

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

3  
4                                   LAWRENCE GALLAGHER,  
5   *Petitioner,*

6  
7   vs.

8  
9                                   CITY OF MYRTLE POINT,  
10   *Respondent.*

11   LUBA No. 2005-097

12   FINAL OPINION  
13   AND ORDER

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17                    Appeal from Myrtle Point.

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19                    Lawrence Gallagher, Myrtle Point, represented himself.

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21                    Michael R. Stebbins, North Bend, represented respondent.

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23                    BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member,  
24                    participated in the decision.

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26                                   DISMISSED                                   09/30/2005

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28                    You are entitled to judicial review of this Order. Judicial review is governed by the  
29                    provisions of ORS 197.850.

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3 **NATURE OF THE DECISION**

4 Petitioner appeals a decision approving a variance to the street width requirements for a  
5 residential street serving a proposed subdivision.

6 **JURISDICTION**

7 On August 18, 2005, the Board received a three-page letter from petitioner dated August  
8 15, 2005. On August 30, 2005, the Board received a response brief from the city, responding to  
9 petitioner's August 15, 2005 letter. On the same date the Board received the city's motion to  
10 dismiss, arguing that this appeal should be dismissed because the petition for review does not  
11 comply with LUBA's rules at OAR 661-010-0030(4).<sup>1</sup>

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<sup>1</sup> OAR 661-010-0030 provides, in relevant part:

- “(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;

1 LUBA staff contacted petitioner to determine whether a petition for review had been filed,  
2 and was informed that the three-page letter dated August 15, 2005 is the petition for review. On  
3 September 7, 2005, petitioner filed a four-page letter that responds to the city’s motion to dismiss.  
4 The September 7, 2005 letter also includes several arguments directed at the challenged decision,  
5 based on several photographs that are attached to the letter. The city responded on September 14,  
6 2005, objecting to our consideration of the photographs attached to petitioner’s September 7, 2005  
7 letter.

8 Turning first to the city’s objection to the photographs, we agree with the city that petitioner  
9 has cited no basis under OAR 661-010-0045 or elsewhere for us to consider the photographs,  
10 which are not in the record. We do not consider the photographs or references to them in  
11 petitioner’s September 7, 2005 letter.

12 Second, we agree with the city that the August 14, 2005 letter fails to comply with the  
13 requirements governing the content of a petition for review under OAR 661-010-0030(4). The  
14 letter includes no statement of facts establishing petitioner’s standing, no statement of the case, no  
15 description of the challenged decision or request for relief, no summary of arguments or material  
16 facts, no statement of jurisdiction, no assignments of error, and no copy of the challenged decision.  
17 For that matter, it also fails to comply with almost all of the specifications for a petition for review  
18 under OAR 661-010-0030(2).<sup>2</sup> For example, it has no table of contents or a blue cover with the  
19 appropriate caption and party information. It is not even signed.

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“(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.

“\* \* \* \* \*

“(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.”

<sup>2</sup> OAR 661-010-0030(2) provides:

1 OAR 661-010-0030(6) provides that a petition for review that fails to comply with  
2 OAR 661-010-0030(4) may, with the Board's permission, be amended, and that the Board shall  
3 determine whether to allow an amended petition to be filed "in accordance with OAR 661-010-  
4 0005."<sup>3</sup> OAR 661-010-0005 provides that:

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- "(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 661-010-0050;
  - "(d) Be typewritten in pica type not exceeding 10 characters per inch, or word-processed in proportionately spaced type no smaller than 12 point for text and 10 point 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. In cases where multiple unrepresented petitioners or intervenors-petitioner file a single petition for review, the petition for review shall be signed by all petitioners or intervenors-petitioner who wish to join the petition for review."

<sup>3</sup> Petitioner has not filed a request to amend the petition for review, and has not submitted an amended petition, unless the four-page September 7, 2005 letter is intended to be an amended petition for review. If so, the September 7, 2005 letter also fails to comply with the requirements of OAR 661-010-0030(4). In any case, we consider on our own motion whether it is appropriate to allow petitioner the opportunity to submit an amended petition for review under OAR 661-010-0030(6) and OAR 661-010-0005.

1           “These rules are intended to promote the speediest practicable review of land use  
2 decisions and limited land use decisions, in accordance with ORS 197.805-  
3 197.855, while affording all interested persons reasonable notice and opportunity to  
4 intervene, reasonable time to prepare and submit their cases, and a full and fair  
5 hearing. The rules shall be interpreted to carry out these objectives and to promote  
6 justice. Technical violations not affecting the substantial rights of parties shall not  
7 interfere with the review of a land use decision or limited land use decision. Failure  
8 to comply with the time limit for filing a notice of intent to appeal under OAR 661-  
9 010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a  
10 technical violation.”

