

**45.1 Conditions of Approval – Generally.** A finding that it is feasible to incorporate design features into a turn lane to render it safe is an insufficient basis to conclude that the turn lane complies with applicable criteria, where the hearings officer fails to impose any conditions requiring that such design features be used. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

**45.1 Conditions of Approval – Generally.** Where a local government finds that an access standards is met and imposes a condition of approval requiring a formal survey of property to ensure that access to a proposed subdivision does not infringe on adjacent property, that is not the same thing as deferring a finding of compliance with that access standard to a later stage of the approval process. *Wolfgram v. Douglas County*, 54 Or LUBA 54 (2007).

**45.1 Conditions of Approval – Generally.** Under ORS 197.522 and similarly worded local law requirements, a city is obligated to consider and impose any conditions of approval proposed by the permit application if such conditions would allow the city to approve a conditional use permit application that would otherwise not meet approval criteria. However, under those authorities the city is not obligated to take the initiative to develop such conditions on its own or develop the evidentiary record that might be needed to impose such conditions. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

**45.1 Conditions of Approval – Generally.** Where a local government finds that OAR 660-012-0060 is satisfied, the findings adopt and incorporate the applicant's traffic impact analysis (TIA), and the TIA includes mitigation measures, the local government does not err in failing to expressly impose a condition of approval requiring those mitigation measures to be implemented. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007).

**45.1 Conditions of Approval - Generally.** Where a city's code does not expressly authorize a city to impose a condition requiring annexation on its decision approving an application to partition unincorporated land, but the code only authorizes the city to approve partitions of unincorporated lands that are subject to an annexation agreement and the city's only other option would be to deny the partition application, the city correctly interprets its code to approve the application with the annexation agreement condition. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

**45.1 Conditions of Approval – Generally.** A local government does not err in failing to impose a condition of approval ensuring that the final planned unit development plan contains senior housing consistent with the approved tentative plan, where the tentative plan includes such housing and an ordinance requires that the final plan can only be approved if it is "substantially consistent" with the tentative plan. *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007).

**45.1 Conditions of Approval – Generally.** Where neither the local government nor LUBA has jurisdiction to resolve the legality of a condition requiring necessary facilities to be constructed prior to obtaining final approval of a two-step subdivision approval

process, the local government may (1) adopt findings establishing that fulfillment of the condition of approval is not precluded as a matter of law, and (2) ensure that the condition will be fulfilled prior to final subdivision approval or actual development. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

**45.1 Conditions of Approval – Generally.** LUBA need not resolve the parties’ legal dispute over whether a condition of subdivision approval requiring construction of a street through a neighboring development is consistent with conditions, covenants and restrictions governing that neighboring development, where only the circuit court has jurisdiction to finally resolve that dispute, and the local government has adequately established an alternative basis to impose the condition regardless of how that legal dispute is resolved. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

**45.1 Conditions of Approval – Generally.** LUBA will reject a petitioner’s challenge to a condition of subdivision approval requiring construction of a public street in a neighboring subdivision notwithstanding that the street may violate covenants, conditions, and restrictions (CC&Rs) governing that neighboring subdivision, where the city adequately demonstrates that it has statutory authority to condemn the land and construct the street notwithstanding the CC&Rs, and the city adequately ensures that the condition requiring construction of the street will be fulfilled prior to final development approval. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

**45.1 Conditions of Approval – Generally.** LUBA will affirm a hearings officer’s finding that it is feasible to expand an existing stormwater facility without infringing on the neighboring petitioner’s rights to the existing capacity of that facility, where there is no evidence that the expansion will affect the capacity of the existing pond, and the hearings officer imposed conditions sufficient to ensure that the expansion will not infringe on the existing capacity. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

**45.1 Conditions of Approval – Generally.** A finding that expansion of an existing stormwater facility will improve problems with the existing facility, combined with a condition of approval requiring that the expanded facility not exacerbate existing problems, is sufficient to address concerns raised by petitioner that the expanded facility might exacerbate existing overflow problems. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

