

OFFICE OF THE SECRETARY OF STATE

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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 661
LAND USE BOARD OF APPEALS

FILED

05/31/2022 11:48 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Codifies temporary rule amendments. Requires notice of related matters. Clarifies various other procedural requirements.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 06/24/2022 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

LUBA is a seven-person agency. The ongoing COVID-19 pandemic and resulting hybrid working environment have reduced LUBA's ability to guarantee the availability of staff to accept in-person filings and carry out other responsibilities that help LUBA meet its statutory and regulatory deadlines for resolving land use appeals. These amendments address this need by allowing staff to focus more of their attention on helping LUBA meet its deadlines. These amendments eliminate in-person filing and expand accepted methods of filing. Because requiring parties to file documents via mail 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.

These amendments clarify various requirements related to representation, briefing, and motions practice at LUBA to increase accuracy and efficiency in processing appeals.

These amendments require parties to provide notice of related matters, which will aid LUBA in using its limited resources more efficiently and avoid potentially inconsistent rulings.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

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

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

LUBA is part of the statewide land use system and provides a forum that helps ensure that all interested parties and members of the public have opportunities to be involved in planning and development decisions. Through its procedural

rules and rule amendments, LUBA strives to provide equal access within the land use process and ensure that LUBA processes and communications allow all interested individuals to fully participate in the land use decision making and appeal process.

FISCAL AND ECONOMIC IMPACT:

There is a potential minimal fiscal and economic impact to some parties from the inability to file documents in person with LUBA. That impact is minimized by reducing the number of copies of documents that are required to be filed and the associated printing and mailing costs.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

The proposed amendments will affect only those state agencies, local governments, and members of the public that will be filing appeals with LUBA. Those state agencies include but are not limited to the Department of Land Conservation and Development and the Oregon Department of Fish and Wildlife.

Some of the parties filing appeals with LUBA will likely be small businesses and associated individuals. While requiring those business and individuals 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. It is not anticipated that any additional reporting, recordkeeping, professional services, equipment supplies, or labor will be required to comply with the proposed amendments. It is not anticipated that any economic effect on small businesses will be significant.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses were not directly involved in the development of these amendments. However, LUBA will be notifying a significant number of stakeholder groups and land use practitioners (some of whom represent small businesses and business groups) of these amendments by posting notice on our website, emailing it to members of the Oregon State Bar's Real Estate and Land Use (RELU) section, and submitting it for publication on RELU's website and in RELU's newsletter. Those groups and practitioners will then have an opportunity to comment on the amendments.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

LUBA did not believe it necessary to undertake the delay and effort to form and consult a formal rules advisory committee.

RULES PROPOSED:

661-001-0000, 661-010-0000, 661-010-0010, 661-010-0012, 661-010-0015, 661-010-0021, 661-010-0025, 661-010-0026, 661-010-0030, 661-010-0035, 661-010-0038, 661-010-0039, 661-010-0040, 661-010-0045, 661-010-0046, 661-010-0050, 661-010-0052, 661-010-0055, 661-010-0065, 661-010-0070, 661-010-0075

AMEND: 661-001-0000

RULE SUMMARY: Updates the names of entities to which LUBA must send notices of proposed rulemaking.

CHANGES TO RULE:

661-001-0000

Notice of Proposed Rulemaking ¶¶

Prior to adoption, amendment or repeal of any rule, the Land Use Board of Appeals shall give notice of the intended action:¶¶

- (1) In the Secretary of State's Bulletin referred to in ORS 183.360 at least 21 days prior to the effective date.¶¶
- (2) By mailing a copy of notice to persons on the Land Use Board of Appeals' mailing list established pursuant to ORS 183.335(8) at least 28 days prior to the effective date.¶¶
- (3) By mailing or furnishing a copy of the notice to members of the House of Representatives and the Senate required by ORS 183.335(15).¶¶
- (4) By mailing or furnishing a copy of the notice to:¶¶
 - (a) Associated Press;¶¶
 - (b) Association of Oregon Counties;¶¶
 - (c) League of Oregon Cities;¶¶
 - (d) ~~Associated Oregon~~ Oregon Business & Industries;¶¶
 - (e) Home Builders Association of Metropolitan Portland;¶¶
 - (f) ~~Oregon Building Industrie~~ Home Builders Association;¶¶
 - (g) 1000 Friends of Oregon;¶¶
 - (h) ~~Oregonians In Ac~~ Property Owners Association;¶¶
 - (i) Oregon Association of Realtors;¶¶
 - (j) Oregon State Bar, Real Estate and Land Use Section; and¶¶
 - (k) Oregon Department of Land Conservation and Development.

