

**25.12 Local Government Procedures – Other.** While issue preclusion does not generally apply in local land use hearings, and while the state’s land use system is incompatible with giving preclusive effect to issues previously determined by a local government tribunal, a hearings officer does not err by giving a federal court judgment preclusive effect in a subsequent local government land use proceeding involving the same parties. *O’Connor v. Clackamas County*, 81 Or LUBA 413 (2020).

**25.12 Local Government Procedures – Other.** Where a local code provision requires that a proposed conditional use be “consistent with the character of the area,” and where nothing in the code defines or describes the relevant study area for purposes of the provision, a local government does not err by expanding the scope of the study area beyond that described in the application. *Tarr v. Multnomah County*, 81 Or LUBA 242 (2020).

**25.12 Local Government Procedures – Other.** Provisions of a challenged ordinance that refer to or rely on provisions of a prior ordinance that LUBA remanded are invalid, even where the prior ordinance contained a severability clause purporting to allow unchallenged aspects of the prior ordinance to take effect after LUBA’s remand. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

**25.12 Local Government Procedures – Other.** Where a prior decision approved a plan amendment and zone change for the subject property and included a condition of approval limiting the type of future development to a “retail shopping center” and the size of future development to a certain square footage of gross leasable area, but where the prior decision approved no specific development, voluntary descriptions, statements, or representations made by the applicant during the prior proceeding regarding the particular store with which the shopping center would be developed are not binding on the applicant in a subsequent site plan review proceeding unless they were memorialized in conditions of approval for the prior decision. *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

**25.12 Local Government Procedures – Other.** The statute of limitations in ORS 131.125(8)(c) is inapplicable to a county’s separate land use enforcement proceeding pursuant to a county code that does not contain any time limitation for enforcement actions for violations of the county’s land use code, because the county has authority over land use code enforcement matters independent from any statutorily derived authority in ORS Title 14 pursuant to county charter, and because ORS 153.030(4) expressly provides that “[n]othing in this chapter affects the ability of any other political subdivision of this state to provide for the administrative enforcement of the charter, ordinances, rules and regulations of the political subdivision, including enforcement through imposition of monetary penalties.” *A Walk on the Wild Side v. Washington County*, 78 Or LUBA 356 (2018).

**25.12 Local Government Procedures – Other.** A city commits procedural error that prejudiced the applicants’ substantial rights when it failed to provide the applicants with a reasonable opportunity to respond to new evidence regarding compliance with tree preservation requirements that was submitted one day prior to the city’s denial of the application for failure to demonstrate compliance with those requirements, based on the new evidence. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

**25.12 Local Government Procedures – Other.** When repair or replacement of windows in a historic district requires permit approval from a review body, any alleged failure of local government staff to respond to inquiries about the process or alleged knowledge of and failure to take action on unauthorized replacement cannot possibly substitute for the required approval process or constitute a de facto approval of the required permit. *West v. City of Salem*, 61 Or LUBA 166 (2010).

**25.12 Local Government Procedures – Other.** Equitable estoppel cannot arise from the actions of local government officials who purport to waive the provisions of a mandatory law or otherwise exceed their authority. *West v. City of Salem*, 61 Or LUBA 166 (2010).

**25.12 Local Government Procedures – Other.** Where a county board of commissioners adopts a tentative decision approving an application, but requests that the opponents provide comments on a proposed condition of approval, it is not procedural error for county counsel to discuss the opponents' comments with the commissioners rather than place the written comments in front of the commissioners for their direct review, where the motion that led to tentative approval did not specify how the commissioners wished to receive the comments. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

**25.12 Local Government Procedures – Other.** OAR 661-010-0005 is a LUBA administrative rule under which LUBA treats certain procedural errors as technical violations. OAR 661-010-0005 does not apply to local governments, and local governments are not bound to treat technical errors in the same manner as LUBA. *Golden v. City of Silverton*, 58 Or LUBA 399 (2009).