**45.1 Conditions of Approval – Generally.** Absent some authority to the contrary, a local government need not approve a property line adjustment necessary to effect a proposed subdivision prior to or contemporaneously with adopting the preliminary subdivision approval. A finding that it is feasible to obtain a property line adjustment, combined with a condition requiring that the adjustment be obtained prior to final subdivision approval, is sufficient. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

**45.1 Conditions of Approval – Generally.** A local government is not obligated to impose of site plan approval that prohibits a use that is not in fact proposed or approved,

simply because it is possible that at some future date the structures authorized by the site plan might be used in a manner prohibited by the code. *Friends of the Metolius v. Jefferson County*, 51 Or LUBA 188 (2006).

**45.1 Conditions of Approval – Generally.** While the fact that a proposed development would be inconsistent with private CC&Rs is not a basis, in and of itself, for reversal or remand, the fact that a condition of approval necessary to meet approval criteria is not feasible because the condition cannot be satisfied because it violates CC&Rs may be a basis for reversal or remand. *Butte Conservancy v. City of Gresham*, 51 Or LUBA 194 (2006).

**45.1 Conditions of Approval – Generally.** Remand is necessary to either withdraw a condition of approval requiring fencing around a property or explain what criterion it relates to and what purpose it serves, where the decision approves development in part and denies it in part, and it is not clear whether the condition of approval relates to approved or denied aspects of the proposed development. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

**45.1 Conditions of Approval – Generally.** Where a petitioner claims that a sewer provider does not have an easement across his property to reach necessary access to a sewer main, a finding that such an easement does exist, that the easement could be condemned if necessary, and imposition of a condition of approval requiring that the easement be obtained is sufficient to establish that it is feasible to provide sewer service. *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006).

**45.1 Conditions of Approval – Generally.** Nothing in ORS 197.522 prevents a local government from imposing conditions of approval “to make the proposed activity consistent with the plan and applicable regulations.” *Ghena v. City of Grants Pass*, 50 Or LUBA 552 (2005).

**45.1 Conditions of Approval – Generally.** Where it appears that providing access to phase 1 of a proposed subdivision is feasible, but the tentative plat application does not show how access will be provided, a hearings officer does not err in imposing a condition of final plat approval requiring that the applicant provide a specific plan for access to phase 1. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

**45.1 Conditions of Approval – Generally.** A city may approve a master plan of development for 1000 dwelling units that could damage wetlands or threaten recovery of endangered western lilies on the site, provided the city imposes a condition of approval that requires the city to revisit the legal requirements to protect the wetlands and western lilies, at the time of detailed development plan approval, when the hydrologic assessment necessary to evaluate each phase of the proposed development against those legal standards will be available. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

**45.1 Conditions of Approval – Generally.** An expert’s letter that merely suggests further study, possible future actions, considerations and thoughts, and potential alternatives is too imprecise or hypothetical to provide adequate conditions of approval. *Baker v. City of Garibaldi*, 49 Or LUBA 437 (2005).

**45.1 Conditions of Approval – Generally.** When a petitioner challenges findings deferring compliance with applicable approval criteria, that petitioner must: (1) identify the applicable approval criteria; (2) identify the findings that defer consideration of those criteria; and (3) explain how that deferral is inadequate to ensure compliance with the approval criteria. *O’Shea v. City of Bend*, 49 Or LUBA 498 (2005).

**45.1 Conditions of Approval – Generally.** There is no generally applicable requirement that conditions of approval be stated in clear and objective language, or impose only mandatory, unambiguous, easily enforced obligations. *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

**45.1 Conditions of Approval – Generally.** Federal law preempts local zoning conditions of approval that are imposed to regulate radio frequency interference. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

**45.1 Conditions of Approval – Generally.** It does not matter whether conditions that are imposed to regulate radio frequency interference are imposed under general zoning conditional use criteria or local regulations that were adopted to regulate radio frequency interference directly. It is the purpose for imposing the condition that is important, and if the condition is imposed to regulate radio frequency interference, it is preempted by federal law. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