Statutory/Other Authority: ORS 183

Statutes/Other Implemented:

AMEND: 661-010-0000

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 cost bills.

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~~August 1, 2021~~2~~ shall be governed by these rules. Proceedings commenced before ~~July~~August 1, 2021~~2~~ 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 all proceedings pending on or after August 1, 2022 shall be governed by the current version of OAR 661-010-0075(1) regarding Cost Bills.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.805

AMEND: 661-010-0010

RULE SUMMARY: Reflects the renumbering of other rules.

CHANGES TO RULE:

661-010-0010

Definitions ¶¶

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

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

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

(3) "Final decision": A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.¶¶

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

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

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

(7) "Lead Intervenor" means the intervenor designated as the contact person for the purpose of receiving documents from the Board and other parties, when two or more intervenors join in a single motion to intervene and are unrepresented by an attorney. See OAR 661-010-0075(~~712~~(6)(b)).¶¶

(8) "Lead Petitioner" means the petitioner designated as the contact person for the purpose of receiving documents from the Board and other parties, when two or more petitioners are unrepresented by an attorney. See OAR 661-010-0075(~~712~~(6)(a)).¶¶

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

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

(11) "Party" means the petitioner, the governing body, and any person who intervenes as provided in OAR 661-010-0050. "Party" does not include a state agency that files a brief under ORS 197.830(8) or an amicus participating under OAR 661-010-0052.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.015(2), 197.015(10), 197.015(12), 197.805

RULE SUMMARY: Clarifies the requirements of appearance and representation before the Board. Requires notice when counsel is retained, substituted, or withdrawn. Requires designation of lead counsel when a party is represented by multiple attorneys. Requires parties to maintain current contact information. Requires notice of known related matters.

CHANGES TO RULE:

661-010-0012

Appearance and Representation Before the Board

(1) Appearances Before the Board: An individual shall either appear on their 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.¶

(2) Notice of Representation: If a party retains or changes counsel after an appeal is filed, including a change from one attorney to another or addition of an attorney within the same law firm, then the party shall file a notice of representation in writing. The notice of representation may not be combined with another document and shall contain the name, address, and telephone number of the attorney. See Exhibit 8.¶

(3) Representation by Co-Counsel: Where a party is represented by more than one attorney, including more than one attorney within the same law firm, the party must designate one attorney as lead counsel, who will be that party's counsel for the purpose of receiving documents from the Board and other parties. Lead counsel is responsible for notifying co-counsel of documents and communications received from the Board and other parties.¶

(4) Duty To Maintain Current Contact Information: All parties to an appeal have a duty to maintain current contact information with the Board, including during the time that an appeal is pending or suspended, until the final opinion and order is issued. Unless updated contact information is provided, the Board shall rely on the contact information provided in the notice of intent to appeal, motion to intervene, or notice of representation.¶

(5) Notice of Withdrawal: Where an attorney withdraws from representation in an appeal, the attorney shall file a notice of withdrawal in writing. The notice of withdrawal may not be combined with another document. The notice of withdrawal shall contain the name, address, and telephone number of the party and the name, address, and telephone number of the new attorney, if one is being substituted. A notice of withdrawal shall be promptly filed and include any pending deadlines. See Exhibit 9.¶

(6) 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 their 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 their 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.¶

