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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**

11/27/2024 9:24 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Removes erroneous references and updates agency's address.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/31/2024 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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Filed By:  
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NEED FOR THE RULE(S)

The proposed amendments are necessary to remove erroneous references from two provisions and to update the agency's address with regards to how filings shall be sent to the agency.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

These amendments amend some provisions of OAR chapter 661, division 10, 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 no anticipated fiscal impact from these amendments.

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. 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.

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

Small businesses may be affected if they are a party to an appeal. 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.

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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.

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RULES PROPOSED:

661-010-0000, 661-010-0025, 661-010-0075

AMEND: 661-010-0000

RULE SUMMARY: Clarifies that all appeals filed on or after January 15, 2025, will be governed by the new rules.

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 ~~November~~ January 15, 2024, shall be governed by these rules. Proceedings commenced before ~~November~~ January 15, 2024, shall be governed by OAR 661-010-0005 through OAR 661-010-0075 as effective on the date the notice of intent to appeal was filed, ~~except that all proceedings pending on or after November 1, 2024, shall be governed by the current version of OAR 661-010-0075(7) regarding the agency's address.~~

Statutory/Other Authority: ORS 197.820(4)

Statutes/Other Implemented: ORS 197.805

AMEND: 661-010-0025

RULE SUMMARY: Corrects an error by removing a reference to a paper copy.

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, 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.¶¶

(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 mailing by first-class, priority, certified, or registered mail, or depositing with or dispatching for delivery by a commercial delivery service, on or before the due date.¶¶

(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 mailing by first-class, priority, certified, or registered mail, or depositing with or dispatching for delivery by a commercial delivery service, two complete copies of the record on optical disks or flash drive, with documents recorded in a PDF format, on or before the due date. 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 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 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.¶¶

(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 a format that differs from how the record was transmitted to the Board.¶¶

(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.

Statutory/Other Authority: ORS 197.820(4)

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

AMEND: 661-010-0075

RULE SUMMARY: Removes reference to the agency's old address, corrects an error by removing a reference to a cost bill.

CHANGES TO RULE:

661-010-0075

Miscellaneous Provisions ¶¶

(1) Attorney Fees and Forfeiture of Filing Fees:¶¶

(a) Time for Filing: The prevailing party may file 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) 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 motion 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 motion 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).¶¶

(c) 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).¶¶

(d) 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.¶¶

(e) If a motion for attorney fees is filed, and the Board's decision is appealed to the Court of Appeals, the Board shall act on the 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 signatures that are:¶¶

(i) An original ink signature;¶¶

(ii) A facsimile signature; or¶¶

(iii) An electronic signature that includes the typed name of the filer and an indication that the typed name is intended to substitute for the filer's signature. If the filer is an attorney, the attorney's bar number and an indication of the party whom the attorney represents must appear as part of or in addition to the signature block. Where an electronic signature is relied upon, the filing shall be accompanied by a certificate of compliance attesting to the authenticity of the signature. See Exhibit 11. If multiple parties are joining in the filing, each party must attest to compliance and the filing shall be accompanied by written confirmation of support for the filing. The "/s/" form of signature is not an electronic signature for purposes of this rule.¶¶

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

(ii) Depositing with or dispatching for delivery by a commercial delivery service on or before the due date. Proof of such deposit or dispatch date includes a receipt from the commercial delivery service showing the date the filing is deposited with the commercial delivery service or a receipt from the commercial delivery service's online tracking service showing the date the filing is dispatched for delivery by the commercial delivery service.¶¶

(C) Documents filed with the Board 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 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, by first-class or priority mail, or by commercial delivery service. Mail service is complete on deposit in the mail. Commercial delivery service is complete on deposit with or dispatch for delivery by the commercial delivery service.¶¶

(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 and manner of 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: No copies of filings are required unless these rules or an order by the Board provide otherwise. See OAR 661-010-0015(1)(a).¶¶

(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) 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) 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.¶¶

(7) Address and Hours of the Board: ~~Until October 31, 2024, the Board's address is 775 Summer Street NE, Suite 330, Salem Oregon, 97301-1283. Effective November 1, 2024, the Board's address is 201 High Street, SE, Suite 600, Salem Oregon, 97301-3398. Effective November 1, 2024, pleadings filed by commercial delivery service will only be accepted at 201 High Street SE, Suite 600, Salem, Oregon, 97301-3398. Until December 31, 2024, the Board will accept as correctly addressed pleadings filed by first class or certified mail that are addressed to either location.~~ The Board's address is 201 High Street, SE, Suite 600, Salem Oregon, 97301-3398. 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.¶¶

(8) Citations to Board Decisions: Citations to Board decisions shall be in the following form:¶¶

(a) For a Final Opinion and Order and an Orders included in LUBA Reporter volumes 1 through 81: John Doe v. XYZ County, 5 Or LUBA 654 (1981).¶¶

(b) For an Order not included in LUBA Reporter volumes 1 through 81: John Doe v. XYZ County, LUBA No 80-123 (Feb 15, 1981) (slip order at 4).¶¶

(c) For a Final Opinion and Order issued after December 31, 2020: John Doe v. XYZ County, LUBA No 2020-987 (Jan 1, 2021) (slip op at 7).¶¶

(9) 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 (9)(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.¶¶

(10) 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) 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.¶¶

(11) 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.¶¶

(12) 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.

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), ORS 197.830(15)