**45.1 Conditions of Approval – Generally.** Federal law does not preempt local laws that regulate the visual and aesthetic impact of radio towers and the antennas placed on those towers. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

**45.1 Conditions of Approval – Generally.** A governing body’s interpretation that it has authority to modify a condition of preliminary subdivision plat approval under a code standard allowing “minor changes” to an unrecorded subdivision plat is not reversible under ORS 197.829(1). *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

**45.1 Conditions of Approval – Generally.** A decision that allows modifications to an existing berm intended to protect a neighboring subdivision from sight and smells of the city sewage treatment plant is consistent with that subdivision’s conditions of approval, where the conditions do not require a berm of any particular size, shape or height, and the decision allows only modifications that do not degrade the function of the berm. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

**45.1 Conditions of Approval - Generally.** Where a non-duplicative plat name is a criterion for preliminary plat approval, a city does not err by granting preliminary plat

approval without a plat name and imposing a condition of approval that the applicant submit a non-duplicative plat name prior to final plat approval. For such an approval criterion, it is at most harmless error that the city failed to find that it is feasible for the applicant to submit the required non-duplicative plat name. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

**45.1 Conditions of Approval - Generally.** Where a local government's findings explain that a subdivision applicant's plan for achieving visual clearance is adequate and that the applicant is negotiating with the adjoining property owner to secure the easement that will be necessary to implement that plan and is confident that the easement can be secured, the local government does not err by failing to require that the applicant obtain the easement prior to preliminary plan approval and failing to find that it is feasible for the applicant to secure the easement. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

**45.1 Conditions of Approval – Generally.** Assuming ORS 197.522 is applicable outside the moratoria context, that statute does not require a local government to develop on its own conditions of approval that would render proposed development compliant with applicable criteria, as an alternative to denial. Rather, the initial burden of proposing conditions to make development consistent with applicable criteria belongs to the applicant. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

**45.1 Conditions of Approval – Generally.** ORS 197.522 does not require a local government to reopen the record after reaching a tentative decision to deny a development application, to allow the applicant an opportunity to propose conditions that would allow approval. Rather, the applicant must propose such conditions during the evidentiary proceedings or in making final legal arguments to address concerns raised during the proceedings and ensure compliance with applicable criteria. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

**45.1 Conditions of Approval – Generally.** Where it is not apparent that a county adopted one or more conditions of approval to address the impacts described in ORS 215.296(1), petitioner's argument that the county's conditions of approval are not "clear and objective," as is required by ORS 215.296(2), provides no basis for reversal or remand. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9.

**45.1 Conditions of Approval – Generally.** Where a zoning ordinance specifically requires that development proposals be approved through design review at the time a permit is requested for development, a local government is not required to duplicate that mandate through a condition of approval at the time the property is rezoned. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

**45.1 Conditions of Approval – Generally.** When a city imposes a condition on development approval and relies on that condition in both its initial approval and its reapproval after withdrawing the decision for reconsideration, a petitioner's failure to raise issues regarding the condition during the evidentiary proceedings on reconsideration precludes petitioner from challenging the adequacy or validity of the condition in a

subsequent LUBA appeal of the decision on reconsideration. *DLCD v. City of Warrenton*, 40 Or LUBA 88 (2001).

**45.1 Conditions of Approval – Generally.** A condition of approval limiting sales of nonfarm-related items in a farm feed store to 10 percent of total sales, rather than the 10 to 20 percent of total sales that the applicant proposed, does not make such a significant change in the permit application that a new application must be required. *Barge v. Clackamas County*, 39 Or LUBA 183 (2000).

**45.1 Conditions of Approval – Generally.** Where a condition of approval for preliminary plat approval does not require the condition to be fulfilled as a condition of final plat approval, whether or not the condition is satisfied is a matter of post-approval enforcement rather than a basis to find the final plat not in conformance with the preliminary plat approval. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000).

