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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

LUBA 2-2022

CHAPTER 661

LAND USE BOARD OF APPEALS

FILED

01/26/2022 4:14 PM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Eliminates in-person filing; addresses filing via commercial delivery service; reduces required copies of briefs.

EFFECTIVE DATE: 02/01/2022 THROUGH 07/30/2022

AGENCY APPROVED DATE: 01/26/2022

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NEED FOR THE RULE(S):

LUBA is a six-person agency. Due to the ongoing COVID-19 pandemic, LUBA is experiencing staffing shortages that will reduce LUBA's ability to guarantee the availability of staff to accept in-person filings and carry out other responsibilities that help LUBA to meet its statutory and regulatory deadlines for resolving land use appeals. ORS 197.830; OAR chapter 661, division 10. These amendments address this need by allowing staff to focus more of their attention on helping LUBA to meet its deadlines. Because requiring parties to file documents via the United States Postal Service or commercial delivery service may increase costs for some parties that would otherwise file in person, these amendments also reduce the number of copies of briefs that must be filed with LUBA, which will help to offset some of those increased costs.

JUSTIFICATION OF TEMPORARY FILING:

There is not enough time to provide the requisite notice for permanent rulemaking before LUBA experiences staffing shortages. Without these amendments, staffing shortages would result in an inability to accept some in-person filings and would make it more difficult for LUBA to meet its statutory deadlines. This would seriously prejudice the public interest and the interests of parties appearing before LUBA because time is of the essence in reaching final decisions in matters involving land use. ORS 197.805.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

These amendments amend various provisions of OAR chapter 660, division 10, which is available at <https://secure.sos.state.or.us/oard/displayChapterRules.action?selectedChapter=125>.

RULES:

661-010-0000, 661-010-0015, 661-010-0021, 661-010-0025, 661-010-0030, 661-010-0035, 661-010-0038, 661-010-0039, 661-010-0052, 661-010-0075

AMEND: 661-010-0000

RULE SUMMARY: Provides that these amendments apply to proceedings commenced both before and after February 1, 2022.

CHANGES TO RULE:

661-010-0000
Introduction ¶

Scope of Rules and Effective Date: All proceedings commenced by a notice of intent to appeal filed on or after July 1, 2021 shall be governed by these rules. Proceedings commenced before July 1, 2021 shall be governed by OAR 661-010-0005 through OAR 661-010-0075 as effective on the date the notice of intent to appeal was filed. However, all proceedings commenced by a notice of intent to appeal filed before, on, or after February 1, 2022 shall be governed by the temporary rules effective February 1, 2022 to July 30, 2022.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.805

AMEND: 661-010-0015

RULE SUMMARY: Provides that, if a notice of intent to appeal is filed via commercial delivery service, the date of filing is the date of dispatch as shown on the receipt from the commercial delivery service's online tracking service.

CHANGES TO RULE:

661-010-0015

Notice of Intent to Appeal ¶

(1) Filing of Notice: ¶

(a) The Notice, together with two copies, and the filing fee 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)-(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~~ ¶

~~(A) The date the Notice is received by the Board, or~~ ¶

~~(B) 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, the date of the receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number is the date of filing; or~~ ¶

~~(C) The date the Notice is dispatched for delivery via commercial delivery service, provided the party filing the Notice has proof from the commercial delivery service of such dispatch date. If the date of dispatch for delivery via commercial delivery service is relied upon as the date of filing, the date of the receipt from the commercial delivery service's online tracking service showing the date dispatched is the date of filing.~~ ¶

(c) If a Notice is received without payment of the fee required by section (4) of this rule, the petitioner will be given an opportunity to submit the required fee. If the filing fee is not received within the time set by the Board, the Board shall dismiss the appeal. ¶

(d) 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, 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. However, where the local government provides only an electronic mail address for a person identified in the Notice as required by subsection (3)(f)(D), service shall be by electronic mail. The date of serving such notice shall be the date of personal service, mailing, or electronic 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, but the Notice shall include the names, addresses, and telephone numbers of all such unrepresented petitioners. See OAR 661-010-0075(7)(a); ¶

(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, then the name, address and telephone number of the applicant's attorney shall also be included; ¶

(D) Any other person to whom written notice of the land use decision or limited land use decision was mailed, either through the United States Postal Service or by electronic mail, 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 661-010-0050. ¶¶

(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: The Notice shall be accompanied by a filing fee of \$300 payable to the Land Use Board of Appeals. Payment may be submitted by check, State of Oregon purchase order or money order. If a check providing the filing fee is returned for insufficient funds and the filing fee is not paid within the time set by the Board, the Board shall dismiss the appeal. Cash shall not be accepted. ¶¶

[ED. NOTE: Exhibits referenced are available from the agency.]