**25.12 Local Government Procedures – Other.** To give preclusive effect to an earlier unappealed land use decision and thus bar raising issues in a subsequent decision on a related, but separate, permit proceeding, the issue must concern particular development that was proposed, considered and approved in the earlier unappealed decision. Where the earlier decision approved only improvements to the second and third floor of a building, and did not purport to approve the first floor reconstruction that is at issue in the subsequent permit proceeding, on appeal of that subsequent permit to LUBA the petitioner is not precluded from raising issues regarding the first floor reconstruction. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

**25.12 Local Government Procedures – Other.** Even if a prior conditional use permit implicitly approved reconstruction of the first floor of an existing building used for a nonconforming use, failure to appeal the prior decision would not necessarily preclude petitioner from arguing on appeal of a subsequent building permit to reconstruct the first floor that the building permit requires nonconforming use review, where the first floor plan authorized in the building permit approval proposes expansions and alterations not depicted on the first floor plan submitted as part of the prior conditional use application. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

**25.12 Local Government Procedures – Other.** Under *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 862 P2d 1293 (1993), a prior decision involving an issue may preclude relitigation of the issue if, among other things, the issue was actually litigated and essential to a final decision on the merits. Where in a prior land use decision the hearings officer concluded that a city code

provision is facially unconstitutional, but the hearings officer denied the petitioner's application on different grounds, the hearings officer's view regarding facial unconstitutionality is *dicta* and not "essential" to a final decision on the merits, and therefore does not preclude the hearings officer from reconsidering that view in a decision on petitioner's subsequent land use application. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

**25.12 Local Government Procedures – Other.** No state statute obligates a county to initiate an enforcement action against violation of its zoning code, and ORS 215.185(3) appears to provide to the contrary. *Love v. Klamath County*, 54 Or LUBA 410 (2007).

**25.12 Local Government Procedures – Other.** Where an applicant requests a legal lot verification under the local code procedure for obtaining such verification, the local government must necessarily inquire into whether the unit of land was lawfully created. That inquiry is not a collateral attack on decision that created the unit of land. *Hogrefe v. Lane County*, 54 Or LUBA 514 (2007).

**25.12 Local Government Procedures – Other.** Where the legal effect of withdrawal of an application on a land use decision that approved that application is not clear under a county's land use regulation, LUBA will deny a motion to dismiss based on the withdrawal. *Jacobsen v. Douglas County*, 54 Or LUBA 790 (2007).

**25.12 Local Government Procedures – Other.** Where a permit decision is not appealed before the local deadline for filing a local appeal expires, and a local governing body decision not to exercise its authority under ORS 227.180(1)(a) to review the permit decisions "on its own motion" is not governed by any statutory or local standards, the governing body's decision is not a land use decision. Such a governing body decision is not a land use decision, notwithstanding that the local governing body considers the merits of the permit decisions before exercising its discretion not to review the permit decisions on its own motion under ORS 227.180(1)(a). *Beilke v. City of Tigard*, 53 Or LUBA 133 (2006).

**25.12 Local Government Procedures – Other.** Where the standard to refer a permit revocation request to a hearing is whether the petitioner has shown a "reasonable suspicion" to believe that a misrepresentation in the permit application was the "sole basis" for approval, because the ultimate standard (sole basis for approval) is so difficult to satisfy, application of the threshold "reasonable suspicion" standard to that ultimate standard makes it relatively difficult to obtain referral of a revocation request to a hearing. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

**25.12 Local Government Procedures – Other.** When a city steps into the shoes of a county to make land use decisions pursuant to an intergovernmental agreement, unless some controlling authority specifies otherwise, the resulting decision on behalf of the county is subject to the statutes applicable to counties rather than those applicable to cities. *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006).

**25.12 Local Government Procedures – Other.** When a local comprehensive plan provision requires coordination with affected natural resources agencies, the coordination with the affected

agencies may be conducted by ODOT when the proposed project involves a multi-jurisdictional transportation project. *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640 (2005).