(7) Notice of Related Matters: When a party files a notice of intent to appeal, a motion to intervene, or a brief, if the party is aware of another appeal pending before the Board or in another forum that involves the same or a closely related land use matter, then the party shall file a notice with the Board identifying the related matter by title and case number. The notice may not be combined with another document. A party may likewise notify the Board if the party is aware of another matter pending in another forum that raises the same or a closely related legal issue. A party need not notify the Board of a related matter if another party has already done so. See Exhibit 10.¶

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

Statutory/Other Authority: ORS 197.820(1), ORS 197.820(4)(a), ORS 197.820(4)(b)

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

AMEND: 661-010-0015

RULE SUMMARY: Adds commercial delivery service to the permitted methods of filing a notice of intent to appeal. Adds priority mail and commercial delivery service to the permitted methods of serving a notice of intent to appeal. Requires that the notice of intent to appeal (1) include both the petitioner's contact information and their attorney's contact information, where applicable; (2) designate lead counsel, where applicable; and (3) include a certificate of filing.

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: ¶

~~(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 or priority mail, or by commercial delivery service. 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, dispatch, 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, then the attorney's name, address and telephone number shall be substituted for that of the petitioner. If two or more petitioners also be included. If the petitioner is represented by co-counsel, then one attorney shall be designated as lead counsel. See OAR 661-010-0012(3). If two or more petitioners join in a notice of intent to appeal and are unrepresented by an attorney, then 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(712(6)(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, 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.¶

(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.¶

(j) A statement certified by the person who made the filing of the date and manner of document delivery. 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), ORS 197.830(9)

AMEND: 661-010-0021

RULE SUMMARY: Removes in-person filing. Adds priority mail and commercial delivery service to the permitted methods of refileing an original or filing an amended notice of intent to appeal after the respondent issues a decision on reconsideration.

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 refileing may also be accomplished by mail~~ mailing on or before the due date by first-class, priority, 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, 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: 661-010-0025

RULE SUMMARY: Provides that, if a local government creates minutes, media recordings, and transcripts of local proceedings, they must all be included in the record transmittal. Removes in-person record delivery. Provides that the record is transmitted when it is mailed or dispatched for delivery via commercial delivery service.

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, if created by the final decision maker~~ 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,~~ mailing by first-class, priority, certified, or registered mail, or dispatching via commercial delivery service 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 mailing by first-class, priority, certified, or registered mail, or dispatching via commercial delivery service on or before the due date 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: 661-010-0026

RULE SUMMARY: Clarifies the deadline for filing objections to original, amended, and supplemental records.

CHANGES TO RULE:

661-010-0026

Objections to the Record ¶

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

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

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

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

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

(d) The record does not conform to the requirements of OAR 661-010-0025(4).¶

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

(4) A party may, within 14 days from the date of service of a record objection, file a response. The governing body's legal counsel shall, within 14 days of the filing of a record objection, either file a response to the record objection or advise the Board in writing of the status of the parties' efforts to resolve the record objection.¶

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

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

Statutory/Other Authority: ORS 197.820(4)

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

AMEND: 661-010-0030

RULE SUMMARY: Decreases the number of copies of briefs required to be filed. Requires consolidated briefing in consolidated appeals where the petitioners are the same. Clarifies that a copy of the challenged decision must be attached to the petition for review.

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. In consolidated appeals in which the petitioners are the same the petitioners shall be limited to a single petition for review. Within fourteen days after the consolidated record is received, petitioners may request permission to exceed the applicable word limit in writing and shall state the reasons why an overlength petition for review will assist the Board in resolving the appeal.¶

(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.¶

(C) The brief includes a copy of the challenged decision, including any adopted findings of fact and conclusions of law, as required by OAR 661-010-0030(4)(e).¶

(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)~~, ORS 197.830(12), ORS 197.830(13)(a)

AMEND: 661-010-0035

RULE SUMMARY: Decreases the number of copies of briefs required to be filed. Allows consolidated responsive briefing.

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). If multiple petitions for review or intervenor-petitioner's briefs are filed, then the respondent and any intervenors-respondents may file a consolidated brief in response, which shall be limited to 15,000 words unless permission for a longer brief is given by the Board.¶¶

(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

RULE SUMMARY: Decrease the number of copies of briefs required to be filed.

