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PERMANENT ADMINISTRATIVE ORDER

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CHAPTER 661

LAND USE BOARD OF APPEALS

FILED

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Codifies certain temporary rule amendments. Are responsive to House Bills 3395 (2023) and 3458 (2023).

EFFECTIVE DATE: 01/01/2024

AGENCY APPROVED DATE: 12/20/2023

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RULES:

661-010-0000, 661-010-0021, 661-010-0071

AMEND: 661-010-0000

RULE TITLE: Introduction

NOTICE FILED DATE: 09/28/2023

RULE SUMMARY: Reflects the effective date of this rulemaking. Provides that all appeals, whether filed before or after this rulemaking, are subject to the current provisions relating to oral argument.

RULE TEXT:

Scope of Rules and Effective Date: All proceedings commenced by a notice of intent to appeal filed on or after January 1, 2024, shall be governed by these rules. Proceedings commenced before January 1, 2024, 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, except that the temporary version of OAR 661-010-0040, as effective October 11, 2023 to March 31, 2024, shall apply to all proceedings pending on October 11, 2023, no matter when commenced, and all proceedings filed on or after that date.

STATUTORY/OTHER AUTHORITY: ORS 197.820(4)

STATUTES/OTHER IMPLEMENTED: ORS 197.805

AMEND: 661-010-0021

RULE TITLE: Withdrawal of Decision for Reconsideration

NOTICE FILED DATE: 09/28/2023

RULE SUMMARY: Allows for withdrawal of a decision relating to the development of a residential structure, consistent with the amendments to ORS 197.830 in HB 3395.

RULE TEXT:

- (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 ORS 197.610 to 197.625 or relating to the development of a residential structure, 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 mailing by first-class, priority, certified, or registered mail, or depositing with or dispatching for delivery by a commercial delivery service, 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 661-010-0015(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, other delivery 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: 661-010-0071

RULE TITLE: Reversal or Remand of Land Use Decisions

NOTICE FILED DATE: 09/28/2023

RULE SUMMARY: Codifies a temporary rule regarding reversal or remand of a land use decision, in part, consistent with the amendments to ORS 197.835 in HB 3458.

RULE TEXT:

(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);
- (d) The decision improperly construes the applicable law, but is not prohibited as a matter of law; or
- (e) All parties stipulate in writing to remand.

(3) The Board may reverse or remand a land use decision in part when:

- (a) The decision adopts a change to an acknowledged comprehensive plan or land use regulation;
- (b) The decision contains a severability clause; and
- (c) The affirmed parts, standing alone, are complete and capable of being executed consistent with the local government's legislative intent.

STATUTORY/OTHER AUTHORITY: ORS 197.820(4), 197.835(1)

STATUTES/OTHER IMPLEMENTED: ORS 197.835