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.620, 197.830(1), (9)

AMEND: 661-010-0021

SUSPEND: Temporary 661-010-0021 from LUBA 1-2022

RULE SUMMARY: Provides that the acceptable methods of refiling an original notice of intent to appeal or filing an amended notice of intent to appeal after a local government or state agency has filed a decision on reconsideration are mailing them or dispatching them for delivery via commercial delivery service. Eliminates delivery to and receipt by LUBA as acceptable methods of refiling and filing.

CHANGES TO RULE:

661-010-0021

Withdrawal of Decision for Reconsideration ¶¶

(1) If a local government or state agency, pursuant to ORS 197.830(13)(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 or, on appeal of a decision under 197.610 to 197.625, the local government shall file a notice of withdrawal prior to the filing of the respondent's brief. A copy of the 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 copy of the 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 661-010-0015. 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 661-010-0055. ¶¶

(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. Filing or refiling may also be accomplished by mail~~ mailing on or before the due date by first-class, certified or registered mail, or dispatching on or before the due date by first-class, certified or registered mail for delivery via commercial delivery service. ¶¶

(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 661-010-0015(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, then the name, address and telephone number of the applicant's attorney shall also 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, either through the United States Postal Service or by electronic mail, 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 (if a deposit was required to file the original notice of intent to appeal) 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. ¶

(f) Parties who have already intervened in the appeal need not file new motions to intervene when an amended notice of intent to appeal is filed or the original notice of intent to appeal is refiled. ¶

(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 a certified copy of the record of the proceeding under review in accordance with OAR 661-010-0025. 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.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.830(13)(b)

AMEND: 661-010-0025

SUSPEND: Temporary 661-010-0025 from LUBA 1-2022

RULE SUMMARY: Provides that the record or an electronic copy thereof is transmitted to LUBA only when it has been received by LUBA. Eliminates delivery as an acceptable method of transmission.

CHANGES TO RULE:

661-010-0025

Record ¶¶

(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 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, CD, DVD or other media 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 media 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 media 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 regulations given pursuant to ORS 197.610(1) or 197.615(1) and (2).¶¶

(2) Transmittal of Record:¶¶

(a) The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board a certified paper copy of the record of the proceeding under review. The governing body may, however, retain any large maps, media recordings, or difficult-to-duplicate documents and items until the date of oral argument. Where documents are retained until the date of oral argument, those retained documents shall be identified in the table of contents, as provided in OAR 661-010-0025(4)(B). 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.¶¶

(b) As an alternative to transmitting a certified paper copy of the record, a local government may transmit the record to the Board in electronic format. Transmittal of an electronic copy is accomplished by ~~delivery~~ receipt of two complete copies of the record on optical disks, with documents recorded in a PDF format. If the record exceeds 100 pages, the electronic copy shall be searchable. A local government may transmit the record in electronic form, and also retain items until oral argument as described in OAR 661-010-0025(2)(a).¶¶

(3) Service of Record:¶¶

(a) Contemporaneously with transmittal, the governing body shall serve a paper copy of the record, exclusive of large maps, media recordings, 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 paper copy of the record on any other party, including intervenors-petitioners, 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 media recording included in the record, or any recording 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 recording.¶¶

(b) By prior agreement of the party to be served, service of the record as described in OAR 661-010-0025(3)(a) may be in an electronic format instead of a paper copy.¶¶

(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).¶¶

(i) Where an item listed in the table of contents includes attached exhibits, the exhibits shall be separately listed as

an exhibit to the item. Where the exhibit is also a document that is being retained under OAR 661-010-0025(2), the exhibit shall also be listed at the end of the table of contents as provided in subsection (ii) below.¶¶

(ii) Where large maps, media recordings, or other items or documents are retained by the governing body under section (2) of this rule, those retained items shall be separately listed at the end of the table of contents;¶¶

(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. Exhibits attached to a record item shall be included according to the numerical or alphabetical order in which they are attached, not the date of the exhibits. 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 that does not substantially conform to the preceding requirements may be rejected 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.¶¶

[ED. NOTE: Exhibits referenced are available from the agency.]