CHANGES TO RULE:

661-010-0038

State Agency Briefs ¶

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

RULE SUMMARY: Decreases the number of copies of briefs required to be filed.

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: 661-010-0040

RULE SUMMARY: Provides that the Board may conduct oral argument by video conference call.

CHANGES TO RULE:

661-010-0040

Oral Argument ¶

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

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

(3) The Board shall inform the parties of the time and place of oral argument. A party shall seek the consent of other parties before requesting a change in the scheduled time or date for oral argument.¶

(a) Unless the Board otherwise orders, petitioner(s) shall be allowed 15 minutes for oral argument. Petitioner(s) may reserve up to 5 minutes for rebuttal following respondents' oral argument, to respond to arguments made during respondents' oral argument. Multiple petitioners shall share the 15 minutes. Requests for an overlength oral argument shall be submitted to the Board in writing at any time after the record is received but in no event later than seven days after the petition for review is filed, shall state whether all parties join in the request, and shall state the reasons why an overlength oral argument will assist the Board in resolving the appeal.¶

(b) The respondent(s) shall be allowed 15 minutes to respond. Multiple respondents shall share the 15 minutes.¶

(c) The Board shall record all arguments, but any party may also arrange at its own expense to record the argument in some other manner.¶

(4) A state agency which has filed a brief pursuant to ORS 197.830(8) may move to argue orally before the Board. The motion shall be filed with the brief.¶

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

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

Statutory/Other Authority: ORS 197.820(4)

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

RULE SUMMARY: Requires that motions to take evidence outside the record be filed as separate documents.

CHANGES TO RULE:

661-010-0045

Taking Evidence Not in the Record ¶¶

(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.¶¶

(2) Motions to Take Evidence:¶¶

(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding. The motion to take evidence shall be filed as a separate document and shall not be contained within a brief or other filing.¶¶

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

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

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

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

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

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

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

(5) Conduct of Hearing:¶¶

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

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

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

(C) The moving party may present surrebuttal evidence;¶¶

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

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

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

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

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

(6) Evidentiary Rules:¶¶

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

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

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

(d) Evidence objected to may be received by the Board. Rulings on the admissibility of such evidence, if not made

at the hearing, shall be made at or before the time a final order is issued.¶

(e) Any time 14 days or more before a hearing, any party may serve on every other party an affidavit, certificate or other document the party proposes to introduce in evidence. Unless cross-examination of the affiant, certificate preparer or other document preparer or custodian is requested within seven days prior to hearing, the affidavit or certificate may be offered subject to the same standards and received with the same effect as oral testimony. If cross-examination is requested, and the requestor is informed within seven days prior to the hearing that the requested witness will not appear for cross-examination, the affidavit, certificate or other document may be received in evidence if the Board determines that the party requesting cross-examination would not be unduly prejudiced or injured by lack of cross-examination.¶

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

(a) Simplification of the issues;¶

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

(c) Limitation of the number of witnesses;¶

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

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

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

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

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

(c) A statement of all agreed facts;¶

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

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

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

(9) Effect on Time Limits: Unless the Board orders otherwise, the filing of a motion to take evidence shall not suspend the time limits for all other events in the review proceeding, including the issuance of the Board's final order. Unless the parties agree otherwise, the Board shall schedule any evidentiary hearing not less than ten days after the order granting the motion to take evidence is issued.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.835(2)(b)

ADOPT: 661-010-0046

RULE SUMMARY: Specifies requirements for motions to take official notice. Requires that such motions be filed as separate documents.

CHANGES TO RULE:

661-010-0046

Taking Official Notice

(1) Grounds for Taking Official Notice: The Board may take official notice of relevant law as defined in ORS 40.090.¶

(2) Motions to Take Official Notice: A motion to take official notice shall contain a statement explaining with particularity what the material sought to be noticed is intended to establish, how it is relevant to an issue on appeal, and the authority for notice under ORS 40.090. The motion to take official notice evidence shall be filed in writing and as a separate document and shall not be contained within a brief or other filing.¶

(3) Any party may file a response within 14 days of the date of service of the motion to take official notice.