11           We agree with the city that allowing petitioner at this juncture to file an amended brief that  
12 complies with OAR 661-010-0030(4) would not be consistent with OAR 661-010-0005. So  
13 deficient is the August 15, 2005 letter as a petition for review that LUBA did not even recognize  
14 that it was intended to be a petition for review until the city filed a response brief attempting to  
15 respond to it. The city argues that petitioner’s noncompliance with OAR 661-010-0030(4) is so  
16 extensive that it is difficult if not impossible to offer an adequate response. The city particularly  
17 complains about the absence of anything cognizable as an assignment of error.

18           While all of the requirements at OAR 661-010-0030(4) are important, the requirement that  
19 the petition for review include assignments of error supported by argument is particularly important.  
20 *Scholes v. Jackson County*, 28 Or LUBA 407, 409 (1994). Here, the August 15, 2005 letter  
21 expresses disagreement with the proposed street, apparently because petitioner believes the street  
22 grade will exacerbate drainage problems in the area. Not only is there no assignment of error, but  
23 there is no cited basis for reversing or remanding the challenged decision. Moreover, the challenged  
24 decision merely grants a variance to the street width requirements, allowing a street that is 24-feet  
25 rather than 36-feet wide. Petitioner does not explain what that variance has to do with any drainage  
26 problems.

27           While none of the August 15, 2005 letter’s individual deficiencies as a petition for review  
28 might warrant denying petitioner the opportunity to file an amended petition, under the present  
29 circumstances the cumulative deficiencies of the petition are such that any amended petition for  
30 review filed would bear no resemblance to the original petition. In effect, petitioner would need to

1 file an entirely different petition for review, presumably one with actual assignments of error alleging  
2 some basis for reversing or remanding the challenged decision. In turn, that would compel the city  
3 to request the opportunity to file a new response brief, a request we would almost certainly grant.  
4 The attendant delay, waste of resources, and opportunity for multiple bites at the apple are simply  
5 not consistent with the “speediest practicable review of land use decisions” while affording all  
6 interested persons “reasonable time to prepare and submit their cases” and “a full and fair hearing.”  
7 Accordingly, it is not appropriate to allow the petition for review to be amended to comply with  
8 OAR 661-010-0030(4).

9 It does not follow that because the petition for review fails to comply with OAR 661-010-  
10 0030(4) and that no amended petition may be filed that *dismissal* of this appeal is the automatic  
11 consequence. The usual course in this circumstance is to continue with this review proceeding and,  
12 if the unamended petition for review provides no basis for reversal or remand, to affirm the city’s  
13 decision. *See Scholes*, 28 Or LUBA at 410 (affirming decision because the petition for review,  
14 which set out no assignments of error or arguments in support thereof, provided no basis to reverse  
15 or remand the challenged decision). However, in this case we conclude that dismissal is the  
16 appropriate course.

17 OAR 661-010-0030(1) provides that “[f]ailure to file a petition for review within the time  
18 required” under LUBA’s rules “shall result in dismissal of the appeal.” Here, the August 15, 2005  
19 letter is so grossly noncompliant with the requirements for a petition for review that we conclude no  
20 petition for review has been filed at all.

21 Moreover, although the city does not advance this argument, we note that even if the August  
22 15, 2005 letter is viewed as a petition for review for purposes of OAR 661-010-0030(1), it was  
23 not timely filed. The record was settled on July 18, 2005, which made the petition for review due  
24 August 8, 2005. No extension was sought or granted. Because LUBA did not recognize the  
25 August 15, 2005 letter as a petition for review, we did not retain the envelope showing the date it  
26 was mailed, and hence the date it was filed, under OAR 661-010-0075(2)(a). Nonetheless, the

1 date of the letter and the fact that LUBA did not receive it until August 18, 2005, strongly suggests  
2 that the letter was mailed to the Board and hence filed on August 15, 2005. Certainly, petitioner  
3 offers no reason to conclude otherwise.

4 Because a petition for review was not filed within the time required by our rules, and  
5 petitioner did not obtain written consent to extend the time for filing the petition for review under  
6 OAR 661-010-0067(2) beyond August 8, 2005, ORS 197.830(11) and OAR 661-010-0030(1)  
7 require that we dismiss this appeal.

8 This appeal is dismissed.