notice shall be accompanied by a filing fee of \$50 and a deposit for costs in the amount of \$150. A separate check or money order shall be submitted for the filing fee and the deposit for costs. Cash will not be accepted.

(C) Filing and Service of Notice

The Notice must be filed with the Board and served on the governing body, the governing body's legal counsel, and all persons identified in the Notice as required by Section 4(A)(6) of these rules within 30 days from the date of the land use decision.

5. Statement of Intent to Participate

(A) Any person identified in the Notice, other than the petitioner and governing body, who desires to participate as a party in the appeal shall within 15 days of service of the Notice upon such person, file with the Board and serve on all parties designated in the Notice, a Statement of Intent to Participate. Any person identified in the Notice who fails to file a Statement of Intent to Participate may not later intervene in the proceeding as provided in § 11 of these rules. The Statement may be in the form set forth in Exhibit B to these rules.

(B) Unless otherwise advised in writing, the Board shall designate as respondents all persons filing a Statement of Intent to Participate.

6. Record

(A) Contents

Unless the Board otherwise orders, or the parties otherwise stipulate, the record shall include at least the following:

- (1) The final decision including the findings and conclusions;
- (2) All exhibits, maps, documents or other written materials;
- (3) All written testimony submitted in the course of the governing body's proceeding;
- (4) Minutes of the proceeding as required by law.

(B) Transmittal of Record

(1)(a) The governing body shall, within 20 days after service of the Notice on the governing body, transmit to the Board the original or certified copy of the record of the proceeding under review. The governing body may, however, retain any

large maps or other large documents which are difficult to duplicate until the time for submission of the governing body's brief.

(b) The governing body shall serve a copy of the record, exclusive of large maps and other large documents which are difficult to duplicate, on the petitioner and shall furnish a copy of the record to any other party provided such other party reimburses the governing body for the reasonable expense incurred in copying the record so furnished.

(2) The record shall:

(a) be transmitted to the Board in suitable cover or folder, bearing the title of the case as it appears in the caption on the Notice and the governing body's numerical designation, if any, of the land use decision;

(b) include a table of contents;

(c) be securely fastened together;

(d) contain consecutive numbering of pages with the page number appearing at the bottom of each page;

(e) be prepared so that its contents appear in chronological order with the most recent item in the record appearing on top.

(C) Objections to Sufficiency or Accuracy of Record

(1) Prior to filing an objection with the Board as provided in this section, a party shall first attempt to resolve the matter with the governing body or its legal counsel. If objection is thereafter filed with the Board, the objection shall state that the party filing the objection was not able to resolve the matter with the governing body.

(2) Any objection that the record does not include all matters before the governing body, that the minutes do not accurately reflect the testimony submitted to the governing body or that the record is in any other manner insufficient or inaccurate shall be filed with the Board within 10 days following service of the record on the person filing the objection.

(3) If the objection is to the completeness or accuracy of the minutes, the party making the objection shall demonstrate with particularity how the minutes are defective. Upon such a demonstration the Board shall require the governing body to produce any additional evidence it has supporting the accuracy and completeness of the contested minutes. If the evidence is to be found in a taped record, the relevant portion of the taped record shall be submitted to the Board in typewritten form.

(4) The Board may conduct a conference to consider any objections filed concerning the record.

(D) Review of Maps or Other Large Documents.

Any party to an appeal who desires to review any large maps or other large documents must make suitable arrangements with the governing body or the Secretary of the Board.

7. Petition for Review

(A) Filing and Service of Petition

The petition for review shall be filed with the Board and served on the governing body and all parties who have filed a Notice of Intent to Participate or intervened within 20 days after the date

the record is received by the Board. Failure to file a petition for review within the time required will result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body.