Statutory/Other Authority: ORS 197.540(2), ORS 197.820(4)

Statutes/Other Implemented: ORS 40.090

AMEND: 661-010-0050

RULE SUMMARY: Requires that a motion to intervene (1) include both the intervenor's contact information and their attorney's contact information, where applicable; (2) designate lead counsel, where applicable; and (3) identify the decision that is being challenged.

CHANGES TO RULE:

661-010-0050

Intervention ¶¶

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

(2) Motion to Intervene: A motion to intervene shall be filed within 21 days of the date the notice of intent to appeal is filed pursuant to OAR 661-010-0015, or the amended notice of intent to appeal is filed or original notice of intent to appeal is refiled pursuant to OAR 661-010-0021. ~~When two or more intervenors join in a motion,~~ motion to intervene (see Exhibit 3) shall:¶¶

~~(a) List the names, addresses, and telephone numbers of all persons moving to intervene and are unrepresented by an attorney, a lead intervenor. In addition, if an attorney represents the intervenor(s), the attorney's name, address and telephone number shall also be included. If an intervenor is represented by co-counsel, then one attorney shall be designated as the contact person for the purpose of receiving documents from the Board and other parties. The motion to intervene (see Exhibit 3) shall:¶¶~~

~~(a) List the names, addresses, and telephone numbers of all persons moving to intervene. If an attorney represents the intervenor(s), lead counsel. See OAR 661-010-0012(3). If two or more intervenors join in a motion to intervene and are unrepresented by an attorney, then one intervenor shall be designated as the lead intervenor, but the motion to intervene shall include the names, addresses, and telephone numbers of all such unrepresented intervenors. See OAR 661-010-0012(6)(b):¶¶~~

~~(b) Identify the decision that is being challenged in the appeal for which intervention is sought by including the following:¶¶~~

~~(A) The full title of the decision that is being challenged in the appeal, as it appears on the final decision;¶¶~~

~~(B) The ~~d~~attorney's name, address and telephone number shall be substituted for the the decision that is being challenged in the appeal became final;¶¶~~

~~(C) A concise description of the decision that is being challenged in the appeal, or a copy of either the notice of decision or the decision being challenged; and¶¶~~

~~(D) The appeal number assigned to the appeal by the Board, if one has been assigned as of the date of the filing of the motion to intervenor(s);e.¶¶~~

~~(b)c) State whether the party is intervening on the side of the petitioner or the respondent;¶¶~~

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

~~(de) On the last page, be signed by each intervenor, or the attorney representing that intervenor, on whose behalf the motion to intervene is filed; and¶¶~~

~~(ef) Be served upon the Board and all parties.¶¶~~

(3) Filing Fee: A motion to intervene shall be accompanied by a filing fee of \$100 for each appeal in which intervention is sought, payable to the Land Use Board of Appeals. Where multiple parties file a single joint motion to intervene, only one fee per appeal is required. If a motion to intervene is received without payment of the filing fee or a check providing the filing fee is returned for insufficient funds, the intervenor will be given an opportunity to submit the required fee. If the filing fee is not paid within the time set by the Board, the Board shall deny the motion to intervene. Cash shall not be accepted.¶¶

(4) Intervention in an appeal that is consolidated with other appeals does not allow the intervenor to appear as a party with respect to those appeals in which the intervenor has not filed a timely motion to intervene.¶¶

(5) Parties who have already intervened in an 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 pursuant to OAR 661-010-0021.¶¶

(6) Intervenor's Brief:¶¶

(a) If intervention is sought as a petitioner, the brief shall be filed within the time limit for filing the petition for review, and shall satisfy the requirements for a petition for review in OAR 661-010-0030.¶¶

(b) If intervention is sought as a respondent, the brief shall be filed within the time for filing a respondent's brief and shall satisfy the requirements for a respondent's brief in OAR 661-010-0035.¶¶

(c) Co-intervenors who file a single motion to intervene shall be limited to a single joint petition for review or response brief, as appropriate, and a single joint cross-petition for review or response to a cross-petition for review, as appropriate.¶

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

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.830(2), ORS 197.830(7)

AMEND: 661-010-0052

RULE SUMMARY: Decreases the number of copies of briefs required to be filed.