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.830(10)(a), 197.830(14), 197.835

AMEND: 661-010-0030

SUSPEND: Temporary 661-010-0030 from LUBA 1-2022

RULE SUMMARY: Provides that the petition for review need be filed with only one copy, not four.

CHANGES TO RULE:

661-010-0030

Petition for Review ¶

(1) Filing and Service of Petition: Unless the Board orders otherwise pursuant to ORS 197.830(10)(a), the petition for review together with ~~four~~one copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. See OAR 661 010-0025(2) and 661-010-0026(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 661-010-0045(9) or 661-010-0067(2), shall result in dismissal of the appeal, forfeiture of the filing fee to the governing body, and an award of up to \$200 for the cost of preparation of the record payable from the petitioner(s) to the governing body. See OAR 661-010-0075(1)(c). Co-petitioners who file a single Notice of Intent to Appeal shall be limited to a single, joint petition for review.¶

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

(a) Begin with a table of contents and authorities; ¶

(b) Not exceed 11,000 words, unless permission for a longer petition is given by the Board. Headings, footnotes, and quoted material count toward the word-count limitation. The front cover, table of contents, table of authorities, appendices, certificate of service, any other certificates, and the signature block do not count toward the word-count limitation; ¶

(c) If a party does not have access to a word-processing system that provides a word count, a brief is acceptable if it does not exceed 38 pages;¶

(d) 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 661-010-0050; ¶

(e) Briefs must be legible and capable of being read without difficulty. The print must be black. Briefs must be prepared using proportionately spaced type. The style must be in font such as Times New Roman, and may not be smaller than 14-point type both for text and for footnotes; ¶

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

(g) 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; ¶

(h) Be printed on 8-1/2 by 11-inch paper, with numbers for each line of text and page numbers on the top of each page of text; ¶

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

(j) Be signed on the last page by the author. In cases where multiple unrepresented petitioners or intervenors-petitioners file a single petition for review, the petition for review shall be signed by all petitioners or intervenors-petitioners who wish to join the petition for review. ¶

(k) A signed certificate of compliance with the above-listed specifications for the petition for review shall be appended after the final page of the petition. See Exhibit 7. The certificate of compliance must include a statement that:¶

(A) The brief complies with the word-count limitation in paragraph (2)(b) of this subsection for briefs and OAR 661-010-0039 for reply briefs by indicating the number of words in the brief. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the brief. If the attorney, or a self-represented party, does not have access to a word-processing system that provides a word count, the certificate must indicate that the attorney, or self-represented party does not have access to such a system and that the brief complies with paragraph (2)(c) of this subsection for briefs and OAR 661-010-0039 for reply briefs.¶

(B) The brief complies with the font limitation in paragraph (2)(e) of this subsection by indicating that the size is not smaller than 14 point for both the text of the brief and footnotes.¶

(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 brief 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. Where there is a map in the record that helps illustrate the material facts, the petitioner shall include a copy of that map in the summary of the material facts or attach it as an appendix to the petition. ¶

(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. Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required. Each assignment of error must state the applicable standard of review. 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; and ¶

(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 media recordings 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 661-010-0005. ¶

(7) Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such. 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. ¶

[ED. NOTE: Exhibits referenced are available from the agency.]

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.830(11), (12), (13)(a)

AMEND: 661-010-0035

SUSPEND: Temporary 661-010-0035 from LUBA 1-2022

RULE SUMMARY: Provides that the response brief need be filed with only one copy, not four.

CHANGES TO RULE:

661-010-0035

Respondents Brief ¶

(1) Filing and Service of Brief: Unless otherwise provided by the Board, respondent's brief together with ~~four~~one ~~copies~~ shall be filed within 42 days after the date the record is received or settled by the Board. See OAR 661-010-0025(2) and 661-010-0026(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 or the lead intervenor, if one is designated.¶

(2) Specifications of Brief: Respondent's brief shall conform to the specifications of the petition for review at OAR 661-010-0030(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 661-010-0030(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.¶

(c) A response brief shall not include an assignment of error or cross-assignment of error.¶

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

(5) Amended Brief: The Board may allow the filing of an amended brief in accordance with OAR 661-010-0005.¶

(6) Response briefs that respond to a cross petition for review shall be filed within the time limit required for filing the response brief under subsection (1) of this rule and must comply in all respects with the requirements governing response briefs.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.830(13)(a)

AMEND: 661-010-0038

SUSPEND: Temporary 661-010-0038 from LUBA 1-2022

RULE SUMMARY: Provides that state agency briefs need be filed with only one copy, not four.