(B) Specifications

The petition for review shall:

- (1) Contain a table of contents in the front portion;
- (2) Not exceed 50 pages, exclusive of appendices, unless permission for an extended petition is allowed by the Board;
- (3) Set out on a cover page, which shall be blue in color, the full title of the review proceeding, including the names, addresses and telephone numbers of all parties or their attorneys who have filed Statements of Intent to Participate in the review proceeding. All such parties shall be designated as respondents on the cover page of the petition for review, unless otherwise indicated pursuant to § 5(B);
- (4) Be typewritten, in pica type, and double spaced with double space above and below each paragraph or less of quotations. Printed or used area shall not exceed 6 and 1/4 inches by 9 and 1/2 inches, exclusive of page numbers.
- (5) Be on white pleading paper, without glaze, with surface suitable for both pen and pencil notations;
- (6) Contain on the last page the name of the author of the petition for review and the name of the law firm or firms, if any, representing the petitioner.

(C) Contents

The petition for review shall contain petitioner's brief and shall:

(1) Set out the facts that establish that the petitioner has standing. If the petition challenges a legislative decision, the facts must show in what manner the interests of the petitioner have been adversely affected or in what manner the petitioner has been aggrieved. If the petition challenges a quasi-judicial decision, the facts must show that the petitioner appeared, either orally or in writing, in the proceeding below and that either the petitioner was entitled as a matter of right to notice and hearing prior to the making of the decision sought to be reviewed or the petitioner's interests were adversely affected or the petitioner was aggrieved by the decision.

(2) Open with a clear and concise statement of the case which shall set forth in the following order and under separate headings:

(a) The nature of the land use decision and the relief sought by the petitioner;

(b) A succinct and clear summary of arguments appearing in the body of the petition for review;

(c) A concise but complete summary of the facts of the appeal material to the determination of the question or questions presented for review. The summary shall be in narrative form with reference to the place in the record where such facts appear;

(d) Any other matters necessary to inform the Board concerning the questions and contentions raised by petitioner, insofar as such matters are a part of the record, with reference to the portions of the record where such matters appear.

(3) Set forth clearly and succinctly each assignment of error under a separate and appropriate heading. Where several assignments of error present essentially the same legal question, they shall be combined so far as is practicable.

(4) Set forth a separate argument for each assignment of error or combination of assignments of error; and

(5) Contain a copy of the land use decision of which review is sought, including the written findings of fact, statements of reasons and conclusions of law adopted by the governing body.

(D) Amended Petition

A petition for review which fails to comply with subsections (B) or (C) of this section 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 the provisions in Section 2 of these Rules.

8. Respondent's Brief

(A) Filing of Brief

Respondent's brief shall be served and filed with the Board within 40 days after the date the record is received by the Board. A copy of the respondent's brief shall be served on the petitioner and all persons who have filed a Statement of Intent to Participate or who have been allowed to intervene in the review proceeding.

(B) Specifications

Respondent's brief shall conform to the specifications required of the petition for review, except that the brief shall have a cover page which is red in color. If there is more than one respondent in the review proceeding, the cover page should specify which respondent is filing the brief.

(C) Contents of Brief

(1) The respondent's brief shall follow the form prescribed for the petition for review, omitting repetition of the assignments of error. Under the heading "Statement of the Case," 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 as may apply to the decision. The additional statement shall refer to pages of the record in support of the additional matter set forth but shall not repeat those portions of petitioner's statement with which respondent agrees.

(2) If respondent challenges petitioner's standing on the basis that the facts alleged in support of standing are not true, respondent shall state in its brief under a separate heading the true facts and in what manner the facts alleged by petitioner are untrue. If necessary in order to obtain sufficient information to dispute petitioner's allegations of standing respondent may take petitioner's deposition pursuant to ORS 183.425. Such deposition, if relied upon by respondent, shall be appended to respondent's brief, or filed with the Board and served on all parties as soon as is practicable.

(D) Amended Brief

The Board may allow the filing of an amended brief in accordance with the provisions for filing an amended petition for review contained in §7(D) of these Rules.