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: 661-010-0055

RULE SUMMARY: Reflects the renumbering of other rules.

CHANGES TO RULE:

661-010-0055

Consolidation ¶

The Board, at the request of any party or on its own motion, may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s) or limited land use decision(s).

Consolidation of appeals does not affect the status of the parties to each appeal. See OAR 661-010-0050(~~34~~).

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.805

AMEND: 661-010-0065

RULE SUMMARY: Requires that all motions be filed as separate documents.

CHANGES TO RULE:

661-010-0065

Motions ¶¶

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

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

(3) How Submitted: Parties shall submit all motions without oral argument unless otherwise directed by the Board. All motions must be filed as a separate document and shall not be included with any other filing. A party that desires a telephone conference on a motion shall include a request for a telephone conference in its motion or response. The Board may, at its discretion, conduct a telephone conference with the parties to consider any motion.¶¶

(4) Effect of Filing Motion: Except as provided in OAR 661-010-0026(6) with regard to objections to the record, or as may otherwise be ordered by the Board on its own motion, the filing of a motion shall not suspend the time limits for other events in the review proceeding.

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.805

AMEND: 661-010-0070

RULE SUMMARY: Clarifies that a final opinion and order will indicate when the decision being reviewed is transferring or invalidating the challenged decision.

CHANGES TO RULE:

661-010-0070

Final Order of Board ¶¶

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

(a) States "Final Opinion and Order";¶¶

(b) Indicates whether the decision being reviewed is affirmed, reversed, remanded, transferred, invalidated, or whether the appeal is dismissed;¶¶

(c) Contains the date of the final order; and¶¶

(d) Is time and date stamped by the Board.¶¶

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

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.805

AMEND: 661-010-0075

RULE SUMMARY: Clarifies that LUBA does not allow filing via electronic mail. Removes in-person filing. Adds priority mail and commercial delivery service to the permitted methods of filing and serving documents generally. Clarifies that documents filed with the Board must include a certificate of filing. Reflects that the provisions relating to appearance, lead petitioners, and lead intervenors have been moved to OAR 661-010-0012. Changes the citation form for unreported orders. Requires notice of transfer after the circuit court transfers a decision to LUBA.

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 or electronic mail. 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 or priority 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 ~~postmark 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.¶

(C) Documents filed with the Board is the date of filing, shall contain a statement certified by the person who made the filing of the date and manner of document delivery. See Exhibit 5.¶

(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~~ or priority mail, or by commercial delivery service. Mail service is complete on deposit in the mail. ¶

(C) Commercial delivery service copies of documents other than the Notice or the record is complete on the date of the receipt from the commercial delivery service's online tracking service showing the date dispatched.¶

(C) Service copies of documents shall include a certificate showing the date and manner 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 deliv~~ and manner or ~~deposit in the mail~~ service, 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.-¶

~~(108)~~ 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~~Order~~: John Doe v. XYZ County, ~~___~~ Or LUBA ~~___~~ (~~Order~~, LUBA No: 80-123, February 15, 1981).-¶

~~(119)~~ 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 ~~(119)~~(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.-¶

~~(120)~~ 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 ¶~~

(b) The petitioner(s) in the transferred circuit court proceeding shall file with the Board a Notice of Transfer that contains the information required by OAR 661-010-0015(3), and shall serve the Notice of Transfer upon all persons required to be named in the Notice of Intent to Appeal pursuant to OAR 661-010-0015(2) and (3). The Notice of Transfer shall be filed within the time set by the Board. The date of the Notice of Transfer is served shall begin the running of the 21-day period within which a motion to intervene in the appeal may be filed.¶

(c) After an appeal is transferred to LUBA and the Notice of Transfer is received by the Board, the Board, by letter, will establish a deadline for the respondent to transmit the record.-¶

~~(131)~~ 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.-¶

~~(142)~~ 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), ORS 197.820(4)(b)

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