CHANGES TO RULE:

661-010-0038

State Agency Briefs II

A state agency that wishes to file a brief under ORS 197.830(8) shall file the brief together with ~~four~~one copies within the time required for respondent's brief. A state agency brief shall have yellow front and back covers. A state agency brief shall be accompanied by a filing fee of \$100.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.830(8)

AMEND: 661-010-0039

SUSPEND: Temporary 661-010-0039 from LUBA 1-2022

RULE SUMMARY: Provides that reply briefs need be filed with only one copy, not four.

CHANGES TO RULE:

661-010-0039

Reply Brief ¶¶

A reply brief shall be permitted. A reply brief shall be filed together with ~~four~~one ~~copies~~ within seven days of the date the respondent's brief is filed. A reply brief shall be confined to responses to arguments in the respondent's brief, state agency brief, or amicus brief, but shall not include new assignments of error or advance new bases for reversal or remand. A reply brief shall not exceed 1,000 words, exclusive of appendices, unless permission for a longer reply brief is given by the Board. If a party does not have access to a word-processing system that provides a word count, a reply brief is acceptable if it does not exceed four pages. A reply brief must include the certificate of compliance required by OAR 661-010-0030(2)(k). A reply brief shall have gray front and back covers.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.830(13)(a)

AMEND: 661-010-0052

SUSPEND: Temporary 661-010-0052 from LUBA 1-2022

RULE SUMMARY: Provides that amicus briefs need be filed with only one copy, not four.

CHANGES TO RULE:

661-010-0052

Amicus Participation ¶

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

(2) Appearance as amicus shall be by brief only, unless the Board specifically authorizes or requests oral argument. An amicus brief shall be subject to the same rules as those governing briefs of parties to the appeal, and shall be filed together with ~~four~~one copies. Where amicus is aligned with the interests of the petitioner(s), the amicus brief is due seven days after the date the petition for review is due. In all other circumstances, the amicus brief is due within the time required for filing respondent's brief. No filing fee is required. An amicus brief shall have green front and back covers.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.805, 197.830(13)(a)

AMEND: 661-010-0075

SUSPEND: Temporary 661-010-0075 from LUBA 1-2022

RULE SUMMARY: Provides that the acceptable methods of filing documents are mailing them via the United States Postal Service or dispatching them for delivery via commercial delivery service. Eliminates delivery to LUBA as an acceptable method of filing. Provides that, if a document is filed via commercial delivery service, the date of filing is the date of dispatch as shown on the receipt from the commercial delivery service's online tracking service.

CHANGES TO RULE:

661-010-0075

Miscellaneous Provisions ¶¶

(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 subsection. ¶¶

(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 25 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 by the petitioner(s) to the governing body and shall not exceed \$200. ¶¶

(D) If an intervenor under OAR 661-010-0050 or a state agency under OAR 661-010-0038 is the prevailing party, the intervenor or state agency may be awarded the cost of the fee to intervene or to file a state agency brief. ¶¶

(c) Forfeit of Filing Fee: 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, then the filing fee required by OAR 661-010-0015(4) shall be forfeited to the governing body. In addition, if the governing body files a cost bill pursuant to this section, the Board shall award the governing body up to \$200, payable from petitioner(s) to the governing body, as cost of preparation of the record. See OAR 661-010-0030(1). ¶¶

(d) Attorney Fees: ¶¶

(A) Attorney fees shall be awarded by the Board to the prevailing party as specified in ORS 197.830(15)(b) and (c); 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 197.845(2). ¶¶

(e) 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. ¶¶

(f) 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) Filing: ¶¶

(A) Documents may not be filed by facsimile. Documents filed with the Board may include facsimile signatures. ¶¶

(B) Except as provided in OAR 661-010-0015(1)(b) with regard to the notice of intent to appeal, filing a document with the Board is accomplished by: ¶¶