**45.1 Conditions of Approval – Generally.** A local government may find compliance with approval criteria by finding that the proposed means to achieve compliance is feasible, and imposing conditions of approval to ensure that the criteria are met. In the alternative, a local government may defer finding compliance with the criteria, but only by observing statutory notice and hearing requirements when making the deferred finding of compliance. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

**45.1 Conditions of Approval – Generally.** Testimony from a state reclamationist and a specialist in river mechanics combined with a condition requiring that a future engineering study precede any expansion of the mining area is sufficient to demonstrate feasibility that mining and reclamation will not increase the potential for channel recapture or exacerbate impacts from flooding. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

**45.1 Conditions of Approval – Generally.** A condition of approval that is suggested by the applicant after the close of the evidentiary hearing in a quasi-judicial land use proceeding is not “new evidence,” within the meaning of ORS 197.763(6)(e), and there is no legal requirement that parties be given a right to rebut such a proposed condition of approval. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

**45.1 Conditions of Approval – Generally.** A condition of approval that the applicant will provide a sanitary sewer capacity study and identify the location and ownership of utility infrastructure and easements does not demonstrate that adequate public utility systems are available or could be extended to service the proposed development as required by local ordinance. *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13 (1999).

**45.1 Conditions of Approval – Generally.** A finding that a proposed subdivision will be connected to the city’s storm drainage system is not supported by substantial evidence, where the proposed drainage system stops short of the city’s storm drainage system and a condition of approval requiring paved access to the subdivision is not adequate to ensure

that the storm drainage connection will be constructed along with that paved access. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

**45.1 Conditions of Approval – Generally.** There is no applicable legal standard that requires a city to have a reasonable basis for refusing to impose a requested condition of approval that a subdivision access road be blocked to all but emergency travel. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

**45.1 Conditions of Approval – Generally.** A staff recommendation regarding appropriate conditions of approval that is submitted after the close of the evidentiary hearing is not new "evidence" that might, if submitted by one of the parties, trigger an obligation to reopen the record for rebuttal. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

**45.1 Conditions of Approval – Generally.** Where a PUD condition of approval requires that certain issues be resolved prior to preliminary plat approval of Phase 7 of the PUD, LUBA will affirm as reasonable and correct a city's interpretation of that condition to allow Phase 7A to be approved in advance of Phase 7B without resolving those issues. *Claus v. City of Sherwood*, 35 Or LUBA 437 (1999).

**45.1 Conditions of Approval – Generally.** A condition of approval limiting the hours of operation is supported by substantial evidence where the city council found that loading and unloading of vehicles next to an adjoining residential area during irregular hours would create a nuisance and the Oregon State Police impose a similar limitation on towing of impounded vehicles. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

**45.1 Conditions of Approval – Generally.** A city may impose a condition requiring annual review of a conditional use approval under a general code provision allowing conditions of approval the city council determines are necessary "to avoid a detrimental impact." *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

**45.1 Conditions of Approval – Generally.** The standard LUBA applies when considering evidentiary challenges to conditions of approval is relatively low. *Botham v. Union County*, 34 Or LUBA 648 (1998).

**45.1 Conditions of Approval – Generally.** In determining whether a proposed quarry expansion should be approved, the local government must find it is feasible to comply with applicable environmental standards addressing air and water quality and noise. In doing so, it is appropriate to impose conditions of approval and defer responsibility for monitoring compliance to planning and engineering staff at a later stage of development. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

**45.1 Conditions of Approval – Generally.** Where an issue is raised below whether a condition imposed in a prior land use decision supplies an applicable approval standard in subsequent land use decisions, the local government must determine whether the

condition is an applicable criterion for approval and, if so, whether it is satisfied. *Bradbury v. City of Bandon*, 33 Or LUBA 664 (1997).

**45.1 Conditions of Approval – Generally.** A local government cannot defer its obligation to make findings of compliance with applicable approval criteria to a state agency. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

**45.1 Conditions of Approval – Generally.** A local government may impose conditions necessary to ensure compliance with applicable water availability criteria only when the findings adequately establish that compliance with those criteria is feasible. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

**45.1 Conditions of Approval – Generally.** When compliance with a particular code standard is deferred, a condition to ensure eventual compliance is required even when compliance depends upon the local government rather than the applicant. *DLCD v. Tillamook County*, 33 Or LUBA 163 (1997).