**25.12 Local Government Procedures – Other.** Where applicable criteria require that the applicant and city identify the intended use and evaluate its impacts, a city errs when, in a combined role as applicant and decision-maker, it substantially changes a “intended use” of property proposed for rezoning after the close of the evidentiary hearing without providing the petitioner an opportunity to present argument and evidence with respect to the new intended use. *Nielson v. City of Stayton*, 47 Or LUBA 52 (2004).

**25.12 Local Government Procedures – Other.** The Oregon Attorney General interprets ORS 174.130 to require the affirmative votes of a majority of a body that is made of three or more persons to take action, rather than a majority of the members of the body who happen to be present. However, where a body’s enabling legislation includes provisions for a quorum, a majority vote of the quorum is sufficient to take action. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

**25.12 Local Government Procedures – Other.** Claim preclusion does not generally apply to local land use proceedings, which are not intended to have the preclusive and final effects of proceedings where claim preclusion is applied. If one proposal for development is denied, land use ordinances anticipate and allow for additional attempts for similar or identical applications. *Lawrence v. Clackamas County*, 40 Or LUBA 507 (2001).

**25.12 Local Government Procedures – Other.** Issue preclusion does not generally apply to local land use proceedings, which are incompatible with giving preclusive effect to issues previously decided by a local government tribunal in another proceeding. *Lawrence v. Clackamas County*, 40 Or LUBA 507 (2001).

**25.12 Local Government Procedures – Other.** A local government may not separate an otherwise unitary land use decision into separate components, remand some components for further local proceedings and designate some components as immediately appealable to LUBA. *Besseling v. Douglas County*, 39 Or LUBA 177 (2000).

**25.12 Local Government Procedures – Other.** Where prior dealings between petitioner and city building officials concerning the elevation of native grade on petitioner’s property simply show there was confusion about the issue, the city is not estopped from taking a position contrary to petitioner’s regarding the location of native grade. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

**25.12 Local Government Procedures – Other.** Residents of annexation territory who signed consents to annexation to obtain city water and sewer services were not coerced into doing so, even though their consents were given because their wells were contaminated and septic tanks were failing. The city did not cause the contamination, nor did the city require the extraterritorial residents to connect to city systems. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

**25.12 Local Government Procedures – Other.** Where the applicants were aware that the local government’s schedule failed to include time for the submission of written legal arguments as

provided for by ORS 197.763(6)(e) and the applicants informed the local government that if they had objections to the process, they would “file” objections with the county counsel, the county could assume that the applicants waived their right to submit final written arguments, when the applicants failed to file objections. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

**25.12 Local Government Procedures – Other.** A basic tenet of the doctrine of claim preclusion is that claims resolved in a *prior* proceeding cannot be relitigated in a subsequent proceeding. Claim preclusion does not apply where the claim that intervenors urge should be precluded stems from a single proceeding in which the county made two determinations. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997)

**25.12 Local Government Procedures – Other.** Issue preclusion can be invoked to prevent an administrative agency from deciding an issue differently than it did in a previous decision; however, it is only applicable in a *subsequent* proceeding when an issue of ultimate fact has been determined by a valid and final determination in a *prior* proceeding. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

**25.12 Local Government Procedures – Other.** Claim and issue preclusion may not be asserted against a petitioner in a LUBA appeal based on a prior circuit court proceeding where the circuit court proceeding ended in a stipulated judgment and where petitioner had no notice of and was not a party to the circuit court proceeding. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

**25.12 Local Government Procedures – Other.** Where an earlier application was to partition a 14.45-acre lot, putting one parcel into farm use in conjunction with adjoining property, and to allow a nonfarm dwelling on the remaining parcel; but a subsequent application is to partition the remaining 8-acre lot into two parcels and to allow a second nonfarm dwelling, the “claims” involved in the two proceedings are not the same, and claim preclusion does not apply. *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990).

**25.12 Local Government Procedures – Other.** The system of local government land use adjudication established by state statute and local regulations places primary importance on expeditious adjudications, contemporaneous application of the same approval criteria to all similarly situated applicants, and the ability of a local government tribunal to make an independent determination on the application of those approval criteria to the facts before it. This system is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding. *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990).