(i) ~~Delivery to the Board on or before the date due; or~~ ¶¶

(ii) Mailing on or before the date due by first class mail with the United States Postal Service. If the date of mailing is relied upon as the date of filing, the date of the first class postmark on the envelope mailed to the Board is the

date of filing. ¶

(ii) Dispatching on or before the due date for delivery via commercial delivery service. If the date of dispatch for delivery via commercial delivery service is relied upon as the date of filing, the date of the receipt from the commercial delivery service's online tracking service showing the date of dispatch is the date of filing.¶

(b) Service: ¶

(A) Any document filed with the Board, other than the record as provided in OAR 661-010-0025(3), or the record after withdrawal for reconsideration as provided in OAR 661-010-0021(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 661-010-0015(3)(f)(A). Service on two or more intervenors unrepresented by an attorney is accomplished by serving the lead intervenor designated under OAR 661-010-0050(2). ¶

(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). ¶

(c) Recycled Paper. Parties filing anything with the Board, including but not limited to notices of intent to appeal, records, motions, and briefs, are encouraged to use recycled paper if recycled paper is readily available at a reasonable price in the party's community. Further, parties are encouraged to use paper containing the highest available content of post-consumer waste, as defined in ORS 279.545, that is recyclable in the office paper recycling program in the party's community. ¶

(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 661-010-0025(2), or a record after withdrawal for reconsideration transmitted pursuant to OAR 661-010-0021(6), is required. ¶

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

(a) 25 cents per page for copies or scans of any Board transcript or document of public record. ¶

(b) \$10 for a copy of a cassette tape, compact disc or similar media disc 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. In the event someone other than an active member of the Oregon State Bar files a notice of intent to appeal on behalf of a corporation, other organization, or another individual, the individual filing the notice of intent to appeal will be given an opportunity to provide an amended notice of intent to appeal that conforms with this section. If an amended notice of intent to appeal is not filed within the time set by the Board, the Board will dismiss the appeal. ¶

(7) Lead Petitioner or Intervenor: ¶

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

(b) A lead intervenor is responsible for notifying the other intervenors of documents and communications received from the Board and other parties, but each intervenor remains responsible for his or her own representation. A lead intervenor's responsibilities under this subsection extend only to intervenors who joined in the lead intervenor's motion to intervene and does not extend to intervenors who filed separate motions to intervene. ¶

(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 or federal legal holiday, the act must be performed on the next working day. ¶

(9) Address and Hours of the Board: The Board's address is 775 Summer Street NE, Suite 330, Salem Oregon, 97301-1283. The telephone number is (503) 373-1265. The Board's office shall be open from 8:30 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: ¶

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

(b) 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 34.102, 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 197.015(10) or (12). ¶

(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 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 14 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) Transfer from Circuit Court: When any appeal of a land use or limited land use decision is transferred to LUBA from circuit court, the petition for writ of review filed in the circuit court shall be treated as the notice of intent to appeal, and the case shall proceed as provided in LUBA's rules, subject to the following: ¶

(a) No additional filing fee shall be required; ¶

(b) After an appeal is transferred to LUBA, the Board, by letter, will establish a deadline for the respondent to transmit the record. ¶

(13) Transfer from the Oregon Department of Land Conservation and Development: Where the Director of the Oregon Department of Land Conservation and Development transfers a matter to LUBA pursuant to ORS 197.825(2)(c)(A), the case shall proceed as provided in LUBA's rules, subject to the following: ¶

(a) The date of the notice from the Director making the transfer shall begin the running of a 21-day period within which one or more parties in the proceedings before the department may file a notice of intent to appeal with LUBA. A notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed. ¶

(b) Except as provided in this section, the notice of intent to appeal shall conform to the requirements of OAR 661-010-0015, including payment of the filing fee. The notice of intent to appeal shall identify the local government as the respondent, rather than the Oregon Department of Land Conservation and Development or the Land Conservation and Development Commission. ¶

(c) On receipt of a notice of intent to appeal, the Board shall, by letter, establish a deadline for the respondent to file the portion of the local record necessary to review the transferred matter. In all other respects, an appeal of a transferred matter shall proceed according to LUBA's rules. ¶

(14) All briefs and motions filed with the Board shall comply with the rules in OAR 661-010-0030(2) with respect to type size, spacing, paper size and printing, numbering and margins. ¶

[ED. NOTE: Exhibits referenced are available from the agency.]

Statutory/Other Authority: ORS 197.820(4)(a), (b)

Statutes/Other Implemented: ORS 34.102, 197.830(9), (13)(a) & (15), 197.835(10), 197.845(3)