**45.1 Conditions of Approval – Generally.** To defer making a necessary discretionary determination beyond the date that a UGB amendment becomes final creates a possibility the UGB will be amended before Goal 14 is satisfied. Either (1) a determination that all standards requiring discretion in their application are satisfied must be made prior to the amendment of the UGB itself; or (2) the UGB amendment must be conditioned on making the necessary determination at a time subsequent when the statutory notice and hearing requirements are observed. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

**45.1 Conditions of Approval – Generally.** Without findings explaining why, for purposes of a conditional use approval, a 13,660-square-foot church 33 feet high is "essentially the same size and height" as a "12,000 +/-" square foot church 29 feet high, LUBA cannot affirm that it is. *Southeast Neighbors United v. Deschutes County*, 32 Or LUBA 227 (1996).

**45.1 Conditions of Approval – Generally.** A city cannot determine there will be compliance with a criterion prohibiting adverse impacts on residential zones by imposing a condition that requires abatement of that adverse impact. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

**45.1 Conditions of Approval – Generally.** Where there is no evidence regarding the nature and scope of a proposed development, the city cannot rely upon conditions of approval in finding compliance with a comprehensive plan policy. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

**45.1 Conditions of Approval – Generally.** A local government may find compliance with an applicable criterion by either (1) finding that the criterion is satisfied; or (2) finding that it is feasible to satisfy the criterion and imposing conditions necessary to insure compliance. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

**45.1 Conditions of Approval – Generally.** Where a county acknowledges an incompatibility between a proposed nonfarm use and surrounding farm uses, it cannot determine that the proposed use satisfies the requirement that it be compatible through the imposition of a condition which will mitigate but not resolve the incompatibility. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

**45.1 Conditions of Approval – Generally.** Conditions of approval do not substitute for establishing compliance with applicable criteria; before the county can impose conditions of approval, it must first establish that the criteria can be satisfied. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

**45.1 Conditions of Approval – Generally.** The attachment as an exhibit to the city's decision of a plot plan showing 3.95 acres of "open space" does not impose an unstated condition of approval requiring dedication of the open space, when the text of the decision makes clear it does not rely on that aspect of the plot plan. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

**45.1 Conditions of Approval – Generally.** If a city relies on the preservation of open space to make a finding that there will be adequate buffering between commercial and residential uses, the city must condition approval on the designation of a specifically described parcel as open space. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

**45.1 Conditions of Approval – Generally.** When a challenged decision justifies amendments to the city's comprehensive plan and zoning maps by relying on a particular development proposal, approval of the amendments must be conditioned on implementation of that proposal. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

**45.1 Conditions of Approval – Generally.** Local government approval of a subdivision tentative plan, with a condition that prior to final plat approval the plan be reconfigured to provide only one access point from the subdivision onto adjoining roads, a change advocated in an alternative plan submitted by neighbors, does not constitute approval of a new subdivision application. *Carter v. Umatilla County*, 29 Or LUBA 181 (1995).

**45.1 Conditions of Approval – Generally.** Because the second sentence of Oregon Laws 1991, chapter 3, section 7(1)(b), imposes limitations on a local government's authority to impose conditions on a local permit for a light rail transit facility, the local government has the burden of demonstrating that any conditions that are not required by Tri-Met's "final order" comply with these limitations. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

**45.1 Conditions of Approval – Generally.** Even if a condition of land use approval is not an "exaction" subject to the "rough proportionality" requirement of *Dolan v. City of Tigard*, conditions of land use approval must support some legitimate planning purpose and must be authorized by the local government's comprehensive plan or land use regulations. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

**45.1 Conditions of Approval – Generally.** Aside from the requirement under *Dolan v. City of Tigard* for an "individualized determination" justifying a condition of approval imposing an exaction, there is no generally applicable requirement that conditions of land use approval be supported by findings that justify imposing the condition. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).