9. Oral Argument

The parties shall be afforded an opportunity to present oral argument to the Board. The Board shall inform the parties of the time and place of oral argument. Unless the Board otherwise orders, petitioner and respondent shall each be allowed 30 minutes for oral argument. Unless otherwise required by any of the parties and appropriate arrangements are made by such party or parties, all arguments before the Board shall be tape recorded only. The parties may with consent of the Board stipulate to submit a case to the Board on briefs without oral argument.

10. Special Evidentiary Hearing

The Board may upon written motion conduct a special evidentiary hearing when it appears that such a hearing is necessary to reveal procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board shall, based upon the evidence presented at the hearing, prepare findings of fact concerning the allegations.

11. Intervention

Except for those persons identified in the Notice of Intent to Appeal as required by § 4(A)(6) of these rules, any person whose interests were adversely affected or who was aggrieved by a land use decision or, in the case of review of a quasi-judicial land use decision, who appeared before the governing body orally or in writing and who was either entitled as of right to notice and hearing prior to the making of the land use decision by the governing body or who was a person whose interests were adversely affected or who was aggrieved by the land use decision, may intervene in and become a party to any review proceeding before the

Board involving that land use decision. Such intervention must be by written motion and must contain the facts which show that the person is entitled to intervene. The motion to intervene shall be filed within the time for:

- (a) filing the petition for review, if intervention is sought as a petitioner, or the time for
- (b) filing the respondent's brief, if intervention is sought as a respondent.

The motion should set forth assignments of error or responses to assignments of error, as appropriate, with supporting argument. The motion shall contain intervenor's brief and shall conform to the specifications for the petition for review as set forth in Section 7 of these rules. Where intervention is sought as a petitioner, the respondent or respondents shall have an additional 10 days within which to file a brief in response to the motion for intervention. Where intervention is sought as a respondent, no reply by the petitioner will be allowed without permission of the Board.

12. Consolidation

The Board may, at the request of any party or on its own motion consolidate any petitions for review into one proceeding provided the petitions seek review of the same land use decision and involve the same or substantially similar issues.

13. Exceptions to Board's Recommendation

(A) Filing

When a petition alleges that a land use decision has violated one or more statewide planning goals, the Board's recommendation to the Land Conservation and Development Commission on such issues shall be submitted to the parties for their review. Parties may file a brief containing exceptions to the Board's

recommendation provided the brief is filed with the Board within 10 days of the date of the recommendation, or such other period of time as the Board may require.

(B) Contents

The brief may discuss any issue contained in the recommendation with which the party filing the brief disagrees. The brief may also address the Board's recommendation as to whether oral argument should be allowed before the Commission. The brief shall include a cover page and table of contents. The body of the brief shall not exceed 15 pages in length, exclusive of the table of contents and cover page.

(C) Failure to File Exceptions

A party will not be deemed to have waived any right to assert on appeal a portion or portions of the Board's recommendation by that party's failure to file a brief excepting to such portion or portions of the Board's recommendation.

14. Motions

(A) 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 serving and filing a motion in writing for such order or relief.

(B) Time of Filing

A party seeking to challenge the failure of an adverse party to comply with any of the requirements of statutes or Board rules shall make such challenges by motion filed with the Board and served on the adverse party within 10 days after the moving party obtains knowledge of such alleged failure. The adverse party may, within 10

days from the receipt of a motion under this rule, serve and file an answer.

(C) How Submitted

Parties shall submit all motions without oral argument unless otherwise directed by the Board. The motion shall show proof of service on all opposing counsel.

15. Final Order of Board

(A) An Order of the Board shall be deemed final when the cover page of the order containing the caption of the appeal:

- (1) states that it is the "Final Opinion and Order";
- (2) indicates whether the decision being reviewed is affirmed, reversed or reversed and remanded;
- (3) contains the date of the final order;
- (4) has received a time and date stamp of the Land Use Board of Appeals.

(B) When an order of the Board becomes final it shall be made available to interested members of the public. The Board may charge \$.25 per page for copies of its final orders or other orders furnished to members of the public.

