

II. “FOR THE RECORD”

There is a wealth of information describing the procedures for submitting written testimony “for the record” of land use proceedings. These procedures include statutes, regulations, local ordinances, and court opinions. The local procedures are weak in describing how to submit testimony into land use proceedings, especially during the course of the proceedings outside of public hearings.

1. Rules and Regulations
2. Josephine County Rural Land Development Code: Rules For Accepting Testimony “For The Record”
3. LUBA Opinions and Headnotes

A. Rules and Regulations

ORS 197.763(1) provides:

“(1) An issue which may be the basis for an appeal to the Land Use Board of Appeals **shall be raised not later than the close of the record at or following the final evidentiary hearing** on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.” [Emphasis added].

ORS 197.763(3)(g) and (j) provide:

“(3) **The notice provided by the jurisdiction shall:**” [Emphasis added].

“(g) Include the name of a **local government representative** to contact and the telephone number where additional information may be obtained;” [Emphasis added].

“(j) Include a general explanation of the **requirements for submission of testimony** and the procedure for conduct of hearings.” [Emphasis added].

ORS 197.763(6)(a) provides:

“(6)(a) **Prior to the conclusion of the initial evidentiary hearing**, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.” [Emphasis added].

ORS 197.820(4) provides”

“Duty to conduct review proceedings; authority to issue orders.”

“(4) The board shall adopt rules governing the conduct of review proceedings brought before it under ORS 197.830 to 197.845.”

ORS 197.830(10)(a) provides:

“(10)(a) Within 21 days after service of the notice of intent to appeal, the local government, special district or state agency shall transmit to the board the original or a certified copy of the **entire record of the proceeding under review**. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections to the record; however, the board shall issue an order on a motion objecting to the record within 60 days of receiving the motion.” [Emphasis added].

ORS 197.830(14)) provides:

“(14) The board shall issue a final order within 77 days **after the date of transmittal of the record**. If the order is not issued within 77 days the applicant may apply in Marion County or the circuit court of the county where the application was filed for a writ of mandamus to compel the board to issue a final order.” [Emphasis added].

ORS 197.835(1) and (2) provide:

“(1) The Land Use Board of Appeals shall review the land use decision or limited land use decision and prepare a final order affirming, reversing or remanding the land use decision or limited land use decision. The board shall adopt rules defining the circumstances in which it will reverse rather than remand a land use decision or limited land use decision that is not affirmed.”

“(2)(a) Review of a decision under ORS 197.830 to 197.845 shall be **confined to the record**.” [Emphasis added].

“(b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is **substantial evidence in the whole record**.” [Emphasis added].

ORS 183.482(4) and (7) provide:

“(4) Within 30 days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the **entire record of the proceeding under review**, but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable. Except as specifically provided in this subsection, the cost of the record shall not be taxed to the petitioner or any intervening party. However, the court may tax such costs and the cost of agency transcription of record to a party filing a frivolous petition for review.” [Emphasis added].

“(7) Review of a contested case **shall be confined to the record**, the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion. In the case of disputed allegations of irregularities in procedure before the agency not shown in the record which, if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a master appointed by the court to take evidence and make findings of fact upon them. The court shall remand the order for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.”

OAR 661-010-0025, in relevant part, provides (Appendix B):

“(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 written 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**.” [Emphasis added].

“(c) **Minutes and tape recordings** of the meetings conducted by the **final decision maker** as required by law, **or incorporated into the record** by the **final decision maker**. . . .” [Emphasis added].

“(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. . . .” [Emphasis added].

ORS 661-010-0010(3) provides:

(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.