

Overview of Comments Received Regarding LUBA’s Fall 2024 Proposed Rule Amendments

In September 2024, LUBA filed a notice of proposed rulemaking that proposed several amendments to LUBA’s rules of procedure, at OAR 661-010-0000 to 661-010-0075, and sought public comment. LUBA would like to thank those who read and considered our proposed rule changes, especially those sharp-eyed individuals that alerted us to typographical errors and clarity issues, as well as those who submitted substantive comments. We have reviewed and considered all the comments. The comments are available upon request to members of the public that would like to review them.

Concurrently with posting this document, LUBA has filed a notice of permanent rulemaking, available on LUBA’s website at the following link: www.oregon.gov/luba/Pages/11_2024_Permanent_Rule_Amendments.aspx. Please carefully review the permanent rules.

Responses to Comments

After considering the comments received, LUBA has made some changes to the proposed rule amendments, summarized below.

1. OAR 661-010-0025

In response to LUBA’s proposal to amend OAR 661-010-0025, regarding service of the record, several comments expressed concern for the burden on the local government of requiring that the local government to serve a paper copy of the record on all parties to an appeal. LUBA has adjusted the rule to allow for service of the record in the same manner as the record is transmitted to LUBA, and allowing for parties to request a copy of the record in a different format.

Below shows the difference between the rule as it was noticed and the rule as it was adopted.

OAR 661-010-0025(3) read, as noticed:

“(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 **all parties to the appeal.** ~~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 **all parties to the appeal** ~~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.”

The adopted version of OAR 661-010-0025(3) reads:

“(3) Service of Record:

“(a) Contemporaneously with transmittal, the governing body shall serve a ~~paper~~ copy of the record **in the format that it was transmitted to the Board**, exclusive of large maps, media recordings, and difficult-to-duplicate documents and items, on **all parties to the appeal.** ~~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 **all parties to the appeal** ~~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 **that differs from how the record was transmitted to the Board** ~~instead of a paper copy.~~”

Thank you again to those who submitted comments regarding this rule.

2. OAR 661-010-0030 and OAR 661-010-0039

LUBA's notice of proposed rulemaking included proposed amendments to OAR 661-010-0030(4), concerning preservation and assignment of error formatting in the petition for review, and OAR 661-010-0039, concerning addressing preservation for the first time in a reply brief, *i.e.* satisfying petitioner's obligation to show that an issue was preserved in the local proceeding. LUBA received comments in support of these amendments, as well as comments expressing concern about these amendments. LUBA is not moving forward with these rule amendments at this time and will continue to consider the goals of these amendments and potential impacts to appeal participants.

Below shows the difference between the rules as they were noticed and the rules as they remain unamended, except as indicated below, in the Fall 2024 rule amendments.

OAR 661-010-0030(4)(d) read, as noticed:

“(d) Set forth each assignment of error under a separate heading- **and contain the following:**

“(A) **Preservation:** Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. **Citations to the record offered to demonstrate that an issue was preserved must be sufficiently specific to establish that an issue was preserved and be accompanied by a quotation identifying the issue raised.** Where an assignment raises an issue that is not identified as preserved during the proceedings below, the ~~petition~~**assignment of error** shall state why preservation is not required.

“(B) **Standard of Review:** Each assignment of error must state the applicable standard **or standards** of review, **supported by citation to the statute, caselaw, or other legal authority for each standard of review.** **Generalized citations to all standards of review are not compliant with this rule.**

“(C) **Each assignment of error must be followed by the argument.** Where several assignments of error present essentially the same legal questions, the argument in support of those assignments of error ~~shall~~ **may** be combined[.]”

OAR 661-010-0030(4)(d) remains unamended as follows:

“(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[.]”

OAR 661-010-0039, as noticed, read:

“A reply brief shall be permitted. A reply brief shall be filed ~~together with one copy~~ within seven days of the date the respondent’s brief is filed. **A reply brief shall not be used to satisfy petitioner’s obligation to demonstrate that an issue raised in an assignment of error in the petition for review was preserved during the proceedings below or why preservation is not required. See OAR 661-010-0030(4)(d)(A).** 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.”

As adopted, OAR 661-010-0039 now reads:

“A reply brief shall be permitted. A reply brief shall be filed ~~together with one copy~~ 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.”

Other amendments to these two rules, including eliminating the requirement to include a copy with brief filings, in OAR 661-010-0030(1) and OAR 661-010-0039, and requiring that an email address be included within a brief’s contact information section, in OAR 661-010-0030(2)(d), have been adopted.

3. Other Comments Received

LUBA received a number of other comments regarding rule amendments that did not result in a responsive change to the proposed amendments.

4. LUBA IS MOVING

Please note that LUBA is in the process of moving and, effective November 1, 2024, LUBA’s new address is:

Land Use Board of Appeals
201 High Street SE, Suite 600
Salem, Oregon 97301-3398

While LUBA expects that parties will file documents by USPS at its new address beginning November 1, 2024, LUBA has allowed a short grace period until December 31, 2024, for misaddressed documents filed by USPS, during which LUBA will accept filings by USPS to either its former address or its current address.

However, filings via commercial delivery service will only be accepted at LUBA’s new address, 201 High Street SE, Suite 600. If you file documents with LUBA using a commercial delivery service, those documents must be filed at LUBA’s address effective as of November 1, 2024. There is no grace period for those filings; filings using a commercial delivery service delivered to LUBA’s former address will not be accepted.

CONCLUSION

LUBA again thanks those individuals who reviewed the proposed rule amendments and submitted comments. Please review the adopted rules before filing documents with LUBA, the new rules can be found here:

www.oregon.gov/luba/Pages/11_2024_Permanent_Rule_Amendments.aspx.

Individuals who did not receive notice of proposed rulemaking who would like to in the future, please submit a request to be put on our mailing list by emailing LUBA at luba.support@luba.oregon.gov, by mail at Land Use Board of Appeals, 201 High Street SE, Suite 600, Salem, Oregon 97301-3398, with a subject line of “Rulemaking Notice List” and indicating if you would like to be contacted by email, mail, or both.