16. Miscellaneous Provisions

(A) Extension of Time

(1) Except as provided in subsection (2) of this section, any time deadline established by these rules for the filing of documents with the Board, other than the Notice of Intent to Appeal, may be extended by the Board upon motion of the party seeking the extension. The motion shall state the reasons for the granting of 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.

(2) A motion which seeks to extend the time for filing the petition for review or respondent's brief must be accompanied by a written stipulation signed by all the parties to the appeal consenting to the extension. A written stipulation consenting to an extension of time for filing respondent's brief must also contain a provision consenting to an extension of the time within which the Board is required to issue a final order by an amount of time equal to the extension stipulated by the parties.

(B) Cost Bill

In order for the Board to award costs, in whole or in part, to the prevailing party, the prevailing party shall file a cost bill within 15 days of the date the final order is issued and shall serve a copy of the cost bill on all parties to the proceeding. The prevailing party may be awarded as costs statutory witness fees, if any are incurred, and costs associated with the court reporting of the proceedings before the Board if the proceedings have been so reported at the election of the prevailing party. In addition, if the prevailing party is the governing body, the governing body may be awarded costs incurred in preparing the record. If the prevailing party is the petitioner, the petitioner may be awarded the cost of the filing fee. Any objections to the cost bill must be filed with the Board within 10 days after it is filed with the Board. Costs awarded against more than one party shall be divided equally among all such parties unless the Board otherwise directs.

(C) Cross Petition

Any person identified in the Notice as a 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 must 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.

(D) Reply Briefs

Reply briefs shall not be allowed unless permission is first obtained from the Board. If allowed, the reply brief shall be confined solely to matters raised in the respondent's brief and the form shall be similar to the form of a respondent's brief. However, a petitioner may, as a matter of right, file a reply brief on the question of the Board's jurisdiction if that issue is raised in the respondent's brief. Reply briefs shall have a gray cover.

(E) Service of Documents on All Parties

All documents, written correspondence or other material filed with or submitted to the Board by any party shall also be served on all parties to the review proceeding. Any document filed with or submitted to the Board shall contain a proof of service on all parties.

(F) Copies of Documents to be Filed With the Board

(1) The petition for review and any briefs filed with the Board shall be filed together with four copies.

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

(G) Conferences

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

(H) Appearances Before the Board

A party to a proceeding before this Board may appear on his own behalf or be represented by an attorney. Appearances by a person other than an individual shall be by attorney, in all cases. As used in this Rule, attorney means an active member of the Oregon State Bar.

(I) Computation of Time

The time provided in these rules for acts to be performed shall be computed by excluding the first day and including the last day. If the last day is Saturday, Sunday or other legal holiday, the act must be performed on the next judicial day.

(J) Address and Hours of the Board

The Board's address is 475 Cottage Street, NE, Suite 219, Salem, Oregon, 97301. The telephone number is 373-1265. The offices of the Board shall be open from 8:30 a.m. to 5:00 p.m. Monday through Friday, exclusive of legal holidays.

(K) Citations to Board Decisions

Citations to Board decisions shall be in the following form: ____ Or LUBA ____ ().

1 numbers of all persons whom the governing body's records
2 indicate were mailed written notice of the land use decision).

3 NOTICE:

4 Anyone designated in paragraph II of this Notice other than
5 Respondent Willamette County who desires to participate as a
6 party in this case before the Land Use Board of Appeals must
7 file with the Board a Statement of Intent to Participate in
8 this proceeding as required by Section 5 of the Board's
9 Administrative Rules, OAR _____. The Statement must be
10 filed with the Board within 15 days of service of this Notice.
11

12
13 -----
14 Attorney for Petitioner

15 CERTIFICATE OF SERVICE

16 I hereby certify that on _____, I served a
17 true and correct copy of this Notice of Intent to Appeal on all
18 persons listed in paragraph II of this Notice pursuant to §3(I)
19 of the Rules of Procedure of the Board by (a) mail or (b)
20 personal delivery. [INDICATE WHICH]

21 Dated: _____
22

23
24 -----
25